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READY, AIM, FIRE: EMPLOYING OPEN RECORDS ACTS AS ANOTHER WEAPON AGAINST PUBLIC LAW SCHOOL CLINICS

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"The effective functioning of our constitutional democracy depends upon the participation in public life of a citizenry that is well informed." – George W. Bush

I. INTRODUCTION

"Information is the oxygen of democracy."[1] Indeed, transparency in government is the essence of any democratic system - without it, corruption is free to thrive in secrecy.[2] Therefore, it is essential to provide the citizenry with freedom of information as it allows one to not only properly scrutinize his or her government's actions, but to participate in an "informed debate of those actions."[3] The legal demand for readily available information through open records and freedom of information acts is an evolutionary product of the "bureaucratic complexities of the early twentieth century."[4] During this time, government entities began to implement increasingly intensive systems of record-keeping.[5] However, as government transactions grew more personal in nature, the public demanded an increased level of transparency and record access.[6] Once modern technology allowed for government entities to efficiently comply with information requests, both the United States federal government and all fifty state governments enacted information access and open record legislation.[7] In 1966, the federal government passed the Freedom of Information Act ("FOIA"),[8]

[1] ARTICLE 19, *The Public's Right To Know: Principles on Freedom of Information Legislation* (London, International Standards Series 1999), 1, *available at* http://www.article19.org/pdfs/standards/righttoknow.pdf.
[2] *Id.*
[3] *Id.*
[4] Lee R. Remington, *School Internal Investigations of Employees, Open Records Laws, and the Prying Press*, 31 J.L. & EDUC. 459, 459 (2002).
[5] *Id.*
[6] *Id.* at 459-60.
[7] *Id.* at 460; FOIADVOCATES, http://www.foiadvocates.com/records.html. (This website also provides a comprehensive look at every state's open records statutes).
[8] 5 U.S.C. § 552 (1996), *available at* http://www.justice.gov/oip/foia_updates/Vol_XVII_4/page2.htm (Noting that this act was amended in 1996 to allow for electronic information).

which "provides a right of access to the public of government records."[9] Although many states modeled their public record laws after FOIA, no state laws are completely identical and thus may be subject to various interpretations by different courts.[10]

State open record statutes generally begin with the proposition that "all records are open to public inspection to any individual or organization."[11] However, this is almost always followed by a list of exemptions. Ubiquitously included within this list is a "personal privacy" exception from unwarranted disclosure; a confidential scientific research exception; exceptions for the records of law enforcement agencies; and documents containing preliminary drafts or recommendations (e.g. not the agency's "final" decision), notes, or private correspondence.[12] Once a request for records is submitted, the state statute will often mandate that a public agency either comply with the request or assert an enumerated exemption, enabling the agency to refuse the request. Many statutes allow for the requesting individual or entity to appeal the denial through a regulatory authority.[13] Appeal is possible if the requesting individuals believe that they are truly entitled to the requested documentation.[14]

One particular area that is often subject to open records legislation is public education. Public schools and universities are considered to be an arm of the state, and thus are held accountable to any open records request from the public.[15] However, if public universities are subject to open records acts, does this mean public university law school clinics are subject as well?

Recently, law school clinics across the nation have faced growing harassment as institutions "increasingly take on powerful interests that few other nonprofit groups have the resources to challenge."[16] New Jersey's Rutgers School of Law-Newark ("Rutgers") is one law school facing such an attack as it recently had to defend itself against an Open Public Records Act ("OPRA") request.[17] Unfortunately, subjecting such clinics to open records legislation has had a disproportionate impact upon *public* law schools.

This Note will argue that powerful adversaries, including state governments, have and will continue to use, open records acts to attack and undermine public law school clinics and their clients. This will have a chilling effect on these clinics. Part II will analyze a New Jersey case exemplifying such attacks on public law school clinics. Part III will discuss the history and role of clinical education in the United States. Part IV will demonstrate that open records acts can be used as a part of a larger scheme to attack public law school clinics utilizing *Sussex Commons v. Rutgers, The State University* as a model for such analysis. Part V will argue that subjecting legal clinics to open record legislation has undermined and will continue to disadvantage legal education in public law schools.

II. SUSSEX COMMONS ASSOCS. V. RUTGERS

[9] The White House, http://www.whitehouse.gov/omb/foia_default (last visited Oct. 6, 2011); *See also*, 5 U.S.C. § 552 (2009) (explaining that FOIA only applies to the executive branch).
[10] FOIADVOCATES, http://www.foiadvocates.com/records.html (last visited Oct. 6, 2011).
[11] Remington, *supra* note 4, at 460.
[12] *Id.*
[13] *Id.*
[14] *Id.*; for a comprehensive look at every state's open records statutes see http://www.foiadvocates.com/records.html.
[15] Remington, *supra* note 4, at 460.
[16] Ian Urbina, *School Law Clinics Face a Backlash*, N.Y. TIMES, Apr. 3, 2010, *available at* http://www.nytimes.com/2010/04/04/us/04lawschool.html.
[17] Sussex Commons Assoc. v. Rutgers, 416 N.J. Super. 537, 539 (N.J. Super. Ct. App. Div. 2010).

Rutgers has recently found a number of its clinics under attack from a particularly powerful adversary. In 2004, the Rutgers Environmental Clinic, one of eight clinical programs affiliated with the school, represented the Coalition to Protect Our Land, Lakes and Watersheds and the Citizens for Responsible Development at Ross' Corner.[18] Both clients are groups who opposed the building of a shopping mall in Frankford Township, New Jersey.[19] In their decision, the New Jersey Superior Court noted that:

> Acting as the legal representative of these two non-profit groups, the Clinic presented evidence in opposition to plaintiff's application at all permit and development hearings, intervened and filed cross-claims in at least two lawsuits between Sussex Commons and the Township, and directly appealed the Township's development approvals.[20]

However, Sussex Commons eventually succeeded, and obtained plans for the project.[21] After obtaining consent for the plans, it filed a complaint against a rival developer, Chelsea Property Group, alleging that they hindered Sussex Commons' attempts to get approvals.[22] During litigation, Sussex Commons uncovered information indicating that Chelsea Property Group had contributed monetary support to the two citizens' groups represented by the clinic in 2004.[23] Although the lawsuit was ultimately dismissed, this "did not deter Sussex Commons in its efforts to obtain more information concerning the groups' activities."[24]

In May 2006, Sussex Commons attempted to acquire specific clinical documents, including financial records from the Environmental Clinic.[25] Despite a trial court's holding that public law school clinics should be categorically exempt from OPRA, a three judge panel reversed the decision, concluding that Rutgers clinics are an arm of the state because they receive public funding and are not given a categorical exemption by the legislature.[26] This decision, however, has ramifications that extend beyond Rutgers or even New Jersey.

III. HISTORY AND THE ROLE OF CLINICS IN LEGAL EDUCATION

Clinical education is "one of the most significant developments in legal education."[27] Essentially, legal clinics provide students with opportunities for a "hands-on education" by working on real cases while under the supervision of law school faculty.[28] Clinics afford students an opportunity to prepare for the practice of law by honing their skills, interacting with clients, and

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[18] *See Sussex Commons* 416 N.J. at 541 (2010); *See also* Sue Epstein, *Rutgers Legal Clinic's Records Are Subject To Open Records, N.J. Appeals Court Rules*, THE STAR-LEDGER, Oct. 26, 2010, at 30, *available at* http://www.nj.com/news/index.ssf/2010/10/rutgers_legal_clinics_records.html.

[19] *Id.*

[20] *Sussex Commons*, 416 N.J. at 537.

[21] *Id.* at 542.

[22] Epstein, supra note 18.

[23] *Id.*

[24] *Id.*

[25] *Id.*; Urbina, *supra* note 16 (The developer claimed that he wanted "to expose how the clinic uses taxpayer money to discourage investment in the state.").

[26] Epstein, *supra* note 18.

[27] In re Determination of Executive Committee on Ethical Standards Re: Appearance of Rutgers Attorneys, 116 N.J. 216, 218 (1989) (hereinafter *Appearance of Rutgers Attorneys*).

[28] Robert R. Kuehn & Peter A. Joy, *"Kneecapping" Academic Freedom*, 96 ACADEME NOV/DEC 2010, http://www.aaup.org/AAUP/pubsres/academe/2010/ND/feat/kueh.htm (hereinafter *Kneecapping*).

learning about the ethical dilemmas that come along with the profession.[29] They also bridge the gap between the case-oriented learning emphasized by traditional law school curricula and the more comprehensive and complex work undertaken by practicing lawyers – in other words, whereas law school teaches students about the law, legal clinics teach law students *how to be lawyers*.[30]

However, while it is important to note that clinics serve a unique and important service in providing students with the hands-on training essential to becoming effective and competent lawyers, they also serve a second, equally salient purpose: providing legal representation to an underserved population.[31]

Clinical education dates as far back as the late 1800s in the form of an apprenticeship system.[32] However, in the early 1930s shortcomings in the apprenticeship system led legal educators to propose "in-house clinical programs."[33] While a form of clinical education began to develop at this time, the number of law school clinics did not expand significantly until the 1960s.[34] In 1958, the Ford Foundation provided $800,000 to establish the National Council on Legal Clinics ("NCLC") while "provid[ing] grants for experimental programs at selected law schools."[35] Former Chief Justice Warren Burger further echoed proponents of clinical education, noting that many "lawyers appear[ing] in serious cases are not really qualified to render fully adequate representation."[36]

In 1969, the Model Student Practice Rule was promulgated by the American Bar Association ("ABA") authorizing certified law students to practice while under the guidance and instruction of a licensed attorney.[37] Since its adoption in 1969, every state and some Federal Courts have implemented comparable Student Practice Rules.[38] In 1992, the ABA's Task Force on Law Schools and the Profession promulgated the "MacCrate Report," which highlighted those layering skills and values it deemed necessary for students to learn in order to be effective lawyers as well as adequately

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[29] Suzanne Levitt, *Submissions to the Louisiana Supreme Court Regarding Challenges to the State's Student Practice Rule: Submission of the Clinical Legal Education Association to the Supreme Court of the State of Louisiana Concerning the Review of the Supreme Court's Student Practice Rule*, 4 CLINICAL L. REV. 571 (1998).

[30] Frank Askin, Symposium: *A Law School Where Students Don't Just Learn the Law; They Help Make the Law*, 51 RUTGERS L. REV. 855, 860 (1999).

[31] *Kneecapping*, *supra* note 28; *Sussex Commons*, 416 N.J. at 541 ("The Clinic provides pro bono [] legal services to the public and offers the students attending the Law School a unique and challenging didactic experience: the opportunity to work on real cases under the supervision of their professors, thereby creating a "hands-on" legal experience while providing under-represented clients with competent legal assistance."); Douglas A. Blaze, *Déjà Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 TENN. L. REV. 939, 948 (1997) ("The clinic experience provides a forum for the student to synthesize through application the substantive and procedural law learned elsewhere in the curriculum. In the process, students refine their analytical skills and see the connection between different areas of the law.").

[32] Levitt, *supra* note 29, at 571.

[33] *Id.;* See, e.g., Jerome Frank, *Why Not a Clinical Law School?*, 81 U. PA. L. REV. 907, 913 (1933).

[34] *Kneecapping*, *supra* note 28.

[35] Blaze, *supra* note 31, at 941.

[36] Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 234 (1973).

[37] *See* A.B.A. Model Student Practice Rule; Levitt, *supra* note 29, at 571 ("This Model Rule implicitly and explicitly recognized the importance of clinical education as being an integral part of a meaningful legal education."); Peter A. Joy & Robert R. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 CLINICAL L. REV. 493, 499 (2002) (hereinafter *Conflict of Interest*) ("The rule requires a certification from the dean of the law school attesting to the student's 'good character and competent legal ability, and as being adequately trained to perform as a legal intern.' Finally, the supervision portion of the rule requires the supervising attorney to 'assume personal professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work.'").

[38] *Conflict of Interest*, *supra* note 37, at 497.

prepared to practice.[39] Promulgated in 1996, every ABA-accredited law school is required to offer "substantial opportunities" for "live-client or other real-life practice experiences."[40] As a result, law school clinics spread even further around the country as a way of satisfying this requirement. Presently, more than ninety-percent of ABA-accredited law schools have clinical programs, and those without clinics have externship programs.[41]

Since the ABA created the Model Student Practice Rule in 1969, all fifty states have adopted their own student practice rule.[42] As scholar Suzanne Levitt notes, "[t]he essential value of practical, experimental education, as recognized by the American Association of Law Schools ("AALS") and the ABA, has not been lost on individual states."[43] Indeed, it would appear every state has recognized the importance of clinical education in teaching law students to become effective and ethical lawyers.[44]

IV. USING OPEN RECORDS ACTS AS A WAY TO GENERALLY ATTACK PUBLICLY FUNDED SCHOOLS

The Rutgers Environmental Law Clinic is a prime example of a public law clinic under attack.[45] Across the country state governments are putting pressure on clinics to abandon clients via threats of decreased funding and fewer job prospects for their graduates.[46] Powerful adversaries, including many state governments, are using the fact that these schools receive public funding in order to limit what clientele clinics represent.[47] In New Jersey, such a feat was accomplished utilizing the Open Records Act, however, this was just one way of limiting "unpopular" clients' access to the courts.

A. History of Attacks on Clinics

Attacks on law school clinics began as early as the 1960s. During this time of social and political turmoil, clinics gradually took on indigent clients and increasingly controversial cases.[48] In response, "politicians, law school alumni, business interests, and even university officials sought to

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[39] Blaze, *supra* note 31, at 943; See also, AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) (hereinafter *MacCrate Report*) (These skills include problem solving, reasoning, legal research, legal analysis, factual investigation, counseling, recognizing and resolving ethical dilemmas, organization and management of legal work, communication, negotiation, litigation and litigation alternatives. The professional values include providing competent representation, seeking to promote justice, fairness and morality, seeking to improve the profession, and commitment to self-development).

[40] ABA *Standards and Rules of Procedure for Approval of Law Schools* (2007) (Std. 302(b)(1)), *available at* http://www.abanet.org/legaled/standards/2010-2011%20Standards/2010-2011%20ABA%20Standards%20pdf%20files/Chapter%203.pdf.

[41] Peter Joy, *The Ethics of Law School Clinic Students as Student-Lawyers*, 45 S. TEX. L. REV. 815, 822 (2004); *Kneecapping*, *supra* note 28.

[42] *Id.*

[43] Levitt, *supra* note 29, at 572.

[44] *Id.*

[45] John J. Farmer & Frank Askin, *It's Deja Vu All Over Again for Rutgers' Legal Clinics*, New Jersey Law Journal (Nov. 17, 2010).

[46] Leslie A. Gordon, *Taking Their Pains to the Clinic: Legislators Punish Law School Clinics for Suing Community Businesses*, 96 A.B.A.J. 20 (2010).

[47] *Id.*

[48] Robert R. Kuehn & Bridget M. McCormack, *Lessons from Forty Years of Interference in Law School Clinics*, 24 GEO. J. LEGAL ETHICS. 59, 59-60 (2011).

influence or control the client selection and case-related decisions of law clinic attorneys."[49] Such interference has continued ever since.[50] These attacks are often brought by state politicians, motivated by clinic actions against the state and its subdivisions, or, perhaps even more commonly, by "companies and their sympathetic political allies who stood to lose significant profits if the clinic cases were successful."[51]

Many law schools, such as the University of Tennessee, University of Colorado, University of Iowa, University of Idaho, Rutgers University – Newark, and University of North Dakota have all been confronted with attacks on their clinics when involved in litigation with state agencies. Although not all of these attacks have been successful, the University of Tennessee Legal Clinic "no longer handles[s] cases against the state where attorney's fees would likely be available."[52] One common tactic utilized by adversaries and critics attempting to restrict client or case selection is threatening to withhold funding to the school.[53] The University of Oregon was a victim of "legislative threat[s] to defund the entire law school over the environmental law clinic's activities."[54] This forced the clinic to move off campus and form a nonprofit public interest law service.[55] Most recently, in 2010, the Maryland legislature threatened to withhold funding from University of Maryland Law School "until the clinic provided details on law clinic clients, cases, expenditures, and funding."[56]

In addition, the ABA has recognized this issue and continues to maintain a policy concerning interference with clinical activities in law schools:

> Improper attempts by persons or institutions outside law schools to interfere in the ongoing activities of law school clinical programs and courses have an adverse impact on the quality of the educational mission of affected law schools and jeopardize principles of law school self-governance, academic freedom, and ethical independence under the ABA Code of Professional Responsibility.[57]

It is clear from this policy alone that such attacks can adversely affect law schools.

B. Open Records Acts – A New Tactic to Attack Law Schools

Public law schools have been the principal target for these attacks because they receive state-funding.[58] In an attempt to silence certain opponents, powerful adversaries attempt to remove clinics

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[49] *Id.* at 60.
[50] *Id.*
[51] *Id.* at 81.
[52] *Id.* at 64.
[53] *Id.* at 65.
[54] *Id.* at 67
[55] *Id.* at 67.
[56] *Id.* at 65.
[57] *Interference in Law School Clinical Activities*, Accreditation Information, Council of the Section, Council Statements No. 9, Am. Bar Ass'n, p.4 (2010).
[58] Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 FORDHAM L. REV. 1971, 1990 (2003) (hereinafter *Ethics Critique*) ("This is due to their vulnerability to the political views of elected officials, the perceived impropriety of a state-funded school suing to require another state entity to spend taxpayer moneys, concerns that law clinic lawsuits against important industries might undermine the economic base of the state, disagreement with the use of taxpayer money to fund legal services for the poor, or a desire to avoid "taking sides" on controversial social or political issues.").

from particular cases because they know that if the clinics do not represent those clients, the cases will not be heard.[59] In the past, threats to cut funding have been the method of choice for influencing what cases and clients public law school clinics take on. The *Sussex Commons* case illustrates a new tactic of interference and attack: utilizing the state's open records legislation to access the internal workings of the clinics and in turn using that information to discourage representation of specific clients.[60]

While law school clinics take various forms and handle a diverse range of subject matter, many accept controversial cases that invoke opposition from powerful adversaries. This might allow adversaries to use open records legislation to obtain documents that they were unable to obtain from discovery.[61] "These materials . . . [may] be sought by opposing counsel as a 'second bite of the apple' in ongoing cases after unsuccessfully seeking these materials through normal discovery processes."[62] Ruling that any potential defendant can make an OPRA request to the clinic will "chill the professional judgment" of clinical professors and censor the number and type of cases accepted by the clinic.[63]

Although Rutgers is the first public university to face an attack via open records legislation, the New Jersey Appellate Division's decision in October of 2010 will have national repercussions with the potential to open the flood gates for any powerful adversary to attack public law schools through their respective state open records act.[64] Subjecting clinics to open records legislation will have devastating effects on public legal education. Clinical students and faculty will be overburdened with the task of sifting through all documents in their files and separating exempt documents from those that might be covered under the open records act. Moreover, these demands will not only divert clinics from their principal purpose but will leave their clients open to harassment from anyone, including clinic adversaries.[65] Tragically, this inequitable hindrance results from the simple fact that public law school clinics are involved with the state.[66]

Ideally, clinics should be subject to limited open records act requests. As mentioned previously, public law schools are state entities and thus subject to open records legislation. Law school clinics within public law schools, therefore, should turn over any relevant information within reason, such as financial data.[67] However, it is paramount to acknowledge that the purpose of any open records legislation is transparency in government and transparency of public records.[68] The personal files of clinical clients are *not* public records.[69] Simply because a law school receives a

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[59] Farmer & Askin, *supra* note 45.
[60] *Sussex Commons*, 416 N.J. Super. at 537.
[61] *Id.*
[62] *Id.*
[63] *Kneecapping*, *supra* note 28 (Citing a recent study conducted by the author in which he found that more than one third of faculty members at legal clinics expressed fears about university or state reaction to their casework and that one sixth admitted to having turned down unpopular clients due to these concerns).
[64] *See* Kaitlin Williams, *College Law Clinics Oppose Record Requests*, THE MICHIGAN DAILY, Jan. 20, 2011, http://www.michigandaily.com/content/new-jersey-court-ruling-jeopardizes-university-law-clinics-work.
[65] Farmer & Askin, *supra* note 45.
[66] *See Appearance of Rutgers Attorneys*, 116 N.J. at 223 ("[S]tate involvement in education should never be a disadvantage.").
[67] *Id.*
[68] Remington, *supra* note 4, at 459**;** *See also Appearance of Rutgers Attorneys*, 116 N.J. at 227 (It is the legislative purpose of the statute at issue that should govern whether or not the clinic is subject to the provision, not just the fact that the clinics can be characterized as state subdivisions).
[69] Farmer & Askin, *supra* note 45 ("They are no more public records than those of any other private law office in the state or the clinics at Seton Hall Law School.").

portion of its budget from public funds it should not "turn these teaching law offices into state entities."[70]

The underlying purposes of any open records legislation, transparency in public affairs and an informed public,[71] would not be furthered by subjecting clinics to such statutes as they do not perform any government function and thus cannot be considered a public agency.[72] Serving indigent clients, even with the assistance of public funding, is not a government function.[73] With this in mind, law school clinics can be viewed as akin to the public defender's office. Clinics in public law schools, like the Public Defender's office, receive public funding and represent private clients who cannot otherwise afford legal representation.[74] Moreover, these clinics are often adversaries of the state.[75] Many states have carved out exceptions to their open records legislation for their public defender's offices, while other state courts have interpreted their states legislation to exempt the public defender's office in its entirety.[76] The reasoning behind this exemption is basic fairness. In *Kight v. Dugger*, the Florida Supreme Court held that the Florida Public Records Act did not require the disclosure of client files maintained by the public defender's office because "[t]o hold otherwise would subject the records of a defendant who is unable to retain private collateral representation to public disclosure while those of a defendant represented by private counsel would be immune from such disclosure."[77] Therefore, clinics would be the civil equivalent to the public defender's office, and the same fairness argument would apply. As criminal legal assistance is not a government function, neither is civil legal assistance to indigent clients and thus a state's open records legislation should not apply to public law school clinics.[78]

As noted by Justice Scalia in *K-Mart Corp. v. Cartier Inc., "*it is a venerable principle that a law will not be interpreted to produce absurd results."[79] Indeed, it is absurd to believe that public law school clinics are any different from the Public Defender's office. By affording them the same exemption as Public Defenders, open records legislation cannot be used as a means to attack public law school clinics.

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[70] John Farmer, *Private Files Need to Stay That Way*, THE STAR-LEDGER, Nov. 28, 2010, at 19,*available at* http://blog.nj.com/njv_guest_blog/2010/11/rutgers_law_clinic_files_need.html.

[71] Times of Trenton Publ'g Corp. v. Lafayette Yard Comty. Dev. Corp., 183 N.J. 519, 535 (2005).

[72] *See* Polk County v. Dodson, 454 U.S. 312, 321 (1981) (holding the office of the public defender is not a state agency within the meaning of 42 U.S.C. § 1983 because it "is not amendable to administrative direction in the same sense as other employees of the State"); Fair Share Hous. Ctr. v. N.J. League of Muns., 413 N.J. Super. 423, 430-32 (N.J. Super. Ct. App. Div. 2010) (holding that the League of Municipalities was not a public agency and thus subject to New Jersey's open records act, despite receiving partial funding from the municipalities, because it did not itself perform any governmental functions).

[73] *See* Gerena v. Puerto Rico Legal Services, Inc., 697 F.2d 447 (1st Cir. 1983).

[74] Therefore, clinics function as a private entity.

[75] Farmer & Askin, *supra* note 45. (Many of these clinics "challeng[e] legislation, defend[] people accused of wrongdoing by state agencies, provid[e] representation to families denied special education by public schools or protect[] families from improper interference by child welfare agencies.").

[76] Kight v. Dugger, 574 So. 2d 1066, 1069 (Fla. 1990); Farmer, *supra* note 70 (In New Jersey, "when the Open Public Records Act was passed, client files of certain legal service providers that receive public funding were effectively exempted from the law's presumption of access. Even though the act already exempted materials that were attorney-client privileged, the decision to place certain private, nonprofit legal service providers outside the reach of OPRA, and to exempt the client files of public legal service providers like the Public Defender's office, was unassailable.").

[77] *Dugger*, 574 So. 2d at 1069.

[78] *See Gerena*, 697 F.2d 447.

[79] K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 325 n.2 (1988) (Scalia, J., concurring in part and dissenting in part).

V. SUBJECTING CLINICS TO OPRA WOULD UNDERMINE AND DISADVANTAGE PUBLIC LEGAL EDUCATION

"The history of clinical education demonstrates that law school clinical programs provide needed legal services to under-represented individuals, while at the same time offering students an opportunity to develop and hone their legal skills . . . ."[80]

As evidenced above, State-funded law schools have been the predominant targets of attacks.[81] Subjecting public law school clinics to a state's open records act can severely burden their educational mission. Clinics will be accountable for responding to and litigating against harassing and burdensome requests for documents. Further overwhelming these understaffed clinics with such responsibility would divert their time and attention from their primary purpose of training future lawyers and providing legal representation to an underserved population. Moreover, labeling these clinic files as public records could also discourage potential clients from seeking their assistance.

A. Overburdens clinics, deterring them from their stated purpose: educating law students and providing legal representation to an underserved population.

Subjecting legal clinics to a state's particular open records act would severely undermine the clinics educational purpose. A law school clinic's primary purpose is to educate law students.[82] To be most effective, law clinics seek to place law students into the role of lawyer so that they can learn to "think and act like a lawyer" and be confronted with the same practical and ethical situations that face practicing lawyers in comparable situations. Subjecting clinics to an open records act will limit the time and attention that clinical faculty can devote to training students to be effective lawyers.

Moreover, subjecting law school clinics to a state's open records act will have a disparate effect on public schools when compared to their private counterparts. As the New Jersey Supreme Court contends, "state involvement in education should never be a disadvantage."[83] However, the New Jersey Appellate Division's decision clearly disadvantages state school students by hindering their training experience. As a result of OPRA, public school clinical training is apt to become less like the "real" practice of law as students will instead spend their time responding to document requests – a task which private law clinics are able to avoid. Only public law schools will be disadvantaged, thus giving private law students a better education with more opportunity to learn through their clinics.

While clinics serve a vital educational purpose, they also serve "as laboratories for exploring different ways to overcome legal and institutional barriers confronting minority and poor communities.[84] Clinical students across the nation "join the mere 5,000 to 6,000 lawyers" providing those unable to afford lawyers with access to the courts.[85] Law school clinics provide over two million hours a year in free legal services representing nearly 130,000 clients annually.[86] Data also

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[80] Hope Babcock, *Environmental Justice Clinics: Visible Models of Justice*, 14 STAN. ENVTL. L. J. 3, 6-7 (1995).
[81] Kuehn & McCormack, *supra* note 48, at 81.
[82] Babcock, *supra* note 80, at 24 (citing an American Association of Law Schools report defining clinical education as "first and foremost a method of teaching.").
[83] *Appearance of Rutgers Attorneys*, 116 N.J. at 223.
[84] Babcock, *supra* note 80, at 7.
[85] Joy, *supra* note 41, at 825.
[86] Gordon, *supra* note 46 (citing a 2007-2008 report published by the Center for the Study of Applied Legal Education. "It was reported that law clinic students provide 2.4 million hours annually of free legal services--1.8 million hours on civil

suggests that clinical law students continue this dedication to pro bono work after they graduate.[87] Former Supreme Court Justice Sandra Day O'Conner advocates for mandatory clinical education for all law students as a way to serve an indigent population.[88] She further notes that having mandatory clinical programs "could take a big bite out of the legal services shortage."[89]

However, allowing public records requests to reach the internal workings and client files of law clinics will have a chilling effect on the types of cases and clients that law school clinics agree to accept. Although most public records acts exempt some information from discovery - such as those documents protected by attorney-client privilege - these exemptions are not all-encompassing.[90] This means that any member of the public, ranging from the most powerful adversary to a vindictive or merely curious citizen, may request and obtain personal facts about a particular client.[91] Subjecting potentially privileged information in client files to a presumption of access would create an avenue of unwarranted discovery and abusive litigation.[92] Therefore, unlike private law school clinics, or law firms, public law schools would have to disclose to their clients (as well as other correspondents) that any private materials submitted to the clinics would be subject to disclosure requests as public records.[93]

Since client records will no longer be safeguarded from public knowledge, the effectiveness of the public service role performed by clinics in their communities will be severely reduced. As the Supreme Court has noted,

> In a time when the need for legal services among the poor is growing and public funding for such services has not kept pace, lawyers' ethical obligation to volunteer their time and skills *pro bono publico* is manifest.[94]

However, by allowing adversarial parties and members of the public to access client information, clinics will be less likely to take on certain clients who are in need of representation. Moreover, clients in need may feel reluctant to approach the clinics, and present clients may be reluctant to cooperate within them, thus impairing the quality of legal representation they may receive. This would do a grave injustice to those who are unable to afford legal counsel.

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matters and 600,000 hours on criminal matters, representing nearly 90,000 clients in civil matters and more than 38,000 clients in criminal cases.")

[87] *Id.*

[88] Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1475 n.73 (1998) (citing Sandra Day O'Connor, Good News and Bad News, Presentation at American Bar Association, Annual Meeting, Pro Bono Awards Luncheon, Atlanta, Georgia (August 12, 1991)).

[89] *Id.* ("There are over 130,000 law students in the country right now. If each could assist one client a year, it would have quite an impact. And if students could be supervised by their professors, we would avoid quality control problems...").

[90] The attorney-client privilege, for instance, is an anomaly and often narrowly construed. Prichard v. United States, 181 F.2d 326 (6th Cir. 1950). Also, "documents do not become cloaked with the lawyer-client privilege merely by the fact that they're being passed from client to lawyer." Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 376 (N.J. Super. Ct. App. Div. 2010); *See also* United States v. Robinson, 121 F.3d 971 (5th Cir. 1997).

[91] Farmer & Askin, *supra* note 45.

[92] For example, members of the Rutgers Constitutional Litigation Clinic work in teams consisting of both faculty and students. These teams hold weekly meetings and frequently discuss both pending and potential cases. It is unclear whether or not any student or faculty notes or minutes from these meetings and discussions are exempt and thus significant disagreement and lengthy litigation might ensue.

[93] Farmer & Askin, *supra* note 45.

[94] Mallard v. United States Dist. Court for S. Dist. of Iowa, 490 U.S. 296, 310 (1989).

The ABA's most recent national assessment of the legal needs of the poor determined that "approximately eighty percent of poor Americans do not have the assistance of an attorney when they are faced with a serious situation where the aid of an attorney might make a difference."[95] Therefore, subjecting public law schools to an open records act will not only diminish the clinical experience received by law students, but will also greatly disadvantage an indigent population that relies on these clinics for free legal services.

B. Subjecting Clinics to Open Records Legislation will Severely Undermine Academic Freedom

Clinical education is "first and foremost a method of teaching."[96] The United States Supreme Court, as well as other courts around the country, has recognized the need to protect academic programs from outside interference.[97] In *NLRB v. Yeshiva University*, the U.S. Supreme Court ruled that universities are "guilds of scholars . . . responsible only to themselves."[98] The Supreme Court has also highlighted two beneficial aspects of academic freedom – 1) the role it plays in educating our future leaders; and (2) the development of new ideas.[99] In *Sweezy v. New Hampshire*, the Court stated that "teachers and students must always remain free to inquire, to study, to evaluate, to gain new maturity and understand; otherwise, our civilization will stagnate."[100] Moreover, the Court stated that academic freedom includes the right of a university to "determine for itself on academic grounds who may teach what may be taught and how it will be taught."[101] Clinical professors must be afforded academic freedom because, through an ABA mandate, clinics are a component of the law school's educational mission and curriculum.[102]

Clinical programs teach their students through faculty-supervised representation of clients.[103] Clinics take on the same role as any other class, as students receive academic credit.[104] However, because the teaching in clinics leaves the confines of the classroom, academic freedom is threatened.[105] Clinical arenas, such as courtrooms, hearings and other practice settings, are akin to classrooms while cases are teaching materials.[106] Academic freedom protects the court or legislature from going into a classroom and changing the teaching materials or syllabus.[107] Clinics are even protected from a prior case-by-case approval by a school's dean or faculty committee.[108] Therefore,

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[95] Steven K. Berenson, *A Primer for New Civil Law Clinic Students*, 38 MCGEORGE L. REV. 603, 610 (2007) ("Subsequent surveys at the state level have reached similar results, and experts in the field attest to the continuing validity of the results of the ABA Study."); *See* Am. Bar Ass'n, *Legal Needs and Civil Just.: A Survey of Ams.*, 1994, http://www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf; *See* Legal Servs. Corp., Serving the Civil Legal Needs of Low Income Americans: A Special Report to Congress 13 (2000).

[96] Babcock, *supra* note 80, at 24 (citing an American Association of Law Schools report defining clinical education).

[97] *Ethics Critique*, *supra* note 58, at 1988 (2003).

[98] NLRB v. Yeshiva University, 444 U.S. 672, 680 (1980).

[99] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the marketplace of ideas. The nation's future depends upon leaders trained through a wide exposure to that robust exchange of ideas.").

[100] *Sweezy*, 354 U.S. 234, 250 (1957).

[101] *Id.* at 263.

[102] *See Ethics Critique*, *supra* note 58; ABA *Standards and Rules of Procedure for Approval of Law Schools*, *supra* note 40.

[103] Babcock, *supra* note 80, at 25 (This teaching method may be "either live or simulated" client interaction).

[104] *Kneecapping*, *supra* note 28.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Informal Ethics Opinions*, Comm. on Ethics and Prof'l Responsibility, American Bar Association, Vol. II, 867-1284,

because "[a]cademic freedom is intended to protect the learning process and the search for truth, it cannot be a privilege enjoyed solely by faculty and students in traditional classrooms."[109] These clinics cannot successfully function without protection for their academic freedom.

VI. CONCLUSION

Law school clinics across the country face growing attacks from powerful opponents, including state governments. Rutgers University-Newark in New Jersey is one law school familiar with such an attack, recently defending itself against an OPRA request. In the wake of the New Jersey Appellate Division's decision that clinics are subject to OPRA, adversaries across the nation will come to view open records requests as a new avenue of attacking and undermining law school clinics. Tragically, however, subjecting clinics to open records legislation will disproportionately affect public law schools and deter their clinics from their primary, two-fold purpose: providing practical, hands-on experience to their law students and offering legal representation to an indigent population. Although some law schools may be a public institution, applying open records legislation in this context would produce an absurd result. As such, to allow any party, including clinic adversaries, to request information from client files is to undermine and disadvantage public legal education.

p.442. Informal Op. 1208 (1972) ("lawyer-client relationship exists between the clients and the clinic lawyers [and] not between the governing body [of the law school]"); *Ethics Critique*, *supra* note 58, at 1977 (finding that "it would violate the professional ethics of the dean and clinic director.").

[109] *Kneecapping*, *supra* note 28.