The Clinical Mission of Justice Readiness

Jane H. Aiken

Abstract: Law schools strive to teach students to be practice ready. That noble goal, however, is not enough. Because of the powerful role that lawyers play in society, educators must also teach students to be “justice ready.” Justice ready graduates are able to recognize injustice and appropriately evaluate the consequences of their actions in a way that mere practice readiness does not teach. The traditional law school curriculum fails to teach justice readiness, instead inculcating in students a penchant for the status quo—an unjust and unchanging social order. Clinical education is the solution for creating justice ready graduates. Its use of Transformative Learning Theory allows students to learn about justice through experience and creates a long-lasting understanding of the lawyer’s role in society.
**Practice Ready: Are We There Yet?**

*Margaret Martin Barry*

[pages 247–278]

**Abstract:** Clinical legal education is garnering more attention as a vehicle for providing the training required to graduate “practice ready” lawyers as law schools face economic concerns and increasing expectations from the legal market. To create a school that trains practice ready lawyers, law schools are increasingly recognizing that they need significant curricular reform. Schools must combine the traditional case method of teaching with experiential learning, where the curriculum focuses not just on doctrine but on training professionals. This Article proposes accepting a framework designed to achieve such goals, wherein first year classes relate doctrine to practice more effectively and the experience culminates with students spending their third year in practice. This approach would leave creativity and expression of mission to course development within the accepted framework.

---

**Back to the Future of Clinical Legal Education**

*Phyllis Goldfarb*

[pages 279–308]

**Abstract:** The premier strength of legal education resides in its dual identity as an academic department of a university and a professional school training future practitioners. This dual identity, which gives law school its unique blend of the intellectual and the practical, can support law graduates as the legal profession undergoes a profound restructuring. Traditional classroom education, when focused not on revealing legal doctrine but on cultivating foundational skills of analysis, interpretation, synthesis, and reasoning, will benefit law graduates even in an altered legal practice environment. Clinical education—which engages students in the multidimensional enterprise of representing clients to inculcate a wide range of generalizable skills and public service values—will need to assume a larger role in tomorrow’s legal curriculum. Because clinical learning emerges from yet transcends specific, holistic, lawyering contexts, it can enable law graduates to adapt to transformation in the legal profession of the future.
THE COST OF CLINICAL LEGAL EDUCATION

Peter A. Joy

[pages 309–330]

Abstract: Critics of clinical legal education often malign its expense and look to clinical budget cuts as the primary means of reducing costs in legal education. This narrow focus, however, ignores the important function that clinical legal education plays in training law students to be ready for practice and assumes other legal education expenses are more important. The 1992 MacCrate Report, the 2007 Carnegie Report, and other studies demonstrate that clinical education is necessary to produce a well-rounded and practice ready law student. Though clinical legal education should not be immune to cost constraints, neither should any other type of law school expenditure. To succeed in economically difficult and demanding times, law schools must put every aspect of legal education through a cost-benefit analysis for cost-saving potential.

LOSING MY RELIGION: THE PLACE OF SOCIAL JUSTICE IN CLINICAL LEGAL EDUCATION

Praveen Kosuri

[pages 331–344]

Abstract: Many law school clinics presume a “social justice” mission—that is, representation of the indigent and under-represented about poverty law issues—as the only legitimate goal for clinic clients and matters. This Article contends that social justice should not be presumed, but rather should be considered an option—among many—to include in a clinic’s pedagogy. If increased experiential learning opportunities for students are a real objective, and clinics are the pinnacle of those opportunities, then broadening the portfolio of clinical offerings to include those that are not focused on social justice should be a valid proposition. The modern clinical legal education movement that began with Ford Foundation-funded clinics has moved from the fringe to the center of legal education. This Article urges that it is incumbent on the leaders of those clinical programs to accommodate different models of clinics, thereby expanding clinical education to more students and unleashing the next phase of innovation and creativity in law school education.
Abstract: Social justice remains relevant in teaching clinical legal education. The clinical legal education model teaches the basics of lawyering not otherwise taught in law school: a practical understanding of the practice of law, how to deal with difficult legal ethics issues, professional skills, and the doctrines that matter. Clinical education also teaches a more personal lesson; it instructs law students to question the machinery of society, instills socially responsible values, and teaches students to address social inequities. These latter lessons all stem from the social justice mission of clinical legal education. While times may have changed since the movement’s beginnings in the 1960s and ’70s, and clinical professors have become further entrenched in academia, the social justice mission continues to drive student learning and instill values not otherwise taught in law schools. As clinics evolve to meet the future demands of law schools and students, they should not eschew their social justice roots, but rather expand the range of educational experiences while continuing to serve under-privileged clients through new and innovative clinics.

NOTES

Sedating Forgotten Children: How Unnecessary Psychotropic Medication Endangers Foster Children’s Rights and Health

Matthew M. Cummings

Abstract: State foster care systems are forcing many foster children to take high dosages of dangerous, mind-altering psychotropic medications. State actors have little medical background for each child and have limited time to diagnose disorders, thereby creating potential constitutional and human rights violations. States are only supposed to administer psychotropic medication to a child when necessary and in the child’s best interest. Many children in foster care, however, are heavily medicated despite the difficulties of proving necessity. Those difficulties are due to a combination of diagnosis practice, the foster child’s background, and the poor condition of state foster care systems. In light of these limitations and the potential for using medication solely to curb bad behavior, such high prescription rates
are unjustified. Many states lack in-depth tracking and oversight measures and fail to recognize this problem, thereby allowing abuse to continue and potentially preventing foster children from seeking justice.

**Toward Efficiency and Equity in Law Enforcement: “Rachel’s Law” and the Protection of Drug Informants**

*Ian Leson*

[pages 391–420]

**Abstract**: Following the murder of Rachel Morningstar Hoffman—a 23-year-old college graduate—Florida passed “Rachel’s Law,” which established new guidelines for the police when dealing with confidential informants. Immediately prior to its enactment, lawmakers stripped Rachel’s Law of key provisions. These provisions required police to provide a potential informant with an attorney before agreeing to any deal. Opponents of these provisions argue that they hamstring law enforcement agencies in their efforts to prosecute drug crimes. Rather than serving as an obstacle to effective law enforcement, the attorney provision in the original version of Rachel’s Law enables efficient prosecution of crimes and protects minor drug offenders who may be unsuited for potentially dangerous undercover informant work. This Note recommends that the attorney provision be restored to Rachel’s Law, and encourages other states to enact similar statutes.

**Peeking Under the Covers: Taking a Closer Look at Prosecutorial Decision-Making Involving Queer Youth and Statutory Rape**

*Michael H. Meidinger*

[pages 421–451]

**Abstract**: Queer youth are in a precarious position. In comparison to their heterosexual peers, queer youth are disproportionately punished in the criminal justice system, and they may be more vulnerable to being prosecuted for statutory rape. They may be selectively prosecuted because prosecutors have broad discretion in whom they prosecute, and social norms favoring heterosexuals may be part of their decision-making process. In light of the significant barriers before a statutory rape defendant alleging selective prosecution, especially for juvenile defendants, limited discovery orders like the one at issue in *Commonwealth v. Washington* may be a pragmatic way to make equitable change.
FOREWORD: THE WAY TO CARNEGIE

SHARON L. BECKMAN*
PAUL R. TREMBLAY**

INTRODUCTION

Law schools have a clear mission, one would think. Even if the American Bar Association did not insist upon it, any given law school would acknowledge its commitment to “prepare[] its students for admission to the bar, and effective and responsible participation in the legal profession.”¹ In return for a substantial contribution of (usually borrowed) money, law schools promise to train students to practice law as competent, thoughtful, and faithful fiduciaries for their clients and to seek a just and fair system.

Though law schools’ collective mission is apparent, the question of how best to implement that mission has perplexed the legal academy for decades and continues to do so. How might law schools best train their students to practice effectively? After an early period where lawyers developed skills through an apprenticeship experience, law schools attempted to teach law as a social science using appellate cases as its data, following the leadership of Christopher Columbus Langdell.² The aim was to train law students rigorously to “think like lawyers,” and es-

---

² See Mark Spiegel, Theory and Practice in Legal Education: An Essay on Clinical Education, 34 UCLA L. Rev. 577, 581 (1987). Langdell professed that “[l]aw, considered as a science, consists of certain principles or doctrines.” C. C. Langdell, A Selection of Cases on the Law of Contracts, at vi (1871); see also Spiegel, supra, at 581 (quoting Langdell, supra at vi). Langdell elaborated in a speech: “[l]aw is a science, and . . . all the available materials of that science are contained in printed books . . . . [The library] is to us all that the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists.” The Harvard Law Sch., Harvard Celebration Speeches, 5 L.Q. Rev. 118, 124 (1885) (reprinting speeches delivered by Justice Holmes and Professor Langdell at Harvard University’s quarter-millennial celebration); see also Spiegel, supra, at 582 (quoting the same speech).
pecially to develop the analytic tools necessary to work expertly with law’s complexity.  

The challenge to the Langdellian case method is that, while effective in inculcating rigorous habits of reading and understanding legal principles, it elides a substantial component of the lawyer’s important work. Critics have long noted that the “science” devised by Langdell does not really teach students to think like lawyers, but more likely to “think like appellate judges,” or to “think like law professors.” The case method misses a great deal of the practice of law by neglecting clients, the role of fact development and ambiguity, the importance of judgment and reflection, and the ethical underpinnings of serving others in a professional role. It erases the context of practice and, in doing so, fails to teach students to recognize and take account of the social, economic, and political forces constraining the choices of others. Observers have recognized this weakness of traditional legal education for decades. The Legal Realists urged law schools to address the street-level experience of law practice in the 1920s and 1930s. A succession of reports on legal education since then—including the Reed Report (also known as the first Carnegie Report) in 1921, the MacCrator Report in 1992, Best Practices for Legal Education in 2007, and the more recent Carnegie Report in 2007—each emphasized the need for greater attention to the practice experience of lawyers within legal education, the development of reflective judgment, and an exploration of the moral experience of lawyering.

---


6 See Frank, supra note 5, at 911–12; Llewellyn, supra note 5, at 673; Karl N. Llewellyn, The Current Crisis in Legal Education, 1 J. Legal Educ. 211, 212 (1948); see also Jerome Frank, A Plea for Lawyer-Schools, 56 Yale L.J. 1303, 1321–22, 1327 (1947).

7 See Alfred Zantzinger Reed, Carnegie Found. for the Advancement of Teaching, Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States with
One readily apparent response to this consensus of opinion would be for law schools to introduce students to clients as a formal and explicit component of their legal education curriculum. During the first half of the twentieth century, few law schools included any form of experiential, practice-based education. The earliest emerging phenomenon of law school clinics developed in the 1960s and 1970s from a mix of pedagogical and political commitments, with important seed funding from the Ford Foundation and its Council on Legal Education and Professional Responsibility. The teachers within the “second wave” of clinical education tended to have some connection to legal services and legal aid practice or criminal defense, and saw their role as activists as much as law professors. Over time, the role of experiential education within law schools evolved in important ways. While the emphasis on activism and social justice remained strong, the teachers and clinical supervisors developed more sophisticated clinical teaching methodology and pedagogy. Law schools accepted clinical courses more and more as legitimate educational vehicles, granting students credit for their participation and offering clinical teachers improved status within the institution.

Those trends, identified by Margaret Martin Barry, Jon Dubin, and Peter Joy as constituting the second wave in clinical education, have continued apace through 2012, as schools now have entered what those
observers describe as the clinical movement’s “third wave.” Every law school in the country offers some significant experiential education courses to its students, and most schools offer many robust opportunities. Likewise, more and more law schools offer clinical professors status equivalent to other law school faculty, including many schools with a “unified” tenure arrangement.

Within the third wave of experiential and clinical education, many important challenges and uncertainties remain for law schools, especially in light of changes in the legal job market brought on by economic forces and social, cultural, global, and technological developments. Among the most critical and stubborn of those challenges and uncertainties are questions of pedagogy, social justice, and cost. The pedagogy questions are central to the primary mission of law schools. If Best Practices for Legal Education and the Reed, MacCrate, and Carnegie reports are sound, how should law schools provide the most effective form of experiential and traditional education to their students, thereby maximizing educational development? Does exposure to any lawyering experience—including pro bono volunteer stints, academic year internships, summer jobs, externships, and in-house clinics—serve the necessary purpose? If not, what factors matter in transforming a felt experience into an effective learning and discernment opportunity?

The pedagogical questions and challenges connect directly to the role of social justice and caring for the disadvantaged. If one accepts the proposition that students will learn best when assuming the professional role of lawyers by representing clients engaged in actual disputes or transactions, it makes sense—at least initially—that the clients whom

13 Id. at 4, 12; Future of the In-House Clinic, supra note 11, at 518.
14 Robert R. Kuehn & Peter A. Joy, Lawyering in the Academy: The Intersection of Academic Freedom and Professional Responsibility, 59 J. LEGAL EDUC. 97, 98 (2009) (citations omitted) (“Today, the American Bar Association (ABA) requires every accredited law school to offer substantial opportunities in live-client or other real-life practice experiences. As a result, there are law clinics in almost every law school, with the AALS Directory of Law Teachers listing nearly 1400 full-time faculty teaching clinical courses.”).
15 Standards & Rules of Procedure for Approval of Law Schools, § 405(c) (2012), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_aba_standards_chapter4.authcheckdam.pdf (“A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members.”). Many schools offer a “tenure equivalent” status for clinical teachers and other full-time faculty employed on long-term contracts, but more schools are instituting a unified tenure track. See Nina W. Tarr, In Support of a Unitary Tenure System for Law Faculty: An Essay, 30 WM. MITCHELL L. REV. 57, 58–59 (2003) (arguing for a uniform tenure track for all law faculty, as yet unrealized at the time Tarr wrote her piece).
the students assist ought to be those who cannot afford counsel elsewhere but face serious legal exposure. Representing disadvantaged clients intrinsically surfaces essential questions of systemic power and fairness. Access to justice therefore serves as a natural, and one might say serendipitous, accompaniment to the educational agenda. But that facile observation masks more complicated questions. Students may learn, and wish to learn, methods of practice and substantive law unrelated to the kinds of legal matters faced by low-income clients. Most observers would seemingly agree that some forms of legal practice, and some client matters, do not directly implicate serious questions of social justice or address access to justice needs. Should law school policies prevent students from learning effective lawyering in those settings?

And then there is the question of cost. Because it is true that one professor may (and some professors do) teach one hundred or more students in a classroom but one clinical professor could not possibly teach and supervise one hundred students as they actively represent clients in a clinic setting, the conventional wisdom concludes that experiential education is expensive, more expensive than other forms of legal teaching. That conventional wisdom, even if true (and, perhaps, on further investigation it may be less true than typically assumed), begs a number of questions, including how costs compare within the academy and how to account for the value of teaching and learning in the varied segments of the law school curriculum.

These questions, and others related to them, are important, interesting, and hard. They are also persistent. Because of all of those qualities, we conceived of the idea of bringing together for a day a group of experienced and thoughtful thinkers and writers to do their best to sort out the competing considerations. The result was this Symposium, named (by our colleague Alan Minuskin) *The Way to Carnegie: Practice, Practice, Practice: A Conversation About Pedagogy, Social Justice, and Cost in Experiential Legal Education*, and held on October 28, 2012, at Boston College Law School.

The Symposium consisted (after an event the evening before for panelists, faculty, and students) of three panels, each addressing one of the topics described above. The first panel addressed the issue of pedagogy. Moderated by Alan Minuskin, the first panel included Margaret

---

16 Associate Clinical Professor, Boston College Law School.
Martin Barry, Phyllis Goldfarb, Rebecca Sandefur, and Karen Tokarz. The next panel addressed the role of social justice within experiential education. Moderated by Francine Sherman, the second panel included Jane Aiken, Praveen Kosuri, Michael Pinard, and Stephen Wizner. A third and final panel addressed the critical questions of cost and implementation. Moderated by Alexis Anderson, the final panel consisted of Muneer Ahmad, Peter Joy, and Richard Neumann. Because Peter Joy encountered a last-minute complication preventing him from attending the event, Russell Engler presented Peter Joy’s ideas, as well as many of his own, as part of this panel.

In the middle of the Symposium, the participants heard a keynote address from Larry Kramer, then Dean of Stanford Law School. Dean Kramer, who has had a notable career as a doctrinal classroom teacher and scholar in the areas of constitutional law, federalism, and civil procedure, described the emphasis that Stanford Law School placed on...
experiential—and particularly clinical—legal education, including expanding its curriculum and faculty and moving to integrate its clinical faculty more seamlessly with classroom faculty. Dean Kramer shared his ideas about each of the topics addressed at the Symposium, both during his keynote address and during the discussion segments of each panel.

The Symposium was a great success. In addition to a day of rich and spirited conversation about clinical education, the Symposium produced six compelling papers, described below.

I. Questions of Pedagogy

If law schools aim to graduate lawyers who are “practice ready,” what does practice ready mean and what pedagogical methods will be most effective in achieving that goal? All six symposium papers offer insights on these questions. The two papers focusing primarily on curriculum—authored by Deans of Clinical Education at their respective law schools—both recommend more clinical and experiential education better integrated within the law school curriculum.

In *Back to the Future of Clinical Legal Education*, Phyllis Goldfarb warns that the current law school model, which costs too much and delivers too little, is economically and educationally unsustainable. For law schools to survive, thrive, and strive to meet society’s legal needs, Goldfarb believes legal educators must reconceive the relationship between law schools’ dual identities as academic institutions and professional schools and create an integrated curriculum in which contextual educational methods play a larger and more central role. Clinical methods rooted in particular yet generalizable contexts, Goldfarb contends, are the most promising means law schools have for confronting future challenges and realizing their potential as schools of both academic and professional instruction.

Goldfarb explains that the schizophrenic separation of academic legal analysis and professional skills and values makes no sense in the law school of the future. Lawyers’ work is complex and requires integration of these components. When the educational enterprise is functioning at its best, the intellectual and practical are tightly intertwined and mutually reinforcing. Law students need—and society needs law students to get—educational opportunities that are three-dimensional, where they use the knowledge they acquire and become attentive, not

---

only to what they are getting, but to the kind of professionals they are becoming.

Drawing on recommendations and findings of the MacCrate and Carnegie Reports and on Professors Marjorie Shultz and Sheldon Zedeck’s empirical research on skills vital to the art of lawyering, Goldfarb argues that clinical legal education is the most promising means available for cultivating the competencies that future lawyers need. Legal analysis, research, and writing will continue to be important, but the contextual pedagogy of skills, values, and professional identity in service to others offered only in clinics will enable law school graduates—and law schools—to thrive and make a positive contribution to society.

Goldfarb concedes that clinical education is expensive—especially compared to the mass education of the traditional case method—and that expanding clinical offerings may require law schools to reduce something else, but she warns that the social and economic costs of doing nothing are far greater. The same economic forces bearing down on law schools have only increased society’s need for reflective, ethical, and skilled lawyers. Redeploying resources toward clinical education may enable clinical educators to teach more students more efficiently. By the same token, if clinics become more central in the law school curriculum, clinicians must maximize their educational value by teaching habits, skills, and values that will serve students in whatever professional opportunities they pursue.

The call for a revamped, integrated law school curriculum with experiential education at its core is also the theme of Margaret Martin Barry’s Article, Practice Ready: Are We There Yet? In this symposium contribution, Barry answers her subtitle’s question in the negative. To move the project forward, she proposes a model law school curriculum, which she hopes will help build consensus among legal educators on how best to prepare students for the legal profession.

Beginning with the proposition that “practice ready” must mean more than the ability to perform legal analysis, Barry contends it must also include a “grounding in how the law is developed, interpreted, critiqued, accessed, and used to work toward expertise, whether inde-


pendently or with the benefit of organizational support.”36 Barry points out that, despite almost a century of critique of the traditional case method and multiple calls for reform, law schools have been reluctant to assess—let alone redesign—their curriculum. While most law schools offer clinical and other experiential offerings in the second and third years and some have diversified their first year curriculum by adding electives and practice-oriented offerings, Barry complains that there has been little reflection on how these pieces fit together and relate to the overall educational enterprise.37 To advance the conversation, Barry proposes a curricular framework for modern legal education which incorporates clinical and experiential education into an overall program designed to build the knowledge, skills, and values lawyers need to enter the profession.

Barry recommends that law schools begin with a “common portal to legal education,” emphasizing legal doctrine and theory but connecting them to people, communities, and values.38 She would maintain basic doctrinal courses but infuse them with factual context, problem solving, ethics, and professionalism. In the second year, Barry recommends more active techniques such as simulations and role plays to teach additional skills, even in large classes.39 Barry would devote the final year of law school to experiential education, allowing students to deploy knowledge, skills, and competencies learned in the previous two years while practicing on real cases in a law school clinic, externship, or a hybrid of the two. Barry recognizes that dedicating one-third of the law school curriculum to experiential education will require a significant reallocation of law school resources, and she urges legal educators to be creative in developing carefully supervised experiential opportunities. Law schools, she proffers, might consider creating their own fee-generating law firms if they can do so consistent with their pedagogical and social justice missions.

36 Id. at 250.
37 Id. at 263. Barry discusses Stanford Law School as an example of a leading school that has revamped its second and third year curricula to include more clinical and experiential options, as CUNY School of Law, Dave Clark School of Law, and the University of New Mexico School of Law did before it. She also outlines the first year program reform at Boston College Law School, Cardozo Law School, Harvard Law School, Washington & Lee University School of Law, and the University of California Irvine School of Law. Id. at 256–60.
38 Id. at 267, 270–71.
39 Id. at 270–71. Barry points to the General Practice Program at Vermont Law School as an example of this approach. Id.
II. Questions of Social Justice

Law school clinics arose from and were inspired by the civil rights and social justice movements of the 1960s and early 1970s. Over the past five decades, the clinical teaching method and social justice missions of clinical legal education have gone hand in hand, with law school clinics providing students opportunities to develop skills and values by representing the poor and politically disempowered. Indeed, all of the articles in this Symposium comment in one way or another on the pedagogical, social, and economic value of the social justice mission of clinical legal education. As the unique educational and career benefits of clinical legal education have become more widely appreciated, however, a diversity of law school clinics have emerged, not all of which serve the poor or promote progressive legal reform. Law students are interested in transactional, legislative, and Supreme Court clinics in addition to traditional, community-based clinics providing direct legal services to the poor. These developments raise questions about the continuing relevance of the social justice mission in clinical legal education: Is clinical legal education a neutral teaching methodology or does it (or should it) have a substantive social justice mission as well? Is teaching students to pursue social justice merely an option for clinics, or is it a moral imperative? A trio of articles by Stephen Wizner, Jane Aiken, and Praveen Kosuri delve deeply into the question of the relationship between clinical legal education and social justice.

In a narrative so appropriate for a symposium on experiential learning, Stephen Wizner describes his personal journey from neighborhood legal services lawyer to Yale professor, and in the process he articulates a timeless vision of the social justice mission of clinical legal education. His Article, *Is Social Justice Still Relevant?*, recounts how the first clinics arose in response to student demand for curricular reform driven by the social activism of the times. Wizner and the Yale students who inspired him to start a clinic there—including Boston College Law School’s former Dean Avi Soifer—believed that lawyers, law schools, and law students could and should use the law to pursue progressive social change. Wizner and the other founders of the clinical legal education movement did not see it as mere skills training but rather as a way to involve future lawyers in the “struggle for social justice in America.”

Wizner contends that the social justice mission that inspired the creation of the first law school clinics should and indeed does continue

---

41 Id. at 347.
to be a central focus of clinical legal education. The methodology of clinical legal education includes professional skills training through the supervised provision of legal services to clients, but the goal is more ambitious. The goal includes, among other things, inculcating in students an understanding of and concern for the circumstances of those who live in poverty or otherwise lack access to legal services, and a feeling of professional responsibility for increasing their access to justice. One should not seek to extract the clinical methodology from this mission, Wizner contends, because giving law students the opportunity to recognize their power and responsibility to democratize the legal system and to pursue justice is an important part of what the methodology of clinical legal education is for.

Wizner does not see the development of new and innovative approaches to clinical legal education as inconsistent with a continued focus on social justice. As a descriptive matter, he points out that a social justice mission continues to inform and drive the majority of clinical program design, teaching, and student learning. He acknowledges the emergence of clinics that do not fit the direct legal services paradigm but suggests that these new types of clinics should also focus on helping low income and other under-represented clients, even if indirectly. Transactional clinics should assist small businesses and nonprofit community organizations. Environmental clinics should defend low-income populations from pollution and other environmental threats. Whatever the context, Wizner explains, when clinics focus their work on providing legal services to or on behalf of low income clients, students can experience the professional and personal satisfaction of making a difference in their lives. Law schools need not choose between clinical educational diversity and social justice because the two can and should continue hand in hand.

Wizner believes that while law schools may not be able to recapture the spirit of the social activism of the 1960s, the social justice mission of clinics should continue to inform everything clinicians do, from designing clinics to client and case selection to supervision and teaching. He urges clinical professors to continue to ask what knowledge and values we are inculcating in our students and how we are equipping them to address needs in the broader community, particularly of those who cannot afford to pay for legal services.

Jane Aiken takes up this challenge in *The Clinical Mission of Justice Readiness*, where she looks to transformative learning theory to inform
how law schools can best prepare students to pursue social justice. Aiken contends that, because everything lawyers do has some relevance to justice or injustice, ignoring or reinforcing injustices in the legal system—as traditional law school classes tend to do—teaches students to respect the status quo and to think they have little or no power or responsibility for ensuring substantive justice. To avoid perpetuating injustice, law schools must do more than help students become ready to join an unjust system; they have a responsibility to teach their students to recognize injustice and fight against it in their legal careers. Aiken warns that the clinical legal education debate must therefore shift from whether clinicians should be in the justice business at all to which methods are most effective in teaching justice readiness.

Aiken believes that virtue, like proficiency in legal analysis and advocacy, can be taught, and is best taught in clinics where the justice dimension is discovered by the students themselves through experience and reflection. Drawing support from transformative learning theory, Aiken argues that the clinical experience, with properly chosen cases or projects, supervision, and guided reflection, allows student to experience the kind of “disorientation” and “reorientation” that can transform their thinking about the legal system and their responsibility to pursue justice in their professional lives.

Aiken argues that well-designed law school clinics are great laboratories for transformative learning because they are full of disorienting dilemmas, including the shock of responsibility for real cases and the emotional turmoil of caring about real clients. While learning theory suggests that the affective experience students gain in clinics may be transformative in and of itself, Aiken believes that combining disorienting experiences with restorative learning methods can move students beyond individual understanding to social responsibility and action.

In addition to choosing cases and projects most likely to stimulate transformative emotions and insights, Aiken urges clinicians to use research on transformative learning to develop teaching methods designed to help students mine their experiences and reflect upon them critically. Transformative learning theory, she suggests, may also provide a basis for comparing the relative efficacy of teaching methods and for en-

---

couraging law schools to offer students more transformative experiential learning opportunities.

Wizner and Aiken articulate and defend a vision for accomplishing social justice goals within a law school’s experiential learning opportunities, and most notably through its clinical programs, but Praveen Kosuri offers a different perspective. Kosuri’s contribution to this Symposium, *Losing My Religion: The Place of Social Justice in Clinical Legal Education*, questions whether law school clinics ought to pursue a social justice mission.\(^44\) Kosuri is quick to note that he is not opposed to social justice; instead, his argument is that insisting on a social justice focus within law school clinics narrows the clinical opportunities available for a wide array of students and sacrifices some pedagogical aims.

Kosuri invokes the image of Martin Luther and The Reformation in his critique of the establishment perspective in clinical education and offers his own theses, much as Luther did in 1517. Kosuri’s argument is elegant, describing clinical legal education as law school’s “pinnacle” pedagogical experience but lamenting the exclusive province of an elite and self-selected group of teachers with uniform ideologies and commitments, all tending toward a shared (but narrow) conception of social justice in clinics. Those clinical teachers offer to students practice opportunities limited to those which replicate the social justice values owned by the clinicians and their “Great Clinician” progeny. The result, Kosuri notes, is that “the Great Clinicians defined social justice,” and “to be a good clinician meant believing in the Great Clinicians’ concept of social justice and inculcating students with that belief.”\(^45\)

In Kosuri’s view, the clinics’ homogeneous dedication to a vision of social justice ignores or excludes those students who do not share that vision or simply wish to participate in clinics covering practice and substantive law settings that happen not to include a social justice component. A diminished, or less dogmatic, focus on social justice would lead to an expansion of the kinds of clinical opportunities available to students and a more efficient delivery of the best kind of legal education.

Kosuri acknowledges the risks he takes by presenting his theses, both through the possible implication to readers that he is not a fan of social justice (not so), and through his defending a position not embraced by many of his clinical teacher peers (much more likely).\(^46\) He is

---


\(^{45}\) Id. at 333.

\(^{46}\) Id. at 343; see also Praveen Kosuri, “Impact” in 3D—Maximizing Impact Through Transactional Clinics, 18 CLINICAL L. REV. 1, 45 (2011).
provocative in arguing that professors committed to social justice inculcate in their students their own values, and that schools ought to attend to the difference between “non-social justice clinics and social justice ones.” Interestingly, Wizner uses the same theme of inculcation in his contribution to this Symposium. While Kosuri seems to worry about inculcation as an imposition of one’s personal values on another, Wizner appears to view that process as teaching and encouraging students to care about what a commonly shared sense of justice requires. This tension raises important questions about whether social justice is an essential element of the legal training mission, appearing in all contexts, or whether it is particular to certain practice settings.48

III. Questions of Cost and Implementation

The third panel of the Symposium addressed a topic critical to any discussion of experiential legal education, and especially clinical legal education—the allocation of resources necessary to offer students a meaningful practice experience in law school. The topics of cost and implementation appeared in other contributors’ work as well, but this panel addressed the questions most directly.49 Conventional wisdom says that, even if it is the most effective method of teaching productive and thoughtful lawyering, clinical legal education—along with many other forms of experiential teaching—is just too expensive to offer to a majority of law students. With law school expenses (and the accompanying student debt) rising steadily, conventional wisdom places on institutions a fiduciary responsibility to their students to diminish, rather than increase, these expensive teaching vehicles.50 At a minimum, observers note, one needs an effective and rigorous cost-benefit analysis before supporting a greater role for experiential learning opportunities for students.

The third Symposium panel addressed those concerns directly. In this issue, Peter Joy, vice dean and professor of law at Washington Uni-

47 Kosuri, supra note 44, at 341.
49 See Barry, supra note 35, at 273–75; Goldfarb, supra note 33, at 305–06.
versity in St. Louis School of Law, offers an assessment that acknowledges these challenges but defies much conventional wisdom. In his Symposium Article, *The Cost of Clinical Education*, Joy argues that observers are asking the wrong questions when they complain viscerally about the cost of clinics. The correct questions, he tells us, relate to the goals of legal education as an endeavor, the reasons behind law school cost increases, the nature of law school expenses, and the effectiveness of teaching methods. The central thrust of his argument is that law schools spend a great deal of money on many things, several of which do not contribute significantly—or as significantly—to the central mission of training competent, ethical, and discerning lawyers.

Joy reports on studies showing that the escalating costs of legal education relate more reliably to the “market for prestige” than to the actual necessary costs of running an institution. And the costs that students must bear, while quite serious, are not driven by experiential education programs. Joy’s research shows that “the most significant long-term driver of rising legal education costs are lower teaching loads and higher salaries for law faculty.” Far from contributing significantly to the cost acceleration of recent years, expenditures for clinical programs, according to Joy, actually have dropped as a percentage of law school budgets, as other costs, including faculty salaries and building projects, have increased dramatically.

Joy also explores the delicate comparison of the production cost of faculty scholarship compared to the costs of effective teaching of students through experiential methods. While experiential education surely calls for some concentrated dedication of resources—mostly in teacher time but also in law practice facilities—the direct cost to the school of producing a publishable law review article can exceed $100,000.

---

52 Id. at 311–12, 315. Joy notes that the ranking high-prestige (and hence high-cost) schools “enable top law students and legal employers to identify each other, thereby increasing ‘employment opportunities and . . . long-term earning potential . . . .’ “ Id. at 313 n.26 (quoting Russell Korobkin, *Harnessing the Positive Power of Rankings: A Response to Posner and Sunstein*, 81 IND. L.J. 35, 42 (2006)).
53 Id. at 316.
54 Id. at 328–29. Joy cites the MacCrate Report’s conclusion that between the late 1970s and the late 1980s—a period when clinics evolved to become a central part of most law school curriculums—clinical program costs dropped from 4.5% to 3.1% of the average law school budget. Id. at 329 (citing MacCrate Report, supra note 7, at 249–50).
ous and elegant scholarship serves many important purposes within the academy, as does effective teaching and mentoring of students. Joy’s point is that a good faith inquiry about the costs and benefits of law school spending on clinical teaching must be a principled one, including in its scope a wider swath of the academy’s activities than the expense of practice-based learning alone.

Joy’s contribution to the Symposium is an essential one. The first two panels grappled openly and compassionately with the pedagogical values of differing teaching methods and with the role of social justice within law schools, whether through clinics or otherwise. Those inquiries and debates alone, however, can easily be discounted if experiential education is simply too costly to implement, its benefits notwithstanding. Joy’s Article introduces—but only begins—a more honest assessment of the relative costs of experiential and clinical education when assessed in light of competing expenditures in the institution and the benefits of those programs. As Joy reminds us at the end of his Article, “The longer law faculties delay addressing these issues, the more difficult the conversations and choices will become.”

**Conclusion**

The 2007 *Carnegie Report* reminded law schools of their fiduciary responsibility to take practice more seriously. The authors contributing to this Symposium have offered insightful and creative ideas to assist the academy in its effort to make legal education more relevant, effective, and just. We thank them and their colleagues who participated on the panels for their generosity of spirit, their kindness, and their commitment to the cause of clinical legal education.

We also express our deepest, heartfelt thanks to the staff of the *Boston College Journal of Law & Social Justice* who worked so hard and so efficiently to make this Symposium happen and to make it such a success.

---

56 *Joy, supra* note 51, at 350.
Abstract: Law schools strive to teach students to be practice ready. That noble goal, however, is not enough. Because of the powerful role that lawyers play in society, educators must also teach students to be “justice ready.” Justice ready graduates are able to recognize injustice and appropriately evaluate the consequences of their actions in a way that mere practice readiness does not teach. The traditional law school curriculum fails to teach justice readiness, instead inculcating in students a penchant for the status quo—an unjust and unchanging social order. Clinical education is the solution for creating justice ready graduates. Its use of Transformative Learning Theory allows students to learn about justice through experience and creates a long-lasting understanding of the lawyer’s role in society.

Introduction

What is the purpose of clinical legal education? Should clinics aim to teach students awareness of injustice and the role that lawyers play in fighting it? Or is that not an essential component of clinical legal education? At one point, the debate over the purpose of clinics was whether to provide teaching or service. Educators, however, struck a balance between the two, and the debate switched to contemplating what to teach: skills or justice. This shift indicates the progress in the debate, as clinical faculty members have embraced their role as teachers. Throughout these debates, however, one thing has stayed the same in the legal profession: justice and injustice are the backdrop. There is no such thing as neutrality; everything has just or unjust effects. Therefore, clinical legal education cannot avoid dealing with justice. The only
question is whether to ignore justice issues that constantly emerge or prepare students to identify injustice when they see it and develop the skills and strategic thinking to remedy it. Clinics must move students beyond being just practice ready.

Law school graduates enter a troubled world. The September 11 attacks still reverberate and the U.S. economy sinks as the greed born in the 1970s and fueled in the 1980s and '90s comes home to roost. This is a time of drone attacks on American citizens, roving wiretaps, secret tribunals issuing search warrants, and incarceration rates higher in the United States than in any other nation. The rich are sheltered from higher taxes and lobbyists try to convince the rest that this policy is for their benefit. The U.S. government enacts draconian immigration laws and fortifies the borders. Banks fail and people lose their homes because they received mortgages they could not afford. The wealthy enjoy comprehensive health insurance as millions of Americans remain one health problem away from economic crisis.

Law school faculty certify to practice and evaluate lawyers—the very people who introduced the torture memo, the war on terror, the resistance to the Kyoto Protocol, the invasion of Iraq, and the tax structure that rewards greed and avarice and abandons the poor. But law schools also educate and certify lawyers who work tirelessly for civil rights, try to create solutions for global poverty, and struggle for peace. Where does the difference between the two groups lie? Lawyers in the latter group feel a sense of responsibility to the world and resist invitations to act out of fear and self-indulgence.

---


8 See Jessica Schort Saxe, Next Civil Rights Frontier? It Surely Has to Be Health Care, Charlotte Observer, Jan. 14, 2012, at 13A.
Part I of this Article argues that law school clinics ought to teach students not just to be practice ready but “justice ready”—to be aware of injustice and commit to fighting it in their legal careers. It then lays out some of the questions clinical faculty should ask in figuring out how to achieve that goal. Part II identifies the ways in which traditional law school courses work against inculcating justice readiness and instead teach students to reproduce an unjust social order. Part III explains that clinical legal education can teach justice readiness by encouraging students to reflect on their own experiences in a social justice context. It emphasizes that justice readiness is best taught by fostering insight rather than by transferring knowledge. Finally, Part IV discusses and advocates for Transformative Learning Theory, which provides a theoretical foundation for the notion that reflection in the clinical setting promotes justice readiness.

I. THE OBLIGATION TO TEACH JUSTICE READINESS

It is tempting for law professors to deny responsibility for what students take away from educational experiences and choose to do with their lives. Professors know that students will exercise power in their relationships with clients, courts, and the community. Professors may think that law students are adults, already fully formed. How, then, can we teach them to do good if they have not already developed the idealism, the willingness to forego financial rewards and social standing, and the commitment to social justice that is necessary to sustain people who work for the poor and challenge injustice?

As educators in a professional school, law school faculty provide credentials to the elite. Everything a lawyer does has to do with justice or injustice, sometimes on the surface and sometimes in the background. Justice is about doing, and clinicians are among the only faculty in law schools who teach students how to “do” law. Therefore, clinical faculty ought to pull back the curtain and reveal the injustice; they ought to teach within a context of justice, showing the effect that all lawyers have on society. If clinical faculty throw up their hands and abdicate their responsibility to the poor and oppressed, they reinforce the ideological justification for oppressive social orders. Professors know that they cannot control their students. They, however, can have a deep effect on how students think about problems and solutions. Virtue, like proficiency in legal analysis and advocacy, comes from understanding, insight, and practice. It must be incorporated into the educational process.
Clinicians have a choice: they can be complicit in ensuring that students are good soldiers for the status quo or they can develop teaching strategies to ensure that future lawyers have an appreciation for justice. Teachers are obligated to take responsibility for what they produce. If teaching methods reproduce the status quo, faculty cannot sit back in their ivory towers and bemoan the state of the world. As educators, they can make a significant difference in how students engage in critical decision-making as community actors.

Thus, the only debate worth engaging in is how best to teach students to be justice ready. First, clinical faculty must determine the skills and knowledge that improve students’ ability to identify injustice. Second, they must develop teaching interventions that increase the probability that students will acquire those skills. Clinical faculty need to work together to discuss appropriate projects for students, develop teaching interventions that inspire students to embrace the role lawyers play in justice, and support one another in this difficult endeavor. Clinicians can help their students make a commitment to justice in their lives as lawyers. The tools just need to be refined.

What kinds of interventions with students can make this happen? How can clinical faculty relate to students as both peers and experts to maximize the chance that they will be faithful trustees of justice in the future? How can faculty teach students to recognize injustice when they see it, engage in meaningful analysis of the causes and potential cures for injustice, and develop an abiding desire to use their legal skills to ensure that justice is done? How can schools do this and still accomplish other pedagogical goals? Teaching students to recognize injustice using, for example, civil rights issues raised by the Patriot Act or homeland security would create too political an environment for teaching critical thinking. Clinical faculty need to focus on what they are trying to teach and find an appropriate vehicle for teaching it. If clinical education is ineffective, law schools can hardly produce lawyers who use clinical insights and understanding to enhance human dignity and build a more just society.

II. LAW SCHOOLS UNDERMINE JUSTICE READINESS

A clinician’s job is made harder because of what students have already endured in law school. Typical law school classes have the effect of

---

10 See id. at 290 (developing the concept of “justice readiness”).
teaching students that they have little power to affect justice in society.\textsuperscript{11} Traditional teaching methodology tends to inhibit a student’s development of critical thinking skills and value commitment. First, the student becomes passive through a process that neutralizes critical faculties and reinforces a receptive mode.\textsuperscript{12} Then, the student goes through a process of confusion, ensuring that former values are questioned and undermined.

In a traditional law school curriculum, the student becomes passive through an experience of dilution. When stepping into the classroom, the student becomes a mere recipient of the professor’s teaching and yields to the professor an ability to express personal thoughts and to criticize the message taught. Learning is bulimic, it occurs through reading and digesting a large body of judicial decisions, articles, and books and then disgorging it. The case method constitutes the lion’s share of legal study and focuses on appellate judges as the ultimate hero. Their words are “the law” and their image dominates the classroom. The hierarchical structure and educational distancing between student and judges stifles the possibility of genuine doubt.

Students may even develop the notion that the law cannot be a vehicle for justice. Because the U.S. legal system is based on stare decisis, students assume that lawyers acting within that system are not agents of change but are agents of stasis. If students enter law schools with ideas and ambitions of justice, the indoctrination process will detach initial intuitions from the law taught in class and remove their sense of justice through the classroom dynamic.\textsuperscript{13}

The case method, comprising only opinions written by appellate court judges, allows this detachment. The opinions are displayed in an abstract way, playing down or ignoring the fact that the decision is a culmination of a controversy.\textsuperscript{14} Facts are presented in a condensed form—with just enough detail to explain the doctrine—and sometimes parties to the dispute remain nameless, only known as plaintiff or defendant.

\textsuperscript{12} See id. at 415 (noting that “the student’s values are attacked” through the use of the Socratic method, which then causes “rationalization for the professor’s own inaction and acceptance of the status quo”).
\textsuperscript{14} See Halpern, supra note 13, at 385.
The difficult stories that form the basis of the cases are presented in a cold, indifferent way. Students will rarely express shock at an instance of physical injury or human tragedy, where a person unjustly loses rights or liberties. This dynamic breeds the attitude among students that the cases they read have imaginary facts and concern the legal doctrine instead of the parties’ emotions, pains, or pleas for justice.\(^{15}\)

Therefore, students learn how to think like lawyers by adopting an emotionally remote, morally neutral approach to human problems and social issues, distancing themselves from the sentiments and suffering of others, avoiding emotional engagement with clients and their causes, and withholding moral judgment. The result is that schools produce graduates who view themselves as mere facilitators of the even-handed application of process, who behave as if there is a level playing field and that they have little or no power or responsibility for ensuring substantive justice.\(^{16}\) Further, they believe that law is naturally like this and they have no insight into alternate ways in which a legal system could function. This is the price of embracing neutrality and treating clinical legal education merely as a skills training ground.

III. CORRECTING LAW SCHOOLS’ WRONGS

Clinics must teach skills, but they should also challenge the conception of law inculcated by law schools. There is no dichotomy between lawyering skills and sensitivity to injustice. Teachers can work toward inspiring students to bring about a more just society with their legal skills.

Teaching students to reflect on their experiences is an essential part of this process. Every day, people are implicitly invited to engage in the cognitive shortcuts that reinforce bias and stoke fear.\(^{17}\) The best strategy to avoid further indoctrinating students is to identify this invitation and challenge its underlying assumptions. For clinical professors to accomplish this, they must teach “reflective skepticism,” where students learn to understand that knowledge is constructed, gain the ability to identify and challenge assumptions, and imagine and explore alternatives. Society needs lawyers who can offer a healthy dose of reflective

\(^{15}\) See id. at 384.


skepticism. Thus, clinical education should aim to create opportunities for students to reflect on their experiences.

Learning should also be placed in a social justice context, where students can glimpse the close relationship between knowledge, culture, and power. In that context students may also recognize the important role lawyers can play in unearthing and challenging hierarchical and oppressive systems of power. Students should be exposed to the ways in which legal power is distributed and exercised in American society, to what ends, and in whose interests. Ultimately, the goal should be to imbue students with a lifelong desire to learn about justice, identify injustice, recognize when they are perpetuating injustice, and work toward a legal solution. When students see this as an essential component of their professional identity, they will leave the educational institution with a sense of personal obligation to confront injustice.

One problem with this kind of learning is that it only works when students gain the insight on their own. Sometimes, good teaching requires that educators be transparent about goals and expectations. At other times, however, educators want students to learn for themselves. In these situations, transparency as to the ultimate goal of the educational experience would interfere with that process of revelation. For students learning justice readiness, revelation is quintessential to the learning process. Clinical faculty cannot say to students, “That is an injustice” or “See how the system and its structural requirements have disadvantaged your client?” and hope students will be able to identify future injustice and understand its causes. Instead, clinical faculty should construct learning experiences that permit the justice issues to unfold, and require students to identify injustice and to understand its structural causes to solve the clients’ problems. The clinician’s job is to tease out those insights through careful case choices and skillful, goal-oriented questioning.

The skills versus justice debate invokes the image of a serious clinician—mentoring students to inculcate the skills necessary for providing excellent legal services—pitted against a firebrand lawyer. It focuses upon combating injustice rather than teaching. It is time to let go of that dichotomy. Yes, clinics can increase access to justice for the systematically disadvantaged, but providing legal services to the needy does not necessarily teach students to be justice ready. It is the clinician’s choice about cases, experiences, interventions, and supervision that increases the likelihood of students gaining insight into justice. That same choice ensures that students have the necessary skills to become excellent lawyers.
In my interactions with students in supervision, I aim to help them gain those insights that I recognize but they do not. I ask them questions alluding to that insight but do not tell them outright what conclusions they should reach. The key is insight, not knowledge. Surely, for my students to adequately handle cases, they require a certain amount of basic knowledge; that is provided through the classroom component, readings, and direct supervision. My more challenging tasks, though, are to teach my students judgment, strategic decision-making, relationship-building skills, professional demeanor, and sensitivity to the justice issues that their cases necessarily raise. This aspect of teaching is generally accomplished through supervision. My challenge, however, is to teach in such a way that my students learn and experience for themselves. This often is directive but not always transparent.

IV. Transformative Learning Theory

Educational literature suggests that revelatory insights like those regularly obtained through clinical legal education require a transformation in the student that is best achieved through personal reflection. Transformative learning theory, largely pioneered by Professor Jack Mezirow, suggests that adult students come to law school already socialized with well-developed meaning schemes—patterns of thought that control the way they interpret perception and construe experience. Discussing Professor Mezirow’s theory, Professor Edward Taylor noted that these sets of habitual expectations operate as codes to form, limit, and distort how adults think, believe, feel, and judge. Learning is essentially a process of appropriating a new or revised interpretation of the meaning of an experience. Adults naturally tend to integrate experiences that validate or fit their meaning schemes and discount those that do not. This process is not so much a matter of matching new and stored information, but rather construing events by referring to an existing frame of reference or an already-established symbolic

---


20 See Taylor, supra note 19, at 6.

21 See id. at 5.

22 See id. at 7.
model with cognitive, affective, and connotative dimensions.\textsuperscript{23} Thus, a person’s current frame of reference serves as the boundary condition for interpreting the meaning of an experience.\textsuperscript{24} To learn, adults must break through preexisting patterns, allowing them to either validate or transform assumptions that they may bring to a given situation.\textsuperscript{25} Because of the effects of traditional legal education, law school courses reinforce the paradigm that lawyers are not agents of change and the notion that law is not really about justice. Law students begin clinical experiences with this frame of reference and the clinician’s responsibility is to pressure this paradigm.

Occasionally, adults must assess their own basic, presupposed notions—long since taken for granted—and find them unjustified or insufficient. This may result in a major transformation, where the student engages in critical self-reflection, changes his or her self-concept, and integrates the ensuing insights. Reinterpreting the old experiences through a new lens gives them new meaning. Professor Mezirow identified ten phases of transformation:

1. a disorienting dilemma
2. self-examination with feelings of guilt or shame
3. a critical assessment of epistemic, sociocultural, or psychic assumptions
4. recognition that one’s discontent and the process of transformation are shared and that others have negotiated a similar change
5. exploration of options for new roles, relationships, and actions
6. planning a course of action
7. acquisition of knowledge and skills for implementing one’s plans
8. provisional trying of new roles
9. building of competence and self-confidence in new roles and relationships; and
10. a reintegration into one’s life on the basis of conditions dictated by one’s new perspective.\textsuperscript{26}

The key to transformation is critical reflection.\textsuperscript{27} The learner engages in exploration of and reflection on the content of a problem or the premise upon which it is predicated.\textsuperscript{28} Finally, the learner enters a “re-orientation” stage.\textsuperscript{29} There, the learner creates a means for coping with

\textsuperscript{23} See id. at 6–7.
\textsuperscript{24} See id.
\textsuperscript{25} See Taylor, supra note 19, at 7.
\textsuperscript{26} Mezirow, supra note 18, at 168–69.
\textsuperscript{27} See id. at 116.
\textsuperscript{28} See id. at 104–05.
\textsuperscript{29} See id. at 168–69.
the problem should it arise again. Learning theory calls this “transfer.” As Professor Mezirow put it, the goal of education is “to help the individual become a more autonomous thinker by learning to negotiate his or her own values, meanings, and purposes rather than to uncritically act on those of others.”

During the Symposium, Professor Stephen Wizner offered an example of a “disorienting moment.” He spoke of a student representing a client in a domestic violence hearing against an unrepresented party. The student engaged in a rigorous cross-examination, devastating the opposing party, and won on a motion for a protection order. The student basked in her victory as she walked home, reflecting on the process. Professor Wizner, her clinical supervisor, asked her if she noticed anything troubling, but she could not identify any issues. Professor Wizner helped her “notice” that the opposing party was unrepresented and that nothing in the law required that he be provided counsel. As a result of the hearing, he lost access to his children and had an order entered against him that could result in his arrest if violated. This was a powerful insight into the justice system for the student and an important learning experience that went well beyond the effective use of legal skills.

Clinical legal education not only creates opportunities for students to learn and use legal skills to promote access to justice, it also creates the space in which these larger explorations of systemic injustice can occur. Yet, it is necessary to go even further. When moments like what happened to Professor Wizner’s student occur, students must examine the role they may have played in perpetuating injustice. A clinical professor could ask the student, “Why do you suppose that you did not no-


34 Id.
tice the other side’s lack of representation?” This could require the student to engage in critical reflection and introspection. That question could then be followed with, “And who benefits from your lack of noticing?” This question asks the student to probe the realm of structural injustice and how acquiescence reinforces that structure. That insight has the possibility of creating a long-term commitment to and responsibility for justice.

Transformative learning theory identifies social responsibility as a critical goal. Renowned educational scholar Paulo Freire’s emancipatory theory of learning calls for people to develop an “ontological vocation,” in which individuals are viewed as subjects—not objects—and work toward transforming their world so that it becomes more equitable. Freire said that it is critical to transformation to understand that people are hosts to the oppressors and need to embrace humanization. He expressed desire for social transformation and the development of critical consciousness so that people can learn to perceive social, political, and economic contradictions and act to transform the world. Transformative learning, particularly as articulated by Freire, offers a theoretical ground for teaching justice readiness in law school clinics.

V. FROM THEORY TO PRACTICE

A shortcoming of transformative learning theory is that it fails to explain how to create the conditions that prompt reflection. Disorientation lends itself to this kind of transformational learning, but how do educators ensure that students experience disorientation and re-orient with a sense of connection and responsibility?

Clinical education creates ideal conditions for transformational learning. Through experience with clients and projects, students can gain new appreciation for their role as lawyers, insight into the privileges they previously had taken for granted, an expanded sense of social responsibility, and belief in the possibility to affect change. Through guided reflection, clinic students can increase their ability to generate ideas about non-clinical matters and become more creative in their approach to problem-solving. Supervision, informed by the insights from transformational learning theory, can help students change

36 See Freire, supra note 35, at 83–84.
37 See id. at 83, 89.
their assumptions about their own agency, change their perspective on their own privilege, and change their behavior in light of these insights.

For example, the shock that students experience in realizing that they have responsibility for real cases—real people’s problems—can be disorienting. It is also disorienting to get to know clients who have lived lives so different from the students’ yet who are so remarkably similar to the students in their humanity. Choosing cases and projects that are likely to have an emotional impact on the student is one way to create the potential for transformation.

Indeed, the choice of cases may have a transformative impact on students without intervention through supervision. Professor Taylor critiqued Professor Mezirow’s theory as being too wedded to rational thinking and committed to conscious discourse as key to critical reflection.\(^{38}\) He drew from neurobiological studies that show that a form of long-term memory called “implicit memory” receives and stores information without conscious awareness.\(^{39}\) Implicit memory has a significant impact on how people behave and make meaning.\(^{40}\) Professor Taylor suggested that transformations need not be the product of rational reflection and conscious change alone, but can also happen in the individual’s implicit memory without any awareness.\(^{41}\) Developing intercultural competency, for example, causes changes through implicit memory in an unconscious manner.\(^{42}\)

Taylor’s concept of culture encompasses more than just the culture of other societies or countries; it includes, for example, the culture of the classroom and, by extension, the legal profession.\(^{43}\) This is proven experimentally by the students in my clinic who often remark that, after the clinical experience, they feel much more comfortable in a courtroom setting—a culture many of them had not experienced before. Moreover, after handling unemployment hearings, they expressed shock at the notion that the loss of jobs could have such devastating effects on clients within only a couple of weeks. For many of my students, this marks their first insight into how many people lack wealth even if they are not defined as “poor.” The students see firsthand how

\(^{38}\) Taylor, supra note 19, at 33–35.
\(^{40}\) Id.
\(^{41}\) Id. at 225.
\(^{42}\) Id. at 229.
few support mechanisms exist for people who have previously worked hard but teeter on the edge of destitution after losing a steady paycheck.

In addition to gaining insight into the culture of poverty, students also develop enormous concern for their clients. Some research suggests that transformation occurs not only because the experience is disconcerting, but because the student has an emotional connection to the experience. It is my experience that the typical student does not choose to engage in a clinic without some kind of passion informing that choice. Emotions, necessarily, are a part of the mix. When I speak with students after a typical semester, their descriptions of the events are loaded with emotional connection—with the people they worked with and the deepening relationships that evolved among them as a group. The constant presence of emotions appears to be a critical component of their burgeoning insight into justice and social responsibility.

Feelings are often the trigger to reflection. Research shows that transformative learning depends not only on rational analysis and reflection, but on the affective aspects of learning. One researcher found that when reflective learning included affective and experiential components, “the learning is likely to be much more clear-sighted, and the actions of those learners grounded in a pragmatically examined cultural, social, economic and political context.” Perhaps it is the emotional connection to the work that permits not only the transformation of the students’ perspective about their clients but the more personal transformation about their visions of themselves and their responsibility.

Professor Elizabeth Lange, an education researcher, noted that when Professor Mezirow’s theory of disorienting moments is combined with restorative learning, a deeper learning occurs that moves from individual understanding to social responsibility. In her empirical study, she found that “transformation is not just an epistemological process involving a change in worldview and habits of thinking; it is also an on-

---

tological process where participants experience a change in their being in the world . . . ." The participants in her research shifted their world view and became more connected to their “material, social, and physical realities” and looked for socially responsible ways to act. Professor Lange focused on disorientation regarding social and economic relations and the re-integrating phase of Professor Mezirow’s theory. Her research suggests that a willingness to encounter change is a necessary prerequisite to making change.

Professor Lange also added another insight into how educators can facilitate transformative learning. She described the learning process, not necessarily sequentially, but as the moments arose. The description of her process looks remarkably like the typical clinical method: (1) have the learner identify and describe a problem; (2) immerse the learner into alternatives for dealing with the problem with an eye toward sustainability; (3) do a cultural analysis of family and social circumstances; (4) do a cultural analysis of personal—fiscal and temporal—circumstances; (5) engage in personal, ethical reflection; (6) do a socioeconomic analysis; (7) “engage in action planning,” individually and within a group; (8) “act on the action plan”; (9) “reflect on the action plan”; and (10) “celebrate.”

Applying these theories to clinical education, a student’s transformation of values may be partially attributable to the nature of being a law student. Law students necessarily view their learning as instrumental. Scholars David Brown and Vanessa Timmer studied how civil society actors can be catalysts for transnational social learning. They defined social learning as “processes that increase awareness, capacities, and repertoires of action amongst actors in a social domain,” with a particular interest in “enhancing awareness, capacity, and action to address transnational problem domains.” Although focused on learning that occurs within organizations, their research reveals that the kinds of ex-

48 Id.
49 Id.
50 See id.
51 Id. at 125.
52 Mezirow, supra note 32, at 10.
54 Id. at 3.
experiences that are the fodder for clinical legal education are more likely to facilitate social learning.\textsuperscript{55} These domains are all concerned about problems that “are linked to strongly held values,” “affect vulnerable groups,” have “generated social and intellectual capital to support transnational campaigns,” and “have developed legitimacy with their constituents and with the larger publics.”\textsuperscript{56} Domains that are least likely to inspire social learning are those in which there is a lack of collaboration among civil society actors and one party dominates, the problems are poorly understood, the actors are ineffective in bridging “polarized values and ideologies,” and there are questions about the organizations’ “legitimacy, transparency, and accountability.”\textsuperscript{57}

**Conclusion**

Teaching students justice readiness should not be left to chance. The clinical legal education debate must shift from whether clinicians should be in the justice business at all to which methods are most effective in teaching this critical part of the clinical mission. Research on transformative learning suggests that the clinical experience, with properly chosen cases or projects, provides an opportunity for students to experience disorienting moments, have emotional investment in their work, encounter change, and reflect on their experience, thus facilitating social responsibility and commitment to justice in their professional lives. The clinician’s job as an educator is to make that process more intentional and help students mine their experiences by focusing their reflection in ways suggested by these theorists.

Clinicians can identify cases and projects that are likely to stimulate transformative learning and insight. They can assign students individual and group tasks that will increase the chances for critical reflection. They can draw on the research for ways to approach this experience that will incite reflective thinking. This research can help develop effective questions, engage clinical students, encourage further reflection, spur experimentation and research into ways to assess learning—an area of research that is quite thin—and lobby law schools to offer more experiential opportunities. The net result is a sense of purpose and satisfaction in creating lawyers committed to social justice. At the very least, those students will understand that to act as a lawyer is to engage in the project of justice. They must make their choices inten-

\textsuperscript{55} See id. at 12–13.

\textsuperscript{56} Id. (emphasis omitted).

\textsuperscript{57} Id. at 13 (emphasis omitted).
tionally. For clinical educators to do less is to abdicate their own responsibility for social justice.
Abstract: Clinical legal education is garnering more attention as a vehicle for providing the training required to graduate “practice ready” lawyers as law schools face economic concerns and increasing expectations from the legal market. To create a school that trains practice ready lawyers, law schools are increasingly recognizing that they need significant curricular reform. Schools must combine the traditional case method of teaching with experiential learning, where the curriculum focuses not just on doctrine but on training professionals. This Article proposes accepting a framework designed to achieve such goals, wherein first year classes relate doctrine to practice more effectively and the experience culminates with students spending their third year in practice. This approach would leave creativity and expression of mission to course development within the accepted framework.

Introduction

If law schools aim to graduate lawyers who are “practice ready,” how effective is clinical education relative to other pedagogical methods, both experiential (including simulation, practicum, and externship offerings) and non-experiential (including classroom and seminar courses), in achieving that goal?1

The assertion that law schools aim to graduate practice ready lawyers lies at the heart of the debate about the role of legal education in preparing students for the profession. Critiques of legal education are

© 2012, Margaret Martin Barry.

* Professor of Law at Columbus School of Law, Catholic University, and Visiting Professor and Associate Dean for Clinical and Experiential Programs at Vermont Law School. I thank Alan Minuskin and the other planners of the Symposium held by the Boston College Journal of Law & Social Justice for inviting me to participate, and the other members of the first panel—Phyllis Goldfarb, Rebecca Sandefur, and Karen Tokarz—for sharing their insights. The Symposium, The Way to Carnegie: Practice, Practice—Pedagogy, Social Justice, and Cost in Experiential Legal Education, took place on October 28, 2011.

abundant and the conclusions are fairly consistent. Yet, despite these critiques, law schools still generally operate on the assumption that legal education is ideal and that deconstructing cases in doctrinal courses is its essence.

It once seemed cutting-edge for law schools to proclaim that they produce practice ready lawyers; buses tooing down Massachusetts Avenue in the District of Columbia even boasted the phrase as an advertising slogan. The concept held great promise, as it meant that schools were actually fulfilling their goals for accreditation. Over time, law school deans increasingly used practice readiness as a talking point. It surfaced in critiques by the profession and made its way into discussions regarding revisions of the ABA Standards for Accreditation of Law Schools.

---

2 See Margaret Martin Barry et al., Clinical Education for This Millennium: The Third Wave, 7 CLINICAL L. REV. 1, 12–13, 32 (2000) (discussing the historical barriers and challenges to the development of clinical education); Rebecca Sandefur & Jeffrey Selbin, The Clinic Effect, 16 CLINICAL L. REV. 57, 58 (2009) (“Law schools teach students to think like lawyers but not to act like them . . . . [T]hey neither prepare students adequately for the practice of law (the skills dimension), nor instill in them sufficiently a sense of professional responsibility and public obligation (the civic dimension).”).

3 See Carrie Menkel-Meadow, Taking Law and _____ Really Seriously: Before, During, and After “The Law,” 60 VAND. L. REV. 555, 578–79 (2007). The casebook method of teaching prevails. See id. at 579 (“If one looked at the schoolroom, the hospital, the police station, the prison, or the business office of the nineteenth century, and then compared it to today’s institutions, one would see more change in each of these than in the law school classroom.”). Additionally, most law school resources go into teaching doctrinal courses and supporting those who teach them. Richard K. Neumann, Jr. & Stefan H. Krieger, Empirical Inquiry Twenty-Five Years After The Lawyering Process, 10 CLINICAL L. REV. 349, 384 (2003) (noting that faculty allotments are often still set based on “a standard-size allotment initially determined generations ago when all faculty taught doctrinal courses and nearly all legal scholarship was doctrinal”).


What does practice ready mean? It could mean that graduates, equipped with a basic array of substantive knowledge, are able to learn what they need to practice through apprenticeship in their first job. In the comforting embrace of an office prepared to introduce the necessary professional competencies, graduates would learn the essentials for participation in the profession. But law schools do promise more—that graduates who pass the bar exam are capable of representing clients, no further lessons required. As it happens, however, law schools overlook or tacitly reject that promise.

For years, law schools remained satisfied that they adequately prepared students for the profession—they believed that introducing students to the skill of legal analysis and to certain areas of substantive law achieved their preparatory obligation. The constellation of substantive law offerings has long remained the same at its core. Additional subject areas generally reflect faculty preferences as well as pressures by students and the legal community to address legal developments of growing interest and demand. The conveyance of doctrine through analysis of cases is the dominant approach to teaching and it has undeniable benefits: it efficiently introduces a significant amount of material, demands that students understand and analyze the material, and

---


7 See Roy Stuckey et al., Best Practices for Legal Education: A Vision and A Road Map 16–17, 19 (2007) (arguing that law schools are not fully committed to preparing students for practice and must “expand their educational goals” because a focus on legal reasoning and some main legal principles is insufficient).

8 Menkel-Meadow, supra note 3, at 579. There are some exceptions to bar-centric first year course selections. See, e.g., First-Year Curriculum Changes: Part Two, Bos. C.L. SCH. (Mar. 14, 2008), http://www.bc.edu/schools/law/news/events/2008-archive/31408-2.html (describing a change in the first year curriculum that allows students to choose an elective class from a variety of offerings).

9 Stuckey et al., supra note 7, at 95–96. International law, environmental law, and intellectual property law are a few examples. Students want to learn about these areas because of the special interests that brought them to law school and their desire to gain and demonstrate knowledge in the areas where they hope to practice. See Deborah Jones Merritt & Jennifer Cihon, New Course Offerings in the Upper-Level Curriculum: Report of an AALS Survey, 47 J. LEGAL EDUC. 524, 533–34 (1997).
creates a contained, shared experience with the material.\textsuperscript{10} It is a socializing process that builds a foundation for approaching doctrine and, significantly, for taking the bar examination.\textsuperscript{11}

Despite almost a century of critique that this approach does not provide enough preparation for the profession, law schools have been reluctant to substantially modify it.\textsuperscript{12} Yet, many in the law academy still hold onto the traditional approach, believing it will—or unconcerned that it will not—give students the grounding required to handle the pressing needs of their clients, whether an individual, corporation, government entity, or NGO. This debate, however, has remained merely theoretical for many schools that continue to avoid significant curriculum redesign and assessment.

Making students practice ready involves more than substantive analysis, especially considering the increasing diversity and complexity of the legal world that graduates enter—the international intersections, the varied practice forums, economic sustainability, and recognition of bias within the law and its application.\textsuperscript{13} The term suggests a sufficient grounding in how the law is developed, interpreted, critiqued, accessed, and used to work toward expertise, whether independently or with the benefit of organizational support.\textsuperscript{14} It is clear that carefully


\textsuperscript{11} See Carnegie Report, supra note 10, at 47–60. But see Stuckey et al., supra note 7, at 15.

\textsuperscript{12} See, e.g., Stuckey et al., supra note 7, at 2 (tracing the historical critique of the legal education model at least as far back as 1917); Barry et al., supra note 2, at 5–9 (discussing the birth of the modern law school and early critique of its emphasis on the casebook method); Erwin Chemerinsky, Why Not Clinical Education?, 16 Clinical L. Rev. 35, 37–38 (2009) (referencing the history of critique dating back to 1921). The critique of this intransigence has been consistent. See, e.g., Stuckey et al., supra note 7, at 17; Menkel-Meadow, supra note 3, at 579.

\textsuperscript{13} See Carnegie Report, supra note 10, at 88 (discussing the “much-needed bridge between the formal skills of legal analysis and the more fluid expertise needed in much professional work”); Stuckey et al., supra note 7, at 17; Gail B. Agrawal, Foreword, 96 Iowa L. Rev. 1449, 1450, 1452 (2011) (discussing the future possibility of a globalized legal market, “the extent to which legal services will be . . . outsourced,” a potentially new regulatory model to govern the practice of law, and training lawyers to recognize issues of social justice).

\textsuperscript{14} See Stuckey et al., supra note 7, at 17 (quoting Alan Watson, Legal Education Reform: Modest Suggestions, 51 J. Legal Educ. 91, 93 (2001)) (“There is so much more to the law, even for the practice of law, than [training]: issues such as the social functions of law, the factors that influence legal development, patterns of change, [and] the interaction of law with other forms of social control . . . .”).
analyzing a set of appellate cases and some statutes does not provide sufficient grounding.\textsuperscript{15} So what else is needed?

Law schools’ responses to that question reflect ambivalence. Many schools have looked to clinical and experiential offerings—which they are required to provide by the ABA—to address pesky critiques about professional relevance.\textsuperscript{16} Yet, there has been little reflection on how these and other more traditional courses relate to each other and to the overall curriculum.\textsuperscript{17} Furthermore, unconvinced of the value of clinical and experiential courses, many schools complain of their cost, fail to treat the faculty who teach them as full participants in the educational enterprise, and decline to make the courses available to all students.\textsuperscript{18} Nonetheless, the clinical legal education movement in this country has had its impact. Clinical programs have given form to consideration of broader competencies, both in the classroom and through supervision. Furthermore, market forces and ongoing critique have pushed law schools to seriously consider substantive curricular change.\textsuperscript{19}

\begin{flushleft}
\textsuperscript{15} See \textit{Carnegie Report}, supra note 10, at 55–56 (criticizing the practice of teaching from casebooks comprised of appellate cases); Barry et al., \textit{supra} note 2, at 32 (questioning the wisdom of “[t]he analysis of legal doctrine as presented in appellate decisions digested in casebooks”); Watson, \textit{supra} note 14, at 93 (arguing for the abolition of the casebook method because casebooks present cases out of context and do not give students a framework for the law).

\textsuperscript{16} See \textit{Standards and Rules of Procedure for Approval of Law Schools}, § 302(b) (2011–2012) (“A law school shall offer substantial opportunities for (1) live-client or other real-life practice experiences . . . .”); Barry et al., \textit{supra} note 2, at 12 (noting demands for relevance as a reason for the expansion of clinical legal education).

\textsuperscript{17} Barry et al., \textit{supra} note 2, at 35 (“Little attention is paid to synthesis, either of bodies of substantive law or lawyering techniques that might help the student understand how the law lives and the lawyer’s role in bringing it to life.”).


\textsuperscript{19} See Barry et al., \textit{supra} note 2, at 30 (“The market forces driving competition among law schools will eventually prompt most law schools . . . to expand the skills and values curriculum . . . .”)
\end{flushleft}
schools are beginning to process a new reality that calls for relevance and effective professional preparation.

Because schools have limited time and resources, consideration of change inevitably leads them to question what they must sacrifice to achieve the goal of producing practice ready lawyers.\textsuperscript{20} If other legal skills are emphasized, how will burgeoning areas of substantive law get covered?

Educators who raise such concerns understand that students cannot know a reliable body of law when they graduate; the law often changes before students leave school. Indeed, the law is dynamic because of the profession, people, and circumstances that interface with and propel it. Thus, the practice ready student should have received an introduction to broad doctrinal precepts and the basic tools needed for access, responsible use, development, and comprehension of the law.\textsuperscript{21} Many in-house clinics strive to cover in one semester, often for less than half of a student’s credit load, a laundry list of goals intended to equip students for their roles as professionals.\textsuperscript{22} Clinics aim to relate substantive law to professional competencies like client interviewing and counseling, communication, fact investigation, drafting, negotiating, trial and pre-trial practice, ethics, professionalism, cultural awareness, problem solving, law office management, notions of alternative dispute resolution, and social justice (ranging from access to the courts to discrimi-


\textsuperscript{21} See Carnegie Report, supra note 10, at 88; Stuckey et al., supra note 7, at 17.

natory laws and practices). By emphasizing reflection on the process of developing these competencies, clinics introduce students to the skill of life-long learning that professionals need. The goals are ambitious, but clinical faculty set them because they recognize that students have not had much chance to engage with these competencies in their other courses.

Externships immerse students in the life of legal enterprises outside of the school, including judicial chambers, government offices, non-profit organizations, corporate offices, and private firms. The goal is for students to have substantive experiences working alongside practicing lawyers or judges, to understand how law is practiced in these settings, and to benefit from the opportunities to reflect on the experience with a faculty member. Hybrid clinics can combine certain in-house clinic goals with practice in external offices.

These experiences connect aspiring professionals to their chosen profession in ways that exploring doctrine cannot achieve. Professors Rebecca Sandefur and Jeffrey Selbin, in their assessment of the study After the JD, argue that there is much to learn about how effective clinics and externships are at preparing students for the profession. There is also much to learn about the value of doctrinal courses. What we do

23 See Carnegie Report, supra note 10, at 88; see, e.g., Barry et al., supra note 2, at 46–48 (describing the lawyering skills developed in clinics at William & Mary School of Law and The City University of New York School of Law).

24 See Carnegie Report, supra note 10, at 85–86; Stuckey et al., supra note 7, at 172.


26 Id. at 6.

27 Barry et al., supra note 2, at 28–29.

28 See Parker & Schechter, supra note 25, at 5. Several substantive courses, such as Civil Procedure, Criminal Law, Criminal Procedure, and Evidence, provide some foundation, but the students in clinics and externships are removed from the doctrinal course experience. See Carnegie Report, supra note 10, at 88. In most schools, practice experiences are available to those students who seek them out. Standards and Rules of Procedure for Approval of Law Schools, § 302(b)(1) (2011–2012); Joel W. Barrows, On Becoming a Lawyer, 96 Iowa L. Rev. 1511, 1511 (2011). Only a few schools require them and fewer connect them to the overall educational development of students. See Barry et al., supra note 2, at 44–46 (discussing the approaches to clinical legal education of a variety of law schools).

29 See Ronit Dinovitzer et al., After the JD: First Results of a National Study of Legal Careers 85–86 (2004), available at http://www.americanbarfoundation.org/uploads/cms/documents/ajd.pdf [hereinafter After the JD]; Sandefur & Selbin, supra note 2, at 79–83, 100–03 (discussing the results of the After the JD study, concluding that the study had too many unaddressed variables to provide sound information about the effects of clinical legal education, and urging further research).

30 See Chemerinsky, supra note 12, at 38.
know from the many qualitative assessments of legal education to date is that we need to teach doctrine differently, doctrine is not all that we need to teach, and the other part of what we need to teach is found in clinical legal education.\textsuperscript{31}

Part I of this Article discusses some of the new pressures that repeatedly call for change in legal education. Part II discusses some of the changes enacted by law schools, possibly in direct response to these pressures. This Article then proposes in Part III an outline for how schools may move past some of the initial roadblocks toward significant redesign.

I. The Pressure on Law Schools to Change Their Approach to Teaching Law

This is a critical moment in the history of legal education and the profession. Law faculties must come together, talk seriously about how lawyers should be trained for the world ahead, and take action. The choice cannot be between skills training and a broader education; it must be both . . . . Unless law faculties can say what a sound legal education requires for today and tomorrow, who will—or should—take us seriously?\textsuperscript{32}

Interestingly, in the face of sustained, harsh critique of legal education, academics that so thoughtfully assess the law have been reactive at best in considering how to modify teaching it.\textsuperscript{33} In his introduction to \textit{Best Practices for Legal Education}, Professor Roy Stuckey offers three assumptions that underlie the principles identified in the book: most new lawyers are not sufficiently prepared for practice; “[s]ignificant improvements to legal education are achievable;” and there will be no significant change to the law school educational process.\textsuperscript{34}

Since Professor Stuckey made those observations in 2007, market pressures have spurred some law schools to consider reform more seriously.\textsuperscript{35} Deregulation, bank failures, falling markets, distrust of investment, frustration with government, job loss, and failure to address cli-

\textsuperscript{31} See Carnegie Report, \textit{supra} note 10, at 120; Stuckey \textit{et al.}, \textit{supra} note 7, at 276–81; Chemerinsky, \textit{supra} note 12, at 38.


\textsuperscript{34} Stuckey \textit{et al.}, \textit{supra} note 7, at 1.

mate change may not seem unusual, but their cumulative effect has been deeply unsettling. As a result, the market for the legal professional’s services has become more conservative as cost for legal services is balanced against other economic pressures. Law firms, previously relied upon by at least the top tier of law graduates for training, are pulling back. Concerned about a decreasing bottom line, these firms are saying with more conviction that schools need to do a better job of preparing students for the profession. Concerned about survival, law schools are beginning to listen. Ideally, deeper concerns about pro-

---

36 See Raj Patel, The Value of Nothing: How to Reshape Market Society and Redefine Democracy 20–24 (2009); Jonathan H. Adler, Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation Under the Obama Administration, 34 Harv. J.L. & Pub. Pol’y 421, 421–22 (2011). Despite the growth in size and diversity of our population and the concomitant reminder that we need to attend to the commons, we celebrate individualism. See, e.g., Wendell Berry, The Unsettling of America: Culture and Agriculture 3–7 (1977) (discussing consequences of the exploitation of Earth’s resources); Garrett Hardin, The Tragedy of the Commons, 162 Science 1243, 1243–44 (1968) (explaining the depletion of overexploited, unregulated shared resources). Our country is an interesting political mix of libertarian values, moral imperialism, threads of social responsibility, environmental concern, and denial. We are at a collective loss as to our roles in society. When President Bush advised that Americans should support the national effort in the wake of 9/11 and the ensuing Iraq War by consuming goods, it captured the helplessness that so many felt and created an unnerving sense of superfluity. See Coleen Rowley, Celebrating Spiritual Death on Black Friday, Huffington Post (Nov. 25, 2011), http://www.huffingtonpost.com/coleen-rowley/black-friday-2011_b_1113102.html; see also Naomi Klein, The Shock Doctrine: The Rise of Disaster Capitalism 8–11 (2007) (discussing how public disorientation is the perfect climate for the wrong kind of control to take hold); Patel, supra, at 20–24 (arguing that faith in prices as a way of valuing the world ignores social and ecological costs, and that the corporate capture of government and financial crisis are the result of a failed political system).


38 See Hayes, supra note 37, at 8.


viding quality education would precipitate reform; the market seems too mercurial to guide academic design. It is folly, however, to ignore the fundamental economic shifts taking place. While these shifts bring much uncertainty, they also reinforce for those involved in legal education how unreasonable it is to ignore calls for significant change.

II. Law School Innovations

Whether in response to critiques of legal education, internal assessment, or both, a number of schools have begun to revise their curricula.41 Some have tweaked the first year programs; others have made significant changes elsewhere.42

A. First Year Programs

In 2006, Boston College Law School changed its Torts, Contracts, and Property offerings from five credit courses running from the beginning of fall semester through February to traditional four credit courses ending in December.43 The school also added Criminal Law to the second semester with the goal of adding more public law perspective to the first year.44 In 2008, the school further modified its first year curriculum to allow students to choose for their spring semester a three credit elective from a menu of classes that are also available to upper level students.45 The rearranging of doctrinal options and the oppor-
tunity to take a practice course provides some autonomy for first year students.\textsuperscript{46} It, however, essentially affirms the traditional first year content and approach.

Cardozo Law School has a two week immersion course held each January wherein students learn courtroom litigation from leading civil and criminal law judges and lawyers.\textsuperscript{47} Students practice different aspects of trial preparation, including interviewing, witness preparation, jury selection, and witness examination.\textsuperscript{48} At the end of the course, students conduct a full jury trial.\textsuperscript{49} This course is valuable because it allows first year students to focus on the application of what they are learning. On the other hand, it underscores the casebook message that litigation is the lawyer’s central work and, given the course’s singularity and brief duration, it may have limited impact on the overall first year experience.

Harvard Law School requires first year students to elect from a group of international and comparative law courses.\textsuperscript{50} The school believes that the courses enable students to relate their U.S. public and private law education to the larger universe of global networks, including economic regulation and private ordering, public systems created through multilateral relations among states, and different and widely varying legal cultures and systems.\textsuperscript{51} The courses introduce students to one or more legal systems outside of the United States, to the practice of borrowing and transmitting legal ideas across borders, and to a variety of approaches to substantive and procedural law that are rooted in distinct cultures and traditions.\textsuperscript{52}

Further innovations in Harvard’s first year curriculum include a legislative and regulatory course and a problem solving workshop.\textsuperscript{53} The Legislation and Regulation course introduces students to legislation, regulation, and administration, and teaches students to think

\textsuperscript{46} See Michael Hunter Schwartz et al., Teaching Law by Design: Engaging Students from the Syllabus to the Final Exam 91 (2009).


\textsuperscript{48} Id.

\textsuperscript{49} Id.


\textsuperscript{51} Id.

\textsuperscript{52} Id.

about processes and structures of government and how they influence and affect legal outcomes.\textsuperscript{54} “The course includes materials on most or all of the following topics: the separation of powers; the legislative process; statutory interpretation; delegation and administrative agency practice; and regulatory tools and strategies.”\textsuperscript{55} The course is considered to be a useful prerequisite to further study and work in legislation, administrative law, constitutional law, and a wide range of regulatory subjects, such as environmental law, securities law, and telecommunications law—a view shared by other schools that have adopted the approach.\textsuperscript{56} Harvard’s Problem Solving Workshop is designed to help prepare students for practice by allowing them to “engage in the sorts of discussions and activities that occupy” practicing attorneys.\textsuperscript{57} Students “combin[e] their knowledge of law with practical judgment to help clients attain their goals . . . .”\textsuperscript{58} The course is intended “to help students become the kind of thoughtful practicing lawyers who can see the theoretical issues lurking behind everyday events.”\textsuperscript{59}

Harvard’s additions address important gaps in the traditional first year curriculum. The Problem Solving Workshop provides an opportunity to apply the doctrine covered in substantive courses to the work lawyers do, ideally infusing the approach within doctrinal courses. The international courses include substantive and procedural law that must be part of the introductory year so that students learn in the context of the broader traditions that inform our legal universe.\textsuperscript{60} Of particular interest are small reading group sections that offer students the opportunity to meet with faculty in informal settings to discuss diverse subjects related to the law.\textsuperscript{61} This approach opens an avenue for pursuing critical legal theory, which is often not given enough consideration in the classroom. If the program is indeed meeting the goals ascribed to it, then this first year platform is a departure worth tracking.\textsuperscript{62}

\begin{thebibliography}{99}
\bibitem{Id.} Id.
\bibitem{Id.; see, e.g., First Year Course Descriptions} Id.; see, e.g., First Year Course Descriptions, Wash. & Lee U. Sch. L., http://law.wlu.edu/academics/page.asp?pageid=1100 (last visited Mar. 13, 2012).
\bibitem{Id.} Id.
\bibitem{Id.} Id.
\bibitem{J.D. Program} J.D. Program, supra note 53.
\bibitem{See Powers, supra note 60.} See Powers, supra note 60.
\end{thebibliography}
ance, however, is unclear between these new courses and traditional requirements.

Washington & Lee University School of Law reorganized some of its traditional first year courses and added ones not generally part of the first year curriculum. The course covers several substantive areas: the “development of principles of separated legislative, executive and judicial functions; the combination of those functions in the modern administrative agency; and the predominantly procedural responses of the legal system to the continuing questions of legitimacy raised by this allocation of authority.” Professional Responsibility examines the “sources and implications of the moral behavior of lawyers” in its consideration of the Model Rules of Professional Responsibility. It also explores “earlier American compilations on professional ethics, proposals for reform[,] . . . sources on the law of legal malpractice and legal-malpractice prevention[,] and non-legal sources on ethics, including biography, fiction, history, philosophy, and moral theology.” Significantly, this course focuses students early in their careers on the moral underpinnings of the profession. The school’s Transnational Law “course introduces students to core principles of public and private international law, comparative law, foreign law, cross-border legal process and deal-making, transboundary dispute resolution, and elements of U.S. law that have international effect.”

\[63\] First Year Course Descriptions, supra note 56.
\[64\] Id.
\[65\] Id.
\[66\] Id.
\[67\] Id.
\[68\] First Year Course Descriptions, supra note 56; see, e.g., Carnegie Report, supra note 10, at 126–28 (discussing the centrality of ethics and moral conduct); Letter from Melvin F. Wright Jr., Chair, Am. Bar Ass’n Standing Comm. on Professionalism, to Donald J. Polden, Chair, Am. Bar Ass’n Accreditation Standards Review Comm. (June 10, 2010), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/comment_outcome_measures_sc_on_professionalism__june_2010.authcheckdam.pdf [hereinafter Wright Letter]. Mr. Wright stated, in part, “On a hierarchy of learning outcomes, recognizing and resolving ethical dilemmas is an elevated and important attribute of lawyers, equal to application of any legal principle.” Wright Letter, supra.

\[69\] First Year Course Descriptions, supra note 56. Washington & Lee University School of Law describes a goal of this course as “equip[ping] students for the reality that U.S. practitioners increasingly require conversance with international, foreign, and extraterritorial law in all aspects of their legal work.” Id.
between U.S., foreign, and international laws and the people they govern. To Like Boston College, Washington & Lee requires Criminal Law, often offered as an upper level option, in the first year.

The relatively new University of California Irvine School of Law, under the leadership of Dean Erwin Chemerinsky, has been one of the most creative schools in first year curriculum design. While it has stayed within the traditional landscape of doctrinal coverage, it links its approach most consciously to preparation for professional practice. The fall semester courses are Legal Profession I, Lawyering Skills I, Common Law Analysis: Contracts, Procedural Analysis, and Statutory Analysis. The spring semester courses are Legal Profession II, Lawyering Skills II, Common Law Analysis: Torts, Constitutional Analysis, and International Legal Analysis.

Irvine’s Legal Profession courses draw “from various disciplines, including economics, history, sociology, and psychology . . . [to] teach students about the variety of practice settings in which lawyers work . . . .” The curriculum also considers the ethical dilemmas commonly confronted in each of these settings. The school “conven[e]s panels of lawyers from each type of practice to talk about their work and careers, the pressures they face, how they resolve such dilemmas, and where they find satisfaction.” Students participate in “exercises based on typical problems confronted in practice.” Students “also address larger issues facing the profession as a whole—including the legal services market and its regulation, the distribution of legal services, the profession’s demographics, social structure, and working conditions, and the implications of globalization for the profession.”

Similar to developments in a number of schools, Irvine’s Lawyering Skills sections “focus on teaching skills that all lawyers use, such as fact investigation, interviewing, legal writing and analysis, extensive le-

---

70 See id.; see also International and Comparative Law, supra note 50.
71 First Year Course Descriptions, supra note 56; Marzagalli, supra note 43.
74 Id.
75 Id.
76 Id.
77 Id.
78 First Year Curriculum, supra note 73.
79 Id.
80 Id.
gal research, negotiation and oral advocacy." Constitutional Law, Torts, Contracts, and Civil Procedure are not described much differently than traditional instruction, and it is not clear which additional skills they offer out of the broader professional skill set favored by Dean Chemerinsky. Irvine’s International Legal Analysis course, like its counterparts at Harvard and Washington & Lee, recognizes the need to understand the United States’ relationship with international laws.

This is by no means an exhaustive list of first year curricular modifications. A number of other schools have made revisions or are considering them. It is encouraging that law schools are giving serious thought to the content of the first year curriculum.

In addition to changing the content of first year courses, some schools are also changing their approach to teaching doctrinal courses. For example, Vermont Law School introduced alternative dispute resolution into several first year courses. The introduction of writing projects, simulations, and multiple assessments is also affecting the way students experience law school. Law schools should continue deve-

81 Id.
82 See id.
83 See First Year Course Descriptions, supra note 56; First Year Curriculum, supra note 73; Powers, supra note 60.
86 See Tonya Kowalski, Toward a Pedagogy for Teaching Legal Writing in Law School Clinics, 17 CLINICAL L. REV. 285, 325–29, 335–36 (2010); see also Raleigh Hannah Levine, Of Learning Civil Procedure, Practicing Civil Practice, and Studying A Civil Action: A Low-Cost Proposal to Introduce First-Year Law Students to the Neglected MacCrate Skills, 31 SETON HALL L. REV. 479, 480 (2000) (proposing integrating oral and written exercises into first year Civil Procedure classes). At Columbus School of Law, Catholic University, I participated in a working group that looked into methods of compliance with regional accreditation requirements and the anticipated changes to Chapter Three of the ABA Standards. In preparing for an initial meeting of the group, I discussed the issues with my research fellow. He shared his experi-
opposing multiple teaching methods to ensure the success of law school curriculum reform.  

B. Upper Level Courses—Clinics and Externships

Substantive law offerings in the second and third years of law school have grown to reflect the complexity and breadth of modern legal practice. For the most part, these courses repeat the emphasis on analysis of case and statutory law, missing the opportunity to engage other skills and explore professional values. Stanford Law School’s new three-dimensional approach to its curriculum breaks this mold, as Dean Larry Kramer observed:

“The first year generally works . . . . The problem is that legal education has traditionally involved teaching one skill (thinking like a lawyer), and doing so for three years . . . . The second and third year curriculum is thus best described as ‘more of the same.’

“Yet more of the same is not enough. What we’re doing is creating an upper level experience that is very different from the one students have traditionally had . . . . The core legal education remains as strong as ever, and our law faculty continues to do what it does best. But students can have a much richer, more varied educational experience in which they also get opportunities to study across disciplines, to work in teams with students from law and other disciplines, to have a serious and intense clinical experience.

“At Stanford, we think lawyers have a valuable role to play—not just in modernizing the way that law is practiced, but in helping to solve the world’s problems. And we think we are

ence in several doctrinal courses at the law school that involved multiple assessments, simulations, and collaborative work. Following his lead, I proposed a survey of the faculty, which ultimately confirmed that most professors used more than one assessment and several used more than two assessments—graded and ungraded—to teach their courses.

87 See Stuckey et al., supra note 7, at 283.
89 See Juris Doctor Course Selection, supra note 88 (describing the large selection of courses offered at Georgetown University Law Center but not encouraging new skills development); Required Courses, supra note 84 (demonstrating topical breadth in courses offered, though students are only required to take one “Skills Requirement” course prior to graduation).
uniquely positioned among law schools to produce lawyers who do that[...]."

To accomplish this, Stanford began a series of reforms, the first of which was adopting the rest of the University’s semester schedule, thus making it easier for students to take courses outside of the law school. By doing this, the school made joint degrees more accessible to students and allowed for completion of joint degree programs in three years. The school also offers concentrations for students wishing to pursue interdisciplinary subjects. It modified its international law program, added more simulation courses, and focused on curriculum advising. The school also added more clinical opportunities.

When a leading law school like Stanford commits to revamping its approach to legal education, it inevitably causes greater introspection throughout the academy. Stanford’s critique of the second and third years has made it more difficult for other schools to be complacent. Significantly, Stanford affirmed what schools like CUNY School of Law, Dave Clark School of Law, and the University of New Mexico School of Law have known all along: clinical experiences are a necessary part of legal education.

91 Id.
92 Id.
93 Id.
94 See id.
95 See A “3D” JD, supra note 90; see also Judith Romero, Stanford Law School Advances New Model for Legal Education, STANFORD L. SCH. (Feb. 13, 2012), http://blogs.law.stanford.edu/newsfeed/2012/02/13/stanford-law-school-advances-new-model-for-legal-education (announcing completion of the first phase of reforms beginning in November 2006 that the school describes as “successfully transforming its traditional law degree into a multidimensional JD, which combines the study of other disciplines with team-oriented, problem-solving techniques together with expanded clinical training that enables students to represent clients and litigate cases while in law school”).
97 See Barry et al., supra note 2, at 43–49 (discussing the approaches to clinical legal education of a variety of law schools). Washington & Lee University School of Law has established a new curriculum for its third year students. See The Third Year in Detail, supra note 96. This model favors the development of practical skills over traditional courses in the third year model by focusing on experiential learning through simulated practice experiences, clinics, and externships. See id. (detailing a third-year program that abandons the traditional course menu for a practical-skills-based curriculum, focusing on professionalism, experiential opportunities, extra-curricular service, and short “intensive” courses
The most significant change in upper level courses has been the expansion of clinical and externship offerings, along with a proliferation of simulation courses intended to address the many skills ignored or neglected in doctrinal courses.\textsuperscript{98} The ABA accreditation standards required much of this change.\textsuperscript{99}

Setting simulations aside, how effectively are clinics and externships covering the vast range of practice preparation that doctrinal courses do not address? Clinical scholars helped pave the way for more thoughtful lawyering, teaching about lawyering, and development of professional values.\textsuperscript{100} The \textit{Carnegie Report} credits the clinical experience with addressing the two missing aspects of legal education: experience with clients and matters of ethical substance.\textsuperscript{101} Clinics offer a point of transfer from performing abstract legal analysis to fulfilling a professional role that is essential to establishing a sense of professional identity and obligation.\textsuperscript{102} As one student recently put it,

"Being able to see a case, basically from its inception through the notice of intent to sue, is a big undertaking . . . . Students in the classroom don’t realize that you have to know a case in

that cover transactional work and alternative dispute resolution). The University also plans to expand clinical program offerings, which will provide more opportunities for experiential learning in the third year. \textit{See id.; see also Edward Santow & George Mukundi Wachira, The Global Alliance for Justice Education, in The Global Clinical Movement: Educating Lawyers for Social Justice 371, 371 (Frank S. Bloch ed., 2011) (discussing the development of clinical legal education throughout the world, and collaboratively through the Global Alliance for Justice Education).}

\textsuperscript{98} \textit{Chart of Legal Education Reform, supra} note 84.


\textsuperscript{101} \textit{Carnegie Report, supra} note 10, at 56–59.

\textsuperscript{102} \textit{Id.} at 28–29 (discussing the third apprenticeship: identity and purpose).
and out, every little nuance, and you have to just pore over
the evidence you have at hand . . . .”

Thus, the legal academy’s attitude toward clinical programs shifts bet-
 tween appreciation and antipathy. Clinical programs are appreciated
for their role in responding to institutional obligations to support ac-
cess to legal representation—the matters of justice that the Carnegie Re-
port references—and introducing students to those obligations. The
legal academy evinces antipathy toward clinical programs by not credit-
ing the rigor of clinical offerings and the value of the competencies
they are designed to develop, namely experience with clients. As
pressure to teach more lawyering competencies has grown, institu-
tional ambivalence regarding clinical programs is giving way to concern about
the ability of clinics to teach the skills new lawyers need.

Law school clinics face their own identity challenges, including
concerns about mission and pedagogy. While promoting access to
justice is a goal shared by clinical faculty, some clinicians place signifi-

ing law student Karen Schmidt).
104 See Carnegie Report, supra note 10, at 126–28; Karen Schmidt, JD/MELP 2012, supra
note 103.
105 See Carnegie Report, supra note 10, at 56–57, 96–97; see, e.g., Deborah Maranville
et al., Re-Vision Quest: A Law School Guide to Designing Experiential Courses Involving Real
Lawyering, 56 N.Y.L. Sch. L. Rev. 517, 519 (2011–2012) (suggesting the need to re-evaluate
the clinical model).
106 See GREGORY MUNRO, OUTCOMES ASSESSMENT FOR LAW SCHOOLS 68–69, 71 (2000).
107 Stephen F. Reed, Clinical Legal Education at a Generational Crossroads: A SelfFocused Self
Study of Self, 17 CLINICAL L. REV. 243, 251–53 (2010) (discussing students as the priority in his
approach to clinical teaching, and serving the poor as less consequential); see Sameer M.
notes:

I have concluded it is better to give the law students good training they can
put to use in BigLaw than to try to get them interested in helping indigent
clients as a full time gig. I try to engender in students the view that pro bono
work, in the context of an otherwise absurdly profitable career, is a good idea
for selfish reasons . . . and unselfish reasons . . . . It may be cynical, but I think
this approach is the best way to get today’s business-minded, transaction-
focused law students to work for the poor. While Great Clinicians may balk at
my laziness and/or lack of caring, I am trying to be realistic: students need to
come to public service or clinical teaching on their own, and they will not re-
spond if I ram it down their throats.

Reed, supra, at 252 (citations omitted). Professor Reed’s perspective reflects one aspect of
the discord regarding priorities for clinical teaching. See id.
cantly higher value on certain types of practice.\textsuperscript{108} Many forms of practice address structural problems in the justice system and access to it. Assessment of the services provided to clients and building student competency in reflection and strategy as they join in the assessment are all important parts of developing strong clinical programs. This type of programmatic goal assessment should continue to guide re-evaluation of clinical programs and legal education in general.

III. A Model Curriculum

Similar to the After the JD Study, the 2010 Survey of Law School Experiential Learning Opportunities and Benefits reported that 63.1\% of surveyed clinic participants found the experience “very useful” and 60.1\% found externships to be “very useful.”\textsuperscript{109} After the JD reported that 62\% rated clinics from “helpful” to “extremely helpful,” as opposed to 48\% for upper year courses and 37\% for first year courses.\textsuperscript{110} Highest of all, 78\% of students ranked summer internships with no law school affiliation from “helpful” to “extremely helpful.”\textsuperscript{111} These are sobering reports. While the reflections of graduates several years out should not be the only benchmark, these reports underscore the need to rethink the value that law schools add to the preparation for practice.\textsuperscript{112}

Students need a foundation in the common law and the areas of law relevant to bar passage.\textsuperscript{113} Both considerations are important, but neither provides a complete answer. While law schools and their faculty value autonomy, preserving it makes preparation for professional prac-

\textsuperscript{108} See, e.g., Ashar, supra note 107, at 391–92 (describing one law school clinic’s push to replace direct representation with community lawyering).


\textsuperscript{110} Sandefur & Selbin, supra note 2, at 85.

\textsuperscript{111} Id.

\textsuperscript{112} See After the JD, supra note 29, at 81; NALP Survey, supra note 109, at 6; Sandefur & Selbin, supra note 2, at 85.

practice uneven and incomplete. As law schools tinker with and change their programs, they should consider forming a consensus with other schools on the proper foundation for all lawyers. This would help set expectations for general professional preparation and determine the specific training needed for specialty areas. If legal educators, accreditors, and the profession agree on a framework, then discussion can focus on assessment and more nuanced design.

A. The First Year Curriculum

On our visits to law schools, we were repeatedly told by both students and faculty that the first-year experience typically results in a remarkable transformation: a diverse class of beginners somehow jumps from puzzlement to familiarity, if not ease, with the peculiar intricacies of legal discourse.

The idea of a common portal to legal education is useful, provided it is the right portal. Law graduates should all share a professional orientation that prepares them to embark on the general study of law. Courses in contracts, torts, and property introduce basic American legal concepts that help lay a proper foundation for students. Comparative and international law, ethics, professionalism, critical legal theory, justice analysis, and problem solving, however, must also be part of the professional orientation. Constitutional law, both as an administrative and rights-based study, should be a first year subject, too, and should

---


115 See, e.g., Karen Sloan, Action on Law School Reform: Legal Educators Are Organizing to Finally Move Beyond the Talking Stage, Nat’l L.J. & Legal Times, Aug. 22, 2011, at 1, 6 (discussing Professor Roberto Corrada’s work and the University of Denver’s Institute for the Advancement of the American Legal System, which includes fifteen law schools as initial consortium members and is dedicated to incorporating the recommendations made in the Carnegie Report); Strategic Plan—Adopted by SCOL Faculty 12/14/2009, U. Denver Sturm C.L., http://law.du.edu/documents/about/SCOL-Strategic-PlanFinal.pdf [hereinafter Strategic Plan] (last visited Mar. 14, 2012). Denver’s Sturm College of Law went through a curriculum planning process. Strategic Plan, supra. Sturm faculty identified core competencies that track the three apprenticeships in the Carnegie Report and decided how to teach to meet them. Id. They determined that areas of core knowledge are Administrative Law, Civil Procedure, Criminal Procedure, Constitutional Law, Contracts, Evidence, Professional Ethics, Property, and Torts.

116 See Stuckey et al., supra note 7, at 275–81; Sloan, supra note 115.

117 Carnegie Report, supra note 10, at 47.

118 See id. at 47, 51, 56–57.
involve a comparative consideration of the goals and implications of such documents.

The *Carnegie Report*, in discussing a common portal, correctly points out that adding courses does not address underlying problems with the casebook method. On the other hand, doing away with case analysis does not solve the problem, either. The cases are efficient for conveying common law and, increasingly, statutory analysis. They often benefit from inclusion of stories that—if sufficiently expanded to include people, their motivations, and contextual influences—offer students necessary perspective otherwise lacking in the first year of law school. This perspective can be augmented by students assessing the ethical and moral implications from standpoints of comparative law, critical legal theory, and alternative dispute resolution. Casebooks, therefore, should undergo a few changes. They should have fewer cases but more information about them and a broader exploration of what the cases contribute to the law and its role in society. This approach also suggests that emphasis on legal theory analysis in the first year is appropriate, as long as it connects the theory to individuals, communities, and values.

One area that has expanded in the first year curriculum is the introduction of skills courses. Teaching skills in the first year has often fallen to the legal writing faculty. The underlying concern behind this shift is that students are too disconnected from the profession and that theory alone sends the wrong message about what lawyering involves. A broad conceptual basis for understanding the law, however, is valuable as a shared foundation. First year research and writing courses should emphasize those analytical competencies, but other professional competencies should be developed in the second and third years of law school, too.

---

119 See id. at 58.
120 See Chart of Legal Education Reform, supra note 84; Powers, supra note 60.
Thus, while legal research and writing should still be included in the first year curriculum, its inclusion should be more consistent and focused. These courses are often offered for fewer credits than other first year courses and are sometimes graded on a pass/fail basis. They often provide the first assessments that law students encounter.\footnote{123 See Maureen Arrigo-Ward, \textit{How to Please Most of the People Most of the Time: Directing (or Teaching in) a First-Year Legal Writing Program}, 29 \textit{Val. U. L. Rev.} 557, 559 (1995); Kirsten K. Davis, \textit{Building Credibility in the Margin: An Ethos-Based Perspective for Commenting on Student Papers}, 12 \textit{J. Legal Writing Inst.} 75, 76 (2006).} While students crave feedback, the demands that often attend these courses compete with the shared introduction to law. As students balance the demands of doctrinal courses—which are graded—the writing and research courses compete for their attention and are a source of frustration for those who see the demands as disproportionate to their relative value in the curriculum.\footnote{124 See Lisa Eichhorn, \textit{The Legal Writing Relay: Preparing Supervising Attorneys to Pick Up the Pedagogical Baton}, 5 \textit{J. Legal Writing Inst.} 143, 147–48 (1999).} Because these courses cover essential, fundamental skills for accessing and using the law, it is worth reconsidering how to optimize their impact. A required pre-semester summer session on research and simple writing assignments followed by graded legal writing projects during the fall and spring semesters might help students integrate this learning more effectively.\footnote{125 See Jean Boylan, \textit{The Admission Numbers Are Up: Is Academic Support Really Necessary?}, 26 \textit{J. Juv. L.}} In addition to connecting writing and research to doctrinal first year subjects, collaboration between doctrinal and legal writing faculty would provide more opportunities for interaction and feedback in all courses—what the \textit{Carnegie Report} refers to as engaging in “knowledge-transforming performance.”\footnote{127 \textit{Carnegie Report}, \textit{supra} note 10, at 109. The institutional distinctions between legal writing and doctrinal faculty make it difficult for these collaborations to work. \textit{See, e.g., Standards and Rules of Procedure for Approval of Law Schools, \S\ 405(d) (2011–2012). The ABA Standards establish a distinction between legal writing and other faculty, a distinction reviewed in 2011 by the Section of Legal Education’s Standards Review Committee. Donald J. Folden, \textit{The Standards Review Committee’s Comprehensive Review of Accreditation Policy Moves Forward}, \textit{Syllabus: Am. Bar Ass’n Sec. Legal Educ. & Admissions to Bar} (2011), http://apps.americanbar.org/abapubs/syllabus/2011/standards_review_committees_comprehensive_review.html.}}
B. The Second Year

In the second year of law school, students should engage in an active learning model that teaches substantive law and integrates competencies that were not emphasized in the first year. This is where schools can address the weaknesses in the transfer between knowledge and practice.\textsuperscript{128} Second year substantive law courses should include training in skills such as interviewing, counseling, storytelling, cultural awareness, dispute resolution, and written and oral argument. The courses should be taught through the use of simulations, role-plays, and other active learning techniques. Law schools could move Civil Procedure class to the second year and teach it in a practical, rather than theoretical manner. The course should include procedure in venues other than courts, such as administrative proceedings, arbitration, and mediation.\textsuperscript{129} If, however, Civil Procedure remains in the first year curriculum, these teaching methods should still apply. Likewise, Evidence and Professional Responsibility should become required courses in the second year, both taught in a way that emphasizes professionalism over doctrine. While requiring these courses interferes with student autonomy, they are nevertheless part of the knowledge that all law graduates should share.

As faculty engage in curricular planning, they should agree on which competencies are covered in each course. By consciously spreading development of competencies across the second year curriculum, students would build and reinforce skills.\textsuperscript{130} The General Practice Program (GPP) at Vermont Law School is an example of how active learning and a range of competencies can be included in second year courses.\textsuperscript{131} “GPP is a two-year, four-semester program for second- and third-year students” that integrates substantive law with professional


\textsuperscript{129} Professor Jackie Gardina includes such an approach in her Civil Procedure course at Vermont Law School.

\textsuperscript{130} See, e.g., Lisa Penland, \textit{The Hypothetical Lawyer: Warrior, Wiseman, or Hybrid?}, 6 \textit{Appalachian J. L.} 73, 89–90 (2006) (focusing on the accumulation of transactional law skills over time). Co-curricular activities, such as moot court and journals, would not be seen as substitutions for building competencies in the curriculum. See, e.g., John O. Mudd, \textit{Academic Change in Law Schools: Part I}, 29 \textit{Gonz. L. Rev.} 29, 31 (1993/94) (discussing calls for “integrating professional skills instruction into the regular academic program”); Thompson, supra note 128, at 57–59.

skills.\textsuperscript{132} Classes are structured to simulate a law firm, with students acting as associates in a practice related to doctrinal subject matter.\textsuperscript{133} “[S]tudents learn and practice a variety of skills: drafting, counseling, interviewing, mediation, negotiation, oral argument, and pre-trial preparation.”\textsuperscript{134} The program’s faculty meet to collaborate on teaching goals and decide which skills to cover in each course.

This is not a model that can be superimposed on large classes without careful development. In a recent article discussing GPP’s Domestic Relations course, Professor and GPP Director Susan Apel noted that the GPP approach requires a smaller student-to-faculty ratio,

\begin{itemize}
  \item a carefully drafted script, well-chosen primary materials, carefully vetted secondary materials, volunteers to act as clients,
  \item the ability of the professor to assume several different roles as needed, willing and brave students, not to mention working video equipment, dedicated classroom and other space, and a hardworking assistant with a remarkable sense of timing, order, and humor.\textsuperscript{135}
\end{itemize}

Professor Apel observes that the faculty who teach such a program must have “extensive practice experience” and be “willing . . . to teach in this simulation-based way.”\textsuperscript{136}

Exporting the GPP learning goals and teaching methods to larger classes is possible. For example, dividing classes into law firms to teach Civil Procedure has provided a way for the rules to resonate while introducing students to a range of lawyering competencies. Professors have used this method by offering their own hypothetical cases or by studying real cases through books like \textit{Storming the Court: How a Band of Yale Law Students Fought the President—and Won} and Jonathan Harr’s tell-

\begin{footnotesize}
\begin{enumerate}
  \item See id. The courses are grouped by semester, and include Domestic Relations in the first semester, Real Estate Transactions, Environmental Problem-Solving, Commercial Transactions, and Employment Law in the second, Criminal Law, Representing Entrepreneurial Business, and International Intellectual Property in the third, and Estate Planning, Personal Injury Law, Municipal Law, Landlord-Tenant Law, and Bankruptcy in the final semester. Id.
  \item Students “lead[] role-playing clients through divorce proceedings, conducting title searches, providing legal counsel for school districts, handling employment grievance cases, producing wills, [and] preparing for civil and criminal court appearances . . . .” Id.
\end{enumerate}
\end{footnotesize}
ing of the *Anderson v. Cryovac* case in *A Civil Action* (and, prior to that, Gerald Stern’s *The Buffalo Creek Disaster*). \(^{137}\)

One major barrier to teaching in this manner is that law schools have not explicitly supported it. \(^{138}\) Teachers who do the hard work of incorporating active learning methods do so knowing that their primary institutional reward will come, not from their efforts to improve what students learn, but from production of scholarship that is of attenuated use to their students. \(^{139}\) This would change if the revised goals for the second year are clear and faculty are rewarded for teaching accordingly.

**C. The Third Year**

One source of debate is when to provide a clinical experience. \(^{140}\) Some express concern that, if students work with real clients too late in their law school experience, they may acquire perspectives about the law that are inconsistent with serving clients, limit their ability to understand the law, or simply lose interest. \(^{141}\) The curriculum proposed above balances these concerns in favor of building toward a third year devoted to experience in real legal practice.

In the first semester of their third year, students should practice either in a law school clinic, an externship, or a hybrid of the two. In the second semester, students could choose another practice experience or elect to continue in the same setting—provided it is a clinic supervised by full-time members of the law school faculty. The experience in the second semester should build on competencies developed in the first. Students would get the opportunity to assume the role of the lawyer and gain experience thinking in context about the law, who and how they serve, and their own identities. If the clinical experience

\(^{137}\) *See Levine, supra* note 86, at 490, 495, 499–500, 502 (discussing three exercises designed to introduce students to fact investigation, client counseling, recognizing and resolving ethical dilemmas, and organization and management of legal work); *see also* Brandy Goldstein, *Storming the Court: How a Band of Yale Law Students Fought the President—and Won* (2005); Jonathan Harr, *A Civil Action* (1995); Gerald Stern, *The Buffalo Creek Disaster* (1976). *See generally* *Anderson v. Cryovac*, 862 F.2d 910 (1st Cir. 1988) (providing the basis for the book and movie *A Civil Action*).

\(^{138}\) *See Levine, supra* note 86, at 484–85.

\(^{139}\) *See Neumann & Stuckey Letter, supra* note 18, at 9; Neumann, *supra* note 40.

\(^{140}\) *See Barry et al., supra* note 2, at 41, 44–45 (describing various clinical education courses taught during different years of law school).

\(^{141}\) *See id. at* 42, 72 (describing the value of teaching clinics early in a student’s career and building on these skills by offering a “multi-layered level of guided experiential learning”).
uses careful supervision to achieve these goals, then schools can and should be creative about clinical opportunities.\textsuperscript{142}

ABA Standard 304(b) limits students to a single full-time externship. This Standard requires that at least 45,000 minutes of a student’s required 58,000 minutes of instruction be “attendance in regularly scheduled class sessions at the law school.”\textsuperscript{143} Interpretation 304-3(e) includes in the 45,000 minutes those clinics in which the work is done under direct faculty or instructional staff supervision, but not other clinical experiences.\textsuperscript{144} This means that students may only take one semester of externships.\textsuperscript{145} While this limits the options available to third-years, it provides a reasonable check on the time students may spend under supervisors who are not primarily focused on legal education.\textsuperscript{146}

Refocusing the third year will require a significant change in the way law schools allocate resources. One third of the law school program would become clinical education. In-house clinics, externships, and hybrid clinics are familiar, well-developed models for providing the experiences students need. As in-house and hybrid clinics integrate what students learned in the first and second years, they would refine and expand the knowledge students accrue in the more complex, live experiences without having to teach as many basic competencies; students in externships will similarly bring more to their placement experiences. Any clinic model, however, requires schools to commit to providing students the opportunity to undertake lawyers’ work for real clients under faculty supervision.\textsuperscript{147}

\textbf{D. The Fee-Generating Model}

Faculty, too, need to be creative in pursuing effective methods for achieving goals for this third year of experiential learning. While clinicians are closer to professional practice than their faculty colleagues,
both are removed from many of the challenges and demands of the profession and both have traditions they are reluctant to change.

One legal news article asked, “What if law schools opened their own law firms?” While law schools have already opened firms in the form of clinics, the idea of a self-contained firm is provocative, if not new. It resurrects a model for providing fee-generating clinics that could result in less expense to schools and greater attention to law practice as a business. The crushing debt students face makes any opportunity to reduce costs worth considering.

Reducing the cost of legal education, however, should not be the only reason to contemplate a fee-generating model. Such clinics must effectively serve educational goals or risk not fulfilling any legitimate purpose. Fee-generating clinics raise many concerns that have remained compelling for decades. For example, schools have a duty to serve those who are unable to access legal remedies and students benefit from engaging first-hand in the social justice implications of serving them. Moreover, competition with the private bar may cause alarm. There are, however, many who could afford the reduced fees of a fee-generating clinic but not those charged by the private bar. Lack of access to representation for these people likewise raises social justice concerns. On the other hand, both law schools—as expressed in their mission statements—and the private bar share the institutional responsibility to provide pro bono services. Extending that institutional obligation to students in the form of tuition is less legitimate, even if viewed as consistent with developing certain educational goals. Furthermore, schools could control the student experience by varying the

---


149 See id. (labeling the idea as “novel” and “radical”).

150 See id.


152 See Martin Guggenheim, Fee-Generating Clinics: Can We Bear the Costs?, 1 Clin. L. Rev. 677, 683 (1995). This becomes an increasingly compelling argument as government and private funding for pro bono services shrink. See Guggenheim, supra, at 683; see also Kellie Isbell & Sarah Sawle, 15 Geo. J. Legal Ethics 845, 850–51 (2002).

153 See Borden & Rhee, supra note 151, at 3.

client base to explicitly focus on issues of access while including those who could pay.

Thus, the impetus to accommodate fee-generating cases must not undermine methods that are central to clinical education, such as maintaining small caseloads.\footnote{See Guggenheim, supra note 152, at 680.} This is especially true if it is contemplated that fees will sustain the clinic, as fees may compete with pedagogy and obscure social justice goals.\footnote{See id. at 683.} Law schools can balance that pressure and underscore the importance of clinics by treating clinical faculty the same as doctrinal faculty; they, for example, should receive the same attention, support in hiring, and expectations for retention as other faculty.\footnote{See id. at 681–83.} Fees generated by the clinic should not determine faculty salaries or be a condition precedent to running the clinic.\footnote{See id. at 683.} The fees, however, could offset some clinic expenses.

Moreover, by charging fees, clinics could engage some of the issues that students do not typically encounter in clinical programs, including ethical considerations regarding billing and the relationship of time to effective client service. These and other aspects of law office management are particularly important for students who aim to set up their own practices after graduation. This model could provide students in their third year with an opportunity to address important moral issues that they might not otherwise encounter in pro bono clinics.\footnote{See Ellmann, supra note 146, at 890 (citations omitted) (“[Private offices can teach a lesson] about the moral value of private practice itself, and more generally of legal work that merely seeks to help clients to achieve their goals within the law and to guide those clients, to the extent the lawyer feels appropriate doing so, towards resolutions that treat other people better rather than worse. This is the work that most law students will go on to do after they graduate. There is evidence that many lawyers have lost heart about their work, perhaps because they have lost track of its moral meaning; if we are to help future lawyers find that meaning, we need to help them find it in the work they are most likely to do.”).}
If the third year of study set in practice becomes a reality, law schools must set clear goals for clinical education. In identifying these goals, it is not enough to simply proclaim that students will be practice ready. The final year needs to be a carefully conceived culmination of the knowledge and skills gleaned throughout the law school experience. The third year in practice is the time to transfer knowledge and skills into real-world settings. There, professional and personal values will be carefully and safely constructed, challenged, and developed. These are rich opportunities to explore conflicts between responsibility to clients and community. These, too, are rich opportunities to teach the values of professionalism. In sum, a third year devoted to real life experiences—classes that assess them—integrates the learning of the clinical legal education movement into the law school curriculum. Such experiences may not guarantee that students are ready for the myriad of increasingly specialized areas of practice, but they will provide sound, transferrable competencies that will serve them well as young lawyers.

Conclusion

Economic uncertainty has done more to make law schools receptive to change than decades of critique. Survival has entered the lexicon, and practice readiness is seen as a lifeline. This change, however, must not occur without a critical approach and evaluation.

Choices about what to teach, when to teach, and how to teach must be tied to clear goals. These goals should have the primary effect of preparing students for the profession they are entering. The Carnegie Report got it right in identifying, as others have before and since, the three apprenticeships of knowledge, skills, and values. While some schools have already made progress toward curricular redesign, schools should agree upon a basic structure integrating these apprenticeships into law school curricula. This Article’s approach to teaching law provides a framework for integrating basic doctrine, competencies, and values that lawyers should understand as they begin their careers and that a legal education should assure. Mission-driven goals can and should co-exist with shared assumptions of what all law school graduates need. Beyond a basic, shared curriculum, schools may choose to emphasize certain aspects of practice and education. Such distinctions enrich the choices students can make and allow institutions to develop expertise.

Law schools have benefitted from the energy and creativity brought by many doctrinal, clinical, and legal writing faculty. While schools need to determine what will work for each, they spend too much time making
modest distinctions about what shared knowledge to emphasize and too little time on how to introduce professional competencies. Institutional aspirations for practice readiness require more than offering limited clinical or externship opportunities for those students who recognize their value; these experiences must feature in a program designed to build for all law graduates an understanding of—and competency in—the role lawyers need to play in our society.
Abstract: The premier strength of legal education resides in its dual identity as an academic department of a university and a professional school training future practitioners. This dual identity, which gives law school its unique blend of the intellectual and the practical, can support law graduates as the legal profession undergoes a profound restructuring. Traditional classroom education, when focused not on revealing legal doctrine but on cultivating foundational skills of analysis, interpretation, synthesis, and reasoning, will benefit law graduates even in an altered legal practice environment. Clinical education—which engages students in the multidimensional enterprise of representing clients to inculcate a wide range of generalizable skills and public service values—will need to assume a larger role in tomorrow’s legal curriculum. Because clinical learning emerges from yet transcends specific, holistic, lawyering contexts, it can enable law graduates to adapt to transformation in the legal profession of the future.

Introduction

A Zen Buddhist story depicts a rider on a horse that is galloping at a tremendous pace, as if rushing to an important destination. A bystander shouts out, “Where are you going?” The rider replies, “I don’t know. Ask the horse.”

In some respects, legal educators are riding that runaway horse. The legal profession is undergoing a seismic shift and it is difficult to determine exactly where it is headed. There is increasing commentary on the sources and contents of this shift, suggesting that it is animated...
by changes in social, economic, and cultural forces such as the internationalization of markets, the incursion of technology, and a series of economic and global cataclysms occurring since the turn of the millennium. Even if changes in legal practice were in the offing anyway, these forces have intensified the quantity and the quality of change.

If law schools do not want to ride into these changes without a deliberate sense of purpose, if they do not want to go the way of Borders Books—a company closing many of its doors because it was not nimble enough to respond to the technological era—then it is imperative that they join those who have begun considering what the likely changes in society and the legal profession will mean for the future of legal education. One of the few things that seem certain is that law schools will not weather societal changes comfortably by remaining the same. The traditional law school model now appears economically and education-

---

2 See, e.g., Thomas D. Morgan, The Vanishing American Lawyer 96 (2010) (“[A]lternative information sources threaten the knowledge monopoly on which lawyers have depended . . . .”); ABA Standing Comm. on Research About the Future of the Legal Profession, Working Notes: Deliberations of the Committee on Research About the Future of the Legal Profession on the Current Status of the Legal Profession, 16 Me. B.J., 236, 236 (2001) (“The practice of law and the administration of justice are at the brink of change of an unprecedented and exponential kind and magnitude. This Age of Technological Revolution, together with the globalization of business and competition, are transforming our profession . . . .”); Sarah Kellogg, The Transformation of Legal Education, Wash. Lawyer, May 2011, at 19, 19 (“Forces at work in the world are fundamentally transforming the legal profession.”); John Markoff, Armies of Expensive Lawyers, Replaced by Cheaper Software, N.Y. Times, Mar. 5, 2011, at A1 (noting that organization of legal work is changing due to automation of formerly labor-intensive tasks).


4 See Karen Sloan, Action on Law School Reform: Legal Educators Are Organizing to Finally Move Beyond the Talking Stage, Nat’l L.J. & Legal Times, Aug. 22, 2001, at 1, 6–7 (describing the formation of a consortium of law schools—with financial support from the University of Denver’s Institute for the Advancement of the American Legal System—in an initiative called Educating Tomorrow’s Lawyers, designed to facilitate the development of new teaching methods for law schools); Michael A. Olivas, Ask Not for Whom the Law School Bell Tolls, AALS News, Fall 2011, at 1, 3 (calling law faculty to “action as a community” to address “daunting developments in the world of legal education”).

5 Richard A. Matasar, Does the Current Economic Model of Legal Education Work for Law Schools, Law Firms (or Anyone Else)?, N.Y. St. B. Ass’n J., Oct. 2010, at 20, 20, 26 (stating that “some schools will fail; others will adjust,” and that “[t]he years ahead suggest that law schools . . . must change or die”); Olivas, supra note 4, at 3 (“[N]ot all law schools can survive the end game of some of these events.”)
ally unsustainable.\(^6\) The emerging concern is that law schools cost too much and deliver too little of what our brave new world requires,\(^7\) a scenario that calls on legal educators to rethink the academic enterprise.

As with other kinds of challenges, attitude and approach matter. As vexing as it is to reconceive legal education, it is a viable endeavor, especially as law schools already have significant strengths to draw upon in facing the future, even if they need repackaging and reconceptualizing.\(^8\) In the reconstructive process ahead, reformers should ask the following questions: How can legal education survive these profound changes? How can it thrive in the world of the future? And how can it strive to contribute to the ability of the world to thrive in the decades to come? In addressing these questions, there is a strong argument that contextual educational methods—most notably clinical education—will

---

\(^6\) Matasar, supra note 5, at 22 (“The demand for legal education will decline at high-priced schools whose graduates are having difficulty repaying their loans.”); see also David Segal, Law School Economics: Ka-Ching!, N.Y. TIMES, Jul. 17, 2011, at BU 1 (explaining that some law students now borrow $150,000 or more before they graduate, but the decline in post-graduation employment prospects makes such financing “a vastly riskier proposition” than it used to be). In a recent New York Times article that provoked controversy among law professors, David Segal asserted a need in the current climate for the law school curriculum to teach students more about law practice. See David Segal, What They Don’t Teach Law Students: Lawyering, N.Y. TIMES, Nov. 20, 2011, at A1 [thereinafter Segal, What They Don’t Teach] (“What [law students] did not get, for all that time and money, was much practical training.”); see also Editorial, Legal Education Reform, N.Y. TIMES, Nov. 26, 2011, at A16 (asserting that the “crisis” in American legal education can be addressed by teaching “useful legal ideas and skills in more effective ways”).


\(^8\) See infra notes 17–31 and accompanying text.
play a leading role in helping law schools of the future to survive, to thrive, and to strive to contribute to meeting society’s needs.

To avoid the irony of examining the role of contextual legal education out of its context, Part I of this Article examines contextual legal education in general, and clinical legal education in particular, within the overall educational mission of the law school. Part I highlights the role that law school’s dual identity, as both a professional school and an academic institution, can play in enabling legal education to navigate the uncharted waters in which we are already immersed. This dual identity is the source of our capacity to meet future challenges. At the same time, it is also a potential drawback if we do not modify and reorganize our longstanding approach to these two diverging, but reconcilable, features of our institutional character.

After laying the conceptual groundwork for this project of reconceiving and reconciling, which entails refashioning the law school’s dual mission into an integrated curriculum, Part II proposes expansion of the clinical method of instruction. This Part argues that clinical methods, rooted in particular yet generalizable contexts, are the most promising that law schools have for confronting future challenges and realizing their potential as schools of both academic and professional instruction. Elaborating on the nature of clinical methods, Part II connects these methods to a contextual pedagogy of skills and values, as recommended twenty years ago by the MacCrate Report, and of the three apprenticeships—cognitive, skills, and identity—as more recently framed and advanced by the Carnegie Report.

Understood broadly, these methodological recommendations encompass education in service to others, undergirded by the disciplinary

---

9 See infra notes 17–65 and accompanying text.
10 See infra notes 66–137 and accompanying text.
11 In this Article, I intend the meaning of “clinical methods” to be broad and to include a variety of pedagogies for teaching through students’ involvement in actual lawyering matters, whether this occurs in in-house clinics, clinical components conjoined to law school courses, or other kinds of models. For a description of the many and varied forms through which students can engage in educational experiences involving real lawyering, see Deborah Maranville, Mary A. Lynch, Susan L. Kay, Phyllis Goldfarb & Russell Engler, Re-Vision Quest: A Law School Guide to Designing Experiential Courses Involving Real Lawyering, 56 N.Y.L. Sch. L. Rev. 517 (2011–2012).
knowledge and strategic skills that effective service requires. The generalizability of these skills will aid future law graduates as they enter a changing profession. The sense of professional purpose that such education provides, the prospect that professional identity can serve a public good greater than oneself, is another feature of this kind of education that can enable law graduates to thrive in their professional lives and to contribute at the same time to the thriving of others.

After exploring the nature and value of the clinical method of instruction, Part II addresses the argument that expanding these methods throughout the law school curriculum is economically prohibitive. While the costs of this expansion are great, the costs of non-expansion are arguably greater. Moreover, the reconceptualization project promoted by this Article may also yield some cost savings, freeing new resources to support the curriculum reform that legal education needs now more than ever.

I. THE TWIN NATURE OF LEGAL EDUCATION

A. Current Strengths for Facing Change

Law school has long had a dual identity—or, less charitably, a split personality—as both an academic department in a university and a school that trains students for a professional trade. Since the mid-

13 Carnegie Report, supra note 12, at 27 (“The common problem of professional education is how to teach the complex ensemble of analytic thinking, skillful practice, and wise judgment on which each profession rests.”).
14 The notion of “teaching for transfer,” to enable students to apply in a new context what they have learned in a previous context, has considerable currency among educational theorists. See Anthony Marini & Randy Generaux, The Challenge of Teaching for Transfer, in Teaching for Transfer: Fostering Generalization in Learning 1, 1–3 (Anne McKeough et al. eds., 1995).
15 See Carnegie Report, supra note 12, at 32 (“Professionals . . . do work that has a public purpose.”) (citing Nicholas Lemann, Liberal Education & Professionals, Liberal Educ., Spring 2004, at 12, 15); see also Walter Bennett, The Lawyer’s Myth: Reviving Ideals in the Legal Profession 128 (2001) (“Professionalism demands that we face . . . moral responsibility seriously and make deliberate choices that utilize our capacity to serve.”). Poignantly, Bennett asserts that “the search for professionalism is really a search for one’s wholeness as a human being.” Bennett, supra, at ix.
16 See infra notes 129–135 and accompanying text.
17 Appointed to the Dane Chair at Harvard Law School in 1829, Joseph Story is credited with advancing the idea that law school was both an academic department of a university and a practical training center for lawyers. See Morgan, supra note 2, at 189 (citing Albert J. Harno, Legal Education in the United States: A Report Prepared for the Survey of the Legal Profession 40–50 (1st ed. 1953)). The authors of the Carnegie Report characterize law schools as “hybrid institutions.” Carnegie Report, supra note 12,
nineteenth century, law schools have lived in the creative tension between the intellectual and the practical with varying degrees of success. This duality of identity bodes well for the ability of law schools to face a transforming future. A law school’s ability to respond to the challenges of the future rests largely on its ability to inhabit each side of its dual mission effectively and to use each in service of the other.

Law school clinics are one of the key sites for advancing the law school’s twin mission. There are others as well. This Article contends, consistent with the Carnegie Report’s recommendations, that when a law school’s curriculum is structured in an integrated and coherent fashion, to cultivate the law school’s intellectual and practical aspects as an academic unit of a university and a professional trade school, students are simultaneously prepared not just for work in the world as we know it today, but for work in the world that has yet to appear on the horizon.

Legal educators frequently assert that their goal is to teach students to think like lawyers. Thinking like a lawyer is, for the most part,
thinking logically and precisely about issues that arise in legal contexts.\textsuperscript{24} The primary justification for the traditional first-year curriculum—in particular for its case-dialogue method, which the authors of the \textit{Carnegie Report} label as the first year’s signature pedagogy—is that it cultivates these thinking skills by teaching students close, detailed, and critical reading of judicial opinions and various ways of reasoning from these opinions.\textsuperscript{25} In well-taught classes focused on appellate case excerpts, students can learn how to interpret judicial opinions; how to identify the rhetorical conventions of the genre; how the legal system uses analogical reasoning; how to understand, at least to some degree, the circumstances that gave rise to the opinions; and how to predict, at least to some degree, the circumstances to which these opinions may give rise.\textsuperscript{26} At the conclusion of this educational process, students should be able to formulate considered responses to questions such as: What are the consequences of these decisions for other kinds of potentially analogous or potentially distinguishable situations? How do various decisions fit together to form a doctrinal pattern? Is the pattern a sensible one or does it need to be improved?

Analysis, synthesis, reasoning, and application to new situations of the legal doctrine that emerges from judicial opinions are fundamental lawyering skills,\textsuperscript{27} which are at once both intellectual and practical en-

\textsuperscript{24} \textit{See \textit{Llewellyn}, supra note 23, at 101 (“You are to acquire ability to think precisely, to analyze coldly, to work within a body of materials that is given, to see, and see only, and manipulate, the machinery of the law.”); \textit{see also \textit{Carnegie Report}, supra note 12, at 54 (“The ability to think like a lawyer emerges as the ability to translate messy situations into the clarity and precision of legal procedure and doctrine and then to take strategic action through legal argument in order to advance a client’s cause before a court or in negotiation.”). But \textit{see Lawrence S. Krieger, Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence, 52 J. Legal Educ. 112, 117 (2002) (“Thinking ‘like a lawyer’ is . . . critical, pessimistic, and depersonalizing[,] . . . . [which is] usually conveyed, and understood, as a new and superior way of thinking, rather than an important but strictly limited legal tool.”).}}

\textsuperscript{25} \textit{See \textit{Carnegie Report}, supra note 12, at 47, 50–51.}

\textsuperscript{26} \textit{See generally Anthony G. Amsterdam, \textit{Clinical Legal Education—A 21st-Century Perspective}, 34 J. Legal Educ. 612 (1984) (offering a trenchant description of the analytic modes of thinking that can and cannot be taught in the traditional law school classroom).}}

\textsuperscript{27} Some of the most thoughtful teaching of these skills occurs in legal writing programs. \textit{See, e.g., Daniel L. Barnett, \textit{Triage in the Trenches of the Legal Writing Course: The Theory and Methodology of Analytical Critique, 38 U. Tol. L. Rev. 651, 659 (2007); Jane Kent Gionfriddo, Thinking Like a Lawyer: The Heuristics of Case Synthesis, 40 Tex. Tech L. Rev. 1, 4, 7}
Although the legal profession may change in a variety of ways in the not too distant future, it seems likely that thinking logically and precisely about legal issues and how they arise, reasoning from legal authority to subsequent scenarios, and other kinds of related analytic skills are broad and generalizable enough to serve a useful function even in an indefinite future.

Of course, lawyers need to think about much more. Consequently, legal analysis skills are insufficient in and of themselves. Nonetheless, in the right proportion, continued emphasis at an early point in the law school curriculum on the development of analytic lawyering skills of this sort—what the Carnegie Report termed the "cognitive apprenticeship" of lawyering—seems a defensible choice for legal education.

While legal analysis is often viewed as the intellectual content of the law school curriculum, it is, of course, an eminently practical skill that acquires meaning and value when employed in a legal practice setting. See Mark Spiegel, Theory and Practice in Legal Education: An Essay on Clinical Education, 34 UCLA L. Rev. 577, 578 (1987) (offering an illuminating discussion of the frequent resemblance between what is deemed intellectual or theoretical and what is deemed practical).

Professors Todd Rakoff and Martha Minow suggest that we are overstating the degree to which the case-dialogue method of classroom teaching can teach students to think like lawyers. See Todd D. Rakoff & Martha Minow, A Case For Another Case Method, 60 Vand. L. Rev. 597, 597, 600 (2007). It is misleading, they assert, to equate skills of legal analysis with thinking like lawyers, because:

"[L]awyers increasingly need to think in and across more settings, with more degrees of freedom, than appear in the universe established by appellate decisions and the traditional questions arising from them . . . . By taking a retrospective view of facts already found and procedures already used by a court, the appellate decision does little to orient students to the reality of unfolding problems with facts still to be enacted, client conduct still to take place, and procedural settings still to be chosen and framed.

Of course, teachers fight against these restraints . . . but it is hard to do so at a deep level.

Id.

Carnegie Report, supra note 12, at 28 (describing law school’s cognitive apprenticeship as focusing on the “habits of mind” central to the legal profession, such as “analytical reasoning, argument, and research”).
B. Limitations and Confusions

At the same time, if law schools hope to thrive in the years to come, legal educators will have to vow to keep our eyes on the prize and not its shadow. Although the pedagogical goal of the law school’s primary mode of classroom education is the development of particular analytical skills, law professors and law students often behave as if legal education’s aim is to develop knowledge of substantive law.32 Too often, classes aspiring to analytic skill development morph into classes about the substantive legal framework of a particular subject, with professors expressing concern about whether they have covered enough of the substantive framework during the course of the semester.33

Highlighting this problem, Professor Michael Dorf wrote a 2005 column in FindLaw’s Legal Commentary blog in which he purported to condense into a few hundred words all the teaching of the first-year of law school.34 The title of his column, The Five-Minute Law School, is an apparent allusion to a classic comedy routine by Father Guido Sarducci called Five-Minute University.35 Not quite as terse or humorous but in the same vein, Professor Dorf summarizes first-year Criminal Law in a paragraph, observing that “[c]riminal liability typically only attaches to people who commit proscribed acts intentionally, or at least know-

---

32 One even deeper shadow side of the first year curriculum is law professors’ tendencies to teach in a manner implying that moral or affective reasoning cannot ground legal authority, and therefore are inappropriate considerations in legal analysis. See Mertz, supra note 23, at 99. While I am persuaded that this observation accurately captures a predominant mode of legal education, I do not see it as an invariable consequence of the case-dialogue method of first-year classroom teaching. In my view, consciousness of the consequences of the message implicit in the traditional law school classroom can lead to teaching methods that specifically alter the message, validate moral or affective grounds of analysis, and highlight their exclusion from ordinary legal decision-making. See Phyllis Goldfarb, Pedagogy of the Suppressed: A Class on Race and the Death Penalty, 31 N.Y.U. REV. L. & SOC. CHANGE 547, 548–50 (2007) (exploring classroom methods for providing greater context in the teaching of appellate case opinions to illuminate how law can be used to legitimize injustices).

33 See Bennett, supra note 15, at 171 (describing law professors’ use of lecture as a backup teaching method in Socratic classrooms “when it is necessary to save time and cover material faster”).


35 See id. Father Guido Sarducci is a fictional character created by comedian Don Novello. See Moober1, 5 Minute University, YouTube (Dec. 1, 2009), http://www.youtube.com/watch?v=qLAd4NzuqXM. In his stand-up routine, the comic cleric talks of founding a university in which he will offer classes to teach only the information that the average college graduate remembers five years after graduation. Id. His Economics class is simply “supply and demand.” Id. His Theology course is “God is everywhere.” Id.
ingly.”36 Tort, he explains, “means the breach of a legal duty imposed by law (rather than voluntarily undertaken by contract). That’s about a third of the course.”37

Professor Dorf’s column implicitly suggests that precious pedagogical resources have higher and better uses than conveying substantive knowledge of existing legal principles. We can predict that knowledge of today’s substantive law, which may soon be altered or obsolete, will not be particularly useful in facing an uncertain future.38 Although few legal educators argue that it is a high institutional priority to introduce students to the substantive legal framework of a wide swath of law’s numerous topic areas, looking at the overall curriculum of most law schools might lead one to conclude that this approach has been made a priority.39 On the other hand, if legal reading, reasoning, research, and writing skills—the 4 Rs—are among a law school’s educational priorities, as they should be, then legal education should equip students to discover and synthesize the relevant legal principles in any substantive area, no matter how it evolves.40

C. Re-Imagining the Twin Mission

This observation leads inexorably to the conclusion that maximizing the future value of law students’ three-year sojourn41 will require law schools to teach less about what the law is and more about what the

---

36 Dorf, supra note 34.
37 Id.
38 See Amsterdam, supra note 26, at 618 (“Given the substantive proliferation, complexity, and fast-paced growth of modern law, it has been impossible to teach students the corpus juris, in any meaningful sense . . . . At best, the law schools could convey to students a very small and rapidly outdated portion of all the substantive law . . . .”).
39 See id. (critiquing “the law schools’ traditional commitment of the overwhelming bulk of teaching resources to the multiplication of classroom courses in a wide variety of substantive subject matters,” which leads to questions about why law schools “teach case reading and doctrinal analysis to the same students twenty-nine times sub nom. torts, contracts, criminal law, admiralty, antitrust, civil rights, corporations, commercial law, conflict of laws, trusts, securities regulation, and so forth[,]”).
40 See id. While published treatises, reference books, practice manuals, and other compilations can help lawyers pick up the substantive legal framework of any area with relative ease, reasoned analysis is a foundational legal skill of lawyering. See Bennett, supra note 15, at 22, 169 (describing reasoned analysis as “perhaps the basic skill” of lawyering, while simultaneously asserting that law school should teach much more).
41 Of course, there is nothing inevitable about the three-year law school curriculum. A handful of law schools have established a curriculum track for earning a J.D. in the span of two years. See Leigh Jones, Law School in Two Years Flat: New Program May Have Led to Higher Enrollment, NAT’L L.J. & LEGAL TIMES, May 29, 2006, at 4, 4.
Students must encounter law not just as a set of doctrinal principles, but also as a set of systemic processes. A curriculum designed to achieve these larger pedagogical aspirations would be organized around foundational professional skills and the contexts for using them, aimed not at having knowledge but at using knowledge. Adopting a theme of skills development would give the law school curriculum a cohesive purpose consistent with Albert Einstein’s observation that “education is what remains after one has forgotten everything he learned in school.”

The point is yet more obvious in other fields of study. Music students with aspirations toward the other Carnegie would benefit from understanding the underlying principles of music theory. Studying music teaches music students to think like musicians. But they cannot achieve their aspirations as Carnegie-bound musicians unless they can enact this thinking in performance over and over again. That is what being a musician means. In the process of performance, a musician’s understanding of music’s underlying principles likely improves, deepens, and maybe even changes in some respects.

Likewise, the Carnegie Report counsels legal educators that law students become lawyers when they enact their understanding and analysis of legal principles in repeated lawyering performances. That is what being a lawyer means. In the process, a law student’s understanding of

---

42 See Carnegie Report, supra note 12, at 29 (observing that law schools undermine the “goal of training competent and committed practitioners” by neglecting the practical skills and professional identity apprenticeships “necessary to orient students to the full dimensions of the legal profession”).

43 Id. at 26 (“The emphasis is not on acquiring information, as such; rather, it is on learning the concepts and procedures that enable the expert to use knowledge to solve problems.”).


45 The title of this symposium, The Way to Carnegie: Practice, Practice, Practice, plays with the analogy between developing expertise in music and developing expertise in law. The title is a reference to a quip that appeared in print in the 1950s, attributed to violinist Jascha Heifetz. See Bennett Cerf, The Life of the Party: A New Collection of Stories and Anecdotes 355 (1956) (“Rumor is that a pedestrian on Fifty-seventh Street, Manhattan, stopped Jascha Heifetz and inquired, ‘Could you tell me how to get to Carnegie Hall?’ ‘Yes,’ said Heifetz, ‘Practice!’”)

46 See Carnegie Report, supra note 12, at 8, 14. Or stated in the negative: “Learning the law thus loses a key dimension when it fails to provide grounding in an understanding of legal practice from the inside.” Id. at 8.
law and legal principles is likely to improve, deepen, and change, along with the ability to provide lawyering assistance in its multiple facets. Both the Carnegie Hall-bound musician and the Carnegie Report-bred lawyer undergo a theoretically grounded developmental process of enacting underlying principles in performance, and only then do the principles acquire meaning, value, and life.

The analogy implicit in the double reference to Carnegie in the title of this Symposium, The Way to Carnegie: Practice, Practice, Practice, illuminates the problem of trying to justify educational disregard of professional performance. Performance is a fundamental part of the twin mission of a professional trade school located in a university, obliging legal educators to undertake the challenges of teaching in a serious way a usable craft. Doing that requires a much sharper curricular focus than has prevailed thus far on the skill and value dimensions of legal education.

Of course, none of this is new. Among others, Jerome Frank said as much in the 1930s. A fellow member of the Legal Realist school of thought, Karl Llewellyn, echoed Frank’s critique of the law school method of instruction. In 1992, the MacCrate Report called for law schools to place a greater emphasis on professional skills and values.

---

47 See id. at 13 (“Legal doctrine does not apply itself . . . . However, this type of knowledge often comes most fully alive for students when the power of legal analysis is manifest in the experience of legal practice.”).

48 See id. at 14 (“[I]f legal education had as its focus forming legal professionals who are both competent and responsible to clients and the public, learning legal analysis and practical skills would be more fully significant to both the students and faculty.”).

49 See id. The difference is that musicians-in-training practice to prepare to perform and lawyers-in-training practice to prepare to practice. Due to the peculiarities of the English language, the means and the end in the legal profession sound one and the same, such that lawyers never get beyond practicing.

50 See Carnegie Report, supra note 12, at 10 (indicating that teaching through law practice “requires deciding, for particular purposes, how and how much conceptual learning and substantive knowledge is important for illuminating and guiding practice”).

51 Id. at 28 (asserting that the goal of professional education is “to teach the skills and inclinations, along with the ethical standards, social roles, and responsibilities that mark the professional”).

52 See Jerome Frank, Why Not a Clinical Lawyer-School?, 81 U. Pa. L. Rev. 907, 916 (1933) (emphasis omitted) (“Law students should be given the opportunity to see legal operations.”).

53 Llewellyn, supra note 23, at 23 (“[Lawyer’s work] is impossible unless the lawyer who attempts it knows not only the rules of the law . . . but knows, in addition, the life of the community, the needs and practices of his client—knows, in a word, the working situation he is called upon to shape as well as the law with reference to which he is called upon to shape it.”). For a description of legal realist thinking, see generally Jerome Frank, Law and the Modern Mind (6th ed. 1949).

54 See MacCrate Report, supra note 12, at 120.
In 2007, *Best Practices for Legal Education* picked up the call for contextual legal education,\(^{55}\) and the *Carnegie Report* translated this observation into apprenticeship parlance, citing the need for law schools to re-invigorate their apprenticeships of skills and professional identity.\(^{56}\) There are nuanced differences between these proposals.\(^{57}\) For purposes of this discussion, however, these nuances hardly matter, because together these voices sound an unrelenting theme: legal education must devote greater attention to what lawyers do in the world.\(^{58}\)

The difference that matters now is that a confluence of forces has lent a new urgency to the situation.\(^{59}\) The very survival and sustainability of legal education may depend on how we respond this time.\(^{60}\) The likely reason that law school teaching methods have remained fairly stable over time and relatively impervious to calls for change is that, for many years and for many people, things were working well enough.\(^{61}\) Although legal education has been costly and focused on a subset of important skills, jobs were plentiful, debt could be repaid over time, faculty could accomplish a considerable amount of research, and workplaces could invest resources in training law graduates, or at least absorbing and accommodating them while graduates cobbled together


\(^{56}\) See *Carnegie Report*, supra note 12, at 32–33 ("[R]ecovering the formative dimension of professional education for the law lies in . . . a searching examination of the importance of experience with all three of the apprenticeships—cognitive, practical, and formative.").

\(^{57}\) Compare *Carnegie Report*, supra note 12, at 32–33, with Stuckey et al., supra note 55, at 1–5.

\(^{58}\) Jerome Frank said this plainly. See Frank, supra note 52, at 913 (arguing that, without giving up the case-dialogue method of teaching or the law school’s “growing and valuable alliance with the . . . social sciences, the law schools should once more get in intimate contact with what clients need and with what courts and lawyers actually do”). The Carnegie Report strikes a similar chord, noting that “[i]t is in these situations of intensive analysis of practice that the fundamental norms and expectations that make up professional expertise are taught.” *Carnegie Report*, supra note 12, at 10; see also id. at 33 ("It is difficult to imagine a stronger emphasis on formation that does not also require schools to place more relative weight on preparation for practice, including exploration of the ethical demands of the profession.").

\(^{59}\) See Kellogg, supra note 2, at 19; supra notes 2–7 and accompanying text.

\(^{60}\) See Olivas, supra note 4, at 3; Sloan, supra note 4, at 6–7; supra notes 2–7 and accompanying text.

\(^{61}\) See Rakoff & Minow, supra note 30, at 598 (explaining that the appellate case method of legal education has had staying power because it simultaneously serves multiple goals and constituencies, including the “intellectually respectable” instruction of “large numbers of students at relatively little expense”).
the skills they needed. Prognosticators are increasingly asserting, however, that this approach to legal education is no longer viable. In times of economic restructuring and constraint, as now, the relationship between the workplace and the law school changes, and the legal profession has deepened its reliance on legal education for preparing students to function effectively in a variety of professional settings.

II. Expanding the Clinical Project

How will law schools respond this time to the renewed challenge of the present market? Although the next chapter of the curriculum reform story is not yet written, there is reason to hope that law schools will indeed rise to the occasion and the opportunity. This hope is rooted in the presence of clinical education in virtually every law school curriculum, and the capacity for legal education to tap this critical resource more fully and effectively.

For a variety of historical reasons, law school clinics began to proliferate more than four decades ago. Although clinics are not typically well-integrated into the general law school curriculum, most law schools consider them indispensable, even if they are not always accorded all the trappings of academic respect. Throughout these four

62 See Matasar, supra note 5, at 21 (reporting that these realities have changed dramatically); Nicholas S. Zeppos, 2007 Symposium on the Future of Legal Education, 60 Vand. L. Rev. 325, 326 (2007) (“The law schools’ monopoly over the training of lawyers will not count for very much unless their students continue to command the handsome salaries that enable them to pay off their loans . . . . This depends on the continued economic health of the legal profession [employing] large numbers of entry level practitioners . . . .”).
63 See Kellogg, supra note 2, at 24 (”Tuition has become a pressure point that threatens the entire enterprise.”); Matasar, supra note 5, at 21 (“Law student educational costs are rising, student debt is rising, the job market is tanking, and there is no end in sight.”);
64 Matasar, supra note 5, at 24–25 (examining changes in the economic relationship between law schools and legal employers); see also Segal, What They Don’t Teach, supra note 5 (stating that, “for decades, clients have essentially underwritten the training of new lawyers,” which, due to economic decline, they are no longer willing to do).
65 Matasar, supra note 5, at 24 (describing the refusal of clients to pay for services of novice lawyers and the resulting pressure that legal employers are exerting on law schools to produce better trained graduates).
66 See Carnegie Report, supra note 12, at 132; Kellogg, supra note 2, at 23.
67 See Margaret Martin Barty, Jon C. Dubin & Peter A. Joy, Clinical Education for this Millennium: The Third Wave, 7 Clinical L. Rev. 1, 12–13 (2000) (describing the historical events in the 1960s and ’70s that led to the widespread creation of clinical programs in law schools around the country).
68 See Nina W. Tart, Current Issues in Clinical Legal Education, 37 How. L.J. 31, 40 (1993) (describing the marginalization of clinics, their faculty, and their students); Zeppos, supra
decades, law school clinics have been shouldering the lion’s share of the pedagogical burden for developing in law students the sorely needed apprenticeships of skills and professional identity. One implication of the *Carnegie Report* is the suggestion that law schools need more clinical education and that they need to accord it a more central place in legal education generally. To grasp the *Carnegie Report*’s argument, one must have a grasp on the nature of the method of instruction employed by clinical educators.

A. Clinical Methods

The language that I prefer for understanding the conceptual space that clinics occupy comes from Professor Tony Amsterdam: clinics provide an opportunity for law students, at an early phase of professional formation, to focus on “ways of thinking within and about the role of lawyers.” In other words, the subject of clinical education is the habits of thought and behavior that lawyers need to effectively perform their professional responsibilities. In the interests of curricular coherence, legal educators could do worse than to deploy this description as a basic operating principle for all of legal education.

While there is much more to learn about the pedagogical effectiveness of various methods of legal education, there is reason to believe that students will better internalize good lawyers’ habits of thought and action when they assume the role of lawyers and receive knowledgeable guidance while they are considering how to approach problems that lawyers encounter. The goal is for these students to

---

69 See *Carnegie Report*, supra note 8, at 30–31, 120 (describing the need to bolster the skills and professional identity apprenticeships of legal education).

70 Id. at 33, 120–21 (“It is difficult to imagine a stronger emphasis on [the formative dimension of professional education] that does not also require schools to place more relative weight on preparation for practice . . . .”).

71 Amsterdam, supra note 26, at 612.

72 See *Carnegie Report*, supra note 12, at 28 (“The essential goal . . . is to teach the skills and inclinations, along with the ethical standards, social roles, and responsibilities that mark the professional.”); see also Roy Stuckey, *Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses*, 13 Clinical L. Rev. 807, 834 (2007) (“[T]hrough this experience of lived responsibility [for outcomes that affect clients,] the student comes to grasp that legal work is meaningful in the ethical, as well as cognitive, sense.”).


74 See Amsterdam, supra note 26, at 616 (describing the clinical method of having students approach legal problems in the role of attorneys and subjecting their performance to
learn careful and thorough deliberation in service of action on behalf of others who have entrusted them with responsibility for a particular aspect of their well being.\textsuperscript{75}

When this enterprise is functioning at its best, the intellectual and the practical are not separable, not distinguishable, but tightly intertwined. The focus is not just on what the students are learning but on how their learning influences their professional judgment and manifests in strategic professional choices. Habits of thought are useful, discernable, and testable only when they are enacted. The emphasis is not on what students are getting but on what they are becoming.\textsuperscript{76}

Acting on behalf of others is a principal feature of lawyering and therefore it would seem to be a sensible feature of training to become a lawyer.\textsuperscript{77} Numerous skills and values enable effective action on behalf of another. For example, lawyers must communicate and collaborate effectively with others and establish a sufficient interpersonal connection with clients to come to understand their objectives and their prospects.\textsuperscript{78} Good lawyering also entails awareness of available processes and institutions from which the client might request a ruling or a remedy.\textsuperscript{79} Strategic planning requires thorough consideration of the plausible alternative routes to a client’s objectives, the capacity to weigh their relative risks and benefits, to make sound decisions among them, and to rigorous analytical review with clinical faculty); Gary Bellow, On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology, in CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING 374, 383 (Council on Legal Educ. for Prof’l Responsibility ed., 1973) (describing the pedagogical value of having law students assume the role of attorneys); Minna J. Kotkin, Reconsidering Role Assumption in Clinical Education, 19 N.M. L. Rev. 185, 186 (1989) (asserting that role assumption is the fundamental methodology of clinical education but challenging its use in certain instances).


\textsuperscript{76} See id. at 82 (arguing that, because law practice requires “engagement with situations,” so too should legal education).

\textsuperscript{77} See id. note 26, at 614.
enable the client to participate effectively in the decision-making process.\textsuperscript{80}

While strategic planning and problem-solving on behalf of others are intellectual and practical skills that lawyers need, along with interpersonal skills that contribute to obtaining an understanding of the content for planning and judgment processes, even this somewhat cumbersome description is vastly oversimplified. Through interpersonal dynamics and planned activities, lawyers obtain an abundance of information. To seek it and to use it, lawyers must understand the potential value and relevance to a legal matter of each piece of information that they can imagine or acquire.\textsuperscript{81}

This description also oversimplifies because a lawyer’s development and processing of information consists of a number of related skills: how to analyze the information provided; how to frame potential legal theories within that information; how to deal with inconsistencies, omissions, and uncertainties in the details obtained; how to determine what other facts might be found or created that would be relevant and helpful; how to go about obtaining this information; and how to fold the information gathered into the refinement of a legal theory that will provide an organizing principle for the welter of detail.\textsuperscript{82} Moreover, to be used in a demand letter, a pleading, an adjudicative forum, or some other relief-seeking or help-seeking endeavor, this material must be organized into a narrative form, to persuade decision-makers that what is being sought is a fair resolution of the matter. Creating persuasive narratives involves yet another set of skills.\textsuperscript{83}

Describing the analytic components of any complex activity, including lawyer’s work, is no easy feat, nor is teaching lawyer’s work to law students through cultivation of the various skills embedded in it. It seems unlikely, however, that the interactive skills of lawyering, such as those involved in information development, strategic planning, and

\textsuperscript{80} Amsterdam describes these sorts of lawyering activities as engaging analytic skills such as “[e]nds-means thinking,” “[h]ypothesis formulation and testing in information acquisition,” and “[d]ecisionmaking in situations where options involve differing and often uncertain degrees of risks and promises of different sorts.” Id. (emphasis omitted).

\textsuperscript{81} Id. (“Hypotheses about what is really relevant are the precondition of effective information gathering.”).

\textsuperscript{82} Id. at 615 (describing an important lawyer’s task as deciding “which state of facts should be created in view of the relative costs and benefits of each including the comparative risks of the best, worst, and intermediate legal results that might obtain under each state of facts.”).

\textsuperscript{83} For a text that illuminates the way that narratives operate throughout law and the legal system, see ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 110 (2000).
professional decision-making, can be taught in classes where facts are already organized, distilled, and determinate. To the contrary, teaching lawyering in a deliberate way would seem to require the case method of instruction to move from a two dimensional to a three dimensional enterprise, that it be less about case comprehension and more about case creation, that it be less reductive and more realistic, based not on how cases are characterized for appellate judges but on how they arise from people and practices in the world. A generation ago, clinical educators conceived a holistic method like this as a basis for lawyering education.

B. Teaching Effective Lawyering

Although legal educators have learned a great deal about the skills of practicing law by qualitatively analyzing the work of law practice, recently we have started to acquire systematic, empirical knowledge of the large palette of lawyers’ professional skills. After spending years engaged in an elaborate and costly research project with a large sample of subjects, Professors Marjorie Shultz and Sheldon Zedeck of University of California, Berkeley have conceptualized and statistically validated twenty-six skills vital to the arts of lawyering. For a variety of complex political and institutional reasons, their research has not had the

84 See Rakoff & Minow, supra note 30, at 601 (“Factual statements [in appellate opinions] do little to equip students to navigate overlapping and diverging witness accounts, gaps in forensic material, disputes over significance levels in statistical studies, or the influence of a narrative frame. Appellate opinions hide, rather than display, how ‘facts’ are constructed and [support] more than one narrative . . . .”).

85 See supra notes 67–70 and accompanying text.

86 See Marjorie M. Shultz & Sheldon Zedeck, Final Report: Identification, Development, and Validation of Predictors for Successful Lawyering 26–27 (2008), available at http://www.law.berkeley.edu/files/bclbe/LSACREPORTfinal-12.pdf. The research identified twenty-six effectiveness factors that Shultz and Zedeck grouped in eight categories: 1) intellectual and cognitive abilities, including analytic reasoning, problem-solving, and situational judgment; 2) research and information gathering abilities, including interviewing skills and fact-finding skills; 3) communication abilities, including listening and advocacy (oral and written) skills; 4) planning and organizational abilities, including organizing and managing one’s own and others’ work; 5) conflict resolution abilities, including empathy and negotiation skills; 6) entrepreneurship abilities, including advising and counseling clients and networking for business development; 7) collaboration abilities, including relationship-building and mentoring skills; and 8) character, including diligence, passion, and integrity. Id. The goal of the research was to develop other tests besides the Law School Admissions test (LSAT) to measure lawyering promise for purposes of informing law school admissions decisions. Id. at 15. While the research found these factors to comprise effectiveness in lawyering, they are skills with obvious value beyond lawyering. See id. at 25–26. Indeed, the effectiveness factors read like a compilation of skills for effectiveness in life in general.
blockbuster impact that it should have, nor has it been followed by research on the educational methods which will best cultivate the broader array of lawyering effectiveness skills that they identified.  

Regardless, the reality that there is more to know about lawyering and legal education does not free us from the imperatives inherent in what we do know about our teaching and our times. Case reading, analysis, interpretation, and application reveal legal principles, but we know that they are also foundational lawyering skills and that emphasizing the skills dimension of these practices in our pedagogy broadens their value. Accordingly, if legal educators seek to deepen our understanding of the effectiveness of pedagogical methods for inculcating a wide array of lawyering skills, nothing prevents us from adopting Shultz and Zedeck’s empirically derived skill sets, intentionally designing a curriculum around developing them in our students, and then assessing whether we have accomplished the skills development that we sought.

For now, clinical education offers the most promising means available for cultivating many of the legal skills that Shultz and Zedeck identified. Clinic students engage a wide-ranging and complex set of interdependent skills that lawyers use and then analyze and reflect on that engagement. Should law schools enable clinics to teach these skills to all law students? Should clinics be available in the first year of law school? Are there other pedagogical approaches that can be devel-

---

87 See Carol Ness, Smarts, for Sure—But What Other Qualities Make a Good Lawyer?, UC Berkeley News (Aug. 4, 2009), http://www.berkeley.edu/news/media/releases/2009/08/04_lawschool.shtml. The Law School Admissions Council (LSAC), the non-profit that administers the LSAT and markets LSAT preparation materials, provided initial financial support for the project but did not continue to fund the research in its later stages. Id. Christopher Edley, Dean of University of California Berkeley School of Law, offered this perspective: “Given the extraordinary quality of this research, the only excuse I can imagine for LSAC refusing to invest more is that they don’t want to undermine the market power of the LSAT. That’s the problem with private-sector funding for truth-telling research.” Id.

88 See supra notes 23–44 and accompanying text.

89 See supra note 86 and accompanying text.

90 See supra notes 71–89 and accompanying text.

91 See Stuckey et al., supra note 55, at 166–67.


93 See supra note 21 and accompanying text; see also Michael A. Millemann & Steven D. Schuwirth, Teaching Legal Research and Writing with Actual Legal Work: Extending Clinical Education into the First Year, 12 CLINICAL L. REV. 441, 442 (2006). Yale Law School already offers clinics to law students in the second semester of their first year. See Clinics & Experiential Learning,
oped, within or beyond the classroom, to help the clinics in their educational endeavors. These are the sorts of questions that we need to be addressing at this pivotal moment in the history of legal education.

C. Teaching Learning While Teaching Lawyering

One of the twenty-six skills identified by Professors Shultz and Zedeck is self-development. It appears on their list of the character traits for effective lawyering. Translated into an educational goal, this research suggests that we explicitly endeavor to instill the skill of self-development into a student’s character. Shultz and Zedeck’s report also discusses the skill of self-monitoring, which is, in part, the ability to learn appropriate actions for new situations. How would one develop that ability? A good start might entail analyzing past situations to determine which actions worked well and which were less successful, then figuring out why.

The skill of self-development, as conceived by Professors Shultz and Zedeck, links with one of the major educational aims that has emerged from clinical instruction: facilitating students’ capacities to learn from their own experience. To the extent clinics are successful in doing so, graduates of clinics will have greater facility in extracting valuable learning from their post-graduation work. In Tony Amsterdam’s words:

[T]hirty or fifty years in practice will provide by far the major part of the student’s legal education, whether the law schools like it or not. They can be a purblind, blundering, inefficient, hit-or-miss learning experience in the school of hard knocks. Or they can be a reflective, organized, systematic learning experience—if the law schools undertake as a part of their cur-

---


94 See, e.g., Maranville et al., supra note 11, at 544–45, 547, 550, 553 (detailing the varieties of forms through which experiential education opportunities involving real legal matters can be offered to students).

95 See Shultz & Zedeck, supra note 86, at 27.

96 Id.

97 Id.

98 Id. at 21.

Curricula to teach students effective techniques of learning from experience.  

Clinical teachers attempt to achieve this goal by engaging students in analysis of their experiences. Clinic students are asked to make their thinking process visible, so that they can articulate, evaluate, and critique their choices in light of what has occurred. By asking students to engage a set of questions designed to develop insights about what worked well, what did not work well, and why these results transpired, clinical teachers seek to instill in students a conscious method for ongoing reflection on experience that they can carry with them into practice to support their continued self-improvement as practicing attorneys.

D. Emphasize What Can Generalize

Self-development and self-monitoring skills are especially useful to students who leave clinics for specialties outside of their clinic's practice areas. While it is ethically necessary for clinic students to serve their clients well, it is at the same time educationally necessary for clinic students to learn generalizable lawyering habits, skills, and values.

---

100 Amsterdam, supra note 26, at 616.  
101 Id. at 617.  
102 Id. at 616–17.  
103 Id. Professor Amsterdam suggests that clinic students learn to learn from experience by subjecting their lawyering performances to questions such as:  

What were my objectives in that performance? How did I define them? Might I have defined them differently? Why did I define them as I did? What were the means available to me to achieve my objectives? Did I consider the full range of them? If not, why not? What modes of thinking would have broadened my options? How did I expect other people to behave? How did they behave? Might I have anticipated their behavior—their goals, their needs, their expectations, their reactions to me—more accurately than I did? What clues to these things did I overlook, and why did I overlook them? Through what kind of thinking, analysis, planning, perceptivity, might I see them better next time?

105 One of the generalizable skills and values that many clinics explicitly or implicitly seek to instill are those of systemic assessment or critique, skills which enable students to measure the legal system that they are actively observing against conceptions of justice and fairness. See Goldfarb, supra note 20, at 1059–60; see also Robert J. Condlin, "Tastes Great, Less Filling": The Law School Clinic and Political Critique, 35 J. LEGAL EDUC. 45, 48–49 (1986) (arguing that clinics can help students to develop perspectives on the "nature of a fair and just legal system and the role of lawyer practices in operating and improving it"). This Ar-
Among the most valuable of these generalizable skills is a usable understanding of how one thinks and behaves for purposes of learning important lessons from experience that can be applied to future choices and actions.\textsuperscript{106} This is a method with long-term benefits for clinic students, no matter what professional opportunities they encounter in the future. Additionally, to return to my opening theme, when the world of law practice undergoes significant changes, these are the skills that may help graduates adapt to change.\textsuperscript{107}

Some of the commentary on the changing landscape of legal practice has undervalued the role that clinical education can play in preparing students to face the legal profession of the future.\textsuperscript{108} This is due in part to the fact that, outside the community of clinical educators, the intention to teach generalizable skills, especially a rigorous method of learning from experience, is not widely understood as an aspect of clinical legal education.\textsuperscript{109} Clinic skeptics imply that practicing law in a legal services setting in a university is so much like practicing law as a new attorney in a typical law office that law schools should instead let students graduate early and receive income for their work, rather than taking their tuition dollars while they are enrolled in clinics.\textsuperscript{110} The implication of this view is that while clinical education may help students learn how to engage in lawyering as it is practiced today, it will not help them in the markedly different world of law practice that has yet to emerge.\textsuperscript{111} Another questionable implication is that the university aspect of university-based legal services adds little of value to lawyers’ training.

The challenge that this perspective poses to clinical education counsels clinical professors’ intensified focus on our university-based

ticle addresses these skills under Part II.E, Pedagogy of Service, and endeavors to promote the notion that systemic observation and normative assessment operate at a skills level that clinics can cultivate. See infra notes 113–128 and accompanying text.

\textsuperscript{106} See Amsterdam, supra note 26, at 616–17; supra notes 99–103 and accompanying text.

\textsuperscript{107} See Amsterdam, supra note 26, at 616.

\textsuperscript{108} See Morgan, supra note 2, at 207–08.


\textsuperscript{110} See Morgan, supra note 2, at 203–05.

\textsuperscript{111} Id. at 208 (critiquing the Carnegie Report’s recommendations for more clinical education because “increasing a student’s exposure to the old regime is likely to be a profound waste of time and money”).
teaching mission as we provide profoundly needed legal services to individuals and communities. Skills such as communication, collaboration, strategic planning, problem-solving, fact development, decision-making, and systemic evaluation are likely to have some enduring value, even if they are used in somewhat different contexts in the legal profession of the future. Effective use of methods for learning from experience will enable law students who internalize them to grow and change as the legal profession transforms. Like other generalizable skills, reflective learning methods reach beyond the particular experience in which they are developed. Shultz and Zedeck’s research supports the idea that these are expansive habits of mind and action that can facilitate the ability of law graduates to discern what they can do to perform proficiently in the transforming legal profession that lies around the bend.112

E. Pedagogy of Service

So far this Article has focused on the transferable skills pedagogy of clinical education, but the clinic’s pedagogy of personal and social responsibility is inextricably interconnected with it.113 Operating at a skills level, this pedagogy also implicates the values dimension of legal education that the MacCrate Report addressed114 and the apprenticeship of professional identity and purpose that the Carnegie Report identified.115 As they are learning, students in clinical programs are providing

112 Shultz & Zedeck, supra note 86, at 24–27; supra notes 95–99 and accompanying text.
113 See, e.g., Steven Hartwell, Promoting Moral Development Through Experiential Teaching, 1 CLINICAL L. REV. 505, 529–30 (1995) (describing the theoretical basis and practical implementation of experiential courses designed to promote moral reasoning); see also David R. Barnhizer, The Clinical Method of Legal Instruction: Its Theory and Implementation, 30 J. LEGAL EDUC. 67, 71–72 (1979) (“[E]ffective use of the clinical method is the only presently available means of consistently facilitating learning of ‘professional responsibility’ in a meaningful, internalized way sufficient to form an affirmative structure capable of guiding behavior . . . .”); Condlin, supra note 105, at 66–67 (“[I]f one is interested in a moral philosophy of lawyering it is necessary to deal with these questions in the first person.”); David A. J. Richards, Moral Theory, the Developmental Psychology of Ethical Autonomy and Professionalism, 31 J. LEGAL EDUC. 359, 374 (1981) (“Professional education, which educates the most powerful class of people in our society, receives these people at a crucial age in which, in response to the circumstances of professional education, they will or will not develop better capacities for ethical reasoning concomitant with their professional identity.”).
114 See MacCrate Report, supra note 12, at 138–41 (asserting that law school should instill values through asking students to personally provide competent representation; to strive to promote justice, fairness, morality, and the improvement of the profession; and to seek out professional self-development).
vital legal services to people in need of them. What is the role of law schools and lawyers in responding to the legal needs of the communities around them? The very existence of clinical programs poses this question and proposes this answer: responding to these needs is an obligation of all who participate in the legal profession.\footnote{116}{The answer that clinical education proposes is consistent with a widely shared perspective on the obligations of professionalism. For example, Walter Bennett, a retired professor and judge, argues that lawyers, having been “granted by society a virtual monopoly on providing legal services,” must undertake a “serious, profession-wide commitment to represent poor people” and others who cannot afford legal services. Bennett, supra note 15, at 142–43. Bennett strongly critiques the legal profession’s failure to fulfill this obligation, asserting that “[t]he chief ethical failing of the American bar is the fact that only approximately 20 percent of the legal needs of the United States’ 35 million poor people are being met by the legal profession.” Id. at 142. To excuse this “failing of the legal profession,” Bennett suggests, is “an astounding repudiation of the most basic professional responsibility.” Id. at 143; see also Deborah L. Rhode, Cultures of Commitment: Pro Bono for Lawyers and Law Students, 67 Fordham L. Rev. 2415, 2419 (1999) (describing the pro bono obligations of lawyers and law schools that follow from the legal profession’s monopoly on the provision of legal services); Rachel Moran, Op-Ed., Bring Back Citizen-Lawyers, Nat’l L. J. & Legal Times, Jan. 19, 2009, at 22, 22 (calling for the revival of an earlier era’s conception of citizen-lawyers who would use their skills to serve the common good).}

Skills acquire value in their use. It matters for what purpose skills are used.\footnote{117}{Bennett, supra note 15, at 125 (stating that professional responsibility entails lawyers’ persistent inquiries about whom they are serving, and an intention to serve the greater good); see also Talcott Parsons, Professions, in 12 International Encyclopedia of the Social Sciences 536, 536 (David L. Sills ed., 1st ed. 1968) (“[F]ormal technical training . . . . must lead to . . . mastery of a generalized cultural tradition . . . . [and] some institutional means of making sure that such competence will be put to socially responsible uses.”) (quoted in Sandefur & Selbin, supra note 73, at 57 n.19).} Law is understood as a profession because it is intended to serve a public good.\footnote{118}{See Section of Legal Educ. & Admissions to the Bar, Am. B. Ass’n, Teaching and Learning Professionalism: Report of the Professionalism Committee 6 (1996) (indicating that lawyers serve clients and the public “as part of a common calling to promote justice and public good”).} Among the obligations that the legal profession places on lawyers is that they work to give meaning to concepts such as fairness, equality under law, and equal access to justice.\footnote{119}{See Bennett, supra note 15, at 142 (asserting that the legal profession “must seriously undertake the pursuit of a broader ideal of justice,” including “giving voice to the voiceless in our current system” and providing fair access to the legal system for all, regardless of means).} The integrity of the legal system depends on lawyers to do this.\footnote{120}{See id.} So, the argument runs, professional skills are always serving professional values, we operate within a profession that has articulated particular values, and it is
An extraordinary benefit of clinical education is that it surfaces these values, they can be readily identified and discussed, and they emerge experientially from work that advances these values.\footnote{See MacCrate Report, supra note 12, at 136 (among other values, law schools should instill in students the value of "striving to promote justice, fairness, and morality").}

Public service skills and values have deep roots in the history of clinical education, from its early beginnings as a vehicle for law students to volunteer their time in providing legal services to the poor to its current incarnation as an important part of the law school’s academic program.\footnote{See Goldfarb, supra note 20, at 1659 ("Learning to articulate one’s tacit normative framework is a vital feature of clinical skills training, for it helps young lawyers to avoid falling hostage to the unarticulated norms of the prevailing practices."); see also Condlin, supra note 105, at 50–51 ("The ability to judge day-to-day law practice against objective standards of justice and fairness is an essential quality of a good citizen and a good lawyer.").} It remains noteworthy that law schools in the 1960s and ’70s began locating legal services offices in university settings and giving students academic credit for their participation, moving clinical education from an extracurricular to a curricular endeavor.\footnote{See Barry et al., supra note 67, at 5–15 (describing various stages of evolution of clinical programs); Maranville, supra note 11, at 521–26 (providing a thumbnail history of the development of clinical legal education).} In part, law schools were responding to student demands for relevance in education in an era of antiwar protest and civil rights activity.\footnote{See Robert Stevens, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 216 (1983); see also Philip G. Schrag & Michael Meltsner, Reflections on Clinical Legal Education 3 (1998) ("Clinical legal education was born in the social ferment of the 1960s."); Muneer Ahmad, Clinical Professor of Law, Yale Law School, Remarks at the Boston College Journal of Law & Social Justice Symposium: The Way to Carnegie: Practice, Practice, Practice—Pedagogy, Social Justice, and Cost in Experiential Clinical Legal Education (Oct. 28, 2011), available at http://www.bc.edu/schools/law/news/events/conferences/carnegie_symp_twj/carnegie_video.html (describing the importance of clinical education’s historical roots in the protest movements of the 1960s and ’70s).} They were also operating from a perspective that universities have obligations to the communities in which they sit.\footnote{This perspective is apparent in the language regarding graduate and post-secondary education in the 1998 amendments to the Higher Education Act of 1965. See 20 U.S.C. §§ 1139–1139h (2006) (repealed 2008); Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581 (repealed 2008); Higher Education Act of 1965, Pub.
vices office in a university makes it a different animal than a legal services office located in another nonprofit setting or in the private workplace. It is crucial to think carefully about what the juxtaposition of university and legal services settings offers and how to realize the full potential of what it offers.

Teaching lawyering in the context of assisting individuals and communities subordinated by social structures, such as class, race, gender, culture, and education, opens dimensions for learning. These dimensions may include fostering greater awareness of lawyers’ participation in a public service profession, developing understanding of what subordination means in people’s lives and how it operates on a regular basis, and gaining perspective on the role that law can play both in addressing problems or exacerbating them. These are intellectually challenging matters that universities invest considerable resources in exploring with students in other contexts.

L. No. 89-329, 79 Stat. 1219 (repealed 2008). These amendments included an Urban Community Service section with a described purpose of “provid[ing] incentives to urban academic institutions to enable such institutions to work with private and civic organizations to devise and implement solutions to pressing and severe problems in their communities.” § 752(a), 112 Stat. at 1798–99.

See David Barnhizer, The University Ideal and Clinical Legal Education, 35 N.Y.L. SCH. L. REV. 87, 123–24 (1990) (arguing that because law practice implicates questions of social engineering and the pursuit of justice, clinics provide a curricular setting for examining models of justice-in-action, an inquiry germane to law school and university education).

Subordination and social inequality are subjects that receive cross-disciplinary attention in university settings. For instance, Cornell University funds an interdisciplinary Center for the Study of Inequality to foster “research on social and economic inequalities, as well as the processes by which such inequalities persist.” See, e.g., CSI: Center for the Study of Inequality, CORNELL UNIV. CENTER STUDY INEQUALITY, http://inequality.cornell.edu (last visited Mar. 17, 2012). Many schools offer courses addressing structural issues of subordination, such as Georgetown’s “Social Inequality” course. See Social Inequality, GEORGETOWN UNIV. SCH. CONTINUING STUDIES, http://scs.georgetown.edu/courses/2314/social-inequality (last visited Mar. 17, 2012). The effort to understand issues of subordination and inequality also arises in the service-learning context, where community-related work is used to teach practical skills, improve the welfare of others, and impart to students a sense of social responsibility. Ernest Boyer, a former U.S. Commissioner of Education and President of the Carnegie Foundation for the Advancement of Teaching, was an early proponent of service learning. See Ernest L. Boyer, SCHOLARSHIP RECONSIDERED: PRIORITIES OF THE PROFESSORATE 77–78 (1990) (“If the nation’s colleges and universities cannot help students see beyond themselves and better understand the interdependent nature of our world, each new generation’s capacity to live responsibly will be dangerously diminished.”) (quoted in Linda F. Smith, Why Clinical Program Should Embrace Civic Engagement, Service Learning, and Community Based Research, 10 CLINICAL L. REV. 723 (2004)). Many universities now have formal service-learning programs and centers, which engage students, in part, in understanding and seeking to redress social inequalities. See GW’S CENTER FOR CIVIC ENGAGEMENT AND PUBLIC SERVICE, GEORGE WASH. U., http://www.gwu.edu/explore/campuslife/studentinvolvement/serviceengagement (last visited Mar. 17, 2012); LEADERSHIP AND COMMUNITY
services practice in a university setting is a logical place to invest energy in exploring with students in a grounded way how law and social structures of subordination intersect, the way these issues manifest in people’s lives, the legal problems they generate, and the impact that law and the legal profession can have in reinforcing or remediating these issues.

F. Facing Economic Realities

The educational depth of clinical methods and the level of responsibility for others’ lives that a student-lawyer shoulders, limit the number of students that any clinical faculty member can teach at any one time. Consequently, compared to the mass education of the large law school classroom, clinical education is a costly method of instruction. In times of economic constraint, a call to expand clinical education may be difficult to heed.

In conducting a broad economic analysis of law schools’ curriculum and purpose, we should remember to take account of another emerging reality: in times of economic constraint, the scale of unmet legal need increases. Training a cadre of lawyers with the capacity to respond to the growing need for legal services among people who are increasingly unable to afford these services is an integral part of the mission of legal education. Clinically educated law graduates are a promising pool from which to draw the lawyers who will provide these services.


129 See Amsterdam, supra note 26, at 617 (“Because they are highly individualized, clinical teaching methods require very low student-teacher ratios and are therefore relatively expensive.”).

130 See id.


132 Legal education must take on this mission because the legal profession as a whole has taken on this mission, at least in its stated norms. See Rhode, supra note 116, at 2416–17; see also Model Rules of Prof’l Conduct Preamble ¶ 6 (2010) (requiring lawyers as “public citizen[s]” to “devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel”). But see Spencer Rand, Teaching Law Students to Practice Social Justice: An Interdisciplinary Search for Help Through Social Work’s Empowerment Approach, 13 Clinical L. Rev. 459, 463–64 (2006) (decriing the profession’s lack of guidance about how lawyers should address social justice issues).

133 After analyzing the findings reported in After the JD, Professors Rebecca Sandefur and Jeffrey Selbin concluded that the report’s positive correlation between clinical experience in law school and public service employment obtains only for those lawyers who came
Stated differently, the cruel dilemma of the moment is that the same economic conditions that make clinical education increasingly difficult for law schools to afford make clinical education increasingly necessary for law schools to offer. Legal educators will need to be creative in meeting this challenge. The hard truth is that expanding clinical education may well require that something else contract, to enable law schools to bear the cost of increasing curricular reliance on the clinical methods that law schools need now more than ever. Despite the challenges of making trade-offs, the situation may also pose a genuine opportunity to rethink the law school curriculum in a manner that makes legal education more adept. Circumstances may be forging the motivational conditions for a curricular overhaul long overdue.

G. Too Little and Too Much

A strength of clinical education lies in its multiple important goals and its contextual methods. There, too, lies a weakness of clinical education. With so much to accomplish by such labor-intensive means, it is tempting and sometimes necessary for clinical teachers to abandon some portion of what ideally we strive to achieve.

As classroom teachers sometimes limit their sights to substantive law coverage rather than the far more transferable skills of reasoning about cases, clinical teachers can limit their sights to the already complex and indispensable task of guiding student-attorneys to represent their immediate clients well. Faced with time constraints and over-

134 See Margaret Martin Barry, Practice Ready: Are We There Yet?, 32 B.C. J.L. & Soc. Just. 247, 274 (2012); Maranville et al., supra note 7, at 547, 550, 553 (describing the many structural permutations available for providing experiential legal education and for supporting the creative design of programs that involve students in learning through work on real legal matters).

135 See Amsterdam, supra note 26, at 618 (suggesting that law schools can fund greater use of clinical teaching methods by reducing the “vast mass of large-class doctrinal teaching” and that this endeavor is “well worth the difficulties”); Barry, supra note 134, at 274; Joy, supra note 131, at 328.
commitment, clinical professors sometimes choose to forego explicit attention to other educational opportunities inherent in the same practice scenarios. In doing so, they may miss the chance to cultivate a broad array of generalizable skills; to support systemic evaluation of law, society, and legal institutions; to inculcate professional identity and the values of public service; and to instill methods of learning through critical review of experience.136

The uncertainties of the future give us yet more reason to try, wherever possible, not to cut these corners. These are the very corners that will empower our students to adapt to what lies ahead in the world they will enter. It is worth mention that sometimes accomplishing these aspirational goals does not require making more time, but rather making alternate use of some of the time we already spend, particularly in the post-mortem phase of analysis of our three-dimensional cases. In other instances, clinical teachers may need to commandeer more resources to accomplish broader goals, but even a small infusion of new resources may greatly multiply the lasting effect of what we do.

Obviously, the time and resource questions are intimately interrelated, and both are formidable problems. Because the expansion proposed in this Article is not an additive model but a reconfiguration, legal educators can choose to do less of some things as a means to doing more of others.137 A potential redeployment of resources toward clinical education may increase the availability of clinically trained faculty and enable clinical educators to teach more effectively within the time constraints that they have perennially faced.

Yet regardless of the prospects for resource redeployment, given the broad ambition for clinical methods, time and resource shortfalls will remain a persistent challenge. In the process of striving to address that challenge and to accomplish the significant goals that we have framed, we will be recommitting to our professional identity and purpose as legal educators. This recommitment will support our teaching as intentionally as we can in accord with our highest aspirations.

136 See supra notes 86–122 and accompanying text.

137 See supra note 135 and accompanying text; see also Maranville et al., supra note 11, at 538 (“Because no law school has unlimited resources, a decision to fund one project is often a decision to close the door on another.”).
Conclusion

Woody Allen famously said, “I’m not afraid to die. I just don’t want to be there when it happens.” Likewise, some legal educators may say, “I’m not afraid of change. I just don’t want to be there when it happens.” Regardless of the choices that legal educators make, change is happening around us and will continue to happen. The horse has taken off and our choices are to watch where it goes or to seize the reins. This Article recommends the latter, so that we can exert as positive an influence as we can on the future of clinical legal education that starts now.

THE COST OF CLINICAL LEGAL EDUCATION

Peter A. Joy*

Abstract: Critics of clinical legal education often malign its expense and look to clinical budget cuts as the primary means of reducing costs in legal education. This narrow focus, however, ignores the important function that clinical legal education plays in training law students to be ready for practice and assumes other legal education expenses are more important. The 1992 MacCrate Report, the 2007 Carnegie Report, and other studies demonstrate that clinical education is necessary to produce a well-rounded and practice ready law student. Though clinical legal education should not be immune to cost constraints, neither should any other type of law school expenditure. To succeed in economically difficult and demanding times, law schools must put every aspect of legal education through a cost-benefit analysis for cost-saving potential.

INTRODUCTION

When discussing the cost of legal education, few areas receive more attention than in-house clinics—wherein students represent clients under the supervision of faculty, usually in a law office within the law school. In-house clinical courses require low student-to-faculty ratios, with faculty working closely and intensively with students. Some suggest that one way to cut the cost of legal education would be to eliminate in-house clinics because they require more faculty resources than classroom courses. This suggestion is not new. In 1984, Professor Mark Tushnet observed, “When faculties feel pressure to reduce budg-
To contain costs, law school administrators should carefully consider budgetary restraint in every aspect of legal education, including in-house clinical courses. Educating law students to become practicing lawyers should be the primary objective of every law school. Anyone serious about defining a quality legal education must consider all allocations of resources within the law school and how to manage costs effectively without compromising law students’ education.

Unfortunately, those who question the cost of in-house clinics usually do not compare its cost to other costs within the law school. Nor do they consider factors like the law school’s mission to prepare students for the effective and ethical practice of law, the role that in-house clinical legal education serves, or student demand for a real-life legal educational experience. Why not?

This Article, consisting of three parts, addresses questions one should consider when examining the cost of legal education, including the cost of clinics. Part I examines the cost increases in legal education generally and some of the forces that have contributed to increased tuition. Part II discusses why in-house clinical legal education exists and situates it in the context of experiential education in law schools. Finally, Part III urges legal educators and administrators to adopt an appropriate methodology before cutting costs. Comparing the costs of various aspects of legal education before budgetary restructuring is crucial to maintaining a balanced law school program. Ultimately, the funding for in-house clinical legal education—like other aspects of legal education—remains a question of priority for law schools to assess before cost-cutting.

I. UNDERSTANDING WHY LAW SCHOOLS INCREASE TUITION

Just as clinical education has to be viewed in the context of legal education, legal education has to be considered in light of university education. University tuitions have climbed dramatically but, at the same time, many law schools have imposed even steeper tuition increases. Though schools’ overall educational costs have increased, tui-

---

3 Id.
5 See id.
tion hikes may have less to do with costs and more to do with perception of quality—essentially, supply and demand.⁶

**A. The Market for Prestige**

From 1981 through 2010, tuition and fees at public and private colleges and universities increased sixfold while the consumer price index increased by a factor of 2.5.⁷ Between the 1987–1988 and 2007–2008 academic years, tuition and fees rose an average of 7.4% per year at four-year public institutions and 6.3% per year at private institutions, despite inflation of only 3.1% per year.⁸ What has driven tuition to increase at rates two times or more than that of inflation over thirty years?

Henry Riggs, President Emeritus of Harvey Mudd College and the Keck Graduate Institute, observed that higher education tuition is a “marketing, not a cost accounting, decision.”⁹ Riggs argues that prestige drives tuition: “Tuition in the private higher-education industry is a classic example of price leadership—the ‘top players’ define the sticker price and all others follow suit.”¹⁰ Riggs provides examples of universities that price themselves at or slightly above the tuition charged by universities acknowledged to be the best in an attempt to signal higher quality—a phenomenon he referred to as “wannabe[]” pricing.¹¹

Riggs’ analysis applies equally to law schools, and can extend to a range of law schools regardless of ranking.¹² The New York Times explored this phenomenon in an article that focused on one institution ranked among the bottom third of all law schools.¹³ That school increased the size of its entering class in 2009 by 30% and priced its tuition higher than that of Harvard Law School.¹⁴ When asked to explain this apparent disjuncture between price and rank, the law school dean stated, “The answer is that we exist in a market. When there is a de-

---

⁹ Riggs, supra note 6.
¹⁰ Id.
¹¹ Id.
¹² See id.; Segal, supra note 4.
¹³ Segal, supra note 4.
¹⁴ See id.
mand for education, we, like other law schools, respond."\textsuperscript{15} But is the market a sufficient justification to raise tuition to the highest level law students are willing to pay?

Despite wannabe pricing, some law schools have held down costs more than others.\textsuperscript{16} The following data aggregate tuition prices in 2010 from 80 public law schools approved by the American Bar Association (ABA) and 119 ABA-approved private schools. The median tuition and fees at public law schools for residents was $18,077, while the median tuition and fees at private law schools was $37,330.\textsuperscript{17} Seven public law schools priced annual tuition below $10,500, six charged between $10,501 and $12,500 annually, and nine schools charged between $12,501 and $15,000 per annum.\textsuperscript{18} These twenty-two law schools represent twenty different jurisdictions, including the District of Columbia, Florida, Georgia, Illinois, New York, and Texas—jurisdictions with large legal markets.\textsuperscript{19} If law students solely sought the least expensive legal education available, then applicant numbers would be far greater for these and other lower-tuition schools.\textsuperscript{20}

The second phenomenon Riggs discusses, related to wannabe pricing, is the pressure for a school to raise tuition to keep in step with its competition.\textsuperscript{21} In other words, why charge less than the maximum price the market will accept? Ultimately, as long as students and their parents will pay the tuition, even if it is only possible by incurring huge

\textsuperscript{15} Id. (quoting Richard A. Matasar, Dean of New York Law School).
\textsuperscript{16} Kenneth Williams, ABA Data Specialist, 2010 Full and Part Time Tuition Data (on file with author).
\textsuperscript{17} Id.
\textsuperscript{18} Id. Specifically, the City University of New York School of Law charged $11,952, Florida A&M Law School charged $10,312, Georgia State University College of Law charged $13,310, North Carolina Central School of Law charged $9,961, Southern Illinois Carbondale School of Law charged $14,746, Southern University Law Center charged $8,478, Texas Southern University Thurgood Marshall School of Law charged $13,065, University of Arkansas-Fayetteville School of Law charged $11,367, University of Arkansas-Little Rock Bowen School of Law charged $11,456, University of the District of Columbia Law School charged $9,480, University of Idaho College of Law charged $12,940, University of Memphis Cecil C. Humphrey School of Law charged $14,298, University of Mississippi School of Law charged $10,275, University of Montana School of Law charged $11,062, University of Nebraska College of Law charged $13,337, University of New Mexico School of Law charged $13,660, University of North Dakota School of Law charged $10,163, University of Puerto Rico School of Law charged $7,611, University of South Dakota School of Law charged $11,208, University of Tennessee College of Law charged $14,462, University of Wyoming College of Law charged $11,264, and West Virginia University College of Law charged $14,212. Id.
\textsuperscript{19} See id.
\textsuperscript{20} See id.
\textsuperscript{21} See Riggs, supra note 6.
student loan debt, universities and law schools will charge what the market can bear. If a law school misjudges the market with its tuition pricing, especially in terms of admitting students with the credentials it seeks, scholarships may discount tuition just enough to maintain desired enrollment statistics.

Riggs’ analysis is useful in understanding how and why both university and law school tuition hikes far outpace the rate of inflation. Universities and law schools raise tuition because they can—the dynamics of supply and demand. Except for the very wealthy or students with the highest credentials, this phenomenon is only possible through ballooning student loan debt.

Students may disregard high tuition prices because the law firms that pay the highest salaries typically hire more heavily from higher ranking law schools, regardless of the ranking’s subjectivity or efficacy. An applicant seeking to land a high paying position would gravitate toward a higher ranking law school. So, too, would applicants seeking to have more opportunities for government or law school teaching positions.

In analyzing how hypothetical applicants may make decisions between differently ranked law schools, Professor Brian Tamanaha explains that the trade-off often becomes whether to pay full tuition at a higher-ranking school or to receive a substantial scholarship at a lower-

---

22 See id.
23 See id.
24 See id.
25 See id.
27 Russell Korobkin, Harnessing the Positive Power of Rankings: A Response to Posner and Sunstein, 81 Ind. L.J. 35, 42 (2006). Professor Russell Korobkin contends that rankings enable top law students and legal employers to identify each other, thereby increasing “employment opportunities and . . . long-term earning potential” for law school applicants. Id. at 41.
28 See id. at 42.
ranking school seeking to entice desirable students. Because of this trade-off, the high cost of law school favors wealthy applicants who can afford to attend the school of their choice, thus permitting them to “further consolidate their grip on elite legal positions.”

It is unclear how many prospective applicants do not consider law school because of its cost. A 2009 report from the United States General Accountability Office (GAO) explored issues relating to the cost of law school and access to legal education by people of color. It concluded that, while some law school officials believed that cost is a factor in a prospective applicant’s decision to apply to and enroll in law school, the effect of cost is not clear, especially on minority access to legal education. The GAO Report does not explore this issue sufficiently, and more research into the effect of tuition on decisions to enter law school is needed.

The GAO Report, however, did find that the availability of lower-interest loans to fully fund legal education declined precipitously because of rising law school tuition. In the 1994–1995 academic year, 100% of public law schools had in-state tuition that lower-interest Stafford Loans could fully fund but, by the 2007–2008 academic year, only 80.2% of public law schools priced tuition lower than the Stafford Loan limit. The situation for out-of-state tuition at public law schools has shifted more dramatically. In the 1994–1995 academic year, Stafford loans could fully fund out-of-state tuition at 97.4% of public law schools; by the 2007–2008 academic year, however, this held true for only 22.2% of public law schools. Predictably, the situation at private law schools is even worse. In the 1994–1995 academic year, 80.4% of private law schools had tuition at or below the Stafford Loan limit, but

---

30 Tamanaha, supra note 26.
31 Id.
33 Id.
34 Id. The GAO also found that since the 1994–1995 academic year, the African-American student population declined from 7.5% of all students to 6.5%. Id. at 20. White student enrollment declined from 76.4% to 65.1%. Id. at 23. Additionally, Hispanic students increased their enrollment share from 5.2% to 7.5%, and Asian and Pacific Islander students increased their enrollment share from 5.4% to 7.8%. Id. at 21–22.
35 See id. at 37.
36 See id. at 38.
37 GAO Report, supra note 32, at 38.
38 Id.
39 Id.
only 10.7% of law schools had tuition below that limit by the 2007–2008 academic year. As the gap between the ceiling on lower-cost loans and annual law school tuition grows, borrowing becomes more costly for lower-income students.

B. What Is Driving Up the Cost of Legal Education?

If the market for prestige drives schools to charge the highest tuition the market will bear, where is the money going? The GAO Report also investigated issues related to legal education cost and access. In preparing its study, the GAO sampled both ABA-accredited and non-ABA-accredited law schools and conducted interviews with law school officials and some students.

Law school officials stated that a “more hands-on, resource-intensive approach to legal education and competition among schools for higher rankings appear[ed] to be the main factors driving law school cost, while ABA accreditation requirements appear[ed] to play a minor role.” The law school officials identified three additional resource-intensive aspects of legal education: “increased emphasis on hands-on clinical experiences[] and smaller skills-based courses; increased diversity of course offerings—e.g., international law and environmental law; and increased student support—e.g., academic support, career services, and admissions support.”

In addition to these three cost drivers, law school officials also reported that U.S. News & World Report rankings drove up law school expenses. The U.S. News & World Report’s ranking criteria include factors such as expenditures per student, student-to-faculty ratio, and library expenses. Law school officials state that offering more clinics and more elective courses helps them to compete for students and that offering higher salaries helps them compete for faculty. Student selectivity—including median test scores and grade point averages and ac-

---

40 Id. at 37–38.
41 Id.
42 GAO Report, supra note 32, at 3.
43 Id. at 11.
44 Id. at 24. The GAO Report did not give any more specific information concerning these expenses. This lack of specific information renders the GAO Report rather general and, at times, more anecdotal and less useful than a more rigorous investigation.
45 Id. at 25.
46 Id.
47 GAO Report, supra note 32, at 25.
ceptance rates are weighted at 25% in the ranking formula.48 Peer, lawyer, and judge assessments comprise an additional 40% of the rankings.49

The GAO Report, among other sources, indicates that in-house clinical legal education contributes to higher law school tuition, but by no means is it the leading cause.50 In fact, a major expense not analyzed is the cost of new law school buildings. New law school construction projects are very expensive; recent buildings have cost schools in the range of $85 million to $250 million.51 As a result, even with alumni donations and other contributions, most law schools incur enormous debt when paying for new buildings, which can take decades to pay off.52

While new buildings represent large, one-time expenditures, the most significant long-term drivers of rising legal education costs are lower teaching loads and higher salaries for law faculty.53 Professor Theodore Seto reviewed reports on law school teaching submitted to the ABA in 2006, which indicated that “[a]t the 10 highest-ranked law schools, for example, the average annual teaching load is 7.94 hours; in U.S. News’s third and fourth tier, it is 11.13 hours—40% higher.”54 This is essentially the difference between teaching less than three courses per year and approximately four courses per year, assuming a typical three credit course.

Overall, teaching loads at law schools have fallen dramatically.55 A study of teaching loads at ABA-accredited law schools in 1941 shows

---

49 Id.
50 See, e.g., GAO Report, supra note 32, at 24; Riggs, supra note 6; Segal, supra note 4.
51 Id. See, e.g., supra note 4.
52 See, e.g., supra note 4. The University of Baltimore and Michigan Law School have building projects over $100 million each, and Fordham Law School is building a new $250 million facility. Id. Even the smaller Marquette University Law School in Wisconsin spent $85 million for its new building. Id.
53 Id. For example, New York Law School sold $135 million worth of bonds for its new building in 2006. Id.
55 Theodore P. Seto, Understanding the U.S. News Law School Rankings, 60 SMU L. Rev. 493, 546 (2007). The annual teaching load is a calculation made by the ABA, wherein they divide the total number of contact hours by the number of full-time equivalent faculty members and then multiply by a factor of two if the school is on a semester system or three if the school uses quarters. Id. at 546 n.186.
56 Compare Boyer, supra note 53, at 284–85, with Seto, supra note 54, at 546.
that professors at that time taught much more than in modern times.\textsuperscript{56} The survey classified schools into three groups and measured several criteria including the size of the full-time faculty, average enrollment, teaching salary, size of the library, and expenditures per student.\textsuperscript{57} The survey found that law schools with larger student bodies paid faculty more but expected them to teach less.\textsuperscript{58} Among twenty-one larger and better-resourced law schools, faculty annual teaching loads averaged 13.42 hours, while those at smaller, less-resourced schools had annual teaching loads averaging approximately 15.3 hours.\textsuperscript{59} Faculty at the smallest schools with the least resources had annual teaching loads of 17.32 hours.\textsuperscript{60}

The contrast in the teaching load expectations from 1941 to 2006 are striking. Law faculty teach approximately half as much as they did in the past, and some teach even less.\textsuperscript{61} Professor Seto found some faculty with annual teaching loads of 6.7 hours, which is approximately one course per semester.\textsuperscript{62} Reducing the teaching expectations of faculty consequently puts pressure on law schools to increase hiring, which is a major expense.\textsuperscript{63}

A review of the growth of law school faculties from 1998 to 2008 demonstrates that faculty at “ABA-accredited law schools grew from 12,200 to 17,080—a 40 percent increase.”\textsuperscript{64} Part of the growth was in part-time faculty, but that demographic expanded at a lower rate of 33\%.\textsuperscript{65} During this time, the average salary for a full-professor grew from $101,600 in 1998 to $147,000 in 2008, a 45\% increase.\textsuperscript{66} When fringe benefits—which amount on average to 27\% of overall salary—are added, the total average cost of a full-time professor in 2008 was

\textsuperscript{56} Compare Boyer, \textit{supra} note 53, at 284, with Seto, \textit{supra} note 54, at 546.

\textsuperscript{57} Boyer, \textit{supra} note 53, at 284.

\textsuperscript{58} See id. at 284–85.

\textsuperscript{59} Id.

\textsuperscript{60} See id. The survey listed the teaching loads on a weekly average basis, and multiplied them by a factor of two—assuming that each school operated on a semester system, calculates the annual teaching loads. See id.

\textsuperscript{61} Compare id., with Seto, \textit{supra} note 54, at 546.

\textsuperscript{62} Seto, \textit{supra} note 54, at 546 n.186.

\textsuperscript{63} See id. at 546–48.

\textsuperscript{64} Crittenden, \textit{supra} note 53, at 40.

\textsuperscript{65} Id.

$187,000. At the four top paying law schools in 2008 for which salary data was available, salaries for full professors averaged $234,738 and fringe benefits averaged an additional 29.1% for a combined average of $303,046 per full-time professor. All of these average salaries are based on nine-month pay and do not include summer research support, which is common at most law schools.

Thus, faculty expenses represent a strong contributing—if not leading—cause for the increase in law school tuition. Comparing the 40% average growth in faculty size with the 45% average increase in salaries more clearly identifies how tuition increases are spent. If law schools eliminated in-house clinical programs, the subsequent savings would amount to less than that saved by requiring each faculty member to teach one additional course every other year, thereby reducing the number of full-time law faculty.

The main benefit of a large faculty—aside from providing more teaching positions for those interested in academia and providing faculty with high incomes and reduced teaching loads—is a greater opportunity to publish more scholarship. Professor Richard Neumann examined legal scholarship and its significance in terms of law school resource allocations at the Journal of Law & Social Justice Symposium

---

67 Crittenden, supra note 53, at 40.
68 See 2008–09 SALT Survey, supra note 66, at 1–3. The four schools with the highest salary and benefits for full law professors were: Emory, with a $212,004 salary and 37% benefits, Harvard, with a $252,450 salary and 25% benefits, Michigan, with a $254,500 salary and 24% benefits, and Minnesota, with $220,000 salary and 30.4% benefits. Id.
69 See id.
70 See id.
71 See id.
72 For example, assuming a full-time law school faculty of 50, a 3 course teaching load, and that no one is on leave, faculty would teach 150 courses or sections of courses per year. If the faculty instead had a 3.5 course teaching load, schools would only need 43 faculty to teach the same number of courses. If one assumes that the average salary and fringe benefits amount to $160,000 (representing a mix of assistant, associate, and full professors), reducing the size of the faculty by 7 produces a savings of $1.12 million per year in faculty salaries and expenses. In addition, schools would realize more savings in fewer summer faculty scholarship stipends, less faculty travel, and at least two fewer faculty assistants. Unless in-house clinical programs employ more than seven full-time faculty and staff at comparable salaries (and few do), simply requiring all full-time faculty to teach one additional course every other year would produce more cost savings than altogether eliminating in-house clinical programs at most law schools. See id.
73 See id. at 42.
entitled *The Way to Carnegie: Practice, Practice, Practice*.74 Professor Neumann estimated that a law review article written by a full professor over one year could cost a law school over $100,000, assuming that as much as 50% of a faculty member’s job is to produce scholarship.75 Of course, for faculty receiving less pay, the cost would be less, but still substantial.76 Professor Neumann discussed the many implications of scholarship costs and he raised a number of issues to consider when assessing those costs in light of the law school’s mission to prepare students for the practice of law.77 Ultimately, he explained, law school is an unsustainable business model because the trend toward reduced teaching loads comes at the expense of actually educating students on how to practice law.78

Professor Brian Tamanaha discusses the plight of law students when trying to decide between an elite school promising lots of debt or a less well-regarded school offering reduced tuition.79 One way to avoid this problem altogether, he suggests, is to limit faculty raises, institute salary reductions, decrease faculty size, increase teaching loads, operate with smaller law school administrations, or grant less money for faculty research, travel, and conferences.80

Professors Neumann and Tamanaha both raise important issues that most law faculties do not seem to consider seriously.81 As the march toward lower teaching expectations and higher salaries indicates, the history for law faculties is one of improving working conditions.82 Unfortunately, law faculty lack incentives to engage in the discussions suggested by Professors Neumann and Tamanaha, as their proposed reforms ultimately may reduce tuition at the cost of professors’ salaries and increased teaching loads.83

75 See id.
76 See id.
77 See id.
78 See id.
79 Tamanaha, supra note 26.
81 See Neumann, supra note 74; Tamanaha, supra note 26; Tamanaha, supra note 80.
82 See Neumann, supra note 74; Tamanaha, supra note 26; Tamanaha, supra note 80.
83 See Neumann, supra note 74; Tamanaha, supra note 26; Tamanaha, supra note 80.
II. **In-House Clinical Legal Education as Part of Experiential Education**

In-house clinical courses are one type of experiential education available at almost all law schools in the United States. An in-house clinical course is a capstone educational experience, where law students work closely under the supervision of faculty to represent clients, draft legislation, or mediate disputes. Other types of experiential education include externship programs, where law students enter a professional legal settings outside of the law school, and simulation courses, where students assume lawyer roles in simulations that usually involve client representation.\(^{84}\)

A. **In-House Clinical Education Programs**

When working as student-lawyers for their clients in an in-house clinic, students learn how to “grapple with the real-life demands of being a lawyer.”\(^ {85}\) Law students are able to practice law and represent clients through clinical programs because every jurisdiction in the United States has adopted a student practice rule.\(^ {86}\) Once admitted, according to the relevant student practice rule, a law student working under the close supervision of a faculty member is able to perform all of the work of a licensed attorney.\(^ {87}\) For example, students in clinical programs often meet with clients and witnesses to gather information, analyze client problems and provide legal advice, review and prepare legal documents such as contracts, wills, or legal briefs, negotiate with opposing parties or their lawyers, and represent clients in administrative hearings, in court, or before other tribunals.\(^ {88}\)

Faculty working as both lawyers and teachers in an in-house clinic engage law students in a process of reflection and self-critique.\(^ {89}\) Professor Donald Schön describes the process of self-critique as teaching

---


\(^{86}\) deNeve et al., *Submission of the Association of American Law Schools to the Supreme Court of the State of Louisiana Concerning the Review of the Supreme Court’s Student Practice Rule*, 4 *Clinical L. Rev.* 539, 549 (1998).

\(^{87}\) Id. at 550.

\(^{88}\) Id.

the law student how to learn from experience, or as he terms, “reflection-in-action.”90 This faculty-intensive educational endeavor is indeed costly, but it is not the most costly aspect of legal education.91

B. Externship Programs

While in-house clinical legal education is expensive due in large part to the low student-to-faculty ratio, other forms of experiential legal education are usually less expensive or, at the very least, no more costly than typical in-class courses.92 For example, lawyering skills courses such as Trial, Pretrial, Negotiation, Mediation, and planning and drafting courses utilize case simulations to teach students. At most law schools, these courses are principally taught by adjunct faculty—practicing lawyers and judges—often paid at a small fraction of the rates of full-time faculty.93

Another form of clinical legal education is an externship or field placement program. These, too, are either less or no more expensive than non-clinical courses and seminars.94 Lawyers and judges conduct the day-to-day supervision of most law student externs and they usually receive no pay.95 Typically, a full-time or part-time faculty member will teach a classroom component to the externship or otherwise facilitate student self-reflection.96 This faculty member, however, may have as many extern students as would be enrolled in a typical course, and cer-

---

90 Id. at 31.
91 See Crittenden, supra note 53, at 40, 42.
92 See Margaret Martin Barry et al., Clinical Education for This Millennium: The Third Wave, 7 CLINICAL L. REV. 1, 25 (2000); Crittenden, supra note 53, at 42.
93 Barry et al., supra note 92, at 25. Law schools typically pay adjunct faculty a flat fee or honorarium, usually $1,500 to $3,000 per course, and some adjunct faculty donate their fees back to the law school or simply teach for free. Id. These simulation skills courses can provide students with valuable insights into both the skills and values necessary to be a lawyer, as students handle legal matters for hypothetical clients. See id. But “[e]ven the best simulation-based courses . . . provide make believe experiences with no real consequences on the line.” Roy Stuckey et al., Best Practices for Legal Education: A Vision and a Road Map 151 (2007). Only when a law student takes the role of lawyer with real clients does he or she confront the dynamic and complex realities a lawyer faces in practice. See Schön, supra note 89, at 31, 33, 35.
95 Swords & Walwer, supra note 94, at 141.
96 Id.
tainly as many students as would be enrolled in a typical law school seminar course.97

Law schools, however, cannot simply place a student with a legal employer and hope that the student learns something.98 A sound externship program is structured to emphasize experiential education and not just experiential learning.99 Externships that fail to provide student training and monitoring can result in students feeling “as if they had been ‘thrown to the wolves’ in the sense that they were simply handed files and told to handle them, being left to their own devices to determine what needed to be done and how to do it.”100 ABA Standard 305 addresses requirements for externship programs.101 Standard 305 requires a law school to demonstrate that it devotes sufficient instructional resources to its externship programs, including training and monitoring of field supervisors, so that there is a demonstrated relationship between the program’s goals and operations.102

Of course, one important distinction often remains between in-house clinics and externship programs: “Many externship programs only offer a small percentage of first-chair experiences for law students.”103 Still, students learn a great deal in externships even without the first-chair experiences typical of in-house clinics.104 Professor Sandy Ogilvy suggested guidelines for externships to emphasize their educational value, including articulated goals that translate into measurable outcomes, appropriate oversight of student experiences both by field supervisors and faculty supervisors, clearly defined responsibilities for

---

97 Id. If the faculty member is an adjunct member of the faculty, then again the cost is much less than a full-time faculty member.
98 See SCHÖN, supra note 89, at 54–55.
99 See id.
100 Lawrence K. Hellman, The Effects of Law Office Work on the Formation of Law Students’ Professional Values: Observations, Explanation, Optimization, 4 GEO. J. LEGAL ETHICS 537, 578 (1991). Professor Lawrence Hellman studied students who worked in a bar-sponsored student practice program through the Oklahoma City University School of Law. See id. at 559, 561. The Oklahoma City University School of Law awarded credit to students only for the externship’s companion course, unlike neighboring University of Tulsa College of Law and University of Oklahoma College of Law, which awarded credit for the entire experience. See id. at 558, 560–61.
102 Id.
103 Peter A. Joy & Robert R. Kuehn, Conflict of Interest and Competency Issues in Law Clinic Practice, 9 CLINICAL L. REV. 493, 494 n.5 (2002). Arguably, unless the externship program provides first-chair experience, students do not have the chance to engage in the responsibility associated with full and complete representation. See SCHÖN, supra note 89, at 33; Joy & Kuehn, supra, at 494 n.5.
104 See SCHÖN, supra note 89, at 33.
students related to learning goals, and mechanisms for program self-evaluation. Externships that implement these or other similar mechanisms to emphasize field supervisor and faculty engagement are likely to enhance student learning from their experiences.

C. The Call for Practical, Practice-Based Legal Education

For over ninety years, studies, committees, task forces, and educators have evaluated U.S. legal education and called for practical, practice-based legal education in addition to legal theory. In 1921, the Carnegie Foundation for the Advancement of Teaching funded the Reed Report, which identified three components necessary to prepare students for the practice of law: general education, theoretical knowledge of the law, and practical skills training. The casebook method’s emphasis on legal analysis, commonly used in most law school courses, fulfilled only the theoretical knowledge objective. The Reed Report derided law schools for not embracing practical skills training.

Starting in the late 1950s and lasting through 1978, the Ford Foundation supported clinical legal education with a series of grants

---

105 J.P. Ogilvy, Guidelines with Commentary for the Evaluation of Legal Externship Programs, 38 Gonzaga L. Rev. 155, 160–61 (2002/03). “The program goals selected by the institution should be translated into measurable outcomes so that the students can determine whether, and to what extent, they are making progress toward achieving the goals and so that the program can evaluate whether the program design is satisfactory.” Id. at 161. The field work supervisor and faculty member should involve the student in drafting an “individualized learning plan,” and both the field supervisor and faculty member should take responsibility for seeing that the goals and objectives are appropriate and have a reasonable opportunity of being fulfilled. Id. at 169–73. “An externship program should require of student participants certain acknowledgments of responsibility for successful completion of the fieldwork placement experience and specific evidence and documentation of learning activities and outcomes.” Id. at 174. Professor Ogilvy describes specifically how the student responsibilities at the externship should relate to learning goals. See id. at 173–76. “[T]he program should have a developed plan for self evaluation that includes the solicitation of evaluation from students, fieldwork supervisors, former students, and other stakeholders in the externship program.” Id. at 176–77. Professor Ogilvy explains both the content and process for engaging in the assessments. See id. at 176–78.

106 See id. at 177.


108 Reed, supra note 107, at 276.

109 See id.; Barry et al., supra note 92, at 5–6.

110 Reed, supra note 107, at 281.
totaling more than $19 million given through the Council on Legal Education for Professional Responsibility (CLEPR). From 1978 through 1997, the United States Department of Education provided additional funding of over $87 million to law schools for in-house clinical legal education. By the end of this funding infusion, at least 147 law schools offered in-house clinical programs.

As grants assisted the growth of clinical programs, members of the bench and bar called for even more lawyering skills training for law students. Perhaps most famously, Chief Justice Warren Burger emphasized the need for law graduates to be better skilled advocates. To assist with the development of clinical education, the ABA adopted a Model Student Practice Rule in 1969. States also adopted student practice rules, which furthered the growth of clinical legal education by permitting law students to represent clients in courts.

The next major call for an increased focus on clinical education came from the ABA’s MacCrate Report in 1992. The MacCrate Report identified lawyering skills and professional values necessary for the

---

111 See Barry et al., supra note 92, at 18–19. The Ford Foundation provided $500,000 to 19 law schools from 1959 to 1965 through the National Council on Legal Clinics (NCLC). See id. at 19. The Ford Foundation provided an additional grant of $950,000 to NCLC in 1965, and NCLC eventually renamed itself the Council on Education for Professional Responsibility. Id. The Ford Foundation gave an additional $11 million to CLEPR to support clinical legal education programs from 1968 through 1978. See Richard Magat, The Ford Foundation at Work: Philanthropic Choices, Methods, and Styles 51 (1979); Barry et al., supra note 92, at 19.

112 Barry et al., supra note 92, at 19.

113 deNeve et al., supra note 86, at 547.


117 Walker, supra note 116, at 1101–02.

ethical, effective practice of law, and called for clinical programs to be the vehicle for teaching them in law school.\textsuperscript{119} Responding to the \textit{MacCrate Report}, the ABA amended its accreditation standards in 1996 to require every accredited law school to offer “live-client or other real-life practice experiences . . . .”\textsuperscript{120} Law schools may satisfy the requirement through offering “clinics or [externship] field placements,” but they need not offer these programs to all students wishing to enroll.\textsuperscript{121}

In 2007, the Carnegie Foundation for the Advancement of Teaching once again examined legal education and published a book commonly referred to as the \textit{Carnegie Report}.\textsuperscript{122} The \textit{Carnegie Report} found a need for the “integration of student learning of theoretical and practical legal knowledge and professional identity.”\textsuperscript{123} Examining legal education in the twenty-first century, the report posited that “[c]linics can be a key setting for integrating all the elements of legal education, as students draw on and develop their doctrinal reasoning, lawyering skills, and ethical engagement, extending to contextual issues such as the policy environment.”\textsuperscript{124} The \textit{Carnegie Report’s} ultimate conclusion is that clinical legal education can play a key role in preparing students for the practice of law.\textsuperscript{125}

Also published in 2007, the book \textit{Best Practices for Legal Education} emphasized a need for students to engage in the supervised practice of law as part of their legal education.\textsuperscript{126} The book notes, “it is only in the in-house clinics and some externships where students’ decisions and actions can have real consequences and where students’ values and practical wisdom can be tested and shaped before they begin law practice.”\textsuperscript{127} Such experience is especially critical after law school when “graduates will become fully licensed to practice law as soon as they pass

\begin{thebibliography}{12}

\bibitem{119} \textit{Id.} at 128, 138–40. The \textit{MacCrate Report} identified ten fundamental lawyering skills: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution, organization and management of legal work, and recognizing and resolving ethical dilemmas. \textit{Id.} at 138–40. The four fundamental values are: providing competent representation; striving to promote justice, fairness and morality; striving to improve the profession; and professional self-development. \textit{See id.} at 213–16, 234–36, 331–32.

\bibitem{120} \textit{ABA Standards for Approval of Law Schools 2011–2012}, Standard 302(b)(1).

\bibitem{121} \textit{Id. Interpretation 302-5}.

\bibitem{122} \textit{Carnegie Report, supra note 107}, at 17.

\bibitem{123} \textit{Id.} at 13.

\bibitem{124} \textit{Id.} at 121.

\bibitem{125} \textit{Id.} at 197–98.

\bibitem{126} \textit{Stuckey et al., supra note 93}, at 154–57.

\bibitem{127} \textit{Id.} at 155.

\end{thebibliography}
a bar examination without any requirement that their work be supervised until they demonstrate competence.”

D. The Continuing Need for Clinical Legal Education

The MacCrate Report, Carnegie Report, and Best Practices for Legal Education together emphasize the need for clinical legal education in law schools to prepare students better. The Ford Foundation, through CLEPR, and the Department of Education devoted millions of dollars to funding clinical legal education because of the quality and value of learning coming from student representation of clients under close faculty supervision. Much like doctors in medical school clinical rotations, law students in clinical courses put the theory they learn in classes to work for clients.

Both legal employers and clients expect graduates to be prepared for the practice of law. Professor John Schlegel noted that the days when most legal employers provide good mentoring are long gone. Indeed, one often hears that legal employers expect to hire graduates who can hit the ground running in the practice of law. While some larger law firms provide new associates with lawyering skills training, some employers—including many prosecuting attorney and public defender offices—prefer hiring graduates who have already received similar training in clinical courses in law school. In the face of these realities, clinical legal education should be an essential part of every student’s education as law schools have an obligation to their students and, most importantly, the public to prepare graduates for the practice of law.

---

128 Id.
129 See MacCrate Report, supra note 118, at 56, 128; Stuckey et al., supra note 93, at 154–57; Carnegie Report, supra note 107, at 197–98.
130 Barry et al., supra note 92, at 19.
131 Stuckey et al., supra note 93, at 155; Walker, supra note 116, at 1139.
133 Id.
135 See Barry et al., supra note 92, at 74–75.
III. Comparing Costs Before Cutting Them

A sound legal education must be a proper combination of doctrinal courses, simulation lawyering skills courses, externships, and in-house clinical courses. The MacCrate Task Force found that, in the 1990–1991 academic year, "professional skills training occupie[d] only nine (9%) percent of the total instructional time available to law schools." While ultimately still insufficient, the number of lawyering skills and clinical courses taught in American law schools has grown significantly since the MacCrate Report’s publication. This change represents some recognition that the objective of law schools, no matter what other goals a school may define for itself in its teaching and scholarship, must be to produce ethical, effective lawyers.

Despite clinical education’s proven importance, some commentators have questioned its cost-effectiveness. In 1980, a report issued jointly by the Association of American Law Schools and the ABA found that the cost per student for clinical education varied greatly depending on the type of clinical program and course. The report observed that variations in costs may stem from factors including the status of the faculty teaching the courses (a factor which affected their relative salaries), student-to-faculty ratios, the number of credit hours awarded, and, in externship programs, the extent of the classroom component. These factors continue to drive costs in clinical programs. As a result, the cost concern often pits in-house clinical courses against externships because the externship structure usually allows higher student-to-faculty ratios, and therefore, lower costs per student. The cost advantage of externship programs has consistently led commentators to predict that law schools will shift resources into externships as the primary form of clinical education.

---

136 See Reed, supra note 107, at 276–80; Barry et al., supra note 92, at 74–75.
137 See MacCrate Report, supra note 118, at 241.
138 See, e.g., Herbert L. Packer & Thomas Ehrlich, New Directions in Legal Education 46 (1972) (questioning clinical legal education “given its high costs”).
139 Swords & Walwer, supra note 94, at 139–43. The faculty resources to support in-house clinical courses are usually greater than faculty resources for externship courses. Id.
140 See id. at 140–45.
141 See id.
While these predictions of the demise of in-house clinical courses have not come true, the threat remains. But, as Professor Beverly Balos observed in 1994, the emphasis on the cost of in-house clinical courses is usually accompanied by failure to consider educational goals and content. Legal educators must weigh the relative costs and merits, not only weighing in-house clinical courses against simulation courses and externships, but also the cost and merits of experiential learning against those of other aspects of law school operations.

In comparing the costs of legal education, it is often difficult to understand the true financial costs of clinical courses versus other courses and other law school expenses. In the past, law schools provided budgetary information to the ABA in ways that made it possible to make more specific comparisons. For example, Dean John Kramer analyzed and compared law school expenditures for 156 ABA-approved law schools from the 1977–1978 and 1987–1988 academic

---

144 See Balos, supra note 143, at 354.
145 See id. Others have also made recommendations for a broader cost-benefit analysis. See, e.g., id. at 352 (arguing that law schools should examine “the entire curriculum and the ways that resources are presently allocated”); Peter A. Joy, The MacCrate Report: Moving Toward Integrated Learning Experiences, 1 CLINICAL L. REV. 401, 404 (1994) (“Upon closer examination, the cost criticism of real-client clinical education is usually myopic. The comparative high costs of seminar classes, supervised research, upper class writing requirements, or maintaining high volume count law school libraries in the computer age are often left out of the cost critique. Moreover, to evaluate effectively any of these programs, one has to look at the benefits of each program in light of their costs.”).
146 See Swords & Walwer, supra note 94, at 140.
147 See John R. Kramer, Who Will Pay the Piper or Leave the Check on the Table for the Other Guy, 39 J. LEGAL EDUC. 655, 658, 661 (1989).
Dean Kramer found that in-house clinical legal education expenditures rose by 92.5% during the 10 year period while the overall costs of legal education rose by 173.9%. Thus, expenditures for clinical legal education rose at a slower rate than overall law school budgets. The MacCrate Task force corroborated this finding, observing that expenditures for in-house clinical education “actually dropped as a percentage of the law school budget from 4.5% to 3.1% during this period.” Thus, major expenses to law schools aside from in-house clinical education exist, some of which appear to be increasing at a relatively rapid rate. It is only prudent that those expenses should be considered in conjunction with the expense of clinical programs when deciding what costs to cut.

**Conclusion**

The analysis of how to reduce the cost of in-house clinical education must take into consideration other law school expenses and the overall objectives of legal education. There is not, however, a reliable method for such an investigation. Without a consistent way to measure the relative benefits of different courses and teaching methodologies for preparing law students for practice, selecting the courses to restructure or eliminate is a hit-or-miss proposition based more on conjecture than evidence.

There are some areas where cost reductions can be attained without potentially sacrificing the quality of law school education. For example, over the past several years, many law school libraries have shifted more resources to electronic databases and away from paper copies. In addition to these efforts, cost savings may also come from regional law library consortiums and specialization of library collec-

---

148 See id. The *MacCrate Report* also relied on this data in its discussion of the allocation of law school resources for professional development of students. See *MacCrate Report*, supra note 118, at 249 n.24.

149 Kramer, supra note 147, at 661. These percentages are calculated from the figures in Table D of Dean Kramer’s Article, which he compiled from the ABA annual questionnaire completed by law schools. See id.


151 *MacCrate Report*, supra note 118, at 249–50. The sources of funding for in-house clinical programs in 1991–1992 showed 68.4% came from the law school or university budget (hard money), 8.6% from the Title IX program, 3.4% from the Legal Services Corporation, 2.7% from attorney fees, 2.3% from state Interest on Lawyer Trust Accounts (IOLTA) programs, 8% in other grants, 3.8% in other non-law school agency funds, and 0.8% in earmarked alumni donations. *Id.* at 250.
Schools could also analyze the cost of courses and seminars that are consistently under-enrolled due to lack of subject-matter interest or enthusiasm for the professor.

Until there is a better understanding of how to measure the benefits of the various aspects of legal education, simply considering the cost of in-house clinical education or other components of legal education may not do service to law students, their future clients, or employers. In that regard, the calls of the MacCrate Report, the Carnegie Report, and Best Practices for Legal Education should not fall on deaf ears. Law schools must place teaching and learning as their first and foremost objectives. This includes all forms of teaching, including the various approaches to experiential teaching and learning. Scholarship also has its place, but it should similarly undergo the cost-benefit analysis employed for other law school expenditures. In sum, every element of the law school structure should be considered for cost saving potential.

This Article raises some of the questions that must be included in discussions regarding the cost of clinical legal education. This dialogue cannot take place in isolation from broader discussions of how to keep down the cost of legal education as a whole. Law schools have never been under greater financial scrutiny and, with legal employment at historic lows and law school tuition at historic highs, the value of legal education is becoming questionable. The longer law faculties delay in addressing these issues, the more difficult the conversations and choices will become.

---

152 See David Barnhizer, Of Rat Time and Terminators, 45 J. Legal Educ. 49, 57 (1995). Professor David Barnhizer recommends creating a limited number of “superlibraries” because “[t]he present structure of law libraries is essentially redundant in the electronic age.” Id. Barnhizer projects that 5% to 10% of law schools’ budgets could be saved, thereby expanding the money available for skills and values teaching. See id.
LOSING MY RELIGION: THE PLACE OF SOCIAL JUSTICE IN CLINICAL LEGAL EDUCATION

Praveen Kosuri*

Abstract: Many law school clinics presume a “social justice” mission—that is, representation of the indigent and under-represented about poverty law issues—as the only legitimate goal for clinic clients and matters. This Article contends that social justice should not be presumed, but rather should be considered an option—among many—to include in a clinic’s pedagogy. If increased experiential learning opportunities for students are a real objective, and clinics are the pinnacle of those opportunities, then broadening the portfolio of clinical offerings to include those that are not focused on social justice should be a valid proposition. The modern clinical legal education movement that began with Ford Foundation-funded clinics has moved from the fringe to the center of legal education. This Article urges that it is incumbent on the leaders of those clinical programs to accommodate different models of clinics, thereby expanding clinical education to more students and unleashing the next phase of innovation and creativity in law school education.

INTRODUCTION

Many of today’s clinical law faculty members presume that “social justice” should be a fundamental characteristic of any clinical offering.¹ In fact, if you attend a clinical conference, you will hear clinicians

¹ See Sameer M. Ashar, Law Clinics and Collective Mobilization, 14 Clinical L. Rev. 355, 360 (2008); Jon C. Dubin, Clinical Design for Social Justice Imperatives, 51 SMU L. Rev. 1461, 1473–74 (1998). Social justice is rarely defined in clinical education conversations, and there is often an assumption that everyone is talking about the same thing. For the most part, it is the assistance of low-income individuals and communities who cannot afford market rate lawyers or have limited access to them. From there, it ranges from individual client representation on “small” matters and “impact” litigation to collective mobilization of disenfranchised constituencies. See Ashar, supra, at 368; Juliet M. Brodie, Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics, 15 Clinical L. Rev. 333, 335–36 (2009); Dubin, supra, at 1475; Stephen Wizner & Jane Aiken, Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice, 73 Fordham L. Rev. 997, 997, 1011 (2004).
proudly extol the social good their clinics do and the audience dutifully applaud this ideology. Rarely, if ever, will you hear any comment about a clinic that does not at least presume social justice.2 This is understandable on many levels. First, no one wants to be perceived as against “doing good” or helping the underprivileged. Second, the audiences at these conferences tend to be peers of the speakers doing the extolling and themselves conduct similar work. To criticize the social justice component of that work would be anathema, not to mention self-defeating. Social justice, after all, is what the modern clinical movement is based on, and clinicians who criticize that concept would be biting the hand that feeds them.

Without the influx of civil rights and poverty law lawyers into law schools during the late 1960s and 1970s, clinical legal education as we know it would not exist.3 Those lawyers became the founders of modern clinical education. When they entered the academy, not every law school in the country had a clinical program.4 There were no Association of American Law Schools (AALS) standards for clinical education.5 The national clinical conferences that now draw hundreds of clinicians every year were the size of a couple of schools’ clinical faculties today.6 To think about how far clinical legal education has come in forty years is truly a marvel. Much of the credit for that growth and stature goes to the founders and their progeny—a group Professor Stephen Reed has labeled the “Great Clinicians”—who fought for and built the programs from which all clinicians benefit.7 Social justice was

---

2 Robert D. Dinerstein, *Clinical Scholarship and the Justice Mission*, 40 CLEV. ST. L. REV. 469, 469 (1992) (“To many people, the relationship between clinical programs and the justice mission of American law schools is so clear as to be self-evident.”).


4 See Barry et al., supra note 3, at 10, 20.

5 See id. at 8–9.


a central tenet to the modern clinical movement. The Great Clinicians brought their fight for civil rights and access to justice from the streets into law schools. Initially they continued to do the same type of work they did in practice but with the assistance of law students, rarely thinking about teaching. In time, however, the Great Clinicians developed a pedagogy that allowed students to learn more from a clinical experience than they would from simply working at a job. Central to that pedagogy were moral lessons about economic disparity, unequal access to the judicial system, and uneven application of laws. Clinicians ultimately framed the pedagogy as “client-centered” lawyering, requiring preparation, performance, and reflection. The Great Clinicians defined social justice, chose the types of cases their clinics would take, and chose the lessons they would impart to students. Those choices conscribed future clinicians who would enter clinical teaching under their tutelage. Over the decades, representing the underserved and subordinated operated as the anchor for clinical legal education, almost religiously. If the modern clinical movement was the Church, then the Great Clinicians were its clergy. The message was clear: to be a good clinician meant believing in the Great Clinicians’ concept of social justice and inculcating students with that belief. To argue that social justice is not essential to clinical legal education is equivalent to Martin

8 See Barry et al., supra note 3, at 12–13; Dubin, supra note 1, at 1464–65; see also Kosuri, supra note 7, at 206–07 (discussing how clinical education developed out of the political and social atmosphere of the 1960s and 1970s); Stephen Wizner & Robert Solomon, Essay, Law as Politics: A Response to Adam Babich, 11 Clin. L. Rev. 473, 473 (2005) (discussing clinical education in the 1960s and stating, “we believed that we were making a political decision—that lawyering on behalf of poor people meant representing the oppressed against entrenched interests, including the state”).

9 See Wizner & Aiken, supra note 1, at 998.

10 Frank Askin, A Law School Where Students Don’t Just Learn the Law, They Help Make the Law, 51 Rutgers L. Rev. 855, 856 (1999) (admitting that he paid little attention to teaching all aspects of lawyering to the law students that worked with him in an impact litigation clinic); see Barry et al., supra note 3, at 9–10; Wizner & Aiken, supra note 1, at 998.


12 See Barry et al., supra note 3, at 13.

13 See Ashar, supra note 1, at 369–70; Blaze, supra note 3, at 947–48; Wizner & Aiken, supra note 1, at 999.

14 See Barry et al., supra note 3 at 12–13; Kosuri, supra note 7, at 206–07.

15 See Kosuri, supra note 7, at 216; see also Karla Mari McKanders, Clinical Legal Education at a Generational Crossroads: Shades of Gray, 17 CLINICAL L. REV. 223, 224 (2010).

16 See Dubin, supra note 1, at 1475.
Luther posting his ninety-five theses to the Castle Church door.\textsuperscript{17} Maybe it is time for our Reformation.

This Article challenges the authority of the clinical clergy to con- scribe the content and subject-matter of law school clinics. These are my five theses:

1. Clinical legal education is not the province of any one con- stituency or ideology.
2. Law schools primarily exist to educate and train law stu- dents—all law students.
3. Clinics are the pinnacle of experiential learning.
4. Clinical faculty should be empowered to create diverse clinical experiences for students.
5. Social justice is still relevant to clinical legal education.

I. Clinical Legal Education Is Not the Province of Any One Constituency or Ideology

When the founders of modern clinical education became law school teachers, they were rebels—iconoclasts that challenged the staid, theoretical world of American law schools.\textsuperscript{18} They brought the protests, injustices, and turmoil of the streets into the hallowed halls of law schools.\textsuperscript{19} Rather than read about neutered disputes in casebooks, the founders of the modern clinical movement allowed students to experience firsthand the fights going on outside the law school walls.\textsuperscript{20} Initially, this appeal was enough.\textsuperscript{21} It reflected the world at that time—activist students working with activist lawyers. Eventually the turmoil in the streets subsided. The fervor that brought forth the clinical movement dissipated. Ford Foundation money that mandated that clinics be

\textsuperscript{17} See id. In the early 1500s, the Catholic Church used the practice of selling “indulgences,” a coupon for a rebate on penitence for sins already committed and confessed to. R.R. Palmer & Joel Colton, A History of the Modern World 75 (6th ed. 1984). Martin Luther was a German priest who disagreed with this practice arguing instead that remission of repentance was between God and the individual, not for the clergy or Church to dispense, and especially not to sell. Id. In 1517 he posted his ninety-five theses to the Castle Church door in Wittenberg, Germany. Id. Luther challenged the belief that the Pope and the Church were the only sources of divine knowledge and argued that all Christians had the power to discern their own religious truths. Id. at 75–76.


\textsuperscript{19} See Wizner & Aiken, supra note 1, at 998.

\textsuperscript{20} See Carey, supra note 18, at 513.

\textsuperscript{21} See Dubin, supra note 1, at 1465–67.
socially progressive dried up. But the rebels, the iconoclasts, had become comfortable in their new habitat. They had learned how to teach—something that they had not been trained to do. And they had an army of law students (albeit a relatively small one) to do the work they cared about. Over the next two decades these former rebels turned law professors channeled energy once directed at civil rights advances and law reform efforts toward fighting battles to entrench themselves in the academy. Students who shared their values fought alongside them. The battles achieved varying degrees of success but, in the aggregate, clinics found a permanent place in law schools. They proliferated and became part of the norm. Those rebels—the Great Clinicians—achieved much of this. But now, they have become the “establishment.” The Great Clinicians no longer challenge the status quo regarding clinical legal education, but rather defend it. They defend their legacy, their sense of social justice, and their niche in the academy. Just as non-clinical faculty like to produce graduates in their image, so do clinical faculty. For the Great Clinicians, that means cultivating social justice lawyers. But the issue is not whether to challenge their accomplishments or their place in history. The issue is whether, in that defense of the past, clinicians are failing multiple segments of students by limiting the types of clinical experiences offered to them.

---

22 See id.
23 See Wizner & Aiken, supra note 1, at 1005.
25 See Blaze, supra note 3, at 958–59.
26 See Barry et al., supra note 3, at 32; Blaze, supra note 3, at 961; Dubin, supra note 1, at 1462.
27 See Barry et al., supra note 3, at 32; Blaze, supra note 3, at 961; Dubin, supra note 1, at 1462.
28 See Kosuri, supra note 7, at 207.
29 See Dubin, supra note 1, at 1466; McKanders, supra note 15, at 235.
30 See Wizner & Aiken, supra note 1, at 1001–02.
31 See Reed, supra note 7, at 253–54.
32 See id.
33 See id.
34 See id. at 250–52. I once compared the modern clinical movement to a house built by the movement’s founders. The founders not only identified space to build their house, but they designed, furnished, and maintained it. It may have begun as a temporary dwelling that was never intended to last but, through the years, the founders strengthened and renovated it. Originally, the site of the house was on the edge of town and away from the main street. Invited guests needed to travel to get there. This was fine for the founders because they were not interested in entertaining lots of people. Instead, they wanted people that were like them; who were interested in the food they cooked and the drinks they served—people who wanted to stay awhile. Gradually, the town began to expand. As it did,
Though the Great Clinicians would likely not claim that they own all of clinical legal education, they have co-opted it and are in constructive possession of it. They are clinic directors, senior faculty members, and hiring committee chairpersons. They are the gatekeepers to the academy. As a result, there is a self-perpetuating aspect to clinical teachers just as there is for non-clinical teachers: we hire folks that look like us. In the early years, this approach made a lot of sense; there were not very many clinical professors to begin with and the few that did exist needed comrades in arms. Decades of building those ranks with people who shared the ideology, however, has resulted in an intellectual homogeneity.

We assume too much, discuss too little, and dismiss alternative perspectives. Politically, we defend our territory. The Great Clinicians explicitly staked our place in the academy with social justice markers. Movement of those markers or encroachment by foreigners is considered trespass on sacred ground. Clinical faculty fear being displaced. Going forward, however, we must shed that territoriality to enhance our position in the institution by promoting more clinical opportunities.

II. LAW SCHOOLS PRIMARILY EXIST TO EDUCATE AND TRAIN LAW STUDENTS—ALL LAW STUDENTS

Law school is first and foremost about educating students. Even though faculty members often use their positions to pursue their own social and political agendas (both inside and outside their institutions), without students, there are no law schools. Thus, the fundamental goal of every law school faculty member should be to educate students as ably as possible. The genius of Christopher Columbus Langdell—appointed Dean of Harvard Law School in 1870—was not in developing the clinical house began to receive visitors. Where once it drew mostly those who shared the founders’ taste for the wilderness, it then drew people who just wanted to drop in. The visitors had heard that the founders served meals rich in sustenance (much better than the town cafeteria). The founders, however, were not so keen on these new visitors. The founders suspected they were in their house for all the wrong reasons. They wanted the meat, but they didn’t want to drink the punch. The punch, for the founders, was the essential part of the meal. It may be that the clinical community has outgrown a single house. The Great Clinicians anchored a new neighborhood featuring an appealing style of architecture favored by new residents seeking their own living space to entertain their own guests. This is a success story, not a failure. Kosuri, supra note 7, at 216.

35 See Reed, supra note 7, at 253–54.
36 See Wizner & Aiken, supra note 1, at 998.
37 See Dubin, supra note 1, at 1475.
38 See Reed, supra note 7, at 243, 253–54.
39 See Ashar, supra note 1, at 411.
the case method of legal education, but rather in developing a method that was so efficient as to make law schools more profitable. The case method allowed education of large numbers of students in a methodical and replicable manner. Clinical legal education, on the other hand, is relatively inefficient. It requires more time, more professors, and adds the complexity of real life into the equation. Yet, the return on investment for clinical education, at least to students, is arguably greater than the return acquired through traditional, large, Socratically-taught lecture classes. Almost eighty years after early-twentieth century scholar and professor Jerome Frank asked Why Not a Clinical Lawyer-School?, experiential learning has begun to permeate doctrinal classrooms. Increasingly, podium faculty are contextualizing doctrine by introducing lawyering. This is a great development—much in line with the 2007 Carnegie Report’s urging to better integrate theory and practice. Presumably, incorporation of practical lawyering skills into these courses is done because it enhances students’ education.

Clinical professors must also remember that educating students is the primary goal, and service to clients the second order. Of course, clinicians must maintain their professional responsibility to clients once representation commences. Clinics, however, should let their teaching goals drive client selection, rather than the reverse. Clinical faculty that use clinics as personal legal services firms run the risk of using law school resources for purposes other than the educational mission. Keeping priorities in order mitigates this risk.

To satisfy this educational priority, clinical opportunities should exist for every law student who wants one. The notion that clinics are

41 See Chemerinsky, supra note 40, at 38.
43 See Amsterdam, supra note 42, at 618.
46 See id. at 12.
47 See id. at 13.
48 See David F. Chavkin, Am I My Client’s Lawyer?: Role Definition and the Clinical Supervisor, 51 SMU L. REV. 1507, 1513 (1998).
49 See Adrienne Jennings Lockie, Encouraging Reflection on and Involving Students in the Decision to Begin Representation, 16 CLINICAL L. REV. 357, 365–67 (2010).
only for “public interest” students or special factions of students must be abandoned. Every law student should feel welcome in a clinic regardless of ideology, background, or interest. This is not to suggest that most clinicians overtly prevent students who do not share their ideology from enrolling in their clinics, but tacit signals may nevertheless make many students feel uncomfortable with clinics that espouse a different ideology, or worse, fear being judged by professors. Additionally, some students may still be forming their ideology; others may not have one at all. Students may be dissuaded from working in a clinic for fear that clinical faculty will dogmatically preach rather than allow students to formulate their own beliefs and values. Incorporating more students in clinics, however, will only enhance the learning experience for everyone. More varied perspectives, greater interaction, and more discussion will only lead to a profounder understanding of issues, people, and values.

III. Clinics Are the Pinnacle of Experiential Learning

The greatest contribution of clinical legal education is not in creating a haven for public interest-oriented law students or in promoting social justice causes, but rather in a methodology that teaches students how to learn from experience, whatever that experience may be. For ninety years, various groups have called for greater experiential learning opportunities in law schools. In the midst of the greatest economic recession in a generation and a contracting legal marketplace affecting all law schools and every type of law practice, student demand for practical legal training is understandably heightened. Law school administrators are already responding to new pressures by increasing the number of simulation courses and externships. Clinics are the top


51 Chemerinsky, supra note 40, at 37 (chronicling the 1921 study supported by the Carnegie Foundation for the Advancement of Teaching, Jerome Frank’s 1933 article extolling a “clinical law school,” a 1944 AALS report edited by Karl Llewellyn, the 1992 MacCrate Report, and the 2007 Carnegie Report).


of the pyramid in terms of experiential learning. Clinicians should embrace this leading role and find ways to bring that superior experience to more students.

In slow economies, students need to develop marketable practice skills. In years past, law firms invested time and money to develop young lawyers who would repay that investment by generating many years of billable hours. Law firms now, however, demand associates who can hit the ground running before they depart to another job, often within the first five years of practice. This change in the market has pushed practical training downstream to law schools.

For law school administrators, simulation courses and externships are far cheaper alternatives to clinics. A clinic, however, offers a richer experience that cannot be replicated by other experiential learning. Clinical pedagogy is the multi-faceted jewel in the crown of clinical legal education. Preparation, performance, and reflection are key elements to any clinical experience regardless of subject-matter. The signature feature of clinical pedagogy is the students’ placement in the primary role of representative, where faculty members use those experiences as focal points for further inquiry. This pedagogy can be applied in any clinical experience and unlocks discussions about varied political, economic, and social issues. Clinical faculty should bring that experience to more students regardless of whether it explicitly includes traditional notions of social justice.

IV. CLINICAL FACULTY SHOULD BE EMPOWERED TO CREATE DIVERSE CLINICAL EXPERIENCES FOR STUDENTS

Legal realists like Jerome Frank envisioned clinical cases to include more than just issues of poverty law. Clinicians argue that it is important to expose students to social justice issues in clinics because most law students would not otherwise have any experience with under-

---

55 NALP Found. for Law Career Research & Educ., Update on Associate Attribution: Findings from a National Study of Law Firm Associate Hiring and Departures—Calendar Year 2010, at 4 (2010) (stating that “70% of 2010 departing associates left their firms within five or fewer years of their arrival”); Thies, supra note 54, at 605-06.
56 Thies, supra note 54, at 611.
57 See Frank, supra note 44, at 917–18.
served communities or poverty law.\textsuperscript{58} This assumes a lot about law students, but even if true, it deliberately excludes an equally valuable learning experience for students lacking exposure to many other strata of American society.

The question is why should law school clinics be the exclusive province of one over the other? One could imagine a slew of law school clinics not rooted in traditional poverty law or social justice issues. Some examples include intellectual property, securities, venture finance, trusts and estates, tax, and bankruptcy. Many of these are related to business, though they may include litigation as well as transactional work. Though ideologically neutral on their face, one could create a social justice agenda to attach to most of these clinics, but the question is why is that necessary? Scholars often depict the clinical dichotomy as one of skills versus social justice, but this overly simplifies what it is to be a lawyer.\textsuperscript{59}

Clinicians tend to marry lawyering values with social justice values.\textsuperscript{60} This is simply not accurate. There are, for example, a whole host of values activated by the lawyer-client relationship. Any clinic that involves clients will involve lawyering competencies that naturally involve more than technical skills. The question is how those competencies are taught—through social justice cases or some other types of cases. Lawyers are taught to zealously advocate for their clients. The professional rules of conduct carefully distinguish a client’s beliefs from that of the lawyer. Yet, to assert that the only values worth holding are social justice values removes the neutral-partisan ethic that is central to the profession.

Furthermore, different approaches and notions of social justice are visible through legal practice. In litigation, there are lawyers on each side of a dispute. One side is often painted as the “bad guy” when, in fact, the conflict is more nuanced. In an ideal world, students would be taught about each perspective. Instead, clinicians tend to champion their own paradigms and values, dismissing alternative views. The notion that if one does not agree with the clinical teacher then he or she is “against” social justice is dogmatic. Instead, both parties may simply have different notions of justice or a different hierarchy of values. For law students, this is an important point. Should the goal of clinical education be to inculcate students so that they see the world the way clinical faculty view it and champion their causes, or should it be to em-

\textsuperscript{58} See Dubin, supra note 1, at 1476–77.
\textsuperscript{59} See, e.g., Wizner, supra note 24, at 327, 330, 332.
\textsuperscript{60} See, e.g., Dubin, supra note 1, at 1475, 1477–78; Wizner, supra note 24, at 329–31.
power students to develop their own understanding of the world and their own values? If the latter, then how must the social justice model be incorporated into clinics?

Most clinicians rightly acknowledge that only a few clinical students will go into public interest careers. As such, most of them are in clinics to learn transferable competencies. Social justice clinics teach many of those competencies, but so can many other types of clinics. Failure to recognize this possibility risks sending a message that the only legitimate clinic is one rooted in social justice, even if another might be a better teaching vehicle.

A venture finance clinic serves as a good example. Setting student practice rules aside, this type of clinic would, on its face, be devoid of traditional social justice issues. Students would represent businesses who are seeking to acquire early stage investment from financial sponsors. The legal work might involve negotiation, document and financial review, and contract drafting. Additionally, students must understand power dynamics between parties, understand various motivations, and learn how to manipulate them to the client’s advantage. A successful representation results in a client receiving funding. This clinic is by and large devoid of social justice. But why is it not a legitimate clinical offering? What is being taught is much more than “skills.” The richness of the experience is not in drafting the agreements, but in learning what motivates people and how to align interests to achieve a desired outcome. Professional ethics are still triggered, though not necessarily in the social justice context. Learning these things in the context of corporate and securities law may in fact benefit a student’s career more than representing a wronged social security beneficiary. Regardless of the clinical context, non-social-justice-oriented clinics should be valid offering for students, thereby allowing them to choose their own pursuits in the clinical arena.

Students—with the right information—are quite capable of discerning the differences between various practical experiences. Law schools can assist by highlighting the spectrum of lessons presented in each type of experience from simulation to live-client clinic. Similarly, with full information, students can discern the differences between non-social justice clinics and social justice ones. They can prioritize their own values and learning objectives.

I purposely do not address the student practice rules in this essay for three reasons. First, every state has their own. Second, they may not apply to all clinical experiences. Third, if law schools had the inclination to modify them to accommodate a particular type of clinic, I have faith that they could figure out how.
Clinical legal education and clinical educators are not a monolith. When the modern clinical movement was established, clinicians brought a wide assortment of cases into the clinical fold. Though the subject matter may have been the personal preference of the instructors, law schools gave them the freedom and trust to turn whatever those cases were into rich educational experiences. Clinics should reestablish that academic freedom. Every clinician should be free to develop teaching objectives and design clinics without mandates about the type of case or a social justice perspective. Schools must set the curriculum so that clinics do not compete or overlap in subject matter, but they should not tell professors what to teach or how to teach it. Law schools should hire faculty they trust to educate their students and then give them the power to do so. No school would do otherwise in a contracts course or a torts course, but clinics prescribe social justice.

V. Social Justice Is Still Relevant

Despite how it may appear, I believe in social justice. I even believe that law school clinics should be free to champion social justice causes. In fact, I am firmly engaged in achieving social impact through the work of my clinic—a transactional clinic at the University of Pennsylvania.

Social justice clinics can provide rich, meaningful experiences to students while allowing them to develop transferable practice competencies that will be useful to them years into practice. I have worked to make my clinic such an experience. But, to be clear, when clinical faculty champion a social cause, it is almost always their cause. Law students do not have a say in what it is. My clinic is the only transactional clinic at my institution. As such, I attract students who wish to explore transactional careers in corporate and securities, intellectual property, and tax practices. I must make sure that my focus on social impact does not impede my goal to train and educate great transactional lawyers.

Despite claims to the contrary, the social justice mission in law school clinics is alive and well. Educating students about economic disparities, unequal application of the law, and abuses of power are important lessons. The strength of these lessons and the valuable service provided to clients will sustain social justice clinics regardless of how

62 See Wizner, supra note 24, at 330.
64 Dubin, supra note 1, at 1474 (concluding that the demise of social justice imperatives in law school clinics is premature).
many other offerings enter the fold. Clinicians need to have confidence in the pedagogical model and not fear the introduction of new clinics with non-traditional subject matter. Independent of the subject matter of a clinic, it is lawyering values that we should care most about.

**Conclusion**

I thought about starting this Article with an apology and a disclaimer—an apology to those that would be offended by what I have to say and a disclaimer to let folks know that I do believe in social justice. The fact that I considered these things highlights the reason why clinicians need more ideological neutrality in clinical programs and discourse. Social justice causes are laudable and incredibly important. I am not advocating that social justice should be removed from all clinics. Instead, I espouse a more expansive and inclusive view of what clinics can do for law students. Experiential learning is here to stay and clinical legal education in particular has been a tremendous success. Clinical pedagogy enhances experiential learning in a way that simulation courses and externships do not. Clinicians should embrace that success and look to share it with more students.

We live in an increasingly factionalized and partisan world. When clinicians champion one world view to the exclusion of another, we are just aiding in that factionalization. Law schools are meant to allow students to explore competing theories and develop their own ideologies. Clinics that are intellectually and ideologically diverse further that mission. Education of students should drive service choices, but each faculty member should have the freedom and independence to structure and design their clinics according to their teaching objectives.

As more students look for competitive advantages when they enter the workforce, more will be driven to clinics. Clinicians should strive to provide a portfolio of opportunities that appeal to a wide array of students. Even if clinicians think that social justice clinics are the Cadillac sedans of clinical education, there is nothing wrong with offering a Chevy pick-up truck, too. Different experiences can serve different purposes. There is no reason to preempt one over another merely because of personal preference or ideology.

Martin Luther ended up breaking from the Catholic Church. He was unable to convince the Church to concede that its followers had the power to attain salvation on their own. Clinical legal education, however, does not need a Reformation. It needs to avoid one by entertaining new perspectives and alternatives to social justice clinics while still preserving the core of the modern movement—its pedagogical
method. In my estimation, law school administrators will begin to pressure clinical programs to expand their offerings to include non-social justice clinics. If clinical programs do not take proactive control over that process, clinical educators risk a schism brought about by a Reformation thrust upon us.
IS SOCIAL JUSTICE STILL RELEVANT?

Stephen Wizner*

Abstract: Social justice remains relevant in teaching clinical legal education. The clinical legal education model teaches the basics of lawyering not otherwise taught in law school: a practical understanding of the practice of law, how to deal with difficult legal ethics issues, professional skills, and the doctrines that matter. Clinical education also teaches a more personal lesson; it instructs law students to question the machinery of society, instills socially responsible values, and teaches students to address social inequities. These latter lessons all stem from the social justice mission of clinical legal education. While times may have changed since the movement’s beginnings in the 1960s and ’70s, and clinical professors have become further entrenched in academia, the social justice mission continues to drive student learning and instill values not otherwise taught in law schools. As clinics evolve to meet the future demands of law schools and students, they should not eschew their social justice roots, but rather expand the range of educational experiences while continuing to serve under-privileged clients through new and innovative clinics.

Introduction

From the beginning of clinical legal education, one central goal has been to engage law students in the pursuit of social justice through the provision of legal assistance to the poor and others who lacked access to legal services.1 Clinical pedagogy is designed around four tenets. It teaches students to employ legal knowledge, theory, and skills to meet individual and social needs; exposes students to the ways in which the law (and lawyers) can both advance and subvert the achievement of social justice and public welfare; instills in students good professional values; and provides supervised opportunities for students—acting in the role of lawyers—to learn to exercise judgment in a professionally competent, ethical, and socially responsible manner.2

© 2012, Stephen Wizner.

* William O. Douglas Clinical Professor Emeritus, Professorial Lecturer, and Supervising Attorney, Yale Law School.


Clinical education plays a significant role in exposing students to social and economic injustice. It accomplishes this by offering students well-taught and well-supervised opportunities to provide legal services to low-income and other underserved individuals, groups, and communities. Law students learn about their clients’ social and economic circumstances first-hand, not simply through studying appellate court decisions, legislation, social policy, and statistics.\(^3\)

Part I of this Article locates the origins of clinical legal education in the social justice movements of the 1960s and '70s. In Part II, I describe my own journey from being a poverty lawyer at a civil legal services organization to a clinical professor at Yale Law School. Part III outlines what I believe are some of the objectives of clinical legal education in light of its social justice origins. Finally, Part IV posits that social justice remains relevant in clinical legal education.

I. THE SOCIAL JUSTICE ROOTS OF CLINICAL LEGAL EDUCATION

Toward the end of the tumultuous decade of the 1960s and in the early years of the 1970s, social and political forces in America pushed open the doors of American law schools for the entry of clinical legal education.\(^4\) Students entering law schools at that time were exposed to—if not participants in—demonstrations, sit-ins, freedom rides, or other political actions protesting the Vietnam War and supporting the Civil Rights Movement, the War on Poverty, women’s rights, the rights of people with disabilities, and other movements for social justice and change.\(^5\) Not only had they seen and been part of the social activism swirling around them, they had witnessed the participation of activist lawyers in struggles for social justice.\(^6\) This struggle occurred around the same time as the inauguration of both the War on Poverty and federally-funded legal services.\(^7\)

---

\(^3\) See id. at 329; Wizner, supra note 1, at 1934.

\(^4\) See Margaret Martin Barry et al., Clinical Education for This Millennium: The Third Wave, 7 CLINICAL L. REV. 1, 12–13 (2000).


\(^6\) See Holland, supra note 5, at 514; see, e.g., Sullivan et al., supra note 5, at 92; Barry et al., supra note 4, at 12; Kosuri, supra note 5, at 12.

These students were critical of the education offered by their law schools.\(^8\) They believed that law schools supported and perpetuated an unjust status quo.\(^9\) They complained that the existing curriculum failed to prepare them to engage as lawyers with issues of social justice.\(^10\) Accordingly, the belief that legal education should be relevant to students’ concerns about poverty, racism, and discrimination drove their demands for reform.\(^11\)

With the infusion of financial support from the Ford Foundation—spearheaded by a Foundation officer named William Pincus—law schools began to apply for and receive seed-money grants to support experiential learning initiatives taught by teacher-practitioners, wherein law students would learn to provide legal services to low-income and other underrepresented clients.\(^12\) Pincus, who happened to be a lawyer, openly criticized the existing legal system and law schools for operating under the false assumption that everyone in need of legal services could obtain them.\(^13\)

Student demands for curricular reform, driven by the social activism of the times and the availability of financial incentives, opened the doors of legal academia to clinical education.\(^14\) The founders of the modern era of clinical legal education did not envision clinical education simply as a way to enrich legal education with practical experience and skills training.\(^15\) They were responding to the social ferment and legal rights movements of that period in the United States, and saw clinical education as a means to expose law students to the legal needs of the poor, minorities, and other vulnerable or legally underprivileged individuals, groups, and communities.\(^16\) They saw it as an opportunity to involve law students in the struggle for social justice in America, and to fulfill what they believed to be a public service obligation of law schools.\(^17\)

\(^8\) See Barry et al., supra note 4, at 11–12.
\(^9\) See id.
\(^10\) See id.
\(^11\) See id.
\(^12\) See Wizner, supra note 1, at 1933.
\(^13\) See id.
\(^14\) See Wizner, supra note 1, at 1933; Holland, supra note 5, at 514.
\(^16\) See id. at 233–34, 238.
During the infancy of the modern clinical legal education movement, Pincus identified the pursuit of social justice as a primary educational value. Clinical education, he believed, "can develop in the future lawyer a sensitivity to malfunctioning and injustice in the machinery of justice and other arrangements of society . . . ." Pincus asserted that law students need “to learn to recognize what is wrong with the society around [them]—particularly what is wrong with the machinery of justice in which [they are] participating and for which [they have] a special responsibility.”

II. BECOMING A CLINICAL PROFESSOR

I arrived in New Haven in the fall of 1970 to begin what would turn out to be my life’s work—law school clinical teaching. I had been a neighborhood legal services lawyer during the 1960s, a time when many of us in the business believed—really believed—that lawyers had the power, and therefore the obligation, to use the law to achieve social justice. What, then, could have led me to give up my comfortable sinecure in a vermin-infested, store-front legal services office on New York City’s (at that time) economically impoverished Lower East Side to risk the unknown lurking within the hallowed halls and ivy-covered walls of Yale Law School?

I had read Clarence Darrow’s autobiography and the example of his life as a crusader for justice on behalf of unpopular clients led me to apply to law school. Then, as a law student at the University of Chicago, I was inspired by Bobby Kennedy, who came to the law school to invite and challenge us to commit ourselves to the struggle for social justice and the alleviation of poverty in America.

My own legal education at the University of Chicago in the early 1960s had consisted of liberal doses of legal realism administered by the likes of Karl Llewellyn, coupled with volunteer work in a neighborhood office of the Chicago Legal Aid Society located in the basement of the law school (the forerunner of the school’s current clinical program, the excellent Mandel Legal Aid Clinic). The notion of learning

19 Id. at 31.
20 Id. at 32.
to practice law under the tutelage of members of the law school faculty never even occurred to us. A few members of the faculty, however, did take on controversial cases. Professors Malcolm Sharp and Harry Kalven represented Lenny Bruce in the appeal of his obscenity conviction to the Illinois Supreme Court. Malcolm Sharp participated in the defense of the Rosenbergs. Karl Llewellyn offered a simulation course that he called “Legal Argument Workshop.” But law students belonged only in the classroom and the library—not in a law office or in court.

So, in the spring of 1970, when I received a telephone call from Dan Freed, a former colleague in the Kennedy Justice Department who had gone on to teach at Yale Law School, I was not even tempted by his invitation to apply for a position as supervising attorney in a so-called “clinical program” that Yale was about to initiate. I had no idea what a clinical program was, and I certainly had no intention of abandoning my legal services clients and comrades to come to an elitist institution like Yale. Dan pretended to accept my sanctimonious response to his invitation, but asked whether I might be willing to take the train up to New Haven for a day just to consult with him and his colleagues and offer my thoughts and advice about how they should design the new program.

I was wholly unprepared for what awaited me when, a few weeks later, I arrived on the doorstep of the Yale Law School. Dan’s “colleagues” turned out to be a dozen or so bright, enthusiastic, sophisticated law students—one of whom, a young man named Avi Soifer, later became Dean of Boston College Law School—who boldly confronted, grilled, and cross-examined me with questions, opinions, and ideas about the law and legal education. At first I was startled, then amused, and finally intensely engaged intellectually and emotionally with them in a discussion of their desire to use the law they were learning to pursue social justice and social change. I was moved by the idealism and passion of these outspoken students. What fun it would be, I thought, to practice law with students like these. I was hooked.

During my years as a legal services lawyer we did have law students helping out in our neighborhood offices—mostly as volunteers, a few for law school credit. Their role was to assist the lawyers by performing legal research and fact investigation. We did not consider ourselves to be their teachers, except to the extent necessary to assign and supervise their work. They were there solely to assist us in representing our cli-
ents, and their learning was a byproduct, not the purpose, of doing the work. So, in the summer of 1970, the prospect of practicing law with law students—of including in students’ legal education the experience of actually doing something with the law that might make a difference, contribute to positive social change, help to create and sustain a more just society, and serve to democratize the legal system—induced me to leave the Lower East Side for Yale and become a clinical professor. My biggest adjustment when I became a clinical professor was to change my relationship with students. Rather than having students help me represent my clients, I had to learn to hand over responsibility for representation to them and to help them with their cases. To fulfill that role, I had to become a teacher. I had to learn to teach students how to relate to clients and to handle their cases, to supervise them as they did so, and help them learn from that experience. As the students learned and became more competent, I soon realized that having a coterie of well-trained and well-supervised students enabled me, through them, to represent more clients and handle more cases than I ever had as a legal services lawyer and to take on complex litigation that I could not have handled efficiently on my own.

In my first couple of years as a supervising attorney, I often supervised or co-supervised as many as twenty-five students. I did not teach classes. I did not attend faculty meetings. I did not attend conferences. I did not sit on committees. I did not write articles. I spent my days accompanying students to courts, administrative agencies, prisons, mental hospitals, government offices, and other practice venues. I spent the rest of the time brainstorming with students about their cases, reviewing and editing pleadings, motions, legal correspondence, memoranda and briefs, mooting students to prepare them for court appearances, and preparing them for negotiations and trials.

While after decades of teaching I continue to do all of these things, I now supervise fewer students, represent fewer clients, handle

---

22 I do not mean by this description to undervalue the students’ substantial contributions to our efforts. Nor do I want to give the impression that we did not like having those idealistic, socially committed law students working with us in our neighborhood offices. My point is simply that, while the students’ involvement in our legal services work assisted us in our representation of clients, we did not consider teaching as our function or obligation.

23 I have described elsewhere my becoming a clinical teacher and the adjustment it required. See Wizner & Aiken, supra note 17, at 1003–04; Stephen Wizner, Walking the Clinical Tightrope: Between Teaching and Doing, 4 U. Md. L.J. RACE, RELIGION, GENDER & CLASS 259, 260–61 (2004).
fewer cases, and instead spend a good deal of the time that I used to devote to those activities on classroom teaching and other professorial activities. I spend a lot of my working hours doing things that I did not do when I was a legal services lawyer, or in my early years as a clinical professor.

Notwithstanding my evolution over the years from supervising attorney to clinical professor, I continue to see my teaching role as one that encourages and empowers law students to provide access to justice through legal services to underprivileged and underserved individuals and communities. In so doing, I hope to remain faithful to my own past as a legal services lawyer, to the historical roots of clinical legal education, and to what I believe to be the public service obligation of the law school.

III. THE OBJECTIVES OF CLINICAL LEGAL EDUCATION

The methodology of clinical legal education consists of professional skills training through the supervised provision of legal services to real clients; that, however, is not the goal. The educational goal is far more ambitious. Beyond skills training, clinical legal education leads law students out of the protected environment of law school classrooms into the real world of law so that they may gain a deeper understanding of how legal doctrines and legal theories actually work (or fail to work), learn about the actual functioning (and malfunctioning) of the legal system, and develop good professional values and an appreciation of the important roles that lawyers play in society.24 An equally important goal is to expose students to social injustices in society and to the potential (and limits) of the law and lawyers in addressing those injustices.25

Clinicians therefore have many responsibilities as both lawyers and teachers. These include: (1) offering students practical experience through the supervised representation of clients; (2) teaching the professional skills students need to provide competent legal representation; (3) teaching students substantive legal doctrine, procedural rules and practices, and legal theory as they relate to the representation of their clients; (4) assuring that students actually provide competent legal services to their clients; (5) teaching legal ethics and professional re-

---

24 Wizner, supra note 1, at 1934.
sponsibility; (6) instilling in students good professional values and guiding them in their development of socially responsible professional identities; (7) exposing students to social injustices and inequalities in society and the role that lawyers can play in addressing them; (8) teaching students about the potential (and limits) of law and legal process in achieving social change; (9) discussing with students the relationship between social policy and advocacy, and between theory and practice; and (10) raising basic jurisprudential questions about the functions of law and the role of lawyers. Clinicians should accept all ten of these challenges, even when acknowledging the tensions that exist between meeting these educational goals and fulfilling professional obligations to clients.

While clinicians should focus their teaching on the supervised provision of legal services to low-income and other underrepresented clients, they must also recognize that there is more to clinical education than simply offering law students the opportunity to learn lawyering skills. Clinicians must aspire to inculcate in their students an understanding of and concern for the circumstances of those who live in poverty or otherwise lack access to legal services and a feeling of professional responsibility for increasing their access to justice.

This conception of clinical legal education should inform all of our work as clinicians, from designing clinics, to client and case selection, to supervision and teaching. As clinicians, we must continually ask ourselves: What are we teaching? How are we teaching it? What knowledge are we instilling in our students? What social, political, and ethical values are we seeking to inculcate in our students? And how are we teaching our students to address needs in the broader community, particularly toward those who cannot afford to pay for legal services? Achieving all of these objectives is not easy. Nevertheless, when we take on the challenge and the responsibility of being clinical professors, we must be ambitious in the goals we set for our teaching and our students’ learning.

IV. THE CONTINUING RELEVANCE OF SOCIAL JUSTICE IN CLINICAL LEGAL EDUCATION

This is the fifth decade of the modern era of clinical legal education—an era that has witnessed the widespread introduction of experiential service learning into American (and some foreign) law schools

26 See Wizner, supra note 2, at 327–28.
and produced a new breed of practice-oriented law professors. This is an appropriate moment to pause and reflect on the continuing relevance of the social justice and service aspirations of the founders of this major reform in American legal education.

The modern clinical legal education movement is rooted in a social justice mission.\textsuperscript{27} That mission envisions clinical legal education as having both a political and moral purpose.\textsuperscript{28} The methodology of clinical legal education is to engage law students in supervised legal services work on behalf of low-income and other underrepresented clients, to teach students to recognize and reflect on the responsibility to democratize the legal system, and to pursue justice.\textsuperscript{29}

Even as clinical professors have developed new and innovative approaches to clinical education, a social justice mission continues to inform and drive the majority of clinical program design, teaching, and student learning. Nevertheless, in some transactional, environmental, legislative advocacy, and other clinics—particularly those that do not represent individual clients but rather partner with advocacy organizations or serve as legal counsel to institutions, groups, or communities—the work that students do may not necessarily be limited to serving only the interests of low-income or other vulnerable beneficiaries. Similarly, as clinicians gain acceptance as members of the legal academy and climb the academic status ladder from “supervising attorney” to “clinical professor,” they increasingly yield some of the time originally spent on direct supervision of students’ legal representation to classroom teaching, legal scholarship, serving on law faculty committees, attending conferences, and other “professorial” activities.\textsuperscript{30}

Notwithstanding programmatic innovations and the “professorialization” of clinicians, the pursuit of social justice can and should continue to be a central mission of clinical legal education. Law school clinics can maintain their focus on the provision of legal services to low income and other under-represented clients in all of their clinical work, whether it be direct individual client service, impact litigation, transactional lawyering, legislative advocacy, environmental defense practice, or any of the other increasingly varied legal activities in which contemporary law school clinics are engaged.

Clinical educators need not make the choice of \textit{either} serving under-privileged clients \textit{or} providing a wide range of educational experi-

\textsuperscript{27} See Aiken, \textit{Provocateurs for Justice}, supra note 25, at 287.

\textsuperscript{28} See Wizner, \textit{supra} note 1, at 1936.

\textsuperscript{29} See \textit{id.} at 1934–35.

\textsuperscript{30} See \textit{Wizner, supra} note 23, at 259.
ences for students. They can do both. For example, transactional clinics can and should focus their economic development and economic justice work on providing services to low income clients in assisting small businesses, non-profit community organizations. The Yale Community and Economic Development Clinic did exactly that by performing the necessary legal work to assist community development corporations in opening a supermarket in a low income neighborhood and creating a community development bank to serve the needs of the unbanked poor. Similarly, environmental clinics can serve as environmental justice advocates, helping communities with large, low income populations to fight pollution and other environmental problems.

Clinics need not, and should not, abandon their social justice roots, even as they develop new and innovative approaches to clinical education. Due to their institutional support and ability to provide legal services without charging fees, clinics have the opportunity to teach students the importance of providing needed legal services and the value of making the law work for everyone. Clinical instruction and practice can enable students to experience the human side of law practice when they serve real clients, directly or indirectly. When clinics focus their work on the provision of legal services to or on behalf of low income clients—people who have little or no access to the legal assistance they need—students can experience the professional and personal satisfaction of making a difference in their lives.

**Conclusion**

It may not be possible for law school clinics to recapture the passion for challenging injustice and the experience of participating in a struggle for social change that animated legal services and civil rights lawyers in the 1960s. The feeling of being part of the movement for social justice that inspired activist lawyers no longer seems to be present in public life. But those who have the privilege of being clinical professors can still strive to re-create some of that spirit through teaching and the experiential learning opportunities offered to our students.

Some years ago, my clinical colleagues and I proposed to our students that they draft a mission statement for our clinical program that would define and inspire our efforts. The students produced a statement of principles that they called a “manifesto.” It concluded with the following words:

At the heart of the education provided by our clinical faculty stand individual clients and the interests of disadvantaged people. Because of this focus, the clinic provides a unique con-
text in which to explore the nature of advocacy as a form of service to one’s community. It is a place where we as students have been able to explore the basic questions of our common calling to the law.31

It is that lesson that clinic students should—and deserve to—learn. And it is for that reason that clinical legal education must remain connected to its social justice roots.

31 A Manifesto from the LSO Board (Fall 1991) (on file with the author).
SEDATING FORGOTTEN CHILDREN: HOW UNNECESSARY PSYCHOTROPIC MEDICATION ENDANGERS FOSTER CHILDREN’S RIGHTS AND HEALTH

MATTHEW M. CUMMINGS*

Abstract: State foster care systems are forcing many foster children to take high dosages of dangerous, mind-altering psychotropic medications. State actors have little medical background for each child and have limited time to diagnose disorders, thereby creating potential constitutional and human rights violations. States are only supposed to administer psychotropic medication to a child when necessary and in the child’s best interest. Many children in foster care, however, are heavily medicated despite the difficulties of proving necessity. Those difficulties are due to a combination of diagnosis practice, the foster child’s background, and the poor condition of state foster care systems. In light of these limitations and the potential for using medication solely to curb bad behavior, such high prescription rates are unjustified. Many states lack in-depth tracking and oversight measures and fail to recognize this problem, thereby allowing abuse to continue and potentially preventing foster children from seeking justice.

INTRODUCTION

Between February and March 2009, seven-year-old Gabriel Myers had multiple therapists, foster home placements, and after-school programs. He lost many of the privileges he typically had at his original


1 Report of Gabriel Myers Work Group, Fla. Department Child. & Families, 1, 3–4 (Nov. 19, 2009), http://www.dcf.state.fl.us/initiatives/GMWorkgroup/docs/GabrielMyersWorkGroupReport082009Final.pdf [hereinafter GM Work Group]. Gabriel entered the foster care system on June 29, 2008, after being the subject of an abuse report, and subsequently, his mother’s arrest. Id. at 3. In the ten months preceding his death and before he moved into the Margate foster home, Gabriel “was initially sheltered in a licensed foster home, then, after a positive home study, placed with relatives. When that placement broke down, he was returned to the licensed home in which he was initially placed.” Id. Unfortunately, his third placement fell apart, too, and the foster care system placed him in a foster home in Margate, Florida, where he lived when he died. Id. One therapist documented that “it is clear that this child is overwhelmed with change and possibly re-experiencing trauma.” Id. During the ten months in which Gabriel was in foster care, an older foster child sexually abused him and an adult relative in Ohio exposed him to pornography. Report of Gabriel Myers Work Group on Child-on-Child Sexual Abuse, Fla. Department Child. & Families, 1 (May 14,
home and faced changes in the visitation arrangements he had with his biological mother.\(^2\) During this time, Gabriel acted out on numerous occasions and had other behavioral problems; as a result, doctors put him on multiple psychotropic medications covered by Medicaid.\(^3\) He took Lexapro, an antidepressant, and Vyvanse, a medication for attention deficit hyperactivity disorder (ADHD).\(^4\) Then, a doctor—having been warned by the FDA for over-prescribing to children—prescribed Gabriel Symbax, a medication not recommended for use in children.\(^5\) Symbax, a powerful anti-depressant, contains an FDA-required black label warning in its packaging because of its potential to cause suicidal thoughts in teenagers and children.\(^6\) Medicaid paid for Gabriel’s Symbax prescription, despite not qualifying for reimbursement.\(^7\) By April 2009, the Florida Department of Children & Families had Gabriel on multiple psychotropic medications, even though his medical records lacked the necessary parental consent form.\(^8\)

On April 16, 2009, less than one month after receiving the Symbax prescription, Gabriel stayed home sick from school while his caretaker’s adult son—Miguel Gould, an unlicensed caregiver—watched over him.\(^9\) During lunch, Gabriel dumped his soup into the trash and then, as Miguel sent him to his room, claimed he wanted to kill himself.\(^10\) In his room, Gabriel threw his toys and told Miguel that he was...
going to commit suicide. Gabriel locked himself in the bathroom and Miguel spent “five or ten minutes” opening the door. By the time Miguel gained entry, Gabriel was unresponsive and, when first responders arrived, it was too late. Gabriel had hung himself using the bathroom’s extendable shower cord, taking his own life less than three months after his seventh birthday.

Psychotropic medications are “drugs that affect the psychic function, behavior and experience of a person using them.” Generally, psychotropic medications are divided into six classes: stimulants, antidepressants, depressants, antipsychotics, mood stabilizers, and anxiolytics (antianxiety). These medications, however, carry significant side effects. Their risks range from constipation, restlessness, and fatigue,
to more serious complications such as impaired motor skills, convulsions, liver damage, and suicidal thoughts. Some can even cause tardive dyskinesia—a neurological disorder producing "involuntary and grotesque movements of the face, mouth, tongue, jaw and extremities and which is irreversible in its most severe form"—chronic irreversible neurological impairments, and death.

There are few studies analyzing the potential long-term effects of psychotropic medications on children or their mental development. The limits of medical science require physicians to diagnose disorders warranting psychotropic medication through symptoms rather than testing directly for diseases. Physicians, psychiatrists, and other practices are not regulated by the FDA and their prescriptions may be "off-label," meaning that they can prescribe higher dosages or medication not approved for children. According to a 2006 report, the FDA approved only thirty-one percent of psychotropic medications for children, but children took approximately forty-five percent of their psy-

---


22 Michael W. Naylor et al., Psychotropic Medication Management for Youth in State Care: Consent, Oversight, and Policy Considerations, 86 Child Welfare 175, at 177–78 (2007); PBS, supra note 20; Psychotropic Medication Utilization Parameters for Foster Children, Tex. Department Fam. & Protective Services, 3 (Dec., 2010), http://www.dfps.state.tx.us/documents/about/pdf/TxFosterCareParameters-December2010.pdf. In fact, the FDA does not limit the manner in which physicians, psychiatrists, and other kinds of practitioners prescribe FDA approved medication. Psychotropic Medication Utilization Parameters for Foster Children, supra, at 3. Though these "off-label" uses are not approved in children, "it may represent the standard of care." Naylor et al., supra, at 177–78. Physicians are expected to "utilize the available evidence, expert opinion, their own clinical experience, and exercise their clinical judgment in prescribing what is best for each individual patient." Psychotropic Medication Utilization Parameters for Foster Children, supra, at 3.
psychotropic medications off-label.\textsuperscript{23} Due to the known side effects, unknown developmental risks, and mind altering impact, best practices dictate that children should only take psychotropic medication when absolutely necessary and as a last resort.\textsuperscript{24}

Though the state in some instances properly administers psychotropic medication to foster children in need, overcrowded care facilities, high caregiver turnover, and inadequate administration increases the risk of over-medication.\textsuperscript{25} Additionally, practitioners and caseworkers have discretionary power—deciding what is within the best interest of the child—to administer mind-altering medication through Medicaid.\textsuperscript{26} Due to this discretionary authority, psychotropic medication is often seen as a way to chemically restrain hyperactive or difficult children and not a last resort.\textsuperscript{27} Every person has the basic human and constitutional right to be free from the dangers of unnecessary, mind-

\textsuperscript{23} Naylor et al., supra note 22, at 178. In addition, medications like clonidine and divalproex can be used to treat some specific medical illnesses for children under the age of eighteen but not for treating psychiatric disorders. Id.

\textsuperscript{24} See Burton, supra note 16, at 467 (“Best practices dictate that psychotropic drugs should be used only as a last resort, and never as the sole approach to addressing children’s mental health needs.”); Naylor et al., supra note 22, at 178; Jacqueline A. Sparks & Barry L. Duncan, \textit{The Ethics and Science of Medicating Children}, 6 ETHICAL HUM. PSYCHOL. & PSYCHIATRY 25, 36 (2004) (“We consider the practice of prescribing drugs to youths as clearly the last resort, and in many cases, unethical, until other options have been discussed.”); see also Sell v. United States, 539 U.S. 166, 181 (2003) (“The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results.”); M. Lynn Crismon & Tami Argo, \textit{The Use of Psychotropic Medication for Children in Foster Care}, 88 CHILD WELFARE 71, 73 (2009) (“Principles of evidence-based medicine recommend that clinicians should utilize treatments with research-proven evidence for their patients before using unproven treatments.”); \textit{Psychotropic Medication Utilization Parameters for Foster Children}, supra note 22, at 3 (“The role of non-pharmacological intervention should be considered before beginning a psychotropic medication, except in urgent situations . . . .”).

\textsuperscript{25} See Sandra Stukes Chipungu & Tricia B. Bent-Goodley, \textit{Meeting the Challenges of Contemporary Foster Care}, 14 FUTURE CHILD. 75, 75 (2004) (discussing the status and inadequacies of state foster care systems); Report of Gabriel Myers Work Group, supra note 1, at 7 (describing medication practices for the Florida Department of Children & Families); PBS, supra note 20 (reporting on psychotropic medication prescriptions of foster children). Inadequate administrative measures include poor finances, improper training of caregivers, inconsistent monitoring, and neglected medical records. See Chipungu & Bent-Goodley, supra, at 75; Report of Gabriel Myers Work Group, supra note 1, at 7; PBS, supra note 20.

\textsuperscript{26} Maggie Brandow, Note, \textit{A Spoonful of Sugar Won’t Help This Medicine Go Down: Psychotropic Drugs for Abused and Neglected Children}, 72 S. CAL. L. REV. 1151, 1161 (1999); see PBS, supra note 20 (discussing the administration of psychotropic medication to foster children).

\textsuperscript{27} See PBS, supra note 20.
altering medication. These children, however, do not have the means to protect their right to avoid unnecessary medication, or alternatively, someone interested in securing that right for them.

This Note argues that the government needs to develop a national database of medical records, track prescriptions, and adopt stricter administration regulations for psychotropic medications to protect the rights of foster children. Part I explores the idea of informed consent and analyzes the difference between a parent’s right to choose when to medicate a child and a state’s decision to do so. Part II illustrates why states cannot consistently act in a child’s best interest and should only administer psychotropic medication when indisputably necessary. Part III addresses why state actors may choose psychotropic medication for reasons other than the best interest of the child. Part IV discusses how the lack of oversight measures, mixed with wide discretion and qualified immunity, allows this abuse to continue and may work to keep these problems out of court. Finally, Part V analyzes what has and needs to be done on a state and federal level to ensure the safety of foster children.

---


29 See Laurel K. Leslie et al., Tufts Clinical & Translational Sci. Inst., Multi-State Study on Psychotropic Medication Oversight in Foster Care 2 (Sept., 2010), available at http://www.tufisctsi.org (under the “About Us” menu, select “Announcements”; then follow the “Landmark Report on Psychotropic Medication and Foster Care Calls for National Resources” hyperlink; then follow the “study report is available here” hyperlink); Report of Gabriel Myers Work Group, supra note 1, at 9 (addressing the failure of Florida foster care workers to properly protect Gabriel Myers’s rights). The state may put foster children into medical testing experiments without consent if the medication involved in the testing is considered beneficial to the child. See Sheryl L. Buske, Foster Children and Pediatric Clinical Trials: Access Without Protection Is Not Enough, 14 Va. J. Soc. Pol’y & L. 253, 278–80 (2007) (discussing the law regarding foster child placement in medical testing experiments).
I. THE BASIS FOR PROVIDING INFORMED CONSENT FOR A CHILD

Each patient must give informed consent before undergoing medical treatment. For those under the age of majority, parents or guardians have the right to provide informed consent on their behalf. When a child is in foster care, however, the state does not have a similar right and the child’s right to autonomy may sometimes trump state interests.

A. The Requirement of Informed Consent

Courts have generally held that informed consent is required for any medical treatment. This is based on the natural and constitutional right of bodily self-determination—the belief that “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body . . . .” Under the doctrine of informed consent, “physicians have a duty to make adequate disclosures to patients regarding proposed medical treatment so that patients can make knowledgeable choices.”

There are two competing methods to determine whether a physician’s disclosure is adequate for a patient to give informed consent. First, the reasonable physician standard requires a physician to disclose any information that a reasonable physician would provide to the patient. States, however, have generally adopted the second approach,
that of the reasonable patient, where a physician must “disclose whatever information a reasonable patient would find material . . . .” 38 The disclosure must include “information relating risks, benefits, and available alternatives, including no treatment . . . .” 39 Accordingly, the American Medical Association (AMA) defines informed consent as “more than simply getting a patient to sign a written consent form. It is a process of communication between a patient and physician that results in the patient’s authorization or agreement to undergo a specific medical intervention.” 40

For a patient to give informed consent, the patient must fulfill three elements: possession of knowledge about the modes of treatment, voluntary consent, and competency to determine what is in his or her best interest. 41 Competency or capacity is “the basic capacity to arrive at a decision by assimilating information through a reasonable process of thinking.” 42 When one is incompetent to give informed consent, that person’s guardian must receive the same information and opportunity to weigh the risks and benefits. 43 The guardian is generally held to the best interest standard, and therefore chooses an option that is in the incompetent person’s best interest of health and person. 44

The general view in the United States is that children cannot meet the elements required to adequately give informed consent to medical treatment. 45 Therefore, the child’s parent—absent evidence of abuse

38 Id.
39 Id.
40 Informed Consent, AM. MED. ASS’N, 1 (Mar. 17, 2011), http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/informed-consent.shtml. The AMA says that physicians should discuss with the patient: 1) his or her diagnosis, if it is known; 2) the medication’s nature and purpose; 3) the medication’s risks and benefits; 4) available alternatives to the medication, regardless of costs or its insurance coverage; 5) the risks and benefits of alternative treatments or procedures; and 6) the potential risks and benefits of not receiving the medication or treatment. Id.
41 Brandow, supra note 26, at 1163.
42 Id. at 1164. Someone who is mentally ill or incompetent to consent to or refuse psychiatric hospitalization is not necessarily incompetent to refuse or give informed consent to psychotropic medication. Talmadge, supra note 32, at 188–90.
43 Talmadge, supra note 32, at 191.
44 Id. The guardian may also base his or her decision on the “substituted judgment” standard, which requires the guardian to make the choice that is most in line with what the incompetent person would choose if he or she had the capacity to make the decision. See id. at 204; Brandow, supra note 26, at 1159.
45 See Coleman, supra note 31, at 546–47; Susan D. Hawkins, Note, Protecting the Rights and Interests of Competent Minors in Litigated Medical Treatment Disputes, 64 FORDHAM L. REV. 2075, 2075 (1996). This view remains intact despite several studies showing that adolescents have sufficient capacity to competently make medical decisions and the Supreme Court recognizing the right of a minor to have an abortion without state or parental con-
or neglect—is given authority. 46 When a child is in state custody, however, the state retains the right to choose a treatment. 47 Thus, the state can medicate children in foster care according to their best interest, regardless of their competency and proximity to the age of majority or the availability of alternative treatments. 48

B. Parental Rights and Abilities to Provide Informed Consent

A parent’s right to decide what is best for a child relies on two principles: personal rights and the belief that parents are most suited to provide for a child’s best interest. 49 Accordingly, parents are usually considered the sole authority for their children and receive deference in considerations of medical treatment, regardless of the child’s competency. 50

sent. See Coleman, supra note 31, at 547 n.118; Talmadge, supra note 32, at 189–92; Hawkins, supra, at 2077, 2095–96; see also Bellotti v. Baird, 443 U.S. 622, 651 (1979) (invalidating a statute requiring unmarried women under the age of eighteen to get parental consent, or at minimum, inform parents of any intentions prior to obtaining judicial approval); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) (finding that a state cannot create a provision “requiring consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy”). In fact, various studies have “found that choices made by fourteen-year-olds did not differ significantly from those of adults in terms of comprehension, understanding of alternatives, rational reasoning, and decision making processes when responding to medical and psychological treatment hypotheticals.” Talmadge, supra note 32, at 191. Although the competency of minors in making their own medical decisions is a significant issue, this Note focuses on all foster children, regardless of whether they have the intellectual capacity and competency to fully comprehend the potential risks and dangers of the psychotropic medication they may be forced to take.

46 Coleman, supra note 31, at 548–49; see also Commonwealth v. Nixon, 761 A.2d 1151, 1152–53 (Pa. 2000) (refusing to adopt a “mature minor doctrine” when a sixteen-year-old daughter refused medical care because the doctrine would absolve parents’ rights and responsibilities to care for their children).

47 Talmadge, supra note 32, at 183.

48 See Coleman, supra note 31, at 546–47; Talmadge, supra note 32, at 189–92; Hawkins, supra note 45, at 2075; see, e.g., Nixon, 761 A.2d at 1152–53.


50 See Coleman, supra note 31, at 545–48; Scott & Scott, supra note 49, at 2401.
1. Parents’ Constitutional Rights to Provide Informed Consent for Children

The decision to medicate a child involves the rights of both the child and the parent.\(^{51}\) A parent’s right is based on the “constitutional doctrine of parental autonomy.”\(^{52}\) The Supreme Court has continually recognized that an individual’s freedom to determine family matters is a constitutionally protected right under the Fourteenth Amendment.\(^{53}\) “[P]arents are entitled to raise their children as they see fit” and can make most of a child’s decisions when the child is a minor.\(^{54}\) Thus, parents receive deference in determining the course of medical treatment for children in the same manner as personal medical treatment choices for competent individuals.\(^{55}\) Therefore, parents may ignore side effects and safer alternative treatments and choose psychotropic medication for their children as long as the choice is “recommended by their physician and . . . has not been totally rejected by all responsible medical authority.”\(^{56}\)

---

51 See Danforth, 428 U.S. at 74; Coleman, supra note 31, at 545–48.
52 Coleman, supra note 31, at 545; see also Troxel v. Granville, 530 U.S. 57, 65 (2000) (“[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court.”); Santosky v. Kramer, 455 U.S. 745, 753 (1981) (discussing “the fundamental liberty interest of natural parents in the care, custody, and management of their child”); Talmadge, supra note 32, at 183 (“Parents normally have the right to direct the education and upbringing of their children as well as to decide whether and when their minor children will get medical treatment.”).
53 Troxel, 530 U.S. at 65; Santosky, 455 U.S. at 753. The courts tend to “defer to parental choice in medical treatment cases out of respect for parental authority . . . .” Talmadge, supra note 32, at 183.
54 Coleman, supra note 31, at 546. Due to this doctrine, parents are also given the right to make a variety of day-to-day decisions for their children, including “where their children go to school, with whom they associate, what treatment they receive in the event they become ill or injured, and in general the values according to which they are raised.” Id. at 548 (citations omitted); see also Troxel, 530 U.S. at 78 (Souter, J., concurring); Parham v. J.R., 442 U.S. 584, 604 (1979); Wisconsin v. Yoder, 406 U.S. 205, 235 (1972) (discussing “the rights of parents to direct the religious upbringing of their children”).
55 See Santosky, 455 U.S. at 753; Saratoga Cnty. Dep’t of Soc. Servs. v. Hofbauer, 393 N.E.2d 1009, 1013–14 (N.Y. 1979) (holding that a parent has wide deference in choosing the kind of medical care for a child); Bottoms v. Bottoms, 457 S.E.2d 102, 104 (Va. 1995) (quoting Malpass v. Morgan, 192 S.E.2d. 794, 799 (Va. 1972)) (“a parent’s rights ‘are to be respected if at all consonant with the best interests of the child’”). Courts, however, have given less deference to the decisions of divorced or separated parents with joint physical and legal custody of a child. See, e.g., Hardin v. Hardin, 711 S.W.2d 863, 865 (Ky. Ct. App. 1986) (authorizing trial courts to make their own determination of what is best for a child when two parents cannot agree); see also Coleman, supra note 31, at 548 n.126.
56 Hofbauer, 393 N.E.2d at 1014.
2. Societal Interest in Allowing Parents to Provide Informed Consent

Although parental autonomy is based on the Fourteenth Amendment, a parent’s right is also based on the best interest of his or her child. Parents retain the right to act in their child’s best interest because of their inherent instinct to do so and their ability to make rational decisions. Furthermore, parents placing their children on psychotropic medication are usually most familiar with the child’s behavior and needs, and therefore can monitor potential side effects. Thus, even if the child objects to treatment, parental decisions outweigh the child’s decision. The parent’s action in the child’s best interest ensures protection of the child’s health and safety.

Parental deference, however, is not absolute. Courts may rebut the presumption of deference in favor of a child’s autonomy if evidence shows that the parent puts the child at risk of harm or violates state

57 Coleman, supra note 31, at 545–48; Scott & Scott, supra note 49, at 2432–37 (discussing the biological bonds and societal norms that influence parental decision rights); Brandow, supra note 26, at 1159 (discussing how states base parental autonomy on “trusting parents to act in the best interest of their children”).

58 Troxel, 530 U.S. at 69; Parham, 442 U.S. at 603 (“Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.”); Coleman, supra note 31, at 546–48 (“[T]he law formally presumes that whatever the parent’s decision, it is in the child’s best interests.”); Brandow, supra note 26, at 1159–61 (discussing the belief that children “lack the mental competence and maturity possessed by adults” to properly give informed consent to medical treatment); Hawkins, supra note 45, at 2081. It is worth noting that “[t]his is a dangerous assumption, because even in the most ideal situation of a ‘loving, intact, two-parent family,’ there are conflicts of interest between parents and child which could prevent the parents from choosing in the child’s best interests.” Brandow, supra note 26, at 1159–60. Furthermore, a parent may be unable to accurately act in the child’s best interest “because of their own dysfunctional upbringing, lack of education, or even mental illness.” Id. at 1160.

59 See Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”); Hawkins, supra note 45, at 2081; Report of Gabriel Myers Work Group, supra note 1, at 4 (stating that part of the failure to recognize Gabriel Myers’s problems was that no single individual took full responsibility to monitor him and meet his needs).

60 See Talmadge, supra note 32, at 183. In addition, another theory for allowing parents to give consent for their children is that parents may frequently choose the same option as the child would if given the opportunity. Brandow, supra note 26, at 1159–60.

61 Brandow, supra note 26, at 1159–60.

62 Coleman, supra note 31, at 548; Talmadge, supra note 32, at 183 (“Courts tend to defer to parental choice in medical treatment cases out of respect for parental authority, but a court may not always view the best interests of the child in the same way that child’s parents view his or her interests.”).
child protection laws through abuse or neglect.\textsuperscript{63} States, therefore, may restrict a parent’s control over his or her child based on its compelling interest to protect children from harm.\textsuperscript{64}

C. States Have Limited Parens Patriae Powers When Choosing a Course of Medical Treatment for a Child

The state’s authority to determine the medical treatment for a child in its custody is based on its limited parens patriae powers.\textsuperscript{65} Those parens patriae powers give the state the authority and duty to protect those who lack the mental capacity to act in their own best interest.\textsuperscript{66} With regard to foster children, these powers are based on: “(1) the presumption that children lack the mental competence and maturity possessed by adults, (2) the fact that the child’s parents are unfit, unwilling, or unable to care for the child, and (3) the requirement that the parens patriae power be exercised only to further the best interests of the child.”\textsuperscript{67} Whereas parental interests outweigh a child’s right to personal autonomy, children in state custody do not necessarily have their interests outweighed by the state.\textsuperscript{68} State decisions of medical treatment made without prior consent from the child or parent likely infringes an

\textsuperscript{63} Coleman, supra note 31, at 548–49 nn.126–27. Among other things, these laws mainly pertain to "physical abuse, emotional abuse, and neglect." Id. at 549.

\textsuperscript{64} See Stanley v. Illinois, 405 U.S. 645, 651–52 (1972); Prince, 321 U.S. at 170 ("Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children . . . ."); see also Coleman, supra note 31, at 549 ("Federal constitutional law generally embraces these boundaries on the ground that states have a compelling interest in protecting children from harm and risk that is intentionally inflicted by their parents.").

\textsuperscript{65} Brandow, supra note 26, at 1161.

\textsuperscript{66} Id. The doctrine is “grounded in the actual or assumed incapacity of the individual to engage in rational decision making in his or her own best interest.” Bruce J. Winick, The MacArthur Treatment Competence Study: Legal and Therapeutic Implications, 2 Psychol. Pub. Pol’y & L. 137, 145 (1996).

\textsuperscript{67} Brandow, supra note 26, at 1161. “[E]ven though a parent has lost the care and custody of his or her children due to neglect, he or she still retains his or her constitutional right (i.e., liberty interest) to the management of important medical decisions for those children.” In re Martin F., 820 N.Y.S.2d 759, 772 (Fam. Ct. 2006) (recognizing that a foster child’s biological mother’s explicit objection to the state administering psychotropic medication to her child deserves protection, as long as there was no court order).

\textsuperscript{68} See Talmadge, supra note 32, at 195 ("Although the circuit courts seem to be divided, it appears that applicable precedent exists for asserting a right to refuse psychotropic medication on the basis of liberty interest and constitutional privacy grounds."); see also Brandow, supra note 26, at 1161–63 (arguing for limited state parens patriae power); O’Leary, supra note 28, at 1201; supra notes 25–29 and accompanying text.
II. STATE ADMINISTRATION OF PSYCHOTROPIC MEDICATION TO FOSTER CHILDREN, NECESSITY, AND PROTECTING THE CHILD’S BEST INTEREST

States must make a firm showing of necessity when medicating wards with psychotropic medication because the potential for mind-altering side effects constitutes an intrusive treatment regimen. The lack of funding for and collaboration between caseworkers and caregivers sometimes creates a risk of misdiagnosis, and therefore, may impede that showing of necessity.

A. Administering Psychotropic Medication Without Consent Is a Severe Infringement on Constitutional Rights

The Supreme Court has consistently held that the right to privacy and bodily integrity grants individuals the freedom from being forced to take psychotropic medication. The state cannot infringe this right without a legitimate interest for treatment that cannot be achieved by less intrusive means. Medication may curtail individual liberties and free will more than most bodily restraints or other treatments because it alters the mind and has the potential for long-term side effects.

The Supreme Court’s jurisprudence on the use of psychotropic medication in adults emphasizes the constitutional right to be free

---

69 See Knepper, supra note 18, at 106–07; Talmadge, supra note 32, at 194–95; supra notes 25–29 and accompanying text.
70 See Sell v. United States, 539 U.S. 166, 181 (2003); Riggins v. Nevada, 504 U.S. 127, 133–35 (1992); Washington v. Harper, 494 U.S. 211, 229 (1990); Talmadge, supra note 32, at 183–84, 194–95. In reference to the forced administration of psychotropic medication, the court in Rodgers v. Okin, stated “[t]he First Amendment protects the communication of ideas. That protected right of communication presupposes a capacity to produce ideas. As a practical matter, therefore, the power to produce ideas is fundamental to our cherished right to communicate and is entitled to comparable constitutional protection.” 478 F. Supp. 1342, 1367 (D. Mass. 1979), vacated sub nom., 457 U.S. 291.
71 See Burton, supra note 16, at 457; Naylor et al., supra note 22, at 175–78; PBS, supra note 20.
73 See Sell, 539 U.S. at 181; O’Leary, supra note 28, at 1201.
74 See Talmadge, supra note 32, at 184; see also Nancy K. Rhoden, The Right to Refuse Psychotropic Drugs, 15 HARV. C.R.-C.L. L. REV. 363, 373 (1980) (discussing the idea that forced administration may violate an individual’s First Amendment freedom to thought).
from forced administration. In *Washington v. Harper*, the Court prohibited medicating a mentally ill inmate unless the state’s interest outweighed the “substantial interference” imposed on his constitutional rights to liberty. In *Riggins v. Nevada*, the Court held unconstitutional the forced administration of anti-psychotic medication to a defendant as a “particularly severe” interference with his Fourteenth Amendment personal liberty rights. The state actions, however, could have been justified if treatment was medically appropriate and done for safety, but only after “considering less intrusive alternatives . . . .”

The Supreme Court determined this level of appropriateness in *Sell v. United States*, holding that it must be “necessary to further [the state’s] interests” when safer or less intrusive treatments “are unlikely to achieve substantially the same results.” The Court has recognized the right to be free from forced administration of psychotropic medication for incompetent adults, and would likely extend this same right to children if given the opportunity. Therefore, states must likely meet a de facto higher standard of necessity when choosing psychotropic medication because the potential for mind-altering side effects creates an intrusive treatment regimen.

---

75 See *Sell*, 539 U.S. at 181–82; *Riggins*, 504 U.S. at 133–35; *Harper*, 494 U.S. at 229–30; *Mills*, 457 U.S. at 299; see also Talmadge, *supra* note 32, at 184, 194–95; Brandow, *supra* note 26, at 1176 (discussing the Supreme Court’s concerns regarding psychotropic medication). Furthermore, states may adopt broader and more extensive liberty interests under the Due Process Clause than those protected by the Constitution. See *Mills*, 457 U.S. at 300.

76 494 U.S. at 229; see also *Riggins*, 504 U.S. at 133–35.

77 504 U.S. at 134, 138.

78 Id. at 135; see *Sell*, 539 U.S. at 179.

79 539 U.S. at 181.

80 See Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) (“Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”); Talmadge, *supra* note 32, at 194–95 (“Although the circuit courts seem to be divided, it appears that applicable precedent exists for asserting a right to refuse psychotropic medication on the basis of a liberty interest and constitutional privacy grounds.”); Brandow, *supra* note 26, at 1176 (“The law should protect the privacy and bodily integrity of minors by taking into account the Supreme Court’s concern regarding forced treatment with psychotropic medications.”); see also *Sell*, 539 U.S. at 181; *Riggins*, 504 U.S. at 133–35; *Harper*, 494 U.S. at 229; *Mills*, 457 U.S. at 299.

81 See *Sell*, 539 U.S. at 181; *Riggins*, 504 U.S. at 133–35; *Harper*, 494 U.S. at 229; Talmadge, *supra* note 32, at 183–84, 194–95. In reference to the forced administration of psychotropic medication, the court in *Rodgers v. Okin* stated, “The First Amendment protects the communication of ideas. That protected right of communication presupposes a capacity to produce ideas. As a practical matter, therefore, the power to produce ideas is fundamental to our cherished right to communicate and is entitled to comparable constitutional protection.” 478 F. Supp. at 1367.
B. States Are Ill-Equipped to Consistently Act in the Best Interest of All Children in Foster Care

State foster care systems may not always act in a child’s best interest because they are constricted by finite resources, high turnover rates, limited training, and poor working conditions. Generally, a child’s caseworker and foster parents are in charge of ensuring compliance with his or her best interest, though such duties and responsibilities are not formally delineated. As the “face of foster care,” caseworkers make major decisions involving the child’s care, including whether to consent to psychotropic medication. There are two major types of foster parents: unrelated foster parents and kin caregivers. Kin caregivers are relatives of the child and account for less than one-third of foster parents nationwide. All foster parents are responsible for monitoring their children but, because they cannot make medical decisions, caseworkers regularly do not inform them about mental health assessments or ask for any feedback. States vest this power in caseworkers because they

---


84 Bass et al., supra note 83, at 18–19, 23–24; see Naylor et al., supra note 22, at 182. Once a course of treatment is approved by the prescribing physician or psychiatrist, it is common for states to require informed consent through the child’s parent or caseworker. Naylor et al., supra note 22, at 182. Nevertheless, in jurisdictions that require parental consent, if the state fails to locate the parent or finds the parent unsuitable to provide informed consent, then the caseworker may provide consent. See id.; Brandow, supra note 26, at 1161. In a 2007 study of thirty-seven states, only six require a court order prior to the administration of psychotropic medication and, in some of those states, the order is only necessary if the parent cannot be located. Naylor et al., supra note 22, at 181–82.

85 See Bass et al., supra note 83, at 16–18.

86 See id. at 17. Even though children placed with kin caregivers tend to have greater stability in placements compared to children placed with unrelated foster parents, kin caregivers tend to be older and have a higher chance of being single, of limited education, and poor health. Id. In addition, due to akin caregiver’s ties to the child’s birth parents, he or she is more likely to allow unsupervised visits by the child’s parents. Id. In some cases, these unsupervised visitations may increase the probability of the child facing repeated abuse. Id.

cannot provide caregivers with the sufficient resources and training needed to handle each child’s constantly changing needs or demands.  

Therefore, foster parents and caseworkers do not properly collaborate to monitor the effects of psychotropic medication on foster children. Because caseworkers usually only spend a limited period of time with a child, the state is simply “too crude an instrument to become an adequate substitute for parents.” Compounding the crude treatment is the foster child’s complex life experience that may result in behavior nearly identical to that of many psychiatric disorders. Due to the lack of funding and collaboration with caseworkers, caregivers are unlikely to distinguish trauma-induced behavior from a psychiatric condition and therefore create a risk of misdiagnosis.

1. Difficulties in Recruiting and Retaining Trained and Qualified Social Workers

States cannot recruit and retain social workers to match the growing need of the foster care system; thus, protection from misdiagnosis and the side-effects of psychotropic medication is lacking. The foster

---

88 Goldstein, supra note 82, at 463; Chipungu & Bent-Goodley, supra note 25, at 83; Brandow, supra note 26, at 1162.

89 See Goldstein, supra note 82, at 463; Chipungu & Bent-Goodley, supra note 25, at 86; Brandow, supra note 26, at 1162–63.

90 Goldstein, supra note 82, at 462–63; see Chipungu & Bent-Goodley, supra note 25, at 83; Brandow, supra note 26, at 1162.

91 See Burton, supra note 16, at 457; Naylor et al., supra note 22, at 176 (“With few exceptions, youth in foster care have been physically or sexually abused, neglected, or both.”); Brandow, supra note 26, at 1163. Additionally, a child’s history of physical and emotional abuse, neglect, and repeated displacements in living arrangements may affect his or her clinical presentation. Naylor et al., supra note 22, at 178. For example, the symptoms associated with bipolar disorder and trauma are so similar that it may take between two and three years to determine whether the symptoms are associated with one or the other. See PBS, supra note 20. Unfortunately, due to inaccurate medical records and constant changes in placement of foster children, practitioners tend to medicate without being able to ensure whether a child’s symptoms are the result of trauma or a bipolar disorder. See id.

92 See Burton, supra note 16, at 457–58; Naylor et al., supra note 22, at 176; PBS, supra note 20.

93 Chipungu & Bent-Goodley, supra note 25, at 77, 83, 86; Talmadge, supra note 32, at 202, 211. The inability to hire and retain staff is not limited solely to caseworkers. See Bass et al., supra note 83, at 8. In a 1999 study of thirteen states conducted by the Urban Institute, nearly half of the states’ child welfare agencies had a change in leadership within three years. Id. (citing Karin Malm et al., Running to Keep in Place: The Continuing Evolution of Our Nation’s Child Welfare System, Urban Institute (Oct. 2001), http://www.urban.org/uploadedPDF/310358_occa54.pdf).
care system grew dramatically in the 1980s and 1990s. This is due in part to the increase in birth rates, maternal incarceration, and parental substance abuse. Child welfare agencies, however, are unable to attract and retain the staff needed to handle these caseloads because of poor working conditions, heavy demands, and low salaries, among other reasons. Therefore, the state cannot provide the consistent and long-term monitoring necessary for children taking psychotropic medication.

Also, most caseworkers are under-qualified or lack the training necessary to handle children with developmental needs or disabilities. These staffing difficulties inhibit a state’s ability to increase education standards for social workers. For example, more than eighty-five percent of all child welfare agencies do not require social workers

---

94 Chipungu & Bent-Goodley, supra note 25, at 77. In 1985, the number of children in foster care was reportedly less than 300,000 children; by the year 2000, however, there were nearly 570,000 children in foster care at any given time. Id. In 2001, more than 800,000 children went through the foster care system, with approximately 542,000 in care at any given time. See Bass et al., supra note 83, at 6; Chipungu & Bent-Goodley, supra note 25, at 77.

95 Chipungu & Bent-Goodley, supra note 25, at 77.

96 See Bass et al., supra note 83, at 24; Chipungu & Bent-Goodley, supra note 25, at 77, 83; Brandow, supra note 26, at 1162. As a result of these conditions, ninety percent of state welfare agencies reported that they had difficulty recruiting and retaining caseworkers. Chipungu & Bent-Goodley, supra note 25, at 83. Public demand for shorter foster care stays has put greater pressure on social workers to provide data on measuring and documenting the process leading to reunification with parents or adoption. Bass et al., supra note 83, at 24; Chipungu & Bent-Goodley, supra note 25, at 83. In addition, the U.S. General Accountability Office reported that seventy percent of frontline caseworkers have either been threatened by violence or have been a victim of violence during the course of their employment. See U.S. Gen. Accounting Office, GAO-03-357, HHS Could Play a Greater Role in Helping Child Welfare Agencies Recruit and Retain Staff 13 (2003). For example, one state’s peer exit interviews found that ninety percent of its child protective services employees experienced verbal threats, thirty percent were physically attacked, and thirteen percent were threatened with a weapon. See id. The administrative demands, risks, and low salaries make it more difficult for child welfare agencies to hire skilled social workers in the areas where children are the most vulnerable. See Chipungu & Bent-Goodley, supra note 25, at 83.

97 See Chipungu & Bent-Goodley, supra note 25, at 77–79, 83; Talmadge, supra note 32, at 202, 211; Brandow, supra note 26, at 1162. The recommended caseload for each caseworker is between twelve and eighteen cases each. Bass et al., supra note 83, at 23. Depending on the agency, however, caseworkers are responsible for anywhere between ten to more than one hundred cases each. Id. The increased policy demand for reunification and adoption requires social workers to spend more “time meeting paperwork requirements rather than providing counseling, support, and encouragement . . . .” Chipungu & Bent-Goodley, supra note 25, at 83.

98 See Robertson, supra note 83, at 188.

99 See Bass et al., supra note 83, at 24. Most social welfare agencies do not require degrees despite evidence showing that caseworkers with degrees have lower turnover rates and higher job performance scores. Id.
to have a bachelor’s or master’s degree in social work. As a result, “only one-third of child welfare workers are trained social workers.” Even if all social workers had these degrees, it is unclear if their education would train them to handle children with developmental disabilities or behavioral problems. As of 1993, fewer than half of all accredited graduate schools of social work offered courses in “development of infants and toddlers with disabilities, parent-professional collaboration, and community resources.” This general lack of experience and training means that caseworkers may agree to place a child on psychotropic medication without being fully aware of the potential risks.

2. Difficulties in Recruiting, Retaining, and Training Suitable Foster Parents

States are unable to recruit and retain the caliber of foster parent needed to consistently monitor children and ensure that psychotropic

---

100 See id.
101 Chipungu & Bent-Goodley, supra note 25, at 83.
102 See Robertson, supra note 83, at 188.
103 See D. Michael Malone et al., Social Work Early Intervention for Young Children with Developmental Disabilities, 25 Health & Soc. Work 169, 176 (2000)). The survey respondents also indicated no interest in creating such a program where one did not already exist. Id. These programs are lacking because of strict course requirements and the belief that training in these areas would develop in employment. Robertson, supra note 83, at 188. The belief that these skills will be obtained while in practice dangerously assumes that practitioners already know best practices, despite limited training and high caseloads. Id.
104 Bass et al. supra note 85, at 23; Chipungu & Bent-Goodley, supra note 25, at 83; Robertson, supra note 85, at 188; Brandow, supra note 26, at 1162; PBS, supra note 20. See generally Tally Moses, The “Other” Effects of Psychotropic Medication: Social Workers’ Perspectives on the Psychosocial Effects of Medication Treatment on Adolescent Clients, 25 Child & Adolescent Soc. Work J. 205 (2008) (exploring results of a national survey of experienced social workers on their perspective about the psychosocial effects of psychotropic medication treatment). The Moses study suggests that the majority of social workers feels that harmful psychosocial effects of medication are outweighed by its beneficial effects. Moses, supra, at 205, 214. The findings further suggest that social workers only look at the global positives and negatives and do not think about the specific harmful psychosocial effects of the medication, such as its impact on self-confidence, normalization, self-efficacy, social rejection, and dependency. Id. at 218–19. For example, despite multiple studies finding that some psychotropic medication users have problems “making sense of the personal transformation associated with medication,” ninety-three percent of social workers disagreed with the statement “Taking medication has made my client confused about who he/she really is.” Id. at 219. Due to weak correlations between answers regarding the beneficial and harmful side effects of the medications, some social workers, the study suggests, may not become aware of certain side effects unless they take the time to ask children specific questions regarding their experiences on the medication. See id. at 218–19.
medications are being administered appropriately. Unstable living arrangements and multiple placements undermine a child’s ability to develop socially, emotionally, and physically. Seventy-five percent of foster children have at least one disruption in their foster home placement and one-fifth have three or more changes. Being a foster parent is arguably one to the most demanding positions one can assume. Not only must foster parents provide for the child’s basic needs, but they also must respond to “emotional and behavioral needs appropriately; arrange and transport children to medical appointments, mental health counseling sessions, and court hearings; advocate on behalf of foster children with schools; and arrange visits with birth parents and caseworkers.”

Historically, foster parents received limited compensation and had to use their own funds to subsidize some of the child’s care. The low compensation ideally prevented self-interested people from becoming foster parents. In modern times, however, societal changes decreased the number of homemakers and increased financial strains, thereby negatively affecting the number of willing and qualified foster parents.

The general lack of caseworkers has had a trickledown effect on their ability to properly train, inform, or assist foster parents.

---

106 See Racusin et al., Psychosocial Treatment of Children in Foster Care: A Review, 41 Community Mental Health J. 199, 207 (2005) (“Separation from caretakers produces emotional insecurity which adversely affects [sic] emotional growth and behavior in later childhood . . . .”); Robertson, supra note 83, at 182 (stating that this is the opinion of “[v]irtually everyone involved in the care and education of vulnerable children”).
107 Robertson, supra note 83, at 182, 187. Approximately fifteen percent of children in foster care for less than one year experience more than two placements. See Bass et al., supra note 83, at 7. Each year a child is in foster care, the likelihood of a placement disruption occurring that year increases. Id.
109 Id.
110 Id. at 85.
111 Teresa Toguchi Swartz, Mothering for the State: Foster Parenting and the Challenges of Government-Contracted Carework, 18 Gender & Soc’y 567, 568 (2004). It is not uncommon for child welfare agencies and caseworkers to question the motives of foster parents that call about not receiving their stipend checks or request reimbursements of costs that are covered by Medicaid. See id. at 582.
112 See Chipungu & Bent-Goodley, supra note 25, at 83–84; Swartz, supra note 111, at 571–72.
113 Chipungu & Bent-Goodley, supra note 25, at 83–86. More than two-thirds of foster parents claim that they were not properly prepared. Id. at 86. Compared to unrelated foster parents, kin caregivers are less likely to receive case management services or financial
quently, many foster parents quit within the first year because of dissatisfaction with the experience.\textsuperscript{114} Foster parent disruption causes emotional insecurity in many foster children, hinders development, produces detachment disorders, and prevents them from building relationships with adults and caregivers.\textsuperscript{115}

When foster children are frequently moved, their caregivers may be unaware of their history or how to deal with their trauma, and may misinterpret self-defeating or uncontrollable behavior.\textsuperscript{116} As a result, a foster parent may seek psychiatric medication from a caseworker when the child only needs a stable living environment.\textsuperscript{117} For these children, any additional placement changes hinder the monitoring of gradual side-effects and positive results of psychotropic medication.\textsuperscript{118}

3. Incomplete and Inaccurate Medical, Educational, and Family Records

Foster children risk misdiagnosis because unstable environments and independently-operated child welfare agencies allow for incomplete medical records and permit diagnoses based solely on apparent behavior.\textsuperscript{119} Foster children do not enter a single foster care system but assistance. See Bass et al., supra note 83, at 17. For kin to receive federal reimbursements, “states must license kin under the same standards as nonrelative foster families, and kin must be caring for children from income-eligible households.” Id. Additionally, states have broad discretion in determining whether kin receive any foster payments at all. Id. For example, in Oregon and California, kin caregivers can only receive foster care payments if the foster children are eligible to receive federal reimbursements. Id.

\textsuperscript{114} Chipungu & Bent-Goodley, supra note 25, at 86. Some foster parents complain about their experience with social workers, including the inadequate training prior to placement, no reinforcement of training once a child is placed, failure to inform foster parents about unique child needs, failure to return phone calls, rigorous demands, distrust, and social workers not involving the foster parents in decision-making. See id. at 84, 86.

\textsuperscript{115} Racusin et al., supra note 106, at 207; Robertson, supra note 83, at 182; see PBS, supra note 20.

\textsuperscript{116} See, e.g., Report of Gabriel Myers Work Group, supra note 1, at 9; PBS, supra note 20.

\textsuperscript{117} See Burton, supra note 16, at 494–95; Racusin, supra note 106, at 207; see also PBS, supra note 20.

\textsuperscript{118} See Bass et al. supra note 83, at 7; Robertst, supra note 83, at 182; Brandow, supra note 26, at 1162; PBS, supra note 20. These behavioral patterns also contribute to the frustration of foster parents that may result in further displacement for the child. See Chipungu & Bent-Goodley, supra note 25, at 83–86; Brandow, supra note 26, at 1162.

\textsuperscript{119} See Robertson, supra note 83, at 184 (discussing how diagnostic mistakes of infants and young children are made when parents and caregivers are not involved); Forgotten Children: A Case for Action for Children and Youth with Disability in Foster Care, Child. Rts., 7 (2006), http://www.childrensrights.org/wp-content/uploads/2008/06/forgotten_children_children_with_disabilities_in_foster_care_2006.pdf (“These challenges are further exacerbated by a
rather multiple intersecting systems. The systems are meant to “create a safety net for children” through intersecting and interacting to ensure that the child’s needs are met.

Children commonly enter the foster care systems with either incomplete medical records or no records at all. Even though psychotropic drugs are only to be prescribed as a “last resort,” doctors often issue prescriptions without seeing full medical records. Foster care agencies, however, generally fail to share with one another information pertaining to the foster children under their control. Therefore, there is no guarantee that each agency knows the same information about a child’s medical, family, temperamental, or scholastic history. This problem worsens when placements span multiple states because each state’s system can vary in organization, responsibility, records, funding, and assessment practices.

Even though parental rights to give informed consent for children make medicating children an easy task, the state administers psychotropic medication at a much higher rate than parents. In fact, foster

general lack of information-sharing, collaboration and communication . . . .”) [hereinafter Forgotten Children]; see, e.g., Report of Gabriel Myers Work Group, supra note 1, at 5 (“There was inadequate, incomplete, repetitive, and at times inaccurate documentation in Gabriel’s case files.”).

120 Bass et al., supra note 83, at 7. These systems include “[s]tate and local child welfare agencies, courts, private service providers, and public agencies that administer other government programs (such as public assistance or welfare, mental health counseling, substance abuse treatment), and Medicaid . . . .” Id. This also places an additional burden on foster parents, as they find it difficult to juggle all the paperwork requirements of each system. See id.

121 See id.


123 See Sparks & Duncan, supra note 24, at 56; PBS, supra note 20.

124 See Laurel K. Leslie et al., States’ Perspectives on Medication Use for Emotional and Behavioral Problems Among Children in Foster Care, Nat’l Resource Center for Permanency & Fam. Connections (Feb. 2010), http://www.nrcpfc.org/teleconferences/2-10-10/L%20Leslie%20medication%20powerpoint.ppt (discussing how child welfare agencies typically do not work together); see also Report of Gabriel Myers Work Group, supra note 1, at 4 (discussing the failures of agencies to properly communicate Gabriel’s history).

125 See Leslie et al., supra note 124, at 12; see, e.g., Report of Gabriel Myers Work Group, supra note 1, at 5.

126 See Bass et al., supra note 83, at 7 (discussing variations in state welfare agencies); see, e.g., Report of Gabriel Myers Work Group, supra note 1, at 5 (analyzing the failures in communication between Florida and Ohio authorities regarding Gabriel’s sexual abuse).

127 Brandow, supra note 26, at 1158–59, 1161; Leslie et al., supra note 124.
children receive psychotropic medication at a rate over ten times that of children living with parents.128 This statistic indicates that states are abusing their parens patriae powers and violating foster children’s natural and constitutional rights by subjecting them to mind-altering medication.129

III. Acting in The Foster Child’s Best Interest When Administering Psychotropic Medication

Though exceeding the parens patriae powers, states sometimes administer psychotropic medication to children even when inappropriate if they burden caregivers or are not otherwise easily restrained.130 This solution incentivizes caseworkers to medicate children as a means to quickly manage their caseloads, while foster parents benefit from the medication’s low cost and ability to restrain children.131

A. Using Psychotropic Medication as a Chemical Restraint

Although most caregivers generally want to work in the child’s best interest, some caregivers use psychotropic medication as a chemical restraint.132 Medication used as chemical restraints are administered “for the sole purpose of sedating and immobilizing the child.”133 Although medical professionals may use this practice on severely deranged and dangerous adult mental patients and criminals, chemically restraining children is condemned by the American Association of Adolescent Psychiatry, the Child Welfare League, Amnesty International, the Interna-

128 See Leslie et al., supra note 29, at 1; Mary Ellen Foti et al., Antipsychotic Medication Use in Medicaid Children and Adolescents: Report and Resource Guide From a 16-State Study, MEDICAID MED. DIRS. LEARNING NETWORK & RUTGERS CENTER EDUC. & RES. ON MENTAL HEALTH THERAPEUTICS, 14 (June 2010), http://rci.rutgers.edu/~cseap/MMDLNAPKIDS/Anti-psychotic_Use_in_Medicaid_Children_Report_and_Resource_Guide_Final.pdf (analyzing psychotropic medication use in the Medicaid system); PBS, supra note 20 (discussing how foster children are nine times more likely to be on antipsychotic medication than other children on Medicaid); Sessions, supra note 3.

129 See Burton, supra note 16, at 493–95; Talmadge, supra note 32, at 184; Brandow, supra note 26, at 1162, 1169.

130 See Burton, supra note 26, at 1162.

131 See Burton, supra note 16, at 494–95; Brandow, supra note 26, at 1162.

132 See Burton, supra note 16, at 494–95; Brandow, supra note 26, at 1162; see also Report of Gabriel Myers Work Group, supra note 1, at 7. An investigation by the Atlanta journal-Constitution into companies running foster homes in Georgia uncovered the fact that several of them repeatedly used psychotropic medication as a chemical restraint. Sessions, supra note 3. Even though these agencies had already received multiple citations, none received a fine greater than $500. See id.

133 Burton, supra note 16, at 492.
tional Narcotics Control Board (INCB), and the 1971 United Nations Convention on Psychotropic Substances.¹³⁴

Due to the burdens facing the foster care system, chemically restraining children provides a quick fix to many of these problems.¹³⁵ For example, states may be overly willing to medicate problematic children to prevent losing caregivers to burdensome working conditions.¹³⁶ As a result, states may medicate children who are either challenging or traumatized only because they burden caregivers.¹³⁷

B. Medicaid Reimbursements Make Psychotropic Medication the Most Cost-Effective Form of Treatment

Because most forms of psychotropic medication are covered by Medicaid, they are the most attractive treatment to foster parents, administering physicians, and caseworkers.¹³⁸ Medicaid is a federally and state-funded health care program that provides services and prescrip-


¹³⁵ Leslie et al., supra note 29, at 20; Burton, supra note 16, at 494–95; Brandow, supra note 26, at 1174. “Despite the fact that there is virtually no research to support the use of psychotropics on children for such conditions as acute aggression, state-involved children are sometimes given these powerful, brain-altering chemicals simply for being aggressive, unruly, or otherwise problematic.” Burton, supra note 16, at 493 (internal quotation marks omitted). For example, a physician-led review of the medical records of children within the Texas foster care system found little support for the aggressive use of psychotropic medication and questioned whether its use merely ensured that children acted in compliance with the expectations of foster parents, “not only to make them more submissive during care, but, more nefariously, to get more money and public benefits.” Id. at 494–95.

¹³⁶ See Chipungu & Bent-Goodley, supra note 25, at 83; Brandow, supra note 26, at 1162. Due to the burdens and restraints of foster home placements, constant therapy and gradual adjustment can become impossible, and caregivers may view medicating disturbed children as the only way for these homes to function properly. See Chipungu & Bent-Goodley, supra note 25, at 83; Brandow, supra note 26, at 1162; Report of Gabriel Myers Work Group, supra note 1, at 3.

¹³⁷ See Burton, supra note 16, at 494–95; Brandow, supra note 26, at 1175. Prescribing physicians may be general practitioners with limited training in psychiatry. See Brandow, supra note 26, at 1175. Furthermore, instead of acting in the best interest of the child, practitioners may be motivated by the interest of the caregiver in promoting the ability to control a child. See id.

¹³⁸ See Leslie et al., supra note 29, at 16, 20; Burton, supra note 16, at 494–95; Brandow, supra note 26, at 1162; PBS, supra note 20.
tion reimbursements to low-income individuals, including children in the foster care system. Although Medicaid reimbursement ensures that foster children receive expensive but necessary treatment, it also incentivizes overburdened caregivers to choose psychotropic medication.

Caseworkers may choose psychotropic medication as a means of relaxing the financial burden on foster parents because the medication’s cost does not come out of the caregiver’s limited stipend. In addition, Medicaid allows overburdened caseworkers to choose psychotropic medication as a quick fix for out of control children, rather than lengthy and comprehensive treatment programs. These perverse incentives mean that a foster child’s best interest may not be taken into account when caregivers administer medication.

**IV. Minimal Data, Tracking, and Oversight Measures May Prevent Foster Children from Seeking Relief**

Despite the danger of psychotropic medication, not all states track when and why they are prescribed. When states fail to keep adequate records, chemically abused children may struggle to find evidence sufficient for use in court to prove that caseworkers infringed their constitutional and personal rights.

---

139 See PBS, supra note 20.
140 See Leslie et al., supra note 28, at 20; see also PBS, supra note 20. As a result, in 2008 alone, Medicaid spend over $288.6 million on psychotropic medication for foster children. See PBS, supra note 20.
141 See Burton, supra note 16, at 494–95; Chipungu & Bent-Goodley, supra note 25, at 85.
142 See Leslie et al., supra note 29, at 20. Due to society’s desire to push for fast solutions to these problems,

The reimbursement structure of our health care system offers incentives for brief medication visits instead of comprehensive, collaborative, and interdisciplinary mental health treatment approaches. Despite research that suggests comprehensive treatment approaches are more effective in treating many mental health problems commonly seen in youth, the reimbursement structure of our health care system tends to impede this treatment strategy.

Id.

143 Id.; Burton, supra note 16, at 494–95; Brandow, supra note 26, at 1162.
144 See Leslie et al., supra note 29, at 6–8, 16; PBS, supra note 20.
A. Limited National Data, Tracking, and Oversight Measures

Even though psychotropic medications endanger health and violate rights of foster children, not every state adequately tracks when and why they are prescribed. Consent to the use of psychotropic medication is left solely in the hands of each child’s individual caseworker, regardless of his or her ability to make an informed determination. Foster children remain over-medicated in part because not everyone in the child welfare community recognizes the problem.

One reason for this failure is that almost all analyses are state- and county-specific, and not national. Without statistical analyses or significant media attention, states may not realize that compartmentalized data systems pose a problem. States, therefore, may be unable to conduct the research necessary to discover a system’s inadequacies and hold irresponsible state actors accountable.

Others may justify overmedication as a result of too many children entering the foster care system with severe histories of maltreatment,

---

146 See Leslie et al., supra note 29, at 6–8, 16 (reviewing statistics regarding state policies in overseeing psychotropic medication administration in foster children); PBS, supra note 20; see also supra notes 73–93, 133–138 and accompanying text (discussing the potential for misdiagnosis and human rights violations that may occur from unnecessarily administering psychotropic medication to a non-consenting individual). In 2008, the Foster Connections to Success and Increasing Adoptions Act required states to develop oversight measures for health and mental health services for foster children. Pub. L. No. 110-351, § 205, 122 Stat. 3949, 3961 (2008) (codified as amended at 42 U.S.C. § 622(b)(15) (2006)); see Leslie et al., supra note 124. Nevertheless, according to a 2010 study of forty-seven states and the District of Columbia, only approximately 54% had developed a written policy or a guideline regarding the use of psychotropic medication in foster children. Leslie et al., supra note 29, at 1, 5. Of the remaining states, 27% stated that they were in the process of developing a program and 19% said they had no plan in place.

147 See Chipungu & Bent-Goodley, supra note 25, at 86; Robertson, supra note 83, at 188; Brandow, supra note 26, at 1162; Leslie et al., supra note 124; PBS, supra note 20.

148 See Leslie et al., supra note 124 (“Identifying the problem—that is the stage we are at—not every one agrees that it is a problem.”) (internal quotation marks omitted).

149 See Leslie et al., supra note 29, at 6; Leslie et al., supra note 124; PBS, supra note 20 (stating that there is no national data on the issue but it has become a growing concern).


150 See Leslie et al., supra note 29, at 6; PBS, supra note 20; see, e.g., Strayhorn, supra note 149, at 141–47 (findings on the inadequacies of the Texas foster care system); Report of Gabriel Myers Work Group, supra note 1, at 9–13 (putting together a review group after the death of Gabriel Myers in 2009).

151 See Burton, supra note 16, at 494–95; Leslie et al., supra note 124; PBS, supra note 20.
neglect, sexual abuse, and broken families.\textsuperscript{152} Without a proper tracking system and oversight measures, however, this justification remains a hypothesis and the risk of improper diagnosis and abusive prescription remains a threat to foster children.\textsuperscript{153} Even if this hypothesis proves correct, the principal rule of medical ethics is “first do no harm” and not “first do something.”\textsuperscript{154} Without ensuring the absolute necessity of medications and then balancing the risks, physicians must first implement other less intrusive courses of treatment.\textsuperscript{155} Doing so shields children from the harms of psychotropic medication and protects their right to be free from forced administration.\textsuperscript{156}

B. The Nature of Psychotropic Disorder Diagnoses, Limited Tracking and Oversight Measures, and Qualified Immunity

In states with limited tracking or oversight, chemically-abused children may have no right to constitutional claims under 42 U.S.C. § 1983 due to the nature of the prescription process and qualified immunity.\textsuperscript{157} State actors that administer and monitor psychotropic medi-

\textsuperscript{152} See Chipungu & Bent-Goodley, supra note 25, at 77, 79, 84; Forgotten Children, supra note 119, at 5 (discussing the likelihood of foster children suffering from issues such as birth defects and maltreatment); see also Leslie et al., supra note 124.

\textsuperscript{153} See Chipungu & Bent-Goodley, supra note 25, at 77, 79, 84; Forgotten Children, supra note 119, at 5; see also Leslie et al., supra note 124.

\textsuperscript{154} See Sparks & Duncan, supra note 24, at 36; PBS, supra note 20; supra note 80 and accompanying text; see also Chipungu & Bent-Goodley, supra note 25, at 79; Forgotten Children, supra note 119, at 5.

\textsuperscript{155} See Sparks & Duncan, supra note 24, at 36; PBS, supra note 20.

\textsuperscript{156} See Sparks & Duncan, supra note 24, at 36; Talmadge, supra note 32, at 183–84; PBS, supra note 20.

\textsuperscript{157} See 42 U.S.C. § 1983 (2006); Youngberg v. Romeo, 457 U.S. 307, 323–24 (1982); Henry A. v. Willden, No. 2:10-cv-00528-RCJ-PAL, 2010 WL 4362809, at *7 (D. Nev. Oct. 26, 2010) (finding the Nevada foster care system to be immune from suit due to the agent’s discretionary powers and because it is not clearly established that foster children have “a constitutional right to . . . monitor of, administration, and use of psychotropic drugs”); Smith v. Rainey, 747 F. Supp. 2d 1327, 1343–44 (M.D. Fla. 2010) (rejecting plaintiffs claim on the grounds of sovereign immunity and that the claim lacked “factual or legal support”); Starkey, 2007 WL 4522702, at *15–16 (granting defendant’s motion for summary judgment with respect to plaintiff’s claim that defendant had ulterior motives when prescribing psychotropic medication because the claim presented “no evidence other than the bare allegation itself”); Wilder, 568 F. Supp. at 1137 (The city’s decision to place plaintiff on psychotropic medication was “presumptively correct, that presumption may be rebutted . . . . [by] a fully developed factual record establishing the actual level of treatment . . . .”); see also Geller v. Staten Island Dev. Ctr., No. 84-CV-354, 1991 WL 99054, at *18–19 (N.D.N.Y. June 5, 1991) (entitling defendant to qualified immunity from suit as long as the defendant’s practices of administering the psychotropic medications were “in conformity with acceptable professional standards existing at the time”). According to 42 U.S.C.
cations—namely consenting caseworkers and recommending practitioners—are not liable if they act within their discretionary authority.\textsuperscript{158} Courts presume discretionary decisions are valid unless there is “a fully developed factual record establishing the actual treatment” that departed from professional standards.\textsuperscript{159}

This burden is substantial.\textsuperscript{160} Diagnosing physicians have wide discretion when making a recommendation and may avoid liability as long as the child’s behavior reflects the symptoms of the disorder.\textsuperscript{161} Likewise, when physicians recommend psychotropic medication, the caseworkers act within their authority when following that advice.\textsuperscript{162} For example, to rebut a qualified immunity defense, the Eleventh Circuit requires proof of deliberate indifference on behalf of the government actor.\textsuperscript{163} To prove deliberate indifference, the claimant must show: “1)
subjective knowledge of a risk of serious harm; 2) disregard of that risk; 3) by conduct that is more than mere negligence.”

Evidence of deliberate indifference, however, may not exist in states without strict oversight and tracking measures, thereby potentially preventing chemically abused children from nullifying qualified immunity.

V. STATE AND FEDERAL GOVERNMENT SOLUTIONS

There are six general criteria that, if implemented, would successfully protect foster children from overmedication. In practice, a comprehensive and collaborative national database would meet these six criteria, thereby protecting foster children’s safety and constitutional rights through dismissal of irresponsible caseworkers and practitioners.

A. What States Need to Do to Address Over-Medicated Foster Children

Though some states have implemented oversight mechanisms or improved healthcare quality to prevent foster children from unjustifiably receiving psychotropic medication, more reform is necessary.

Due to the differences between foster care systems, no single policy is perfect for all state systems. A successful system, however, should fulfill six general criteria: it should (1) promote recognition of problems, (2) maximize medical data tracking and collection, (3) promote communication and collaboration between the foster organizations and

---


164 Feaver, 2004 WL 213198, at *3 (citing McElligott, 182 F.3d at 1255).

165 See Youngberg, 457 U.S. at 323–24; Starkey, 2007 WL 4522702, at *13–15; Wilder, 568 F. Supp. at 1137; PBS, supra note 20 (discussing the motivations against the best interest of the child involved in the overuse of psychotropic medication in foster children and the need for tracking measures). This is more troubling considering the fact that, in a 2010 study of forty-eight states measuring what factors states would want to use in an oversight system that flags concerning trends in medication, only ten states (21.3%) would look for “no documentation of discussion of risks and benefits of medication,” and only fourteen states (29.8%) would look for prescribed dosages of medication that are not consistent with recommendations. See Leslie et al., supra note 29, at 7.

166 See Leslie et al., supra note 29, at 9–10, 12–13, 15; Leslie et al., supra note 124.

167 See Leslie et al., supra note 29, at 9–10, 12–13, 15; Foti et al., supra note 128, at 38; Leslie et al., supra note 122; supra notes 73–82, 134–138 and accompanying text.

168 See Leslie et al., supra note 29, at 5 (reporting that approximately fifty-four percent of states in 2010 had a policy in place on psychotropic medication use in foster children); Leslie et al., supra note 124 (reporting forty-nine percent of states with a policy in place on psychotropic medication use in foster children).

169 See Leslie et al., supra note 29, at 1 (discussing policies of various states aimed at solving the problem); Foti et al., supra note 128, at 38 (“There was no single essential approach—each State crafted interventions based on its specific environment.”).
stakeholders, (4) create systems of oversight and secondary review of consent, (5) train and educate employees on overmedication, and (6) gather input from foster parents, biological parents, and children.\textsuperscript{170}

The first criterion in a successful system is to make government actors recognize the problem of overmedication.\textsuperscript{171} One efficient way to achieve this goal is to collect data and then promote the findings.\textsuperscript{172} Some states have already done this, using means such as gathering all available local and national data, pooling data with agencies in other states, and commissioning independent reports.\textsuperscript{173} States then need to review this data and implement measures limiting the chances of improper psychotropic medication prescription.\textsuperscript{174}

To maximize medical data tracking—the second proposed criterion—states should require practitioners to fill out in-depth reports, justifying recommendations of psychotropic medication and noting the risks, benefits, and alternatives explained to the caseworker.\textsuperscript{175} This data would give a basis for states to hold practitioners accountable for inadequate records.\textsuperscript{176} Another potential oversight measure is to better ensure that recipients only take medication prescribed for a legitimate purpose.\textsuperscript{177} Some states have traditionally accomplished this by initially screening for health issues within three days after a child enters foster care, more thoroughly screening after thirty to sixty days, and requiring annual screenings thereafter.\textsuperscript{178} This further oversight, however, should come from an impartial psychiatrist that reviews all prescription decisions or an attorney appointed for the child to represent his or her interests.\textsuperscript{179}

States should also collaborate with other organizations, thereby fulfilling the third criterion of sharing a common vision of how to ad-

\textsuperscript{170} See Leslie et al., \textit{supra} note 29, at 9–10, 12–13, 15; Leslie et al., \textit{supra} 124.

\textsuperscript{171} See Leslie et al., \textit{supra} note 29, at 9; Leslie et al., \textit{supra} note 124.

\textsuperscript{172} See Leslie et al., \textit{supra} note 29, at 9; Leslie et al., \textit{supra} note 124.

\textsuperscript{173} See Leslie et al., \textit{supra} note 29, at 9. See, e.g., \textit{Strayhorn}, \textit{supra} note 149, at 10 (report by the Texas Comptroller of Public Accounts); \textit{Report of Gabriel Myers Work Group}, \textit{supra} note 1, at 7–8 (report commissioned by the Florida Department of Children & Families).

\textsuperscript{174} See Leslie et al., \textit{supra} note 29, at 9–19; Leslie et al., \textit{supra} note 124.

\textsuperscript{175} See Leslie et al., \textit{supra} note 29, at 12; Leslie et al., \textit{supra} note 124; Sessions, \textit{supra} note 3.

\textsuperscript{176} See Leslie et al., \textit{supra} note 124; Sessions, \textit{supra} note 3 (questioning the state of Georgia for not properly holding practitioners accountable).

\textsuperscript{177} See Leslie et al., \textit{supra} note 29, at 12.

\textsuperscript{178} See \textit{id.;} Naylor et al., \textit{supra} note 22, at 183; Leslie et al., \textit{supra} note 124; see also PBS, \textit{supra} note 20 (discussing motivations that impact psychiatrists’ decisions to medicate over therapy).

\textsuperscript{179} See Leslie et al., \textit{supra} note 29, at 12, 20; Naylor et al., \textit{supra} note 22, at 183; Leslie et al., \textit{supra} note 124; see also PBS, \textit{supra} note 20.
dress overmedication and effectively communicating the risks.\textsuperscript{180} This would also help provide up-to-date guidelines on acceptable practices, allowing caseworkers and foster parents to recognize when medicating a child is unnecessary.\textsuperscript{181} To stop stifling normal behavior, states should educate foster parents about behavioral patterns common to foster children undergoing placement changes.\textsuperscript{182}

Furthermore, some states have already implemented the fourth criterion—secondary oversight mechanisms—by setting guidelines based on recommendations of the Academy of Child and Adolescent Psychiatry, the American Academy of Psychiatry, the Child Welfare League of America, or a state-recommended evaluation conducted by an appointed agency.\textsuperscript{183} Practitioners should follow a chosen guideline and seek departmental review when psychotropic medication is prescribed outside of the recommendations.\textsuperscript{184} States should then use this information to form a database of foster children’s medical records and psychotropic prescriptions—categorized by child, recommending practitioner, and consenting caseworker—by merging the data from Medicaid and child welfare agencies.\textsuperscript{185} Therefore, states will quickly spot out-

\textsuperscript{180} See Leslie et al., supra note 29, at 9; Leslie et al., supra note 124 (discussing the problem of child welfare agencies not working together); Report of Gabriel Myers Work Group, supra note 1, at 4–5, 9, 31 (stating that failures of child welfare agencies to properly communicate with one another had an impact on Gabriel’s death). To address this issue, some states have created a child-serving advisory group, placed public individuals in charge of care, developed standards of practice, provided education and training, and provided coaching and mentor programs wherein retired child welfare workers mentor new ones. Leslie et al., supra note 29, at 9–10.

\textsuperscript{181} See Leslie et al., supra note 29, at 11.

\textsuperscript{182} See Chipungu & Bent-Goodley, supra note 25, at 86–87; Racusin et al., supra note 106, at 207–09.

\textsuperscript{183} See Leslie et al., supra note 29, at 12 (providing the California Evidence-Based Clearinghouse as an example of a state’s recommended evaluation tool).

\textsuperscript{184} See id.; Julie M. Zito et al., Psychotropic Medication Patterns Among Youth in Foster Care, 121 Pediatrics e157, e162 (2008); see also PBS, supra note 20. The Texas Department of State Health Services created a board, composed of a research pharmacist, a physician, a mental health administrator, a child psychologist, six child and adolescent psychiatrists, and an adult psychiatrist to write a system of practice guidelines for the administration of psychotropic medication in foster children. Zito et al., supra, at e162. The board determined that the state should require a departmental review “if antipsychotic agents and antidepressants were prescribed for youth under age 4 years, stimulants under age 3 years, if ≥2 drugs from the same class were prescribed concomitantly, and if ≥5 different classes of psychotropic medication were prescribed concomitantly.” Id. Although these guidelines are provided, they are not the law and psychiatrists can recommend psychotropic medication to children despite their existence. PBS, supra note 20.

\textsuperscript{185} See Leslie et al., supra note 29, at 6; PBS, supra note 20.
liers and hold accountable irresponsible caseworkers and practitioners.\(^{186}\)

To promote the fifth criterion of training and educating employees, states should involve foster parents in decisions on psychotropic medication administration.\(^{187}\) This increases familiarity with medications and potential side effects, thereby allowing for closer monitoring.\(^{188}\) This is a means of training foster parents while gathering their input and promoting collaboration.\(^{189}\)

Finally, to implement the sixth criterion of preserving the rights of the biological parents and the child, states should find ways to involve them in the decision-making process.\(^{190}\) Even if parents are incapable of raising their child, they still have the constitutional right to parental autonomy and may have the child’s best interest at heart.\(^{191}\) Additionally, involving them in the decision-making process may alleviate concerns regarding later reunification because it may educate parents about their child’s health, behavioral problems, and medication.\(^{192}\)

Furthermore, involving children in their own medical decisions may not only help protect their rights but also may increase the effectiveness of care.\(^{193}\) This would improve relationships with caregivers, promote understanding of disorders and treatments, and may increase children’s commitment to improving themselves.\(^{194}\) When strict guidelines prevent misdiagnosis and cause the termination of irresponsible caseworkers and practitioners, children will be less susceptible to co-

\(^{186}\) See Leslie et al., supra note 29, at 6; PBS, supra note 20.

\(^{187}\) See Leslie et al., supra note 29, at 5, 15; Chipungu & Bent-Goodley, supra note 25, at 86–87; PBS, supra note 20.

\(^{188}\) See Leslie et al., supra note 29, at 5, 15; Chipungu & Bent-Goodley, supra note 25, at 86–87; PBS, supra note 20.

\(^{189}\) See Leslie et al., supra note 29, at 5, 15; Chipungu & Bent-Goodley, supra note 25, at 86–87; Leslie et al., supra note 124; PBS, supra note 20.

\(^{190}\) See Leslie et al., supra note 29, at 15.

\(^{191}\) See Santosky v. Kramer, 455 U.S. 745, 753 (1981); Scott & Scott, supra note 49, at 2431–32; supra notes 52–57 and accompanying text. This should not apply to parents who intentionally abuse or neglect children, but may apply to parents lacking in fitness only because the community cannot help support their children through community services. See Chipungu & Bent-Goodley, supra note 25, at 80; Brandow, supra note 26, at 1158–61.

\(^{192}\) See Leslie et al., supra note 29, at 15.

\(^{193}\) See Brandow, supra note 26, at 1176.

\(^{194}\) See id. at 1177 (“Children who participate in decisionmaking adjust better to treatment, are more committed to treatment, show greater compliance with treatment, and prematurely terminate treatment less frequently.”). This should apply to all children, especially older children. Talmadge, supra note 32, at 191–92; Brandow, supra note 26, at 1173–78.
erced consent. In those situations where a medication’s necessity is unclear, parents and the child may provide valuable feedback. Finally, a child’s involvement in the decision-making process may create a better treatment experience and ensure preservation of rights.

B. States Cannot Protect the Rights and Safety of Foster Children Without Implementing National Policies and a National Database

The overmedication issue needs prioritization on a national level because it is arguably the only way for the government to prevent state actors from violating foster children’s constitutional rights. Because the majority of states lack either Medicaid databases, child welfare databases, or a combination of both with which to track psychotropic medication use, foster children crossing between states may not have complete and accurate information in their files. Even a cautious practitioner or caseworker may never know if he or she has the necessary information to ensure an accurate determination. Therefore, states must collectively protect children’s rights and mental safety by ensuring the complete certainty of medical records. This requires the aid of the federal government through a national database of foster children’s medical records and case information, thereby preventing misdiagnosis and protecting the children’s best interests.

A national database would force states to create measures that preserve children’s rights, punish state actors that violate these rights, and promote cross-border communication methods. A federal governmental advisory body may implement this database, review and pro-

---

195 See Leslie et al., supra note 29, at 12, 15; Brandow, supra note 26, at 1177; Leslie et al., supra note 124; PBS, supra note 20.
196 See Leslie et al., supra note 29, at 15; Brandow, supra note 26, at 1176–77.
197 See Brandow, supra note 26, at 1176–78.
198 See Leslie et al., supra note 29, at 19; Talmadge, supra note 32, at 190–92; Leslie et al., supra note 124.
199 See Leslie et al., supra note 29, at 6; Foti et al., supra note 128, at 38; see, e.g., Report of Gabriel Myers Work Group, supra note 1, at 3–5 (discussing the failure to communicate vital information regarding sexual abuse once Gabriel was moved from Ohio to Florida).
200 See Leslie et al., supra note 29, at 6; Foti et al., supra note 128, at 38; see, e.g., Report of Gabriel Myers Work Group, supra note 1, at 3–5.
201 See Leslie et al., supra note 29, at 6, 16; Leslie et al., supra note 124 (stating a solution to the problem is “[g]ather[ing] data of medication use—national and state specific”); see, e.g., Report of Gabriel Myers Work Group, supra note 1, at 3–5.
202 See Leslie et al., supra note 29, at 16, 19; Foti et al., supra note 128, at 38; Leslie et al., supra note 124; see, e.g., Report of Gabriel Myers Work Group, supra note 1, at 4–5.
203 See Leslie et al., supra note 29, at 19; Foti et al., supra note 128, at 38; supra notes 73–82, 134–138 and accompanying text; see, e.g., Report of Gabriel Myers Work Group, supra note 1, at 3–5.
mote the best oversight and treatment practices, quantify the impact on a child’s well-being, and protect rights and liberties. Furthermore, this comprehensive and collaborative national database would meet all six criteria for a successful foster care system, thereby protecting foster children’s safety and constitutional rights and dismissing irresponsible caseworkers and practitioners.

CONCLUSION

Over-prescription of psychotropic medication turns many foster children into victims of chemical abuse and infringes their constitutional and natural rights. Even though psychotropic medication should only be used as a last resort, caseworkers and practitioners have wide discretionary power in determining what medication is in a child’s best interest. This discretionary authority can become dangerous when the actors lack the evidence or the ability to make a proper judgment. When states fail to provide measures to ensure that discretion is not abused, they miss the problem, cannot hold irresponsible actors accountable, cause harm to foster children, and potentially prevent children from bringing claims for relief. Although some states have implemented oversight, all states should follow suit and the federal government should regulate state collaboration to protect the health, safety, welfare, and rights of foster children.

204 See Leslie et al., supra note 29, at 19; Talmadge, supra note 32, at 190–92; Brandow, supra note 26, at 1176.
205 See Leslie et al., supra note 29, at 9–10, 12–13, 15; Foti et al., supra note 128, at 38; Brandow, supra note 26, at 1176; Leslie et al., supra note 124; supra notes 73–82, 134–138 and accompanying text.
TOWARD EFFICIENCY AND EQUITY IN LAW ENFORCEMENT: “RACHEL’S LAW” AND THE PROTECTION OF DRUG INFORMANTS

IAN LESON*

Abstract: Following the murder of Rachel Morningstar Hoffman—a 23-year-old college graduate—Florida passed “Rachel’s Law,” which established new guidelines for the police when dealing with confidential informants. Immediately prior to its enactment, lawmakers stripped Rachel’s Law of key provisions. These provisions required police to provide a potential informant with an attorney before agreeing to any deal. Opponents of these provisions argue that they hamstring law enforcement agencies in their efforts to prosecute drug crimes. Rather than serving as an obstacle to effective law enforcement, the attorney provision in the original version of Rachel’s Law enables efficient prosecution of crimes and protects minor drug offenders who may be unsuited for potentially dangerous undercover informant work. This Note recommends that the attorney provision be restored to Rachel’s Law, and encourages other states to enact similar statutes.

Introduction

In 2008, police arrested Rachel Hoffman, a 23-year-old Florida State University graduate, after they found ecstasy pills and marijuana in her apartment. Facing multiple drug charges, she became an informant for the police department in Tallahassee, Florida. As part of a drug sting, Rachel attempted to buy cocaine and a firearm from two


2 See Portman, supra note 1.
felons targeted by the police.\textsuperscript{3} Police recovered her body thirty-six hours later; Rachel had died from a gunshot wound.\textsuperscript{4}

The public heavily criticized the Tallahassee police department for its handling of Hoffman, particularly for failing to provide her with proper training in her role as an informant.\textsuperscript{5} Soon after her death, Hoffman’s parents and Florida lawmakers lobbied for the passage of confidential informant reform legislation.\textsuperscript{6} As a result, Florida passed “Rachel’s Law” in 2009, becoming the first state to provide new policies and procedures for the use of informants by law enforcement.\textsuperscript{7} Rachel’s Law requires the police to consider an informant’s suitability for a particular agreement, including age, maturity, and the attendant risks of harm.\textsuperscript{8} The law requires police to inform suspects that police officers are not authorized to decide whether criminal charges are


\textsuperscript{4} See Portman, supra note 1; Leary, supra note 1.


\textsuperscript{7} See Fla. Stat. § 914.28 (2010); Natapoff, supra note 3. In addition to Florida, other states have developed guidelines regarding police informants, but these state laws are focused on ensuring the reliability of information rather than the safety of the informants themselves. See Alexandra Natapoff, Snitching: Criminal Informants and the Erosion of American Justice 193–97 (2009). Local police departments have varying levels of internal regulations that address the use of informants. See id. at 187–88. For example, the Las Vegas Police Department has written guidelines that require officers to keep files on their informants and advise them that they are not permitted to commit crimes while gathering information. See id. at 188. Some states, such as New Jersey, regulate the use of juvenile informants, with an eye toward their well-being. See THE NEW JERSEY SCHOOL SEARCH POLICY MANUAL, at A10-1 app. 10 (1998), available at http://www.state.nj.us/lps/dcj/school/school1.pdf. The New Jersey regulations prohibit the use of juvenile informants who are participating in substance abuse treatment or have a history of mental illness. See id. at A10-2. They explicitly aim to address “the danger to the juvenile of acting as an informant.” Id. On the federal level, the Department of Justice (DOJ) has issued comprehensive guidelines that are used to regulate the Federal Bureau of Investigation (FBI) and Drug Enforcement Administration (DEA) in their use of confidential informants. See John Ashcroft, ATT’Y GEN., THE ATTORNEY GENERAL’S GUIDELINES REGARDING THE USE OF CONFIDENTIAL INFORMANTS 1 (2002), available at http://www.ignet.gov/pande/standards/invprg1211appdf.pdf. In 2006, the DOJ issued even more specific guidelines regulating the use of FBI informants. See Alberto R. Gonzales, ATT’Y GEN., THE ATTORNEY GENERAL’S GUIDELINES REGARDING THE USE OF FBI CONFIDENTIAL HUMAN SOURCES 1–3 (2006), available at http://www.justice.gov/oip/docs/agguidelines-use-of-fbi-chs.pdf.

\textsuperscript{8} See Fla. Stat. § 914.28(5)(a)–(h).
dropped or altered. It also legislates for more efficient investigations, such as a provision requiring law enforcement to consider “[t]he risk the person poses to adversely affect a present or potential investigation or prosecution . . . .”

While applauded in many circles, lawmakers stripped the final version of Rachel’s Law of certain key provisions. Among them was a requirement that suspects be told they can see an attorney before agreeing to deals. Other provisions would have prohibited the use of individuals participating in substance abuse programs as informants without obtaining court approval. Lawmakers also removed a prohibition on using nonviolent offenders in operations targeting violent felons. While these provisions disappeared in concession to law enforcement interests in Florida, they were the ones most aggressively lobbied for by Rachel’s parents. State Senator Mike Fasano, a proponent of the bill, explained that “if you want to keep a bill moving, you have to give a little something . . . .”

In general, the law enforcement community has been reluctant to embrace informant reform. Informants are an essential element in criminal prosecution and law enforcement officials argue that they risk a disadvantage when informant interactions are slowed. Thus, they

---

9 See id. § 914.28(3)(a).
10 Id. § 914.28(5)(b).
11 See Salinero, supra note 6.
15 See Salinero, supra note 6. General counsel for the Florida Department of Law Enforcement testified to the State Senate Committee on Criminal Justice that “the original bill would bring drug investigations using confidential informants to a ‘screeching halt.’” Id. Florida newspaper reports alleged that the provisions disappeared at the behest of law enforcement agencies. See id.; Leary, supra note 1.
16 Salinero, supra note 6.
17 See Law Enforcement Confidential Informant Practices: Joint Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. & the Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the Comm. on the Judiciary House of Representatives, 110th Cong. 76-78 (2007) [hereinafter Joint Hearing] (statement of Ronald E. Brooks, President, National Narcotic Officers’ Association Coalition) (“[I]n the vast majority of the thousands of . . . investigations that I have conducted or supervised there would not have been a successful conclusion had it not been for the information provided or access gained through the use of an informant.”).
18 See United States v. Bernal-Obeso, 989 F.2d 331, 334-35 (9th Cir. 1993) (“[O]ur criminal justice system could not adequately function without information provided by informants . . . .”); Rich, supra note 5, at 688-89; see also Alexandra Natapoff, Snitching: The Institutional and Communal Consequences, 73 U. Cin. L. Rev. 645, 655 (2004) (“Our justice system has become increasingly dependent on criminal informants over the past twenty years, primarily as a result of the confluence of several related trends: the United States Sentencing Guidelines (USSG), mandatory minimum sentences, and the explosion of
argue, the crime-fighting enterprise is harmed when police officers must offer an offender the opportunity to speak with an attorney before making a deal.\textsuperscript{19} This perspective, however, ignores the fact that informants—such as Rachel Hoffman, a nonviolent drug offender with no training—are too often put at risk.\textsuperscript{20}

Evidence shows that Hoffman's situation was not an isolated incident.\textsuperscript{21} In 1998, seventeen-year-old Chad MacDonald was pulled over for speeding by California police and the officers found methamphetamines.\textsuperscript{22} After arresting him, they gave him a choice between prosecution and working as an informant.\textsuperscript{23} The police failed to tell him that, as a first-time offender, he could have enrolled in a drug rehabilitation program.\textsuperscript{24} The day before MacDonald's birthday, after two months of drug crime enforcement efforts.); Salinero, \textit{supra} note 6. In particular, informants are essential to the prosecution of drug crimes. \textit{See Joint Hearing, \textit{supra} note 17, at 66 (statement of Alexandra Natapoff, Professor of Law, Loyola Law School) (“Informants are a cornerstone of drug enforcement. It is sometimes said that every drug case involves a snitch.”). Law enforcement officials argue that restrictions on the use of informants would make these prosecutions more difficult. \textit{See id.} at 87 (statement of Ronald E. Brooks, President, National Narcotic Officers’ Association Coalition).\textsuperscript{19} \textit{See Joint Hearing, \textit{supra} note 17, at 87 (statement of Ronald E. Brooks, President, National Narcotic Officers’ Association Coalition); Salinero, \textit{supra} note 6.\textsuperscript{20} \textit{See Joint Hearing, \textit{supra} note 17, at 66 (testimony of Alexandra Natapoff, Professor of Law, Loyola Law School) (“The government’s use of criminal informants is largely secretive, unregulated, and largely unaccountable.”); Natapoff, \textit{supra} note 18, at 670–671 (discussing the problem of broad law enforcement discretion); Portman, \textit{supra} note 1.\textsuperscript{21} \textit{See, e.g.}, Michael Beebe, \textit{Walking Thin Line in Village of Attica: Would-Be Informant Says Police Coerced Her into Cooperation}, \textit{Buffalo News}, Nov. 8, 2009, at A1 (describing the story of Bianca Hervey, who was recruited as an informant after being stopped for driving with a suspended license); Scott Martelle & Bonnie Hayes, \textit{Fatal Deception: Web of Lies May Have Snared Young Drug-User-Turned-Informant, Killed Allegedly by People Who Knew of His Ties to Police}, \textit{L.A. Times}, Apr. 5, 1998, at A3 (describing the story of Chad MacDonald, who was killed after becoming an informant); \textit{see also} Rich, \textit{supra} note 5, at 682–83 (citations omitted) (“Hoffman’s situation is typical of those faced by an increasing number of civilians who assist police in exchange for leniency.”). In September 2009, in the town of Attica, New York, police pulled over a twenty-year-old college student named Bianca Hervey for driving with a suspended license. \textit{See Beebe, \textit{supra}. Handcuffed to a bench and told by police she would spend the night in jail, Hervey agreed to become a confidential informant for the county drug task force. \textit{Id.} Hervey’s situation is especially alarming because, unlike Rachel Hoffman, Hervey had no association with drugs. \textit{See id.;} Salinero, \textit{supra} note 6. Attica Police Chief William Smith made clear to the young woman’s father, a lawyer who rushed to her aid before she was harmed, that he had no plans to change the practice. \textit{See Beebe, \textit{supra}. “[Hervey’s father] doesn’t like the way police do things, I guess . . . . He doesn’t like the way it’s done . . . . It is what it is.” \textit{Id.}}\textsuperscript{22} \textit{See Michael R. Santiago, Comment, “The Best Interests of the Child”—Scrutinizing California’s Use of Minors as Police Informants in Drug Cases, 31 McGeorge L. Rev. 777, 778 (2000); Martelle & Hayes, \textit{supra} note 21.\textsuperscript{23} Santiago, \textit{supra} note 22, at 778.\textsuperscript{24} \textit{See id.}
police informant work, the police recovered a “tortured and battered body . . . .”

MacDonald’s mother filed a missing persons report five days after she last saw him, and using that information, the police identified the recovered body as MacDonald’s. As a result of MacDonald’s case, California adopted legislation protecting juvenile informants.

While Rachel’s Law is an important step toward meaningful reform, the protection of informants requires even more attention. This Note argues that reinstating some of the fundamental considerations included in the original version of Rachel’s Law will protect the less-than-ready informant and make law enforcement more efficient.

Part I provides a brief history of the police practice of using confidential informants. Part II looks at the current state of the informant system. It describes the flaws in the system and the ways in which the system implicates the Constitution. Part III examines the differences between the original and final versions of Rachel’s Law, and focuses on the provisions providing a right to counsel and protection for informants in drug rehabilitation programs. Part IV argues for reinstating the stripped provisions and explains why restoring them, at least in part, would serve the needs of both informants and law enforcement. The Note concludes by encouraging other states to enact legislation similar to the original version of Rachel’s Law.

I. The Use of Criminal Informants in Law Enforcement

The use of informants can be traced back from ancient Greece, through Judas Iscariot, to Britain in the Middle Ages, and onward through modern times. The reasons behind the use of informants have changed over time, but one persistent theme is the rooting out of anti-government sentiment and activity.

By the thirteenth century Britain employed what was known as the “approver system,” where “a person accused of treason or a felony could

---

25 Id.
26 See Martelle & Hayes, supra note 21.
27 See Santiago, supra note 22, at 781.
28 See Rich, supra note 5, at 682–85; Portman, supra note 1; Natapoff, supra note 3.
29 See Natapoff, supra note 7, at 183–84 (explaining that making counsel available to informants will “improve the fairness and regularity of the process”); Rich, supra note 5, at 694–96, 698–99 (describing how law enforcement agencies become less able to recruit new informants when they develop a reputation for “burning” them).
30 See Robert M. Bloom, Ratting: The use and Abuse of Informants in the American Justice System 1, 3, 5, 7 (2002).
31 See id. at 2, 5, 7.
confess and inform on any remaining accused persons." If successful, the approver could be pardoned and exiled. If the information was false, however, the approver could be executed. For those accused of murder, there were few reasons not to risk informing, thereby raising questions of reliability and leading to the system’s abuse. After all, the informant risked execution either way. By the eighteenth century, the approver system gave way to the informal practice of confessing to a crime and revealing one’s accomplices in the hopes of receiving leniency. The use of confidential informants then increased as law enforcement in Western Europe began to "professionalize." 

American courts addressed the use of informants in the middle of the twentieth century when defendants alleged that confidential informant testimony violated the Fourth, Fifth, and Sixth Amendments. In an oft-quoted passage, Judge Learned Hand explained, "[c]ourts have countenanced the use of informers from time immemorial . . . it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly. Entrapment excluded, . . . decoys and other deception are always permissible." In 1966, the Supreme Court sanctioned the use of informants, calling the practice “not per se unconstitutional.” The Court explained that “[t]he established safeguards of the Anglo-American legal system,” such as cross-examination and jury determinations of credibility, addressed any constitutional concerns about informant evidence.

---

32 Id. at 5; see also Graham Hughes, Agreements for Cooperation in Criminal Cases, 45 Vand. L. Rev. 1, 7 (1992).
33 Bloom, supra note 30, at 5.
34 Id.
35 See id.
36 Id.
37 See Hughes, supra note 32, at 7 (“This practice was rife in the nineteenth century when the lack of an organized police force often made it essential to procure accomplice testimony in order to track down or build a case against a major criminal.”).
38 Bloom, supra note 30, at 2.
40 Dennis, 183 F.2d at 224.
41 See Hoffa, 385 U.S. at 311.
42 Id. In his dissent, however, Chief Justice Warren questioned the blanket approval of the use of informants in criminal trials. See id. at 315 (Warren, C.J., dissenting). Warren explained:

At this late date in the annals of law enforcement, it seems to me that we cannot say either that every use of informers and undercover agents is proper or, on the other hand, that no uses are. There are some situations where the law could not adequately be enforced without the employment of some guile or
Modern law enforcement agencies focus their use of informants on ferreting out individual criminals. Informants permeate every level of the criminal justice system, particularly in the investigation of drug crimes. Indeed, the U.S. government’s “War on Drugs” increased the use of informants in the prosecution of drug crimes. Professor Alexandra Natapoff explains that “approximately one-third of criminal offenders are under the influence of drugs at the time of their offenses, while as many as 80 percent of inmates have a history of substance abuse.” These offenders have information and contacts that make them ideal informants. Informants are “irreplaceable” in the context of “the investigation of narcotics, prostitution, and other vice crimes, because inside information is often necessary for police to learn about their occurrence.”

There are several categories of informants. Some are paid by the police for their cooperation. Others are voluntary, sharing information with police out of “feelings of civic duty” or for other various reasons.
sons.\textsuperscript{51} The third category—into which Rachel Hoffman fell—is composed of offenders trading cooperation in exchange for leniency.\textsuperscript{52} Professor Michael Rich calls this subcategory “coerced informants” because the government claims to have sufficient evidence for a conviction.\textsuperscript{53} Most active informants are coerced informants.\textsuperscript{54}

Coerced informants are subject to intense pressures to cooperate.\textsuperscript{55} For instance, an offender’s uncertainty is highest immediately following arrest.\textsuperscript{56} This “mak[es] her most likely to agree to cooperate at that time.”\textsuperscript{57} When the individual does not readily offer information, “the most powerful motivational tool available to the police or prosecutor is the fear of criminal charges and a long prison sentence.”\textsuperscript{58} The promise of leniency, sometimes vague and uncertain, can be enough to “flip” an offender.\textsuperscript{59}

Critics often overlook the issue of coercion, instead focusing on the inherent unreliability of information generated by informants.\textsuperscript{60} This focus solely on reliability concerns, however, masks other flaws in

\textsuperscript{51} Id. Other reasons may include a desire to associate with the police or a wish to eliminate criminal competition. See id. Professor Robert Bloom discusses the many theories behind what may have motivated Judas Iscariot, who “remains the epitome of betrayal and informing to many,” and suggests that the same motivations continue to influence informants. Bloom, supra note 30, at 4–5. These motivations include greed, hate, jealousy, and altruism. See id. at 4.

\textsuperscript{52} See Rich, supra note 5, at 690.

\textsuperscript{53} Id. at 691–92.

\textsuperscript{54} Id. at 695.

\textsuperscript{55} See id. at 691–92.

\textsuperscript{56} Id. at 694.

\textsuperscript{57} Rich, supra note 5, at 694.

\textsuperscript{58} Id. In some cases, informants who stop cooperating may be placed in jail for a night to think it over. Id. at 700. This is not, however, the only tool at law enforcement’s disposal. See Alexandra Natapoff, Deregulating Guilt: The Information Culture of the Criminal System, 30 Cardozo L. Rev. 965, 969 (2008) (“Police and prosecutors create criminal informants using everything from threats to friendship to deceit to sex.”). Informants may even earn the permission to commit new offenses. Id.

\textsuperscript{59} See Natapoff, supra note 18, at 652; Rich, supra note 5, at 682–83. Officers and prosecutors tend to have broad discretion when making offers to informants. See Natapoff, supra note 18, at 652–53. Sometimes, rather than a promise of outright forgiveness for a crime, the informant is told the prosecutor will make a non-binding recommendation to impose a lower sentence. Id. at 652. In other cases, the informant is promised nothing at all at the outset, with any reward being contingent on the quality of the work or information the informant eventually provides. See id. For example, Tallahassee police told Rachel Hoffman that “she only had to provide ‘substantial assistance’ or do ‘one big deal’ to avoid charges . . . .” Rich, supra note 5, at 682.

\textsuperscript{60} See Natapoff, supra note 18, at 651, 663–64. Addicted informants and informants with mental health issues are especially prone to unreliability because of their vulnerability to coercion. See Natapoff, supra note 7, at 184–85.
the informant system.61 For example, Rachel Hoffman provided officials with labor rather than information or witness testimony, so the question of reliability did not apply in her case.62 Focusing too much on the unreliability of snitches as witnesses “obscures the nature of the mechanisms by which that unreliable testimony is created.”63 The informant institution’s biggest flaw is arguably the controversial and secretive mechanism by which informants are coerced into informing.64

II. FUNDAMENTAL FLAWS IN THE INFORMANT INSTITUTION

Informants generally have little recourse when wronged or harmed by law enforcement and, therefore, are in need of an attorney when they first consider becoming an informant.65 Some see an informant agreement as “an extreme form of plea bargain[ing]” and, even though pleas in court are a product of counsel, none is provided to informants making similar decisions on the street.66 Lack of counsel particularly affects those with substance abuse or mental health problems.67

A. The Coerced Informant and the Constitution

The process of flipping an alleged offender into an informant circumvents the protections of the Bill of Rights because it lacks uniform rules and is unchecked by outside scrutiny.68 Unlike someone who engages in a plea agreement, a coerced informant is generally not given the benefits of judicial review, formal documentation, or assistance of counsel.69 While the lack of constraints may be preferable for law en-

61 See Natapoff, supra note 18, at 664.
62 See id.; Portman, supra note 1.
63 Natapoff, supra note 18, at 664 (“[W]hile informants may well be inherently unreliable, that is not their worst feature. Rather, their use is problematic because it undermines the uniform application of criminal liability rules, the accountability of law enforcement, and, for some neighborhoods, the well-being of a community.”).
64 See id. at 659; Rich, supra note 5, at 684–87. Professor Alexandra Natapoff suggests a series of public accountability reforms for the informant institution generally because of the “informal, ad hoc way it eliminates or reduces criminal liability off the public record.” Natapoff, supra note 18, at 658, 696–98.
65 See Natapoff, supra note 18, at 667; Rich, supra note 5, at 694, 701.
66 Natapoff, supra note 18, at 664.
68 See Rich, supra note 5, at 685–86. For example, Professor Rich theorizes that coerced informants are subject to involuntary servitude in violation of the Thirteenth Amendment. Id.
69 See id. at 695; see also Natapoff, supra note 18, at 667–68 (contrasting cooperation deals with plea bargains). Professor Natapoff explains:
forcement as a way to remain unrestrained, their absence places the rights of informants at risk.\textsuperscript{70} Officials use this unrestrained expediency to keep potential informants isolated and off-balance.\textsuperscript{71} By its nature, expediency raises questions of due process and fairness to the informant.\textsuperscript{72}

At times, the criminal informant institution functions as an informal and covert adjudication of criminal liability.\textsuperscript{73} Nevertheless, informants who later claim that the process of being flipped violated their Sixth Amendment right to counsel are unlikely to have success.\textsuperscript{74} The Supreme Court held that this right does not attach until the government has initiated adversarial proceedings against a defendant.\textsuperscript{75} Yet, without the benefit of counsel, an alleged offender may not be able to understand the strength or weakness of the evidence.\textsuperscript{76} A fearful sus-

\footnotesize{Natapoff, supra note 18, at 667 (citations omitted).}
\textsuperscript{70} See Joint Hearing, supra note 17, at 87 (statement of Ronald E. Brooks, President, National Narcotic Officers’ Association Coalition); Rich, supra note 5, at 685–86.

\footnotesize{Rich, supra note 5, at 696 (“Shortly after an arrest, police maximize the arrestee’s fear of a long sentence by emphasizing the maximum penalties for the crimes with which she might be charged and suggesting that the only way out is for her to cooperate.”).}
\textsuperscript{71} See Natapoff, supra note 18, at 663–64; Rich, supra note 5, at 685–86, 695–96. The combination of fear tactics and the secrecy inherent in the informant recruitment process almost encourages ethically questionable behavior on the part of police. Rich, supra note 5, at 696 (citations omitted) (“[B]ecause many criminal defense attorneys will discourage their clients from becoming informants, police make arrests at night, when defense counsel are least likely to be available, or discourage arrestees from contacting their attorneys.”).

\footnotesize{Natapoff, supra note 18, at 658. For example, police in the Hoffman case did not take her to jail or inform the local prosecutor of the evidence found in her apartment. Pecquet, supra note 3. A spokesman for the Tallahassee Police Department said “the practice is not uncommon.” Id. In the weeks after Hoffman’s death, a lobbyist for the ACLU in Tallahassee, Larry Helm Spalding, said, “[w]hen police make the decision (whether to charge someone with a crime), they’re making the prosecution decision for the prosecutor . . . . You have a system here that while it is very effective, it is also very subject to abuse.” Id.}

\footnotesize{See United States v. Gouveia, 467 U.S. 180, 187 (1984) (holding that the right to counsel does not attach until after indictment).}
\textsuperscript{72} See id.

\footnotesize{Rich, supra note 5, at 682–83 (citations omitted) (noting that Hoffman “lacked a meaningful understanding of the charges she could face as a result of the drugs found in her apartment, or what she had to do in order to receive leniency”). For instance, an offi-
pect unaware of the law may agree to cooperate without knowing that the officer has no valid case. Indeed, even in cases with insufficient evidence against a suspect, officers may nevertheless claim that charges are going to be filed.

When informants are wronged by police, they have two potential remedies: claiming a substantive due process violation or suing in tort. Substantive due process claims may be possible under the “state-created danger” doctrine. Such claims, however, face several hurdles. An informant must demonstrate that the state was obligated to provide protection and that its failure to do so shocked the conscience. Yet, even if an informant is able to meet this burden, such claims often fail in light of the qualified immunity of law enforcement officials.

A wronged informant may also “assert state-law tort claims against the individual officers” or agencies for which they worked. An informer claiming to have incriminating evidence against a suspect may have obtained it illegally, See Katz v. United States, 389 U.S. 347, 358–59 (1967) (defining the expectation of privacy for purposes of the Fourth Amendment and refusing to adopt the government’s position on the legality of its actions).

77 See Rich, supra note 5, at 682–83. For some informants, knowledge of police tactics comes after repeated arrests. See Richard Rosenfeld et al., Snitching and the Code of the Street, 43 Brit. J. Criminology 291, 300 (2003). One interviewee described the wisdom he had accrued after several encounters with the police:

‘We’ll let you go by eight tonight’ [if you tell us what we want to know, said the police], and I’m like, the warrant got to get issued . . . if the warrant don’t get issued, you gonna get out anyway by 8 o’clock tonight. They don’t think I know that, but I’ve been locked up so much I know all that shit . . . got out that night . . . .

Id. Another interviewee claimed to know that the police were not in a position to offer deals at all. Id.

78 See Rich, supra note 5, at 696. Due process concerns frequently arise when law enforcement uses informants, but the concern is over the rights of the defendant and not the informant. See Natapoff, supra note 18, at 663–64.

79 See Rich, supra note 5, at 701–02.

80 See id. at 702–03; see also Butera v. Dist. of Columbia, 235 F.3d 637, 647, 654 (D.C. Cir. 2001) (noting that police may violate substantive due process by failing to protect a police informant).

81 See Rich, supra note 5, at 702–03.

82 See Butera, 235 F.3d at 650–51, 654; Rich, supra note 5, at 702–03. Courts have held that the state-created danger doctrine is most applicable in the context of custody, where the state has a greater responsibility for the individual. See Butera, 235 F.3d at 647–48. Acknowledging that the concept of custody is itself difficult to clarify, Butera v. District of Columbia held that a wronged informant may have a claim over a third party’s violent act if the police “affirmatively act to increase or create the danger that ultimately results in the individual’s harm.” Id. at 651.

83 See Butera, 235 F.3d at 652, 654 (dismissing claims on qualified immunity grounds).

84 Rich, supra note 5, at 701.
mant may also bring a claim under contract law because state-informant agreements are treated as contracts. But, due to the differing social positions of the parties and for reasons of public policy, courts in these disputes tend to make credibility determinations in favor of law enforcement.

The dearth of effective legal remedies for a wronged or harmed informant is not common knowledge among potential informants and shows that legal counsel is necessary before cooperating. The moment of initial confrontation with law enforcement is the “least transparent and therefore most problematic” for the informant. At this point, the pressure to cooperate is greatest, and potential informants are most at risk of making a damaging decision.

**B. The Absence of Counsel**

“Lawyers play a particularly important role” for defendants contemplating cooperation after being charged “because so much turns on predictions about the relative benefits of the uncertain path of cooperation, compared to taking an ordinary plea or going to trial.” The same array of problems faces an informant denied the presence of counsel at the key moment of negotiation. Secrecy, a key ingredient of the informant relationship, is a strong argument for requiring participation of counsel because many informants likely base their decisions on fear and powerlessness. Therefore, suspects like Rachel Hoffman who contemplate becoming confidential informants would benefit from the expertise of counsel.

---

85 Id. at 700.
86 Id. at 701.
87 See Natapoff, supra note 18, at 659; Rich, supra note 5, at 694.
88 Natapoff, supra note 18, at 659.
89 See id.; Rich, supra note 5, at 694 (“A civilian’s uncertainty about her future is highest in the hours after being arrested, thus making her most likely to agree to cooperate at that time.”).
90 Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 593 (1999); see also Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 89 (1995) (“[E]ven for the most knowledgeable defendant, the decision to cooperate will be a leap into the unknown. In this situation, the advice of a defense attorney will be critical, perhaps dispositive.”).
92 See Natapoff, supra note 18, at 658–59; Rich, supra note 5, at 694.
93 See Natapoff, supra note 18, at 659; Rich, supra note 5, at 694; Richman, supra note 90, at 89; Weinstein, supra note 90, at 595. As Professor Graham Hughes explains, however, cooperation deals can be seen as “exotic plants that can survive only in an environment
For some, the informant agreement is “an extreme form of plea bargain[ing].”\textsuperscript{94} Generally, the extensive use of plea bargaining in the U.S. criminal justice system is justified by the numerous safeguards in place.\textsuperscript{95} These safeguards include “specificity, completeness, finality, enforceability, judicial review and publicity, and . . . counsel.”\textsuperscript{96} Further, if a defendant pleads guilty, the court confirms that she is knowingly and voluntarily waiving her right to trial.\textsuperscript{97} Such safeguards, however, are absent in the formation of informant agreements.\textsuperscript{98}

Professor Richman characterizes plea bargains as relatively certain, while he calls the cooperation process “a leap into uncertainty.”\textsuperscript{99} In the context of a plea bargain, the suspect enjoys the benefits of legal counsel’s experience.\textsuperscript{100} Counsel generally knows the “market” and “price” for a given offense, and serves as an “educated purchasing agent” who negotiates for the government’s best offer.\textsuperscript{101} Because of these safeguards, the defendant has “no particular need to trust in the government’s good faith.”\textsuperscript{102}

In contrast, informant agreements are frequently open-ended and unspecific, and their details rarely committed to record.\textsuperscript{103} In the absence of a formal written contract, “[c]ourts treat an agreement between an informant and the state like any other contract . . . .”\textsuperscript{104} Thus, informants who draft agreements without the assistance of counsel “will be at considerable risk.”\textsuperscript{105} Often, the size of an informant’s reward is contingent on the quality of the work.\textsuperscript{106} Moreover, the vital question of whether an offered deal of leniency or immunity will travel between jurisdictions makes the assistance of counsel “virtually indispensible.”\textsuperscript{107}

from which some of the familiar features of the criminal procedure landscape have been expunged.” Hughes, supra note 32, at 3.
\textsuperscript{94} Natapoff, supra note 18, at 664.
\textsuperscript{95} Id. at 665.
\textsuperscript{96} Id.
\textsuperscript{97} Id. at 666–67. This will often include questions about “whether the defendant has been threatened or coerced in any way.” Id. at 667.
\textsuperscript{98} See id. at 667.
\textsuperscript{99} Richman, supra note 90, at 91, 94.
\textsuperscript{100} See id. at 92–93.
\textsuperscript{101} Id.
\textsuperscript{102} Id. at 92.
\textsuperscript{103} See Natapoff, supra note 18, at 665–66.
\textsuperscript{104} Rich, supra note 5, at 700.
\textsuperscript{105} See Hughes, supra note 32, at 41.
\textsuperscript{106} See Natapoff, supra note 18, at 666.
\textsuperscript{107} Hughes, supra note 32, at 42 (noting the value of an attorney who can explain the risks of cooperation to a potential cooperator).
Both plea bargains and informant agreements are coercive, and the procedural safeguards in place for plea bargains—including the availability of counsel, exist in part to counteract that aspect.\textsuperscript{108} This concern with coercion underpinned the Supreme Court’s criminal procedure cases during the Warren era.\textsuperscript{109} Yet, the coercive aspects of informant agreements remain largely overlooked.\textsuperscript{110}

One potential explanation for this lack of concern is the unregulated nature of the prosecution of “common and diverse” drug crimes, which are prosecuted at the state, local, and federal levels.\textsuperscript{111} As a result, informant handling practices for drug crime prevention are non-uniform and crafted on a case-by-case basis.\textsuperscript{112} In contrast, U.S. attorneys in federal criminal practice inform white collar suspects that they may consult an attorney while considering a cooperation agreement.\textsuperscript{113} The lengthy war on drugs also contributes to the lack of regulation of drug crime informants because, as mandatory sentencing laws tighten, police pressure intensifies and more people become informants.\textsuperscript{114}

Without procedural safeguards and the assistance of counsel, informants like Rachel Hoffman are forced to face these obstacles on their own.\textsuperscript{115} Uninformed about the choices before her, Hoffman agreed to cooperate, likely based upon a fear of incarceration.\textsuperscript{116}

\footnotesize{
\textsuperscript{108} See Natapoff, supra note 18, at 664–65; Rich, supra note 5, at 691–92.
\textsuperscript{109} See, e.g., Miranda v. Arizona, 384 U.S. 436, 470 (1966) (establishing minimum standards by which police officers must inform suspects of their constitutional rights). Chief Justice Warren wrote in Miranda v. Arizona, “[t]he presence of counsel at the interrogation may serve several significant subsidiary functions as well . . . . With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court.” Id. Even as the Supreme Court later narrowed the holding of Miranda, the notion of coercion has remained central. See Colorado v. Connelly, 479 U.S. 157, 159, 170 (1986) (holding that coercive police conduct precludes a finding of voluntariness in the context of confessions).
\textsuperscript{110} See Natapoff, supra note 18, at 664–65; see also Salinero, supra note 6 (explaining how lawmakers removed provisions of Rachel’s Law—in place to safeguard against the coercion of informants—at the behest of law enforcement).
\textsuperscript{111} See Natapoff, supra note 7, at 26.
\textsuperscript{112} See id.
\textsuperscript{113} See id. at 183. Federal suspects receive attorneys due, in part, to the organization and uniformity of the Federal Bureau of Investigation and Department of Justice guidelines governing federal prosecutors. See Ashcroft, supra note 7, at 17, 19; Gonzales, supra note 7, at 27–28; Natapoff, supra note 7, at 26, 141–45 (contrasting unregulated state practices with the DOJ’s extensive guidelines).
\textsuperscript{114} See Natapoff, supra note 7, at 128; Natapoff, supra note 18, at 696 (“The war on drugs and concomitant legislative enactments of the 1980s raised the profile of informants in the criminal justice system without increasing protections against their overuse.”).
\textsuperscript{115} See Natapoff, supra note 18, at 665; Pecquet, supra note 5.
\textsuperscript{116} See Rich, supra note 5, at 682–83; Natapoff, supra note 3.
}
result, Rachel’s parents pushed for a law requiring police, among other things, to advise a potential informant of his or her right to counsel prior to making a cooperation agreement.117

C. The Use of Informants Enrolled in Drug Rehabilitation Programs

The prevalence of informants in drug cases also has societal consequences.118 In particular, the practice where “people routinely negotiate their fates directly with police on street corners or in local jails” affects those with substance abuse or mental health problems.119 These informants “are more subject to coercion, less likely to be able to make good decisions on their own behalf, and as a result more likely to enter into bad deals or to get hurt as a result of their cooperation.”120 Lack of counsel further worsens the situation for an addicted or mentally disabled informant.121 These informants “can be the most defenseless players in the criminal justice drama” because of the unequal bargaining positions of the two sides.122 As a result, the information or assistance these informants provide may be especially unreliable.123

Removing drug addicts from substance abuse rehabilitation programs and turning them into informants is not worth the resultant reduction in crime.124 At the same time, drug informants are, by some accounts, the backbone of the system.125 These informants serve a particular utility because they have the most knowledge about, and the

117 See Salinero, supra note 6.
118 See Natapoff, supra note 18, at 685. Professor Natapoff stresses that the informant institution has a particularly negative effect on poor black communities. See id. at 684–87 (“With half the male population under supervision at any given time, and with more than half of this group connected with the illegal drug trade, it is fair to estimate that more than one quarter of the black men in the community are under some pressure to snitch.”). The use of drug informants also leads to official toleration of large amounts of crime. See id. at 647–48 (noting that “not only do informants’ past crimes go unpunished, but authorities routinely tolerate the commission of new crimes . . . as part of the cost of maintaining an active informant”). This practice does little to improve the conditions in high-crime communities. See id. at 687.
119 Natapoff, supra note 3.
120 Natapoff, supra note 7, at 184–85.
121 See id. at 39–41.
122 Id. at 40.
123 Id. at 184–85.
124 See id. (proposing a limit on using drug addicts as informants). In some cases, police give drugs directly to informants or allow them to “skim” drugs from their deals. Id. at 54, 184–85.
125 See Joint Hearing, supra note 17, at 77 (statement of Ronald E. Brooks, President, National Narcotic Officers’ Association Coalition); Bloom, supra note 30, at 7; Rich, supra note 5, at 688–89.
most access to, drug communities. Using informants solely for this reason is difficult to justify in high-crime communities because the “net crime-fighting benefit” wanes where informants “facilitate” and “generate” more crime than they prevent.

III. Rachel’s Law—Before and After

In March of 2008, police received a tip from a confidential informant regarding Rachel Hoffman’s involvement in drug activity. Police searched her trash and found a ledger with names and amounts of money. In April, police searched Hoffman’s apartment. They found 151.7 grams of marijuana, six ecstasy pills, and other drug paraphernalia. Police did not take Hoffman to jail or notify the prosecutor’s office about the drugs. Instead, Hoffman—in a drug treatment program at the time—agreed to assist the police.

On May seventh, the police gave Hoffman thirteen thousand dollars and sent her on a controlled drug buy to purchase both drugs and weapons. She approached two suspected criminals, who then unexpectedly changed the meeting plan and directed her to a remote location not under police surveillance. At this point, the police lost contact with Hoffman. They found her body two days later.

The aftermath of Hoffman’s murder saw meaningful discussions on reforming informant regulations. Newspapers reported that Governor Charlie Crist said he would “possibly support a proposed legislative fix.” State senators also expressed their condolences and outrage.

126 See Joint Hearing, supra note 17, at 77 (statement of Ronald E. Brooks, President, National Narcotic Officers’ Association Coalition); Bloom, supra note 50, at 7; Rich, supra note 5, at 688–89.
127 See Natapoff, supra note 18, at 688–89.
128 See Pecquet, supra note 3.
129 Id.
130 Id.
131 Id.
132 Id.
133 Id.
134 See Rich, supra note 5, at 682; Leary, supra note 3; Pecquet, supra note 3.
135 See Salinero, supra note 6; Leary, supra note 3.
137 Id. The police department’s audio surveillance equipment failed, and the airplane supplied by DEA was unable to monitor the situation from above because of tree-cover. Id.
138 Salinero, supra note 6.
139 See Portman, supra note 1.
140 Id.
at the events surrounding Hoffman’s death. The Leon County grand jury, which issued indictments charging the two suspects with first degree murder, was also extremely critical of the Tallahassee Police Department. “Letting a young, immature woman get into a car by herself with $13,000.00, to go off and meet two convicted felons that they knew were bringing at least one firearm with them, was an unconscionable decision that cost Ms. Hoffman her life.”

In 2009, the Florida State Senate introduced “Rachel’s Law.” Over the course of its evolution, the bill changed in several key ways. The legal counsel provision of the originally filed bill read as follows:

Each person who is solicited to act as a confidential informant must be given the opportunity to consult with legal counsel before entering into a substantial assistance agreement. If the person is not represented by legal counsel at the time of the solicitation, the law enforcement agency must advise the person of his or her right to consult with legal counsel before entering into the substantial assistance agreement.

The legal counsel provision in the final version of the bill does not require law enforcement officials to advise potential informants of their right to counsel. It reads as follows:

\[\text{\textsuperscript{140}}\text{See id.}\]

\[\text{\textsuperscript{141}}\text{See Presentment, supra note 135.}\]

\[\text{\textsuperscript{142}}\text{Id. (“Confidential Informants should not be used in transactions of this magnitude without a long term working relationship in which they have demonstrated trust, credibility and an understanding of what is required to complete such work in a safe manner.”).}\]

\[\text{\textsuperscript{143}}\text{See Salinero, supra note 6.}\]

\[\text{\textsuperscript{144}}\text{See Fla. Stat. § 914.28 (2010); S.B. 604, 2009 Fla. S. § (4)–(6), Reg. Sess. (Fla. 2009); see also Salinero, supra note 6 (describing the provisions that were removed as the bill passed through the Senate Committee on Criminal Justice).}\]

\[\text{\textsuperscript{145}}\text{See S.B. 604, 2009 Fla. S. § 5(b). Another provision absent from the final version concerned substantial assistance agreements, and read as follows:}\]

Before a proposed confidential informant provides any assistance to a law enforcement agency, all plea negotiations and consideration offered to the proposed confidential informant must be reduced to a written substantial assistance agreement that is executed by the law enforcement agency and the confidential informant and approved by the state attorney prosecuting the case. The substantial assistance agreement must include a description of the work that the confidential informant will be doing, the length of service, and the consideration that the confidential informant will be receiving.

\[\text{\textsuperscript{146}}\text{See Fla. Stat. § 914.28(3)(c).}\]
A law enforcement agency that uses confidential informants shall . . . [p]rovide a person who is requested to serve as a confidential informant with an opportunity to consult with legal counsel upon request before the person agrees to perform any activities as a confidential informant. However, this section does not create a right to publicly funded legal counsel.\textsuperscript{147}

The original version of the bill included a provision concerning the use of informants in substance abuse programs.\textsuperscript{148} It specified that a confidential informant participating in a court-ordered substance abuse treatment program could not be an informant without the permission of a supervising circuit judge.\textsuperscript{149} It also required potential informants participating in voluntary substance abuse treatment programs to receive express approval of a state attorney before accepting.\textsuperscript{150} The state attorney would have had to consult with treatment providers to discuss whether working as an informant would jeopardize an individual’s success in the program.\textsuperscript{151}

The final version of the bill, however, allows law enforcement agencies to “establish policies and procedures to assess the suitability of using a person as a confidential informant by considering” eight factors.\textsuperscript{152} One of these factors is “[w]hether the person is a substance abuser or has a history of substance abuse or is in a court-supervised drug treatment program . . . .”\textsuperscript{153} This provision lacks the original bill’s express concern with the success of the informant’s treatment.\textsuperscript{154}

Another concern initially addressed by Rachel’s Law is a police department’s ability to send a nonviolent informant into a drug deal

\begin{footnotes}
\item[147] Id. (emphasis added).
\item[148] See S.B. 604, 2009 Fla. S. § 4(a)–(b).
\item[149] Id.
\item[150] Id.
\item[151] Id.
\item[152] Fla. Stat. § 914.28(5)(a)–(h) (2010).
\item[153] Id. § (5)(d).
\item[154] Compare id., with S.B. 604, 2009 Fla. S. § 4(a)–(b), Reg. Sess. (Fla. 2009). The ultimate motivation for this provision may be the success of the investigation and not the well-being of the informant because it is placed among other provisions expressly concerned with an informant’s adverse effects on the investigation. See Fla. Stat. § 914.28(5)(a)–(b). Another provision requires assessment of “[t]he risk the person poses to adversely affect a present or potential investigation or prosecution . . . .” Id. § (5)(b). The law is also concerned with “[w]hether the person has shown any indication of emotional instability, unreliability, or of furnishing false information.” Id. § (5)(f).
\end{footnotes}
with violent felons. The original version required law enforcement agencies to consider "[t]he propensity of the target offender for violence." This provision, however, fails to appear in any form in the final version of the bill.

IV. RESTORING THE RIGHT TO COUNSEL AND BOLSTERING THE EFFICIENCY OF LAW ENFORCEMENT

Fully restoring Rachel’s Law to its original form is not a realistic ambition, but the goals of the original bill can still be realized. Under pressure from Florida law enforcement, Senator Fasano removed the contested provisions from the original Rachel’s Law. Fasano heeded to law enforcement officials’ explanation that restrictions on informants obstruct crime fighting. Although attempts to impose wide-ranging restrictions on the use of informants will likely see resistance, restoring the attorney provision addresses the system’s many inherent problems and helps achieve its original goals.

A. An Attorney Will Serve as a Catch-All

Access to counsel for informants would serve as a potential safeguard against the coercive nature of the informant relationship and help protect their constitutional rights. This benefit is already seen with defendants who negotiate cooperation agreements with prosecu-

---

155 S.B. 604, 2009 Fla. S. § 6(c); see Salinero, supra note 6. Hoffman’s father said, “[h]ow do you send a kid in to do a deal like this? . . . . Rachel was not an undercover police officer. This is not a civilian job.” Portman, supra note 1.


157 See Fla. STAT. § 914.28.

158 See Joint Hearing, supra note 17, at 76–78 (statement of Ronald E. Brooks, President, National Narcotic Officers’ Association Coalition); Hughes, supra note 37, at 41–43 (describing the importance of counsel at the early stages of the informant process).

159 See Salinero, supra note 6.

160 See Joint Hearing, supra note 17, at 76–78 (statement of Ronald E. Brooks, President, National Narcotic Officers’ Association Coalition); Salinero, supra note 6.

161 See Joint Hearing, supra note 17, at 76–78 (statement of Ronald E. Brooks, President, National Narcotic Officers’ Association Coalition); Hughes, supra note 32, at 41–43 (noting the various ways an informant can benefit from counsel and discussing the importance of counsel in the cooperation process in the context of defendants already charged with a crime and represented by counsel); Salinero, supra note 6; see also Natapoff, supra note 7, at 40 (discussing the unequal bargaining power between informants and law enforcement); Richman, supra note 90, at 89; Rosenfeld et al., supra note 77, at 291 (stating that “street criminals . . . have great difficulty staking a legitimate claim to victim-status”); Weinstein, supra note 90, at 593.

162 See Natapoff, supra note 7, at 183; Rich, supra note 5, at 690–92.
An attorney familiar with the workings of the criminal justice system on a local level serves as a catch-all that counsels the individual and monitors law enforcement. Attorneys may help informants assess situations, communicate with courts, and understand their participation in drug rehabilitation programs.

Furthermore, an attorney would ensure that nonviolent offenders are not employed in the targeting of violent felons. The attorney’s knowledge would help an informant realize a particular assignment’s scope and suitability. Therefore, an attorney’s presence would honor much of the original wording of Rachel’s Law, which considered an informant’s substance abuse rehabilitation efforts, criminal background, and naivety.

B. How Restoring the Right to Counsel Serves the Interests of Law Enforcement

If informants had access to counsel, the attorney could ensure adherence to Rachel’s Law, protect the informant, and provide law enforcement with informants capable of the task set forth. This, in turn, helps law enforcement by maintaining informants and minimizing their losses.

1. Shifting the Perspective of Law Enforcement Officials

An informant’s attorney would ensure adherence to Rachel’s Law, protect the informant, and serve law enforcement’s interests by providing only capable informants. The government’s one-sided cost-benefit analysis places fighting crime above the interests of marginal-

---

163 See Hughes, supra note 32, at 41–43; Richman, supra note 90, at 89; Weinstein, supra note 90, at 593.
164 See Richman, supra note 90, at 89 (“In this situation, the advice of a defense attorney will be critical, perhaps dispositive.”).
165 See Natapoff, supra note 7, at 184–85 (noting the special vulnerability of drug users); Richman, supra note 90, at 89–91.
166 See Natapoff, supra note 18, at 667–68; Richman, supra note 90, at 91.
167 See Richman, supra note 90, at 91 (describing the attorney’s role “as a monitor, even a guarantor, of the government’s performance”).
169 See Fla. Stat. § 914.28(5)(a)–(h) (2010) (listing provisions which protect both informants and investigations); Richman, supra note 90, at 91 (discussing counsel’s ability to “monitor . . . the government’s performance” in the context of defendants already charged with a crime and represented by counsel).
170 See Natapoff, supra note 18, at 666; Rich, supra note 5, at 698–99.
171 See Fla. Stat. § 914.28(5)(a)–(h); Richman, supra note 90, at 91.
ized informants subject to criminal charges if they do not cooperate.172 This analysis, however, does not acknowledge that there are various classes and abilities of informants.173 The classes include: coerced informants—like the inexperienced Rachel Hoffman; paid informants; those motivated by duty, revenge, jealousy, or business interests; and those similar to the coerced informant class who make a plea-style agreement with prosecutors in exchange for leniency in sentencing.174 Therefore, consideration of an informant’s class and the consequences of their abilities—or lack thereof—would keep informants safe and further the fight against crime.175 Rachel’s Law in its original form aimed to remedy these problems.176

The informant institution has utility and value but law enforcement officials fear that more rights for informants would impede effec-

172 See Joint Hearing, supra note 17, at 83–84, 89 (statement of Ronald E. Brooks, President, National Narcotic Officers’ Association Coalition). Without informants, Brooks says that “law enforcement would have very few significant successes, organized criminals would operate with impunity, and the safety of our Nation would be in jeopardy.” Id. at 78. He describes informants as a class most frequently motivated by greed, and says that “most of these informants would not qualify as productive members of society and you probably would not want them as your next-door-neighbor.” Id. at 83–84.

173 See Rich, supra note 5, at 690 (explaining that “[i]nformants assist the police for a variety of reasons”). Professor Rich further defines the classes: the coerced informant is promised leniency in exchange for cooperation, the paid informant is one on whom the police have no evidence of other crimes, and motivated informants may have “feelings of civic duty . . . a desire for revenge, jealousy, or the hope of using the police to eliminate criminal competitors.” Id.

174 See Natapoff, supra note 18, at 658–59; Rich, supra note 5, at 690. Defendants who enter into a plea agreement may sign what is known as a “5K.” See Natapoff, supra note 18, at 658 (stating that a defendant may receive a downward departure for providing substantial assistance to a government investigation). The decision whether to provide a departure is still left to the discretion of the prosecutor and the court. Id. Cooperation agreements involving 5Ks are considered to be relatively transparent. Id. On the other hand, “the least transparent and therefore most problematic informant arrangement occurs where the informant is ‘flipped’ by a law enforcement agent at the moment of initial confrontation and potential arrest.” Id. at 659. This arrangement depends on the “idiosyncrasies of the particular officer” and is marked by its secrecy. Id.

175 See Natapoff, supra note 18, at 658–59 (discussing the problems inherent in secrecy); Rich, supra note 5, at 683 (discussing Hoffman’s case and the scrutiny it brought on the actions of the Tallahassee Police Department). Hoffman, in preparation for her fatal controlled buy, received “no training in conducting undercover police operations . . . .” Rich, supra note 5, at 683. Apart from the tragedy of her death, the case brought harsh criticism to the Tallahassee police. See Presentment, supra note 135 (“[T]he police were found guilty of poor planning and supervision, and a series of mistakes throughout the Transaction, T.P.D. handed Ms. Hoffman to Brads- 

176 See S.B. 604, 2009 Fla. S. § (4)–(6), Reg. Sess. (Fla. 2009); Salinero, supra note 6 (describing elements “stripped” from the original bill).
tive law enforcement.\footnote{177 See Joint Hearing, supra note 17, at 69 (statement of Alexandra Natapoff, Professor of Law, Loyola Law School) (“The practice is, in many ways, a necessary evil. Without it, some kinds of cases could never be prosecuted or solved.”); Natapoff, supra note 3 (citing Rachel’s Law as the first bill a state legislature has passed to address the issue of regulating criminals); Salinero, supra note 6. The guidelines enacted by New Jersey are concerned solely with the use of juveniles as confidential informants. See The New Jersey School Search Policy Manual, supra note 7, at A10-1–A10-4. Professor Natapoff proposes “sunshine reforms” for the informant institution in order to improve overall public accountability, but she makes clear that her proposed measures are not intended to erect “substantive limits on informant use.” Natapoff, supra note 18, at 697. The only limits she proposes are to “informant rewards rather than informant activities.” Id.} Prior the contested provisions’ removal from Rachel’s Law, a Florida Department of Law Enforcement representative told the State Senate Committee on Criminal Justice that encouraging informants to consult with counsel would bring drug investigations to a “screeching halt.”\footnote{178 See Joint Hearing, supra note 17, at 87 (statement of Ronald E. Brooks, President, National Narcotic Officers’ Association Coalition).} Testifying before Congress in 2007, Ronald E. Brooks, President of the National Narcotic Officer’s Association’s Coalition, said, “[a]ltering law enforcement’s ability to use confidential informants would tie the strong hand of state and local law enforcement behind its back.”\footnote{179 Salinero, supra note 6 (quoting Michael Ramage, General Counsel for the Florida Department of Law Enforcement).} Informant rights, however, could save lives and stem inefficient and counterproductive crime fighting measures.\footnote{180 See Presentment, supra note 135 (calling the actions of the Tallahassee police “unconscionable”); Natapoff, supra note 18, at 696 (calling for reform of the informant institution); Pecquet, supra note 3. Tallahassee Police Chief Dennis Jones called Hoffman’s murder “such an unusual occurrence,” and said that extensive review was necessary because of “the public attention that’s been called to it.” Pecquet, supra note 3.} Resistance to informant system reform may be due to law enforcement’s general “aversion and nauseous disdain” of informants, but respecting their humanity would further improve the system.\footnote{181 See Presentment, supra note 135 (calling the actions of the Tallahassee police “unconscionable”); Natapoff, supra note 18, at 696 (calling for reform of the informant institution); Pecquet, supra note 3. Tallahassee Police Chief Dennis Jones called Hoffman’s murder “such an unusual occurrence,” and said that extensive review was necessary because of “the public attention that’s been called to it.” Pecquet, supra note 3.} Even the compromised form of Rachel’s Law is focused both on how informants serve investigations and how law enforcement serves informants.\footnote{182 See Fla. Stat. § 914.28 § 1(5)(a)–(h) (2010).} Police officers may, in their haste, sometimes utilize informants who are unsuited to particular assignments.\footnote{183 See Rich, supra note 5, at 685, 691–92.} In these situations, drug stings...
may go awry, leaving law enforcement’s interest in efficient crime fighting unsatisfied. If law enforcement officers adhere to Rachel’s Law, however, both parties benefit. For instance, the provision requiring consideration of an informant’s emotional stability protects both the informant’s well-being and law enforcement’s interest in successful operations. Likewise, the provision requiring consideration of age and maturity protects the safety of ill-prepared informants and the integrity of criminal investigations.

2. Minimizing the Likelihood of “Burning” Informants

Supplying informants with counsel would help them to understand their abilities and expectations, thereby limiting the “burning” of snitches and improving relations between police and informants. Law enforcement departments try to avoid burning snitches because those that send unsuited informants into dangerous situations or reveal identities may have difficulty recruiting informants in the future. This type of integrity maintenance is present in most cooperation relationships. Professor Graham Hughes wrote about informants who testify at trial:

The cooperating witness is not a strong candidate for sympathy . . . . But, whatever his moral worth, his fate under and after the cooperation agreement deserves attention because it is an important index of the fairness and integrity of the prosecutorial system. A bargain is, after all, a bargain. Double dealing by the State will create doubts about the rectitude of the criminal justice process.

The events surrounding Rachel Hoffman’s death, sparked community outrage. A lasting repercussion of her death, however, is the likelihood that future offenders recruited by the Tallahassee Police Depart-

---

184 See Rich, supra note 5, at 683; Pecquet, supra note 3; Salinero, supra note 6.
185 See Fla. Stat. § 914.28.
186 See id. § 914.28(5)(f); Presentment, supra note 135 (“[Hoffman’s] inexperience, coupled with obvious immaturity and a carefree attitude, made it highly unlikely that Ms. Hoffman could successfully complete a transaction of this magnitude.”).
187 See Fla. Stat. § 914.28(5)(a); Presentment, supra note 135.
188 See Natapoff, supra note 18, at 666; Rich, supra note 5, at 698–99.
189 See Natapoff, supra note 18, at 666; Rich, supra note 5, at 698–99.
190 See Hughes, supra note 32, at 40.
191 Id.
192 See Pecquet, supra note 3; Natapoff, supra note 3.
ment will be more hesitant to cooperate. These individuals may find the criminal justice system less risky than being mishandled as an informant.

While Hoffman’s situation illuminated inequities in informant recruitment, the case of Chad MacDonald highlights problems with police practices during and after an informant’s use. Police released MacDonald as an informant after a traffic stop turned into charges for methamphetamine possession. After police released him from his duties, and without the protection and secrecy provided by his handlers, word spread that he snitched and he was then murdered. To make matters worse, MacDonald’s assailants also raped and murdered his sixteen-year-old girlfriend. Retaliatory attacks like these discourage potential informants from cooperating by forcing a choice between becoming lifelong informants, forever under police protection, or death.

The fear of retaliation affects the lives of many police informants. For example, Sammy “The Bull” Gravano—a mafia hit man—turned informant—entered the federal witness protection program, likely to evade retaliation. Having an identity revealed “seems more worrisome to street criminals than jail time, and for good reason.” The dangers of exposure and retaliation may worsen after the informant relationship terminates because police sometimes punish informants who stop cooperation or run out of information. Police may punish informants by revealing identities to suspects or picking up informants and driving them through their own neighborhood, making

---

193 See Natapoff, supra note 18, at 666 (noting that agencies which mishandle informants may have difficulty recruiting new ones); Rich, supra note 5, at 698–99.
194 See Rich, supra note 5, at 698–99; Rosenfeld et al., supra note 77, at 304.
195 See supra note 7, at 41; Santiago, supra note 22, at 778; Martelle & Hayes, supra note 21.
196 Martelle & Hayes, supra note 21.
197 See id.
198 See id.
199 See Rosenfeld et al., supra note 77, at 304. Informants believe that “[o]nce you give information to the police, you will have to keep providing it, ‘or else.’” Id. “The shelf life of an informer is only as long as the leads s/he provides are worthwhile . . . . Snitches who no longer fulfill their end of the bargain reportedly are given cases or exposed as payback for a ‘break’ that is no longer justified.” Id.
200 See id. (quoting an informant who said, “[a]n informer is always in jeopardy of retaliation from other offenders”).
201 See Natapoff, supra note 7, at 26.
202 See Rosenfeld et al., supra note 77, at 304.
203 See id.
others see their cooperation firsthand.\textsuperscript{204} One informant explained, “the police come and get you . . . and drop you off in the middle of the fucking neighbourhood where everybody’s at. “Thank you!” They ride the fuck off and throw $50 out the window.”\textsuperscript{205}

Some police officers believe in making examples of uncooperative or misbehaving informants, thereby providing better control over them.\textsuperscript{206} This tactic can backfire, however, when criminals become convinced that cooperating with particular law enforcement agencies is not a worthwhile endeavor.\textsuperscript{207} In these circumstances, “the discipline of the marketplace” serves to protect informants.\textsuperscript{208} One study of informants found that “[a] number of interviewees implied or declared outright that the authorities would promise one thing and do another, going back on their word and leaving them, as ‘tattletales’, in the lurch. Informing, in this sense, was pointless.”\textsuperscript{209}

Restoring the original legal counsel provision of Rachel’s Law would address the problems attendant to informant burning.\textsuperscript{210} An attorney may warn the potential informant about a particular law enforcement agency’s penchant for burning informants.\textsuperscript{211} As a “repeat player,” counsel is more likely to know the history of an agency.\textsuperscript{212} Particularly, counsel could supplement an informant’s knowledge about an agency’s tendency to punish and would help in deciding whether navigating the criminal justice system is safer and more prudent.\textsuperscript{213} A lawyer’s advice on appropriate punishments will guard against police coercion by negating an officer’s threats of impossible or nonexistent charges.\textsuperscript{214}

\textsuperscript{201} Id.
\textsuperscript{202} Id.
\textsuperscript{203} See id. (proposing that such law enforcement tactics may be intended to “threaten or extort or punish”).
\textsuperscript{204} See Natapoff, supra note 18, at 666; Rich, supra note 5, at 698–99; Rosenfeld et al., supra note 77, at 300.
\textsuperscript{205} Richman, supra note 90, at 109–10 (discussing situations where the government fails to satisfy bargains made with testifying informants); see also Natapoff, supra note 18, at 666 (stating that “one of the most powerful protections available to informants may not be the court but the market”).
\textsuperscript{206} Rosenfeld et al., supra note 77, at 300.
\textsuperscript{207} See S.B. 604, 2009 Fla. S. § 5(b), Reg. Sess. (Fla. 2009); Natapoff, supra note 18, at 666; Rich, supra note 5, at 698–99.
\textsuperscript{208} See Richman, supra note 90, at 74 (discussing the expertise of counsel in the context of represented individuals who consider cooperation agreements).
\textsuperscript{209} See id.
\textsuperscript{210} See id.; Rosenfeld et al., supra note 77, at 304.
\textsuperscript{211} See Rich, supra note 5, at 696; Richman, supra note 90, at 74.
Police departments may resist the change that an attorney’s advice would bring to the informant system because of its potential impact on tactics.215 If informants as a class become accustomed to police mistreatment and deceit, however, they may choose to take their chances in the criminal justice system.216 As a result, law enforcement would then lose an irreplaceable tool for fighting crime, particularly in minority communities where distrust of the police is already high.217

C. Reform Similar to a Restored “Rachel’s Law”

Adopting an attorney provision similar to the one excluded from Rachel’s Law reduces the likelihood of harm to unsuitable informants, benefits law enforcement agencies, and protects communities.218 Unfortunately, informant handling tragedies have preceded reform legislation in the few states that have enacted it.219 The murders of Hoffman and MacDonald, for example, led to legislation in Florida and California, respectively.220

Texas, too, enacted “output measures” to buoy the reputation of its law enforcement agencies after many embarrassing, fraudulent, and

---

215 See Joint Hearing, supra note 17, at 78 (testimony of Ronald E. Brooks, President, National Narcotic Officers’ Association Coalition); Santiago, supra note 22, at 782; Salinero, supra note 6.

216 See Natapoff, supra note 18, at 666; Rich, supra note 5, at 698–99; Rosenfeld et al., supra note 77, at 300–04.

217 See Joint Hearing, supra note 17, at 78 (testimony of Ronald E. Brooks, President, National Narcotic Officers’ Association Coalition); Natapoff, supra note 18, at 666, 672; Santiago, supra note 22, at 782; Salinero, supra note 6. According to Professor Natapoff’s statistics, roughly eight percent of men in poor black communities are cooperating with the police. See Natapoff, supra note 18, at 666, 685. She notes in comparison that during the height of its power, the East German secret police, “one of history’s most infamous deployers of informants,” employed approximately one percent of the East German population. Id. at 685. Police appear to tolerate and perhaps even encourage criminality in black communities. See id. at 689. Professor Natapoff explains:

Not only does this dynamic potentially increase crime, but it degrades those communities’ experience of the criminal justice system. If the immediate costs of snitch use outweigh its benefits, or even if community members perceive the official use of snitches as devaluing the security of the community, the informant institution may be eroding law enforcement effectiveness and legitimacy.

Id.

218 See S.B. 604, 2009 Fla. S. § 5(b), Reg. Sess. (Fla. 2009); Richman, supra note 90, at 74 (noting the benefits of counsel when defendants are negotiating cooperation agreements).

219 See Santiago, supra note 22, at 781 (describing recent California legislation); Salinero, supra note 6 (describing recent Florida legislation).

220 See Santiago, supra note 22, at 781; Salinero, supra note 6.
botched drug stings. For instance, a Hearne, Texas drug task force arrested twenty-eight people after a November, 2000 tip by suicidal drug informant Derrick Megress. He had accepted a prosecutor’s offer of clemency in exchange for producing at least twenty arrests. Prosecutors exonerated each suspect arrested at Hearne’s behest, though some had already pleaded guilty.

The Texas Department of Public Safety enacted new output measures as a means of altering its priorities in drug enforcement. Patrick O’Burke, Commander of the Texas Public Safety Commission Narcotics Service, explained that output measures have traditionally been defined by “[t]he number of investigations and/or investigative reports written[,] [t]he number of arrests for narcotics law violations[,] [and] [t]he amount of illegal drugs seized.” The previous output measures emphasized overall volume of arrests but did not reduce drug activity. O’Burke instead recommended a definition of success based on the disruption of drug distribution.

Thus, the new output measures emphasize the “[n]umber of Drug Trafficking Organizations dismantled[,] [p]ercentage of arrests defined as ‘targeted’ Drug Trafficking Organization members[,] . . . . [and] [p]ercentage of total arrests that are defined as ‘End Users.’” Law enforcement should desire a reduction of end user arrests, opting instead to enroll them in “treatment, corrections or rehabilitation op-

---

221 See Joint Hearing, supra note 17, at 11–12 (testimony of Patrick O’Burke, Commander, Texas Public Safety Commission Narcotics Service) (describing new procedures); Natapoff, supra note 7, at 196; Ross E. Milloy, Fake Drugs Force an End to 24 Cases in Dallas, N.Y. Times, Jan. 16, 2002, at A14. In Tulia, Texas, in 1999, a drug informant falsely accused sixteen percent of the town’s black population with drug dealing “[w]ith no corroboration or physical evidence . . . .” Natapoff, supra note 7, at 196. In Dallas, in 2001, officers planted fake drugs on twenty-four individuals to inflate drug bust statistics. See id. at 7; Milloy, supra. “All the cases involve a single unidentified informer who has received at least $200,000 from the Dallas Police Department over the last two years . . . .” Milloy, supra. In 2001, almost half of the cocaine and a quarter of the methamphetamines seized by the Dallas Police Department was actually gypsum from wallboard. See id.

222 See Natapoff, supra note 7, at 3–4.

223 See id. at 3. Officers also promised Megress payment of one hundred dollars for each name he provided. See id.

224 See id. at 4.


226 See id. at 14.

227 See id.

228 See id. at 15.

229 See id.
tions.” Therefore, “investigations against these individuals should receive no priority from drug enforcement initiatives that seek to disrupt illegal trafficking.”

The new Texas output measures demonstrate a recalibration of priorities, favoring efficiency and community protection over gross drug-related arrests. Officers will be more properly focused on “identifying and disrupting [the] illegal distribution of drugs,” thereby creating efficiencies and protecting the community. The output measures implicitly encourage police to improve informant control and management, thus reducing the tendency to burn informants and creating more trust in law enforcement.

Texas’ paradigm shift suggests that other states may also welcome informant reform. Enacting reform before its precipitation by tragedy and community outrage would save lives, ensure efficient crime fighting, and protect vulnerable community members. Restoring the legal counsel provision stripped from Rachel’s Law would further enhance the efficacy of each of these factors.

Conclusion

Informants are an essential tool to law enforcement and must be protected. They are invaluable because their credibility enables them to infiltrate criminal organizations, especially in the context of drug crimes. The lack of informant regulations on the state level, however, leaves informants and communities unprotected. In particular, granting legal counsel to potential informants before cooperating with police would make them knowledgeable about their circumstances and

231 Id.
232 See id.
233 See id.; Natapoff, supra note 18, at 666; Rich, supra note 5, at 698–99.
234 See Joint Hearing, supra note 17, at 11–16 (testimony and statement of Patrick O’Burke, Commander, Texas Public Safety Commission Narcotics Service) (discussing how “end-users” should not be the priority of law enforcement); Natapoff, supra note 7, at 128 (“[T]he public policy of using informants itself contributes to the sense that today’s law enforcement is all too often unreliable or unfair.”); Natapoff, supra note 18, at 666; Rich, supra note 5, at 698–99.
235 See Joint Hearing, supra note 17, at 11 (statement of Patrick O’Burke, Commander, Texas Public Safety Commission Narcotics Service) (acknowledging the need for “sweeping reform”).
236 See Santiago, supra note 22, at 780–81; Salinero, supra note 6; Pecquet, supra note 3.
237 See Natapoff, supra note 7, at 183; Hughes, supra note 32, at 41–45; Richman, supra note 90, at 89; Weinstein, supra note 90, at 593.
options. Furthermore, an attorney’s advice would benefit law enforce-
ment by providing only those informants competent for the assigned
task. A right to counsel would also minimize instances where infor-
mants are mistreated or burned by law enforcement agencies. Prevent-
ing informant burning increases the public’s trust in law enforcement
and ensures that future informants remain willing to cooperate. De-
spite these arguments in favor of proper informant treatment, Florida
stripped provisions granting an informant the right to counsel from
“Rachel’s Law,” the first informant protection legislation passed in the
United States. The legal counsel provision should, however, be restored
to Rachel’s Law and other states should adopt similar legislation to fur-
ther protect the rights and lives of informants across the country.
Abstract: Queer youth are in a precarious position. In comparison to their heterosexual peers, queer youth are disproportionately punished in the criminal justice system, and they may be more vulnerable to being prosecuted for statutory rape. They may be selectively prosecuted because prosecutors have broad discretion in whom they prosecute, and social norms favoring heterosexuals may be part of their decision-making process. In light of the significant barriers before a statutory rape defendant alleging selective prosecution, especially for juvenile defendants, limited discovery orders like the one at issue in Commonwealth v. Washington may be a pragmatic way to make equitable change.

Introduction

If it’s two boys and they’re both young or it’s two girls, there’s a tendency to assume it’s abuse. [With] opposite genders they’re more likely to say “Well, you know, they’re experimenting.”

—A juvenile defender

Statutory rape laws vary by state and complications arise when the sexual activity occurs between a juvenile and a person who is close in age but has already reached majority. Prosecutors have discretion in prosecuting statutory rape cases and their decisions often depend on several factors such as the age of consent, whether the sexual activity resulted in pregnancy, the age gap between the parties, and whether

---


the parties are of the opposite sex. ³ The parties’ sex may invite scrutiny when, for example, a state legislatively carves out a “Romeo and Juliet” exception. ⁴ This exception precludes prosecution of parties engaging in proscribed sexual activity if they are close enough in age, as defined by the statute. ⁵ Although this exception may be gender-neutral, some Romeo and Juliet exceptions discriminate against non-heterosexual (“queer youth”) because they exempt only opposite-sex sexual activity. ⁶ For this reason, the heterosexual or homosexual nature of the activity may factor into a decision to prosecute. ⁷ These discriminatory Romeo and Juliet exceptions place queer youth at a greater risk for statutory rape prosecution. ⁸

Even in states without these discriminatory exceptions, prosecutors may still consider sexual orientation when prosecuting. ⁹ In Commonwealth v. Washington W., a Massachusetts case, two boys under the age of seventeen allegedly had an ongoing sexual relationship. ¹⁰ When the younger boy’s father discovered the relationship, he reported it to the police. ¹¹ The prosecution subsequently charged the older boy, Washington, with two counts of statutory rape and two delinquency complaints of indecent assault and battery. ¹² Although Massachusetts has no Romeo and Juliet exception, Washington argued that the district attorney selectively prosecuted him because of his sexual orientation. ¹³ Therefore, the trial court granted a limited discovery order compelling

³ See Michelle Oberman, Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape, 48 Buff. L. Rev. 703, 734 (2000); Sutherland, supra note 2, at 314–15, 326–27 (“[W]here the age gap between the parties is narrow, charges for violations of age of consent laws are much more likely to be filed when the partners are of the same sex.”).


⁵ Id.

⁶ Id. at 226–27.

⁷ See id.


⁹ See Sutherland, supra note 2, at 326–28; see, e.g., Commonwealth v. Washington W., 928 N.E.2d 908, 911–12 (Mass. 2010) (seeking discovery to prove selective statutory rape prosecution based on sexual orientation).

¹⁰ See Washington W., 928 N.E.2d at 910.

¹¹ See id.

¹² See id.

the district attorney’s office to produce statistical data regarding the prosecution of statutory rape and indecent assault and battery in cases involving similarly aged teenagers of the opposite sex. As Washington argued, even in states where discriminatory Romeo and Juliet exceptions do not exist, sexual orientation may be a factor in prosecutorial decision-making.

Any defendant alleging selective prosecution faces several barriers. In United States v. Armstrong, the Supreme Court held that a defendant must first make a threshold showing of selective prosecution before a court will grant discovery. To meet this threshold, defendants must demonstrate that prosecutors targeted them while ignoring other similarly situated individuals. The Court imposed this barrier to discovery for policy concerns, such as facilitating law enforcement and reducing the attorney general’s encroachment into Executive territory. Prosecutors retain broad discretion in choosing their defendants and, even if a defendant reaches the threshold necessary for discovery, Armstrong remains an arguably insurmountable barrier. Absent clear evidence to the contrary, prosecutorial decision is presumed proper.

In juvenile cases, the confidentiality of juvenile court records creates another barrier to the threshold showing of relevance sufficient to warrant discovery. While adult defendants may access records of similar
larly situated adults, juvenile defendants may not access records of similarly situated juveniles due to privacy concerns. Because of this lack of access, a defendant like Washington faces an especially significant obstacle in proving selective prosecution.

Another barrier that defendants like Washington face is a lack of legal protection for sexual orientation. America has not yet found an equal place for queers in its legal system. This is evidenced in part by the patchwork of rights for queer Americans—notably, a lack of equal recognition for same-sex relationships. This barrier means that queer youth charged with sexual misconduct face negative social attitudes and community norms, as embedded in prosecutorial decision-making. Therefore, the novelty of legally recognized same-sex relationships will likely remain a barrier for queer youth arguing selective prosecution until the recognition of such relationships is commonplace.


23 See Washington W., 928 N.E.2d at 914 (“An adult defendant could search court records to determine, from complaints and indictments, the number of prosecutions that have been instituted . . . .”); Bazelon, supra note 22, at 155.

24 See Washington W., 928 N.E.2d at 914; Bazelon, supra note 22, at 155; Horne, supra note 22 at 659–60.

25 See Washington W., 928 N.E.2d at 911 (“Massachusetts courts do not recognize sexual orientation as a protected class.”); Higdon, supra note 4, at 224; Edward Stein, Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights, 49 UCLA L. Rev. 471, 482–83 (2001); Kenji Yoshino, The New Equal Protection, 124 Harv. L. Rev. 747, 756 (2011). “Lauren Berlant and Michael Warner define heteronormativity as ‘the institutions, structures of understanding, and practical orientations that make heterosexuality seem not only coherent—that is, organised as a sexuality—but also privileged.’” Robert S. Chang & Adrienne D. Davis, Making Up Is Hard to Do: Race/Gender/Sexual Orientation in the Law School Classroom, 33 Harv. J.L. & Gender 1, 15 n.30 (2010) (quoting Lauren Berlant & Michael Warner, Sex in Public, 24 Critical Inquiry 547, 548 n.2 (1998)). Sexual orientation is reviewed under a lower, rational basis standard—unlike classifications such as race. Yoshino, supra, at 756. “The few courts that have held that sexual orientation classifications warrant heightened scrutiny have had their decisions overruled or vacated.” Stein, supra, at 482.

26 See Majd et al., supra note 1, at 2; Higdon, supra note 4, at 214; Stein, supra note 25, at 482–83; Yoshino, supra note 25, at 756.


This Note argues that discovery requests, like the one affirmed in Washington W., may be a means to achieve equitable change in the selective prosecution of queer youth. Part I explains statutory rape laws as applied to teenagers who engage in proscribed sexual activity and highlights some factors in the prosecutorial calculus. Part II discusses historical and recurring attitudes toward queers, emphasizing states’ hesitance to equally recognize same-sex adult relationships. Part II also explains that, in light of the challenges queer adults still face, queer youth are disadvantaged and are in a precarious legal position. Part III reviews selective prosecution requirements post-Armstrong, and finally, Part IV argues how queer youth may achieve favorable results within the existing framework through discovery requests.

I. WHICH TEENAGERS ARE PROSECUTED FOR THEIR SEXUAL ACTIVITY?

A significant number of American teenagers are sexually active. One study states that seventy percent of all teenagers in the United States have had sex by age nineteen. Another study involving adolescents around age fourteen found that approximately twenty percent had already had oral sex, and over thirty percent said they intended to have oral sex within the next six months. Neither sexual intercourse nor oral sex is required to violate the law in most states. Laws proscribing sexual activity with minors under the age of consent are often written broadly to ensnare a range of sexual contact, including non-forcible contact that the participants may think is innocent. Consequently, illegal sexual activity between teenagers, though difficult to precisely quantify, is widespread.

---


32 Id.

33 Bonnie L. Halpern-Felsher et al., Oral Versus Vaginal Sex Among Adolescents: Perceptions, Attitudes, and Behavior, 115 Pediatrics 845, 846–47 (2005). The median age of the sample in the study was 14.54 years old. See id. at 846.


35 See Oberman, supra note 3, at 707; see, e.g., Pima Cnty. Juvenile Appeal, 790 P.2d at 730.

36 See Halpern-Felsher et al., supra note 33, at 845; Oberman, supra note 3, at 704 n.3; Facts on Teens’ Sexual and Reproductive Health, supra note 31. Professor Michelle Oberman points out that, based on estimates of U.S. Census data available in 2000, there were 15 million American residents ages thirteen to sixteen and, even estimating conservatively,
The age combinations that constitute proscribed sexual activity vary by state. Some states forbid sexual contact between a legal adult who is eighteen or older and a minor under sixteen. Other states follow the Model Penal Code and forbid sexual activity between parties who are beyond a specified age gap, such as when the parties are more than four years apart. Others have blanket prohibitions forbidding sexual contact with children under a certain age but mitigate the offense’s severity if the parties are within a specified age gap. Despite these state-by-state variations, prosecutorial discretion remains constant. It is impossible for prosecutors to charge every teenager who violates statutory rape laws. Therefore, prosecutors must inevitably choose their defendants and considering which teenagers are prosecuted reveals not only state policies but prosecutorial motives.

Professor Michelle Oberman categorizes contemporary prosecution of statutory rape cases into three groups—cases involving pregnancy, cases that are easily identifiable, and cases perceived as “sick.” First, prosecutors pursue cases resulting in pregnancy because single teenage mothers often cost the government more money. Second, prosecutors pursue easily-identifiable cases that are reported by healthcare providers, state agencies, and other mandated reporters when minors use their services. The state has an interest in pursuing these cases, not only because of similar concerns about governmental financial support, but because there is a need to protect children. In this situation, the state exercises its ability to shield children from harmful sexual activity and sexually transmitted diseases (STDs). Finally, prosecutors pursue “sick” cases that involve either a significant age gap or exploitation, such as when there is a notable power differential between the parties. There are over 7.5 million annual incidents of statutory rape. See Oberman, supra note 3, at 704 n.3. Moreover, these estimated incidents do not capture other statutorily proscribed sexual activity. See id.

37 See Oberman, supra note 3, at 768–69.
38 See id. at 768.
39 See Model Penal Code § 213.3(1)(a) (1980); Oberman, supra note 3, at 769.
40 See Oberman, supra note 3, at 769.
42 Oberman, supra note 3, at 704.
43 Levine, supra note 15, at 692; Oberman, supra note 3, at 733.
44 Oberman, supra note 3, at 733.
45 See id. at 734–35.
46 See id. at 733, 739–41.
47 See id. at 710, 739–40.
48 See id. at 730–31, 752.
tween parties. At least one other scholar, however, characterizes this third category as the selective prosecution of “unpopular men,” such as older men or men of color who have sex with underage girls.

Prosecutors may also choose to pursue a case between teenagers depending not on Oberman’s proffered factors, but on whether they see the relationship as among peers or as predatory. A peer relationship is one where sexual activity generally occurs after the parties have been together for an appreciable amount of time. Prosecutors, however, assess more than the parties’ prior relationship, and a study by Professor Kay Levine found that their discretion relied on “signs of commitment, family support, and marriage potential.” Intimate relationships with these characteristics are not predatory and are therefore more likely to receive leniency from prosecutors, a practice known as an “intimacy discount.”

Queer youth, however, may have more difficulty achieving familial support, and local legislatures may deny them the right of marriage. Thus, unlike their heterosexual peers, queer youth may not be afforded an intimacy discount.

II. EMERGING QUEER YOUTH AND THE MALTREATMENT THEY RECEIVE

Queer youth are acknowledging their sexuality earlier than before and this poses unique legal challenges as they develop. Foundationally, queer youth must confront the legacy of anti-queer sentiments and laws that do not treat same-sex relationships equally. Beyond these

---

49 See Oberman, supra note 3, at 743–44. Oberman notes that cases involving a young person and an older person in a position of power or trust, such as those between a student and her or his teacher, are likely to be prosecuted in part because the adults are exploiting their relationships with the young persons. See id.


51 See Levine, supra note 15, at 694.

52 See id. at 721–22.

53 Id. at 694–95, 706–08.

54 See id. at 694–95, 701, 724 n.127.

55 See id. at 739 n.176.

56 See Levine, supra note 15, at 694–95, 739 n.176.


58 See Lawrence v. Texas, 539 U.S. 558, 564 (2003); Edward L. Tulin, Note, Where Everything Old Is New Again—Enduring Episodic Discrimination Against Homosexual Persons, 84 Tex. L. Rev. 1587, 1587, 1629 (2006) (explaining that even post-Lawrence, homosexuals are still perceived as criminals and remain targets of discriminatory state laws); Wardenski, supra note 15, at 1367–68 (arguing that queer youth are still stigmatized as criminals because of their sexuality).
handicaps, queer youth must also contend with the possibility of selective prosecution for sex-based crimes like statutory rape.59

A. Bedrock of Discrimination

It is instructive to look at queer youth today through the historical lens of recurring animosity toward homosexuals in America, and even a cursory review shows that they do not start with a clean slate.60 The term “homosexual” emerged in the late nineteenth century with a derogatory connotation.61 Society considered homosexuality a disgusting disease, a sign of evolutionary inferiority, a threat to national security, and even animalistic.62 Homosexuals have battled with a presumption of being child molesters, unfit parents, and a threat to the American way of life.63 They have, throughout American history, endured degradation, humiliation, physical torture, and deadly violence.64 Yet homophobia and anti-gay sentiments such as these do not dwell in the past; they manifest themselves in the present.65 Indeed,
many of these perceptions are plainly visible in twenty-first century American culture.\textsuperscript{66} Even if attitudes toward gay people are improving, the recurring rejection of homosexuals indicates that queer youth continue to confront these not-so-past perceptions.\textsuperscript{67}

\textbf{B. Lack of Legal Recognition for Same-Sex Relationships}

Despite confronting ongoing societal hostility, queer Americans hoped for improved legal protection after the U.S. Supreme Court’s 2003 decision in \textit{Lawrence v. Texas}.\textsuperscript{68} In \textit{Lawrence}, a judge levied a two hundred dollar fine on each of two adult men—John Geddes Lawrence and Tyron Garner—for having consensual anal sex within the privacy of the home after police entered the residence looking for weapons, but instead arresting them for the Class C misdemeanor.\textsuperscript{69} After years of litigation, the Supreme Court reversed the convictions and held unconstitutional a Texas statute criminalizing intimate sexual conduct be-

\textsuperscript{66} See, e.g., Fla. Dep’t of Children & Families v. Adoption of X.X.G. & N.R.G., 45 So. 3d 79, 81, 92 (Fla. Dist. Ct. App. 2010) (holding unconstitutional a Florida law prohibiting homosexuals from adopting); Tulin, supra note 58, at 1603–04 (arguing that modern ways of depicting homosexuals are “strikingly similar” to past understandings, such as “the Progressive-Era paradigm of homosexuality as a threat to the American family unit” and the modern version of the “Cold War-Era paradigm of homosexuality as a threat to American national security”); Cupp, supra note 62 (urging politicians to avoid conflating gay marriage with bestiality); Brian Braiker, Grocery Store Un-Censors Elton John’s Baby Picture, ABC News (Jan. 26, 2011), http://abcnews.go.com/Entertainment/grocery-store-censors-elton-johns-baby-picture-with-shield/story?id=12770479 (reporting on Harps Food Stores, a grocer that used a “family shield”—usually used to cover pornographic material—to cover a picture of Elton John, his male partner, and their baby); Andrew Harmon, Arnold Signs Bill Aiding Gay Youths, Advocate.com (Oct. 1, 2010, 4:00 PM), http://www.advocate.com/News/Daily_News/2010/10/01/Schwarzenegger_Signs_Bill_Aiding_Gay_Youth (reporting on Governor Schwarzenegger’s signing of several bills pertaining to queer youth and adults, including a bill that allows access to mental health services as a response to a wave of gay youth suicides and a repeal of a 1950s law calling for research into the causes of homosexuality and its cures).

\textsuperscript{67} See Tulin, supra note 58, at 1587; Wardenski, supra note 15, at 1367–68. Gerald Unks argues that “[h]omosexuals are arguably the most hated group of people in the United States.” Gerald Unks, Thinking About the Gay Teen, in The Gay Teen: Educational Practice and Theory for Lesbian, Gay, and Bisexual Adolescents 3 (Gerald Unks ed., 1995). Unks explains that it is now socially unacceptable to deride people based on classifications such as race, gender, or religion, and that minorities such as these “have gained a modicum of protection and acceptance.” \textit{Id}. He points out that “words such as ‘nigger,’ ‘kike,’ ‘gook,’ or ‘wop’” are unacceptable but that “‘faggot,’ ‘fairy,’ ‘homo,’ and ‘queer’ are used by many without hesitation.” \textit{Id}.

\textsuperscript{68} See Lawrence, 539 U.S. at 558; 602–63 (2003); Wardenski, supra note 15, at 1365.

between two people of the same sex in the privacy of a home. Memorably, Justice Kennedy concluded his opinion stating that “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.” Yet, despite this stirring closure, gay rights advocates must toil for equal protection under the law because Lawrence has not borne its anticipated fruit. Lawrence’s strength will depend on its progeny and it is unclear whether courts will use it to validate more favorable rulings for gay rights.

For instance, the Arizona Court of Appeals declined to apply the Lawrence decision to gay marriage after the state denied Harold Standhardt and Tod Keltner a marriage license. Standhardt and Keltner, a gay couple living in Arizona, had been in a committed relationship and, three days after Lawrence, a local official denied their request for a marriage license because Arizona had a statutory prohibition against same-sex marriages. The couple sued, arguing that such a prohibition was unconstitutional in light of the Supreme Court’s decisions in Lawrence and Loving v. Virginia. In Loving, the Court held that a Virginia statute prohibiting interracial marriage violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

---

70 See Lawrence, 539 U.S. at 563, 578–79. The Texas statute at issue defined “deviate sexual intercourse” as “(A) any contact between any part of the genitals of one person and the mouth or anus of another person” or “(B) the penetration of the genitals or the anus of another person with an object.” Tex. Penal Code Ann. § 21.01(a) (2009). The Lawrence Court did not say that the couple had a fundamental right to engage in their intimate sexual conduct but instead decided the case solely on their due process argument, explaining that private sex is within the “realm of personal liberty which the government may not enter.” Lawrence, 539 U.S. at 578 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992)).

71 Lawrence, 539 U.S. at 579.

72 See Leonard, supra note 57, at 189–90; Tribe, supra note 27, at 1949–50; Tulin, supra note 58, at 1587.


74 See Standhardt v. Superior Court, 77 P.3d 451, 456 (Ariz. Ct. App. 2003). Justice Kennedy’s decision in Lawrence was carefully tailored to avoid formally recognizing homosexual relationships. See Lawrence, 539 U.S. at 578. In stating that Lawrence did “not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter,” Justice Kennedy effectively tethered Lawrence’s reach. See id.; Leonard, supra note 57, at 189; Tribe, supra note 27, at 1945, 1949–50.

75 See Standhardt, 77 P.3d at 453–54.

76 See id. at 454, 458.

77 Loving v. Virginia, 388 U.S. 1, 12 (1967).
is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”78 Standhardt and Keltner argued that, in light of Lawrence and Loving, the state’s refusal to marry them violated the right to marry and equal protection rights under federal and state constitutions.79 The Arizona court disagreed, stating that they each have a fundamental right to marry but “[they] do not have a right to marry each other.”80 This legacy continues because, despite a small minority, most states do not legally recognize same-sex relationships in marriage.81

C. Queer Youth’s Precarious Position in Modern America

Queer youth may risk disproportionate punishment for their sexual encounters because social norms that do not include same-sex relationships factor into prosecutorial decision-making.82 This is complicated by the fact that more queer youth are acknowledging their sexual orientation at an earlier age.83 According to the American Academy of Pediatrics, sexual orientation is likely established during early childhood and

78 Loving, 388 U.S. at 12 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).
79 See Standhardt, 77 P.3d at 454, 458.
80 Id. at 464–65. Notably, however, in Goodridge v. Department of Public Health, the Massachusetts Supreme Judicial Court also did not expressly conclude that there was a fundamental right for people of the same sex to marry each other but nonetheless held that precluding such marriages did “not survive rational basis review . . . .” 798 N.E.2d 941, 961 (Mass. 2005). Goodridge is arguably part of Lawrence’s trickle down effect. See id. at 948, 961. Similar efforts to achieve marriage equality in other states, however, have failed. See, e.g., Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 863, 868 n.3 (8th Cir. 2006); Hernandez v. Robles, 855 N.E.2d 1, 10 (N.Y. 2006) (construing Lawrence as addressing “intimate, private activity” and not the “state-conferred benefit” of marriage), abrogated by N.Y. Dom. Rel. Law § 10-a (McKinney 2011). Compare Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009) (holding Iowa statute limiting marriage to a man and a woman was unconstitutional), with A.G. Sulzberger, Ouster of Iowa Judges Sends Signal to Bench, N.Y. Times, Nov. 4, 2010, at A1 (explaining “[a]n unprecedented vote to remove three Iowa Supreme Court justices who were part of the unanimous decision that legalized same-sex marriage . . . .” in Iowa). New York’s legislature disagreed with the outcome of Hernandez v. Robles and abrogated it by passing N.Y. DOMESTIC RELATIONS LAW § 10-a, which expressly permits same-sex marriage. § 10-a.
81 See HRC Marriage Equality Laws, supra note 27.
82 See Majd et al., supra note 1, at 1–3; Chang & Davis, supra note 25, at 15 n.30 (citing Berlant & Warner, supra note 25, at 548 n.2); Levine, supra note 15, at 694–95; Wardenski, supra note 15, at 1367–68, 1374–75.
young people are becoming aware of their sexuality earlier than was previously common.84

1. Discriminatory Romeo and Juliet Exception

Discriminatory Romeo and Juliet exceptions conditioned on opposite-sex parties may unfairly ensnare queer youth.85 In Texas, for example, sexual contact with a child under the age of seventeen is felonious, but an affirmative defense exists if the actors are no more than three years apart and the victim is “of the opposite sex.”86 This exception is therefore unavailable to teens engaging in same-sex sexual contact.87

Similarly, Alabama bestows an advantage on heterosexual sex.88 Although rape in the second degree is narrowly defined in Alabama as “sexual intercourse with a member of the opposite sex,” the state’s sodomy law captures homosexual sex, termed “deviate sexual intercourse.”89 Unlike its rape statute, however, Alabama does not reduce the penalty for parties charged with sodomy who are less than two years apart in age.90 Thus, as in Texas, youth in Alabama who engage in homosexual sex could be subject to harsher punishment than similarly situated heterosexual teens.91

84 See Frankowski et al., supra note 8, at 1827–28. One study “found that the average age that youth realized they were gay was a little over age 13.” Ryan, supra note 83, at 1. It is difficult to quantify the number of homosexuals in America because fear of homosexuality in respondents hinders the accuracy of the data. See Frankowski et al., supra note 8, at 1828. The Academy of Pediatrics also explains that human sexuality likely exists on a continuum, noting that many adults who identify as heterosexual report having had sexual encounters with members of the same sex when they were adolescents. See id. Therefore, sexual orientation, sexual activity, and laws policing the sexual activity of teens and minors may affect teens of varying sexual identities, regardless of the number of people who actually identify as homosexual. See id.


86 Tex. Penal Code Ann. § 21.11(a)(1), (b)(1), (d). The statute also requires that the actor did not use such coercive methods as duress, force, or threats; was not required to register as a sex offender at the time of the offense; and did not have another conviction under the statute. See id. § 21.11(b)(2)–(5).

87 See id. § 21.11(b)(1).

88 Compare Ala. Code § 13A-6-62(a)(1) (2011) (providing an exculpatory age-based exception for sexual intercourse between members of the opposite sex), with id. § 13A-6-64(a)(1) (providing no exculpatory age-based exception for sodomy).

89 Id. §§ 13A-6-60, 13A-6-62(a)(1), 13A-6-63(a)(1). The applicable age range is less than sixteen but more than twelve years old. Id. § 13A-6-64(a)(1). Deviate sexual intercourse is defined as “[a]ny act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another.” Id. § 13A-6-60(2).

90 See id.; §§ 13A-6-62(a)(1), 13A-6-64(a)(1).

California also treats heterosexual sex more leniently through subtle differences between statutory rape and sodomy laws. While it is felonious for “[a]ny person” to engage in “unlawful sexual intercourse with a minor,” the crime is reduced to a misdemeanor if the actors are within three years of age. It is also unlawful for “any person” to engage in sodomy with someone under the age of eighteen, but no similar gradation of offense exists based on the actors’ age difference. Although heterosexual teens may engage in sodomy as defined by the statute, penile-anal contact is more commonly characteristic of homosexual male sex. Therefore, queer teens in California may suffer a harsher penalty for their sexual conduct. Moreover, in Texas and Alabama, exculpatory exceptions are made for otherwise illegal sexual contact if the actors are legal spouses—a status which same-sex partners are not granted.

The Kansas case of *State v. Limon* demonstrates the irreparable harm that queer youth may face as a result of these discriminatory statutes. Matthew Limon had oral sex with M.A.R., the male complainant,
when the boys were approximately three years apart in age.\footnote{99} Limon was convicted of criminal sodomy and, because Limon and M.A.R. were both male, he was subject to disparate treatment "based upon the homosexual nature of [his] conduct."\footnote{100} The court sentenced Limon to over seventeen years in prison and, upon his release, he faced up to five years of supervision and registration as a persistent sex offender.\footnote{101} Had Limon been able to avail himself of the Kansas Romeo and Juliet provision, his sentence would have been drastically reduced.\footnote{102}

Limon appealed his initial sentence but the Kansas Court of Appeals affirmed and denied further review.\footnote{103} The Supreme Court, after deciding \textit{Lawrence}, granted Limon’s petition for certiorari and vacated the Kansas Court of Appeals’ judgment as deserving “further consideration in light of \textit{Lawrence} . . . .”\footnote{104} This nudge by the U.S. Supreme Court, however, did not move the Kansas court.\footnote{105} Even though the court recognized the starkly different fate awaiting teenagers like Limon, it upheld the discriminatory Romeo and Juliet provision.\footnote{106} The court explained that \textit{Lawrence} applied only to adults, and that the legislature could “punish those adults who engage in heterosexual sodomy with a child less severely than those adults who engage in homosexual sodomy with a child.”\footnote{107} The court affirmed Limon’s lengthy sentence and required sex-offender registration, holding that disparate treatment of homosexual sexual activity is in the state’s interest.\footnote{108}

\footnote{99} See State v. Limon (\textit{Limon II}), 122 P.3d 22, 24 (Kan. 2005); \textit{Limon I}, 83 P.3d at 232–33. The boys had oral sex shortly after Limon had turned eighteen, one month before M.A.R. turned fifteen. See \textit{Limon II}, 122 P.3d at 24.

\footnote{100} \textit{Limon II}, 122 P.3d at 24.

\footnote{101} See \textit{id.} at 25. “Sodomy” can include both oral and anal sexual contact. See \textit{Kan. Stat. Ann.} § 21-5501(b) (2011) (defining sodomy in part as “oral contact or oral penetration of the female genitalia or oral contact of the male genitalia; anal penetration, however slight, of a male or female by any body part or object”). \textit{Id.}

\footnote{102} Professor Michael Higdon warns that Romeo and Juliet provisions such as these “should immediately inspire caution given that they require individuals who are not even adults to register as a sex offender.” Higdon, \textit{supra} note 4, at 250. He also points out the potential for serious complications from the required public disclosure component of sex offender registration because queer youth may be closeted. \textit{See id.} at 250–51. In addition to being labeled a sex offender and having their secret identities thrust into the public, outing queer youth in this way could increase the risk that they will commit suicide. \textit{See id.}

\footnote{103} \textit{See Limon II}, 122 P.3d at 25.

\footnote{104} \textit{See id.}


\footnote{106} \textit{See Limon I}, 83 P.3d at 292.

\footnote{107} \textit{See Limon I}, 83 P.3d at 237–38 (holding in part that Limon failed to show that his sentence was “unconstitutionally disproportionate”).

\footnote{108} \textit{See id.} at 235.

\footnote{109} \textit{See id.} at 237.
The court credited four interests on which the state could rationally rely in punishing criminal homosexual sodomy with a sentence almost fourteen-times longer than that for criminal heterosexual sodomy.\textsuperscript{109} First, the court credited protecting children from consensual homosexual sex as a rational interest, as homosexual sex is contrary to traditional sexual norms.\textsuperscript{110} Second, the court mentioned the state’s preference for marriage and procreation, as it helps replenish the population.\textsuperscript{111} Third, the court credited leniency toward heterosexuals because it facilitates parental responsibility, as freeing the offender from prison would better allow both parents to financially support a child should pregnancy result.\textsuperscript{112} Finally, the court imputed the prevention of STDs as a rational basis, because homosexual sex between males is “more generally associated” with a higher risk of STD transmission.\textsuperscript{113} In these ways, the court allowed the state to encourage “traditional sexual mores” that could lead to marriage and procreation because it “furnish[es] new workers, soldiers, and other useful members of society.”\textsuperscript{114} “The survival of society,” the court reasoned, “requires a continuous replenishment of its members.”\textsuperscript{115} The court also reasoned that punishing heterosexual sodomy less severely was akin to punishing first-time offenders of crimes less severely than repeat offenders.\textsuperscript{116} The court explained that statutes punishing people based on classifications, such as the sex of the parties, are allowable if the legislature is protecting a class of people, like children.\textsuperscript{117}

The Supreme Court of Kansas considered these same interests and found that they were not rationally related to the harsh treatment of criminal homosexual sodomy.\textsuperscript{118} In light of \textit{Lawrence}, the Supreme

\textsuperscript{109} See id. at 235-37.
\textsuperscript{110} \textit{Limon I}, 83 P.3d at 235-36.
\textsuperscript{111} Id. at 237.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 237. The court also reasoned that anal sex between two males could rationally be punished more severely than anal sex between an adult and a child of the opposite sex because, despite both victims being anally penetrated, sex with a gay male might be more hazardous in transmitting diseases such as HIV. See id. at 242 n.2 (Malone, J., concurring).
\textsuperscript{114} Id. at 237 (majority opinion).
\textsuperscript{115} \textit{Limon I}, 83 P.3d at 237.
\textsuperscript{116} Id. at 240.
\textsuperscript{117} See id. at 236.
\textsuperscript{118} See \textit{Limon II}, 122 P.3d at 32, 38. The court summarized the state’s interests in a Romeo and Juliet provision that required the parties to be of the opposite sex as:

(1) the protection and preservation of the traditional sexual mores of society;
(2) preservation of the historical notions of appropriate sexual development of children;
(3) protection of teenagers against coercive relationships;
(4)
Court of Kansas held insufficient the state’s interest in protecting children from homosexual sex because “moral disapproval of a group cannot be a legitimate governmental interest.”\textsuperscript{119} Although \textit{Lawrence} did not involve minors, the Supreme Court of Kansas saw no record of scientific evidence that “homosexual sexual activity is more harmful to minors than adults.”\textsuperscript{120} Thus, there was no justification for a harsher punishment.\textsuperscript{121}

The court relied on an amicus brief from the National Association of Social Workers and its Kansas chapter showing that teenagers’ sexual experiences do not affect their sexual orientation.\textsuperscript{122} The court further noted that the statute offered reduced penalties for heterosexual sexual contact, such as sodomy and lewd contact, that did not actually result in pregnancy.\textsuperscript{123} Finally, the court cited Limon’s argument that the state should discourage teen pregnancy, and thus, those relationships leading to teenage procreation.\textsuperscript{124}

The Kansas Appeals Court incorrectly credited the state’s concerns about STDs as a rational basis for punishing homosexual sex more harshly.\textsuperscript{125} The Kansas Supreme Court, however, clarified that homosexual teen sex did not pose a greater health concern for spreading HIV.\textsuperscript{126} The court credited statistics provided by the Center for Disease Control showing that the majority of HIV positive people between the ages thirteen and nineteen—the same ages affected by Romeo and Juliet provisions—are female.\textsuperscript{127} “[T]he gravest risk of sexual transmission for females,” the Court concluded, “is through heterosexual intercourse.”\textsuperscript{128} Moreover, Limon’s criminal sodomy conviction stemmed from the increased health risks that accompany sexual activity; (5) promotion of parental responsibility and procreation; and (6) protection of those in group homes.

\textit{Id.} at 33–34. Of these arguments, two were not specifically relied upon by the court of appeals—protection from coercive relationships and protection of those in group homes. See \textit{Limon I}, 83 P.3d at 235–37. Regardless, the Supreme Court of Kansas found these arguments unpersuasive. See \textit{Limon II}, 122 P.3d at 38.

\textsuperscript{119} See \textit{Limon II}, 122 P.3d at 35.

\textsuperscript{120} See \textit{id.}

\textsuperscript{121} See \textit{id.}

\textsuperscript{122} See \textit{id.}

\textsuperscript{123} See \textit{id. at 37}.

\textsuperscript{124} See \textit{Limon II}, 122 P.3d at 237.

\textsuperscript{125} See \textit{id. at 36}.

\textsuperscript{126} See \textit{Limon II}, 122 P.3d at 237.

\textsuperscript{127} See \textit{id. at 36}.

\textsuperscript{128} See \textit{id. at 36}.

\textsuperscript{129} See \textit{id. at 36}.
from oral sex which, as the court noted, has a “near-zero chance” of transmitting HIV.\textsuperscript{129}

Under the court’s rationale, the state must show that such conduct poses a greater likelihood of spreading disease than heterosexual sodomy.\textsuperscript{130} The state could not show this, however, and its purported public health interest did not rationally support the statute’s harsher treatment of homosexual sodomy.\textsuperscript{131} Therefore, the Supreme Court of Kansas held that the statute failed the rational basis test and violated the Equal Protection Clauses in both the federal and Kansas constitutions.\textsuperscript{132}

2. States Without Discriminatory Romeo and Juliet Exceptions

Even in states without discriminatory Romeo and Juliet exceptions, prosecutors may selectively target queer youth for statutory rape.\textsuperscript{133} In Commonwealth v. Washington W., a thirteen-year-old boy in Massachusetts allegedly began having sexual encounters with a fifteen-year-old boy named Washington.\textsuperscript{134} While the alleged encounters continued, Washington turned sixteen.\textsuperscript{135} When the younger boy’s father learned of the alleged encounters, he reported the situation to the police and they charged Washington with two delinquency complaints of statutory rape and two delinquency complaints of indecent assault and battery on a child under the age of fourteen.\textsuperscript{136}

The Massachusetts Supreme Judicial Court (SJC) affirmed the prosecutor’s “wide discretion” in deciding whether to press charges against Washington because a prosecutor’s decision is presumed to be in good faith.\textsuperscript{137} Nonetheless, the SJC also affirmed a limited version of

\textsuperscript{129} See id.
\textsuperscript{130} See id. at 36.
\textsuperscript{131} See Limon II, 122 P.3d at 36.
\textsuperscript{132} See id. at 38.
\textsuperscript{133} See Levine, supra note 15, at 694–95, 739 n.176; Sutherland, supra note 2, at 327–28; see, e.g., Commonwealth v. Washington W., 928 N.E.2d 908, 910 (Mass. 2010) (seeking discovery to prove selective statutory rape prosecution based on sexual orientation).
\textsuperscript{134} See Washington W., 928 N.E.2d at 910. The court noted that the boys had been diagnosed with Asperger’s Syndrome but did not elaborate how this factored into the court’s decision. See id.
\textsuperscript{135} See id.
\textsuperscript{136} Statutory rape of a child under the age of fourteen is punishable by imprisonment for up to ten years in Massachusetts. See Mass. Gen. Laws ch. 265, § 13B (2011). The court noted that, though the prosecution argued that Washington forcibly raped the complainant, for some unstated reason Washington did not face charges for rape by force. See Washington W., 928 N.E.2d at 910 n.1.
\textsuperscript{137} See Washington W., 928 N.E.2d at 911 (quoting Commonwealth v. Bernardo B., 900 N.E.2d 834, 842 (Mass. 2009)) (internal quotation marks omitted).
the discovery order granted to Washington by the juvenile court to pursue his selective prosecution claim. The Court reasoned that “the subtleties behind a decision to prosecute just one youth in the context of same-gender sexual relations suggests that a comparison of similarly situated juvenile defendants . . . may provide more telling and relevant statistical information to support the juvenile’s claim.” According to the court, Washington needed discovery because the prosecution possessed all revealing data.

a. Parental Prosecution

Prosecutors may also selectively pursue queer youth because, as in Washington W., parents urge them to do so. This parental push could lead to selective prosecution based on a queer youth’s failure to fit social norms. The SJC in Washington W. noted that the younger boy involved had “indicated that homosexuality was wrong and that he was not a homosexual, and his parents initiated the criminal complaint.” In its relatively short opinion, the court mentioned three times that the younger boy’s parents were involved in the decision to prosecute, highlighting the way that parental reactions factor into a prosecutor’s decision-making.

Parents often have pronounced reactions when they discover that their child has engaged in same-sex sexual activity. For example,

Beatrice Dorn, legal director of the Lambda Legal Defense and Education Fund, says statutory rape cases where the defendant is barely older than the victim are more likely to be prosecuted if the partners are of the same sex. ‘It happens be-

---

138 See id. at 911, 914. The court granted Washington a limited discovery order so that he could potentially make the required threshold showing of relevance and thereby argue for a more expansive discovery order. See id. at 915.

139 Id. at 914.

140 See id.

141 See id. at 914; Sutherland, supra note 2, at 322, 327–28.

142 See Majd et al., supra note 1, at 1–3; Chang & Davis, supra note 25, at 15 n.30 (citing Berlant & Warner, supra note 25 at 548 n.2); Levine, supra note 15, at 694–95, 739 n.176; Sutherland, supra note 2, at 314, 322; Wardenski, supra note 15, at 1367–68, 1374–75.

143 Washington W., 928 N.E.2d at 914.

144 See id. at 910, 910 n.2, 914; see also Sutherland, supra note 2, at 322, 327–28.

cause parents go nuts when they find out their kid has been having gay sex.”

Age of consent violations are more likely to be filed when the actors are of the same sex. Washington embraced this notion and argued that it would “likely show that underage mutually agreed-to heterosexual actions amongst similarly aged teenagers are not prosecuted, but that homosexual acts are prosecuted, especially when the parents of one of the parties insist.”

b. The Ripple Effect

Queer youth are also more likely to be punished by school officials and local law enforcement officers, and this can have a detrimental ripple effect. According to a 2010 study conducted by the American Academy of Pediatrics, “[n]onheterosexuality consistently predicted a higher risk for sanctions” such as being expelled from school, being stopped by police, being arrested, and being convicted of crimes. This is especially true regarding sex-based offenses. A 2009 study by Legal Services for Children, the National Juvenile Defender Center, and the National Center for Lesbian Rights found that despite opinions by medical and mental health professionals to the contrary, some juvenile justice professionals still consider LGBT people as mentally ill and sexually deviant. As a result, police often selectively target LGBT youth and disproportionately charge them with sex offenses while overlooking similar crimes involving heterosexual offenders. Moreover, the American Academy of Pediatrics study concluded that these “disproportionate educational and criminal-justice punishments . . . are not explained by greater engagement in illegal or transgressive behaviors.” Instead, some researchers conclude that the disproportionately

---

147 Sutherland, supra note 2, at 327–28. Teens may also experience maltreatment in their own homes, such as verbal and physical abuse due to parental rejection of their sexuality. Higdon, supra note 4, at 216–17.
148 Washington W., 928 N.E.2d at 914.
150 Himmelstein & Brückner, supra note 149, at 49.
151 See id. at 4, 3.
152 See id. at 3.
153 See id. at 3.
154 Himmelstein & Brückner, supra note 149, at 49.
punitive treatment that queer youth experience is a product of the juvenile justice system’s “profound lack of acceptance of LGBT identity.”155 This lack of acceptance is “[r]ooted in a lack of understanding of—and sometimes outright bias against—LGBT youth . . . .”156

Though queer youth’s disproportionately higher rate of punishment is attributable in part to the biases and ignorance of adult officials, it is also a likely consequence of being rejected by peers.157 The majority of queer youth are harassed by their peers, which can lead to an increased risk of formal punishment both in school and in the juvenile justice system.158 According to a 2009 report by the Gay, Lesbian and Straight Education Network, almost eighty-five percent of lesbian, gay, bisexual, and transgender middle and high school students reported being verbally harassed in school because of their sexual orientation, and over forty percent reported physical harassment.159 Peer harassment has led to lowered grade point averages, increased dropout rates, and “a heightened risk for juvenile court involvement” for queer youth.160

Harassment has also contributed significantly to arrest and formal truancy charges, as queer youth may skip school out of concern for their personal safety.161 “In one study, 32.7 percent of LGBT students reported that they had missed school in the past month because they felt unsafe, compared to 4.5 percent of a national sample . . . .”162 When such harassment occurs, police and school officials may presumptively blame the bullied queer student.163 In one case, school officials told a bullied queer that, because he wore nail polish, he was “so provocative that the kids couldn’t help but pick on him . . . .”164 When queer youth are truant from school to avoid this type of harassment,

---

155 See Majd et al., supra note 1, at 2.
156 Id.
157 See id. at 76–78.
159 See GLSEN, supra note 158, at 3. The survey sample consisted of a total of 7261 students between the ages of thirteen and twenty-one. Id. at i. Students surveyed were from all fifty states and the District of Columbia. Id.
160 See Majd et al., supra note 1, at 76.
161 See id.
162 Id.
163 See id. at 76–77.
164 Id. at 77 (internal quotation marks omitted).
they may experience a detrimental effect because truancy counts against children in juvenile proceedings.\textsuperscript{165}

c. Social Rejection

Queer youth are also socially rejected in other ways.\textsuperscript{166} For example, in \textit{McMillen v. Itawamba County School District}, a Mississippi school’s “opposite sex” prom date policy barred Constance McMillen from bringing her girlfriend to prom as a date.\textsuperscript{167} Itawamba Agricultural High School’s assistant principal informed McMillen that she could not bring her girlfriend to prom unless they each brought male dates.\textsuperscript{168} Even if the girls brought male dates, the school district superintendent required that they wear dresses, forbade them from slow dancing together, and said they would be asked to leave if they made anyone uncomfortable.\textsuperscript{169} McMillen sought help from the American Civil Liberties Union in suing the school district, and the U.S. District Court for the Northern District of Mississippi ruled that the school’s actions violated McMillen’s First Amendment right of free expression.\textsuperscript{170}

Instead of respecting the District court’s decision and allowing McMillen and her girlfriend to attend, the school invited McMillen to a fake prom attended only by seven other students.\textsuperscript{171} Unbeknownst to her, the rest of the students attended a different, secret prom.\textsuperscript{172} Because the status quo for queer youth creates harassment by peers, a higher risk of formal punishment, and persistent community rejection, queer youth are in a precarious position.\textsuperscript{173} Despite the court’s ruling amid public scrutiny, school officials and parents persisted in excluding

\textsuperscript{165} See Majd \textit{et al.}, supra note 1, at 78.
\textsuperscript{167} See McMillen, 702 F. Supp. 2d at 701.
\textsuperscript{168} See id.
\textsuperscript{169} See id.
\textsuperscript{170} See id. at 701, 705.
\textsuperscript{171} See ACLU Decoy Prom, supra note 166.
\textsuperscript{172} See id.
\textsuperscript{173} See Limon II, 122 P.3d at 25; Limon, 83 P.3d at 237; McMillen, 702 F.Supp.2d at 705; GLSEN: supra note 158, at 3; Majd \textit{et al.}, supra note 1, at 1–3, 75–78; Himmelstein & Brückner, supra note 149, at 49; ACLU Decoy Prom, supra note 166.
McMillen to her legal detriment because of her sexual orientation.174 Just as the Court of Appeals of Kansas resisted change, school officials and parents clung to the status quo despite arguable legal directives to the contrary.175

Queer youth’s precarious position is compounded by the instability that results from being rejected by family—an experience familiar to a substantial percentage of queer youth.176 “One study found that 45 percent of parents were angry, sick, or disgusted when first learning of their child’s sexual orientation or gender identity,” and another found that “approximately 30 percent of LGBT youth were physically abused by family members as a result . . . .”177 When their families react negatively, queer youth are more prone to engage in criminal activities, especially crimes of necessity like shoplifting and prostitution.178

---

174 See ACLU Decoy Prom, supra note 166; Ian Thompson, Ms. McMillen Goes to Washington!, ACLU BLOG OF RIGHTS (June 23, 2010, 5:40 PM), http://www.aclu.org/blog/lgbt-rights/ms-mcmillen-goes-washington (noting that McMillen made headlines and that this controversy eventually brought her to the White House, where President Obama lauded her courage).

175 See Limon I, 83 P.3d at 238 (finding rational basis for different punishment of criminal homosexual sodomy than for criminal heterosexual sodomy despite the case being remanded from the U.S. Supreme Court for reconsideration in light of Lawrence). Compare McMillen, 702 F. Supp. 2d at 705 (holding that a school violated a lesbian student’s First Amendment right of free expression because of its discrimination based on sexual orientation), with ACLU Decoy Prom, supra note 166 (reporting the school’s defiant exclusion of McMillen despite a court ruling that the school district violated McMillen’s constitutional rights). The school ultimately settled with McMillen after the ACLU filed an amended complaint that included the “decoy” prom. See Press Release, American Civil Liberties Union, Mississippi School Agrees to Revise Policy and Pay Damages to Lesbian Teenager Denied Chance to Attend Prom (July 20, 2010), available at http://www.aclu.org/lgbt-rights/mississippi-school-agrees-revise-policy-and-pay-damages-lesbian-teenager-denied-chance-a.

176 See Majd et al., supra note 1, at 3, 70, 74. Beyond direct legal peril, when queer youth are rejected by their families, friends, and peers, they have a greater risk of health problems. See Tumaini R. Coker et al., The Health and Health Care of Lesbian, Gay, and Bisexual Adolescents, 31 ANN. REV. PUB. HEALTH 457, 458, 468 (2010). A 2009 study found that queer youth who were “highly rejected” by their families were eight times more likely to attempt suicide, six times more likely to report high levels of depression, and three times more likely to use illegal drugs and be at “high risk” for STDs such as HIV. See Ryan, supra note 83, at 5. Finally, as Professor Levine explains, “the emphasis on family support and premarriage type commitments leaves no room for gay relationships, which often lack the support of the teen’s family and cannot lead to marriage,” thus resulting in a denial of the same “intimacy discount” or prosecutorial forbearance that heterosexual youth may receive. Levine, supra note 15, at 694–695, 739 n.176.

177 See Majd et al., supra note 1, at 70.

178 See id. at 3, 72. “Research shows that leaving home as a result of family rejection is the greatest predictor of future involvement with the juvenile justice system for LGBT youth. In a study of LGBT homeless youth, 39 percent reported they had been ‘kicked out’ of their home because of their sexual orientation or gender identity, and 45 percent reported involvement with the juvenile justice system.” Id. (citations omitted).
over, queer children with unsupportive families generally do not fare as well in the legal system.\textsuperscript{179}

III. CHALLENGES TO SHOWING SELECTIVE PROSECUTION IN SAME-SEX JUVENILE STATUTORY RAPE CASES

Even though queer youth are more vulnerable in their communities and punished disproportionately, proving their selective prosecution in statutory rape cases poses several challenges.\textsuperscript{180} Queer youth must show that they are disfavored enough to merit protection, show prosecutorial bias, and surmount the prosecutor’s near-absolute discretion.\textsuperscript{181}

A. Showing Prosecutorial Bias

Before receiving a discovery order, a defendant must make a threshold showing of selective prosecution.\textsuperscript{182} State courts may differ on what meets the threshold, but generally, the defendant must show prosecution based on “an unjustifiable standard such as race, religion, or other arbitrary classification.”\textsuperscript{183} Making this showing may be difficult when sexual orientation is not a suspect class requiring heightened scrutiny.\textsuperscript{184} Courts would likely use the lowest standard of review, the

\textsuperscript{179} See id. at 3, 74.
\textsuperscript{180} See United States v. Armstrong, 517 U.S. 456, 463–64 (1996) (discussing the “background presumption . . . that the showing necessary to obtain discovery should itself be a significant barrier”); Sapir, supra note 20, at 141–42 (arguing that racist prosecutors could conceal their biases making showing selective prosecution based on race an “insurmountable obstacle”); Heller, supra note 20, at 1322–23 (arguing that the significant barrier erected by Armstrong “has effectively mooted an important constitutional protection”).
\textsuperscript{181} See Poulin, supra note 30, at 1076 (explaining that the defendant must show “that similarly situated offenders who are not members of the disfavored group have not been prosecuted”); Sapir, supra note 20, at 141–42, 173; Stein, supra note 25, at 482 (“The few courts that have held that sexual orientation classifications warrant heightened scrutiny have had their decisions overruled or vacated.”); Yoshino, supra note 25, at 756 (explaining that sexual orientation is reviewed under a lower, rational basis standard unlike classifications such as race); see, e.g., Armstrong, 517 U.S. at 465; Commonwealth v. Washington W., 928 N.E.2d 908, 912 n.4 (Mass. 2010) (declining to consider whether sexual orientation is a protected class in Massachusetts).
\textsuperscript{182} See, e.g., Armstrong, 517 U.S. at 465 (requiring a threshold showing of credible evidence showing that similarly situated persons were not prosecuted); Washington W., 928 N.E.2d at 915 (affirming discovery order to allow Washington to make a threshold showing).
\textsuperscript{183} See Washington W., 928 N.E.2d at 911–12 (quoting Commonwealth v. King, 372 N.E.2d 196, 206 (Mass. 1977)).
\textsuperscript{184} See id. at 912 n.4 (declining to consider whether sexual orientation is a class suspect enough to warrant protection, but noting that selective prosecution could be found under the lower rational basis standard); Higdon, supra note 4, at 231–34 (explaining some gradations of standards of review as applied by the courts); Stein, supra note 25, at 482; Yo-
rational basis test, to evaluate queer youths’ claims of selective prosecution. As exemplified by the Court of Appeals of Kansas in Limon, such a standard is highly deferential to the state.

Any defendant arguing selective prosecution faces the “significant barrier” erected by the Supreme Court in United States v. Armstrong. In Armstrong, the Court explained that selective prosecution claims are rooted in constitutional equal protection standards. To prove selective prosecution, and thus an equal protection violation, a defendant must show (1) the prosecution’s discriminatory effect and (2) its motivation by a discriminatory purpose; in other words, the prosecutor must specifically intend to discriminate.

A queer defendant likely faces similar obstacles to revealing a prosecutor’s buried bias as those faced by defendants arguing racially-motivated selective prosecution. Prosecutors with racial biases are unlikely to admit them openly. Yoav Sapir explains this phenomenon, stating that “it is very hard to find someone who will admit that she is racist, or who will openly say, ‘I think black people are criminals.’” Similarly, prosecutors biased against queers are unlikely to publicly admit...
nounce their feelings.\textsuperscript{193} Although Sapir argues that disparaging remarks about gay people are more socially acceptable than racism, prosecutors would probably not risk being branded as biased.\textsuperscript{194} This difficulty, combined with the judicial deference to a prosecutor’s discretion, makes proving discriminatory intent exceptionally challenging.\textsuperscript{195}

B. Near-Absolute Prosecutorial Discretion

A defendant arguing selective prosecution must also confront the reality that deference to prosecutorial discretion is near-absolute.\textsuperscript{196} This practically unchecked power is vulnerable to abuse motivated by a prosecutor’s personal biases.\textsuperscript{197} As explained in \textit{Armstrong}, courts presume that prosecutorial decisions are proper unless there is “clear evidence to the contrary.”\textsuperscript{198} Such unfettered discretion led Robert H. Jackson, former U.S. Attorney General and Supreme Court Justice, to comment that “[t]he prosecutor has more control over life, liberty, and reputation than any other person in America.”\textsuperscript{199}

Despite potential for abuse—or, at a minimum, for questionable choices that greatly affect citizens’ lives—the prosecutor retains discretion because the benefits arguably outweigh the potential harm.\textsuperscript{200} Those benefits are: \textit{“(1) promoting prosecutorial and judicial economy and avoiding delay; (2) preventing the chilling of law enforcement; (3) avoiding the undermining of prosecutorial effectiveness; and (4) adhering to the constitutional principle of separation of powers . . . .”}\textsuperscript{201}

Protecting prosecutorial discretion furthers prosecutorial economy by

\textsuperscript{193} See id.
\textsuperscript{194} See id. at 141–42, 173. Sapir argues that because racist and misogynistic views are less acceptable today, they are more hidden and sometimes remain unconscious. See id. at 173 (explaining, for example, that a black person carrying a weapon could be seen as different, more serious, or more dangerous than an armed white person). Biased prosecutors, however, may suppress anti-queer sentiments more as same-sex relationships are becoming increasingly legitimate in the law. See Brumbaugh et al., supra note 190, at 345 (reporting on the conflict between perceived social values and civil rights). Moreover, an unconscious bias similar to that of racism and sexism arguably exists for queer Americans in a heteronormative society. See Chang & Davis, supra note 25, at 15 n.30 (citing Berlant & Warner, supra note 25, at 548 n.2); Higdon, supra note 4, at 214.
\textsuperscript{195} See Armstrong, 517 U.S. at 465; Heller, supra note 20, at 1322–23; Sapir, supra note 20, at 141–42.
\textsuperscript{198} See Armstrong, 517 U.S. at 464–65 (internal quotation marks omitted).
\textsuperscript{199} Jackson, supra note 197, at 18; see Heller, supra note 20, at 1325.
\textsuperscript{200} See Heller, supra note 20, at 1328.
\textsuperscript{201} Id. at 1326.
preventing frivolous lawsuits and the need to respond to time-consuming discovery requests.\textsuperscript{202} Also, this policy decreases the number of prosecutorial discretion cases, thereby furthering judicial economy and avoiding delays.\textsuperscript{203} Limiting prosecutorial discretion claims stops the chilling of law enforcement too, thereby allowing decisive law enforcement.\textsuperscript{204} This avoids undermining law enforcement by keeping strategies confidential and free from controversy.\textsuperscript{205} Finally, separation of powers is maintained by not encroaching on the province of executive-appointed officials who are in a better position than courts to make effective prosecutorial decisions.\textsuperscript{206}

C. Challenges Unique to Juveniles

A challenge unique to juveniles arguing selective prosecution is the confidentiality of sensitive juvenile records, as seen in \textit{Commonwealth v. Washington W.}\textsuperscript{207} The standard for showing selective prosecution under the Massachusetts Constitution is parallel to the federal standard, as articulated in \textit{Armstrong}\.\textsuperscript{208} A defendant making a claim under the Massachusetts Constitution must make a threshold showing of relevance.\textsuperscript{209} As the court in \textit{Washington W.} pointed out, however, a juvenile defendant is at a disadvantage because, unlike an adult, this threshold is not satisfied by searching court records for evidence and comparing the number of complaints, indictments, and prosecutions.\textsuperscript{210} The juvenile defendant’s disadvantage is thus unique because he or she cannot comparatively demonstrate how similarly situated individuals are treated.\textsuperscript{211}

Access to juvenile court proceedings and records varies by state, but it is often disallowed when children are accused of certain crimes, and especially when they are victims of abuse.\textsuperscript{212} Limiting public access,
especially to court proceedings, when children are victims of abuse may help victims recover without undue public attention and could encourage future victims to report abuse.\textsuperscript{213} Some consider this shielding of the minor victim to be important to recovery because sexual assault, specifically rape, is psychologically traumatic and societal reactions may exacerbate the harm.\textsuperscript{214} Furthermore, public attention may negatively affect the ability of the child’s family to cope with the abuse and, consequently, hinder the child’s healing.\textsuperscript{215} Safety concerns also prompt a closed record because publicity could lead to further abuse or retaliation from the abuser.\textsuperscript{216}

The court in \textit{Washington W.} also noted a characteristic unique to selective prosecution claims when the parties to a statutory rape case are of the same sex.\textsuperscript{217} First, gender equality cannot be achieved—and prosecutorial biases neutralized—by simply charging all parties with statutory rape.\textsuperscript{218} For example, the heterosexual statutory rape case of \textit{Commonwealth v. Bernardo B.} dealt with a male minor charged with statutory rape of three female minor friends.\textsuperscript{219} Bernardo, a fourteen-year-old boy, allegedly engaged in manual and oral sex with three girls, two of whom were twelve and one of whom was about to turn twelve.\textsuperscript{220} The court found that he used no force and that all parties under the age of consent mutually “assented-to” the sexual activity, but only Bernardo faced statutory rape charges.\textsuperscript{221} The district attorney did not dispute the encounters’ “consensual” nature but refused Bernardo’s request to also charge the girls with statutory rape.\textsuperscript{222} Bernardo therefore argued that he was selectively prosecuted based on his gender.\textsuperscript{223} In \textit{Bernardo B.}, the prosecutor’s decision relied on gender norms, but in \textit{Washington W.}
W., similarly charging all parties would not prevent “the danger of selective prosecution” based on sexual orientation.224

IV. More Discovery, Please: Why the Court in Washington W. Got It Right

The court in Commonwealth v. Washington W. reasoned that, “in light of the constraints imposed by the Juvenile Court, [Washington’s] claim [was] sufficiently serious to warrant further inquiry.”225 The court therefore affirmed the limited discovery order, allowing Washington to make the threshold showing necessary for further discovery toward proving selective prosecution.226 The court credited the experience of two judges in juvenile court who initially issued the discovery orders and concluded that “discovery would not be burdensome for the Commonwealth.”227 Although the SJC limited the scope of the order, the court affirmed it without considering whether sexual orientation is a protected class in Massachusetts.228 Although “selective prosecution must be based on discriminatory treatment of someone who is a member of a protected class,” the SJC granted discovery because Washington could possibly demonstrate violation of his constitutional rights under rational basis review.229 The court noted that the Commonwealth actually emphasized, “the historic continuing animosity against homosexual[s],” and that equal protection violations are important because “the desire to effectuate one’s animus against homosexuals can never be a legiti-

224 See Washington W., 928 N.E.2d at 914 (construing Bernardo B., 900 N.E.2d 834).
225 928 N.E.2d 908, 914 (Mass. 2010).
226 See id. at 913–14. Washington originally sought discovery including such things as the number of cases both reported and charged in the last five years for “statutory rape and/or indecent assault and battery where the accused and the complaining witness were under 17 years old, including the age and sex of the accused and the complaining witness,” and similarly for “sexual assaults of a person—including but not limited to Rape, Rape of a Child, Statutory Rape, Assault with Intent to Commit Rape, and Indecent Assault and Battery—including the sex of the accused and the sex of the complaining witness.” Id. at 913. Washington also sought “[a]ny and all written policies by the Norfolk County District Attorney in effect during the last five years concerning the charging of statutory rape” and “[a]ny statistical compilations, reports or studies done by the Norfolk District Attorney’s Office concerning sex crimes or sex cases in Norfolk County in the last five years.” Id. The SJC ruled that the juvenile court judges did not abuse their discretion in granting the orders but limited the order to “cases where statutory rape, indecent assault and battery, or both, were charged and the juvenile and the complainant were both under the age of seventeen years.” Id. at 915.
227 See id.
228 See id. at 912 n.4, 915.
229 See id. at 912 n.4.
mate governmental purpose."\textsuperscript{230} As there was a path for Washington to pursue his claim, the court held that the discovery order was warranted.\textsuperscript{231}

Regardless of Washington’s ultimate success, the preliminary discovery order reveals a potentially problematic breed of selective prosecution and may result in equitable change.\textsuperscript{232} Professor Anne Poulin explains that “airing [a] defendant’s claim in the legal process may have a more subtle beneficial influence on the future exercise of prosecutorial discretion.”\textsuperscript{233} Such “soft enforcement” influences the system from within because complying with discovery orders spurs self-regulation and therefore ensures proper future prosecutorial decisions.\textsuperscript{234} Soft enforcement can also contribute to public understanding of prosecutorial decision-making, result in heightened public scrutiny, and create “a demand for more careful exercise of prosecutorial discretion.”\textsuperscript{235} Although concerns exist over the chilling of law enforcement, critics maintain that prosecutors are too powerful and that giving them unfettered discretion leaves some people more vulnerable.\textsuperscript{236} Soft enforcement is a less intrusive means for equitable change because it encourages “self-scrutiny,” which may effectively “sensitize” the law enforcement community to systemic and individual biases.\textsuperscript{237} The juvenile justice system must improve sensitivity to sexual orientation and address biases because “LGBT youth continue to face harmful discrimination in their homes, schools, and communities . . . . [and] juvenile justice pro-

\textsuperscript{230} Washington W., 928 N.E.2d at 912 n.4, 914 n.5 (internal quotation marks omitted).
\textsuperscript{231} See id. at 912 n.4, 914.
\textsuperscript{232} See Poulin, supra note 30, at 1090–92.
\textsuperscript{233} Id. at 1091.
\textsuperscript{234} See id. at 1090.
\textsuperscript{235} Id. at 1090.
\textsuperscript{236} See id. at 1090–91; Sapir, supra note 20, at 138–40. Sapir notes that James Vorenberg raised the concern that broad and almost unchecked discretion of prosecutors will result in a situation in which “society’s most fundamental sanctions will be imposed arbitrarily and capriciously and that the least favored members of the community—racial and ethnic minorities, social outcasts, [and] the poor—will be treated most harshly.” Sapir, supra note 20, at 138–39 (quoting James Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1555 (1981)). Sapir also argues that “[i]n contrast to the legislation process, individuals often make prosecutorial decisions. Presuming that the majority of the population is not racist, the probability that a single prosecutor will be racist is higher than the probability that there will be a racist majority among a group of legislators.” Id. at 139.
\textsuperscript{237} Poulin, supra note 30, at 1091–92.
Professionals remain unprepared to effectively serve [and] ... treat them fairly.”

Despite concerns about opening juvenile court records regarding sex and abuse, a court can consider and balance the interests involved to tailor a discovery order without granting unfettered access. Courts may maintain the integrity of public policy concerns behind closed juvenile court records by giving defendants private access only to court records and not the actual proceedings. Balancing interests and tailoring access can also ensure that the discovery does not burden the state.

Furthermore, queer youth and their communities could benefit from the publicity surrounding cases claiming selective prosecution based on sexual orientation. “[C]ourts are public places where society’s values, ideas, and concerns are continually tested,” and allowing the public to hear more stories involving queer youth in these ways could spur helpful public discussion. Such discourse could contribute to increased soft enforcement, ultimately acting as a check on prosecutorial discretion and resulting in equitable change.

Given the hurdles inherent in selective prosecution claims, discovery orders like the one issued in Washington W. could be a pragmatic way to achieve equitable improvements in the juvenile justice system. Queer youth experience disparately higher amounts of formal sanction, especially for sex-based crimes, and the juvenile justice system inadequately responds to their needs. Therefore, queer youth should not shy from difficult selective prosecution claims. Even if such claims are ultimately unsuccessful, merely bringing the claim may improve the juvenile justice system through soft enforcement, and “[t]he key to soft enforcement is often discovery.”

238 Majd et al., supra note 1, at 1.
239 See, e.g., Washington W., 928 N.E.2d at 915 (limiting the scope of the discovery order requested).
240 See id.; Petrof, supra note 212, at 1687–89.
241 See id.; Petrof, supra note 212, at 1687–89.
242 See, e.g., Washington W., 928 N.E.2d at 915.
243 See Horne, supra note 22, at 685.
244 See id. at 689.
245 See Poulin, supra note 30, at 1090–91; Horne, supra note 22, at 689–90.
246 See Poulin, supra note 30, at 1090, 93.
247 See Majd et al., supra note 1, at 2; Poulin, supra note 30, at 1090–91.
248 See Majd et al., supra note 1, at 3; Himmelstein & Brückner, supra note 149, at 54; Poulin, supra note 30, at 1090–93.
249 Poulin, supra note 30, at 1092 (explaining that any useful data is likely in the hands of the prosecution); see also Washington W., 928 N.E.2d at 914 (“All information regarding
Conclusion

Statutory rape laws vary by state, but a prosecutor’s broad discretion is constant. As studies reveal, queer youth are quite vulnerable in their communities, and they are more likely to be formally punished. Despite the seemingly insurmountable barriers to claiming selective prosecution, especially for queer youth, defendants in these situations should still challenge the status quo. Even if queer youth are selectively prosecuted and are unsuccessful in their claims, they may nonetheless improve their communities by telling their stories.

Similarly situated juveniles is within the possession of the district attorney’s office, and the juvenile has no ability to access that information absent a court order.”