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# WHAT IS ESSENTIAL: LEGAL DESIGN AND CLIENT STORIES

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## I. INTRODUCTION

Legal design—the application of human-centered design principles in the practice of law—is a potentially transformative development

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in legal practice.<sup>1</sup> Under the general label of innovation, a growing number of law schools in the U.S. are introducing legal design into their curricula.<sup>2</sup> Likewise, the number of law firms touting legal design as a service they offer to clients is increasing.<sup>3</sup>

The move to integrate design principles into legal education and legal practice is a response to several factors creating pressure for changes in the legal profession. As clients demand more legal work at less cost, paralegals and other paraprofessionals are doing work that was once done by lawyers.<sup>4</sup> Technology is also shifting the modes of delivering legal services, as automated processes handle legal work at less expense than traditional counsel, often with the effect of providing broader access to legal resources.<sup>5</sup>

<sup>1</sup> Joshua Kubicki, *Human-Centered Design and the Law*, MEDIUM (June 8, 2016), <https://medium.com/rethink-the-practice/human-centered-design-and-the-law-519b98770fe3>; Margaret Hagan and F. Kürşat özenç, *Guest Editor's Introduction*, 36 DESIGN ISSUES 3 (2020).

<sup>2</sup> See Margaret Hagan, *Justice Innovation with Law School Design Labs*, DIALOGUE (June 15, 2018), [https://www.americanbar.org/groups/legal\\_services/publications/dialogue/volume/21/spring-2018/iolta-design-labs](https://www.americanbar.org/groups/legal_services/publications/dialogue/volume/21/spring-2018/iolta-design-labs) [hereinafter *Justice Innovation with Law School Design Labs*]. For an extended exploration of one school's experience of integrating legal design into the curriculum, see Dan Jackson, *Human-Centered Legal Tech: Integrating Design in Legal Education*, 50 L. TCHR. 82, 91–96 (2016) (describing Northeastern Law School design curriculum).

<sup>3</sup> See Jason Dirx, *Got a "Wicked Problem"? Design Your Way Out of It*, ITLA (June 27, 2017, 11:50 AM), <https://www.iltanet.org/blogs/jason-dirx/2017/07/27/got-a-wicked-problem-design-your-way-out-of-it?ssopc=1> (citing design thinking approaches adopted by law firms King & Wood and Davis Wright Tremaine); Joanna Goodman, *Bringing Art School to Law School: Can Legal Design Change the Practice of Law*, ABOVE L. (Sept. 25, 2019, 9:15 AM), <https://abovethelaw.com/legal-innovation-center/2019/09/25/bringing-art-school-to-law-school-can-legal-design-change-the-practice-of-law/>; Dan Jackson et al., *The Rapid Embrace of Legal Design and the Use of Co-Design to Avoid Enshrining Systemic Bias*, 36 DESIGN ISSUES 16, 18 n.12 (2020).

<sup>4</sup> See, e.g., *Poor Law: The Rise of Paralegals*, ECONOMIST (Oct. 20, 2016), <https://www.economist.com/middle-east-and-africa/2016/10/20/poor-law> (describing work of Namati in Africa, which utilizes community-based paralegals to provide legal assistance to the poor); *Dynamic Data in Action with the Innovative Paralegal Dashboard*, HIIL (Jan. 11, 2017), <https://www.hiil.org/news/dynamic-data-in-action-with-the-innovative-paralegal-dashboard/> (describing innovative paralegal initiative in Mali); see also THOMAS MORGAN, *THE VANISHING AMERICAN LAWYER* 125–26 (2010) (describing corporate use of non-lawyers to deliver law-related work to clients).

<sup>5</sup> See Mark A. Cohen, *Global Legal Tech Is Transforming Service Delivery*, FORBES (Aug. 29, 2017, 5:44 AM), <https://www.forbes.com/sites/markcohen1/2017/08/29/global-legal-tech-is-transforming-service-delivery/#468843461346> (describing recent research on technology's impact on legal profession); Blair Janis, *How Technology Is Changing the Practice*

Facing accelerated change in the profession and the rise of artificial intelligence in delivering legal assistance, lawyers are looking for ways to provide legal services that draw more heavily on uniquely human capacities.<sup>6</sup> In the current climate, lawyers are more likely than ever to play advice-giving roles once considered to be outside the traditional scope of legal representation.<sup>7</sup> Further, clients of all types, from corporations to individual litigants, increasingly want their lawyers to encourage (or at least be open to) innovation and experimentation rather than offer cautions about avoiding risk.<sup>8</sup> Responding to these pressures, lawyers are marketing their services as innovative problem-solvers, and developing new ways of providing value to clients.<sup>9</sup>

Still, much of what is characterized as legal innovation is old wine in new bottles, including efforts to bend technology in order to

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*of Law*, 31 GPSOLO 10, 11 (2014) (arguing that legal services providers ignore technological developments at their peril).

<sup>6</sup> See, e.g., Rory Cellan-Jones, *The Robot Lawyers Are Here - And They're Winning*, BBC NEWS (Nov. 1, 2017), <https://www.bbc.com/news/technology-41829534>.

<sup>7</sup> For an insightful discussion of the transformation of legal practice particularly in the business arena, see Dana Remus, *Out of Practice: The 21<sup>st</sup> Century Legal Profession*, 63 DUKE L.J. 1243, 1245 (2014).

<sup>8</sup> David J. Parnell, *Angela Styles of Crowell & Moring: 'Clients Are Asking Us to Take More Risk'*, FORBES (Feb. 20, 2017, 2:56 PM), <https://www.forbes.com/sites/davidparnell/2017/02/20/angela-styles-crowell-moring-clients-asking-us-to-take-risk>; see also David Nahmias, *The Changemaker Lawyer: Innovating the Legal Profession for Social Change*, 106 CALIF. L. REV. 1335 (2018) (exploring the role of lawyers as entrepreneurs of social change); Nicki Saunders Cho, *The Conversation: A Decade of Innovative Lawyering*, THOMSON REUTERS (Apr. 27, 2016), <https://blogs.thomsonreuters.com/answeron/conversation-innovative-lawyers-legal-industry/> (asserting that innovative lawyers take risks).

<sup>9</sup> Both lawyers who specialize in commercial work and those in public interest areas are exploring these new approaches. See, e.g., *Design Thinking and Agile Development: What Are They and How Do They Help Access to Justice?*, SRLN (Oct. 2017), <http://massappleseed.org/wp-content/uploads/2017/12/SRLN-brief-design-thinking-oct-2017.pdf> (discussing application of design thinking, legal design, co-design, and agile development to access to justice work); Ioana Good, *For Law Firms, Design Thinking Offers a New Way Forward*, LAW.COM: AM. LAW. (Nov. 5, 2018, 10:14 AM), <https://www.law.com/americanlawyer/2018/11/05/for-law-firms-design-thinking-offers-a-new-way-forward/>.

serve traditional models of delivering legal services.<sup>10</sup> Applying technology to expedite legal filings or to streamline discovery fits into this category.<sup>11</sup>

Legal design takes a different approach, rethinking the dynamics of lawyer-client relationships and providing avenues for lawyers to inject creative practices into their legal representation. Importantly, while it offers a transformative perspective on client services, legal design builds on the profession's past innovations. As this article will explain in greater detail, legal design respects essential, longstanding principles of client representation while simultaneously supporting new ways to approach lawyer-client relationships and delivery of legal services.

What exactly does this mean in practice? Charlotte Baker, a "legal design engineer," illustrates legal design with reference to consumer contracts.<sup>12</sup> She notes that few consumers read the entire length of a contract.<sup>13</sup> In fact, the documents are typically written in jargon that is hard to understand even for lawyers.<sup>14</sup> Instead of trying to decipher these documents, people often just sign so that they can move on to other things.<sup>15</sup>

Baker asserts, however, that by employing empathy and "applying legal design to a contract, we might re-write it in plain ('human') language, remove jargon, include helpful summaries, and add visualisations [*sic*] of information, diagrams, icons, timelines and pictures."<sup>16</sup> The key elements in this application of legal design are empathy and

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<sup>10</sup> See, e.g., *Simple Citizen*, SIMPLECITIZEN, <https://simplecitizen.com/> (last visited Nov. 21, 2020) (providing automated assistance with immigrant forms). The creators of Simple Citizen were recognized by the American Bar Association in their 2019 Legal Rebels awards. *Meet the 2019 Legal Rebels*, A.B.A. J. (Sept. 1, 2019, 12:05 AM), <http://www.abajournal.com/magazine/article/2019-legal-rebels>.

<sup>11</sup> Bob Ambrogi, *The 20 Most Important Legal Technology Developments of 2018*, LAWSITES (Dec. 26, 2018), <https://www.lawsitesblog.com/2018/12/20-important-legal-technology-developments-2018.html> (noting technology changes to improve billing and legal research).

<sup>12</sup> Charlotte Baker, *Legal Design Explained: Part 1- What Is Legal Design?*, SCL (Mar. 29, 2019, 10:00 AM), <https://www.scl.org/articles/10490-legal-design-explained-part-1-what-is-legal-design>.

<sup>13</sup> *Id.*

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

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

human centeredness. But while Baker's example applies design concepts to a contract—a type of legal product—the more transformative ambition is to apply these same design-based approaches to fundamentally re-think legal interactions and services.

This article proceeds as follows. Part I describes the emerging concept of legal design in detail, looking at legal design through the lens of design theory and also examining modes of implementing legal design in practice.

In Part II, I compare legal design to more traditional models of lawyering. In particular, I examine the parallels between the use of client stories in legal design and the role of individual stories as a jumping-off point for problem-solving in policymaking contexts. On the surface, legal design seems to handle client stories quite differently from their treatment in traditional legal representation, and appears closer in nature to policymakers' focus on group interests and multiple sources of data. However, lawyers' approach to client stories is not as rigid as it may seem at first glance. In particular, two examples challenge the idea that individual client stories have a fixed place in the practice of law: (1) "cause lawyering," and (2) on-line legal services.

In Part III, I evaluate the transformative promise of legal design. My examination of how client stories are treated in different lawyering contexts suggests that traditional legal representation and legal design find common ground in their emphasis on empathy and human-centeredness. I argue that legal design is anchored in the essential components of traditional legal practice, while providing a bridge to a future where new modes of legal problem-solving are both possible and preferable.

## II. WHAT IS LEGAL DESIGN?

### *A. The Context: Legal Design, Legal Designers, and the Legal Marketplace*

Legal design is "a nascent discipline in which human-centered design methods are applied to the legal industry to innovate how legal information and services are delivered."<sup>17</sup> The promise of legal

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<sup>17</sup> *What Is Legal Design?*, ALIX DEVENDRA (July 28, 2015), <https://alixdevendra.com/blog/2015/7/28/what-is-legal-design>; see also Milan Gandhi, *What Is Legal Design?*

design is that it will equip lawyers to better serve clients, enabling them to create novel solutions to legal problems that, by being human-centered, are more responsive to client needs.<sup>18</sup> Legal designers do not aim to compete with robots on the legal information turf, but to instead use their human capacities, imaginations, and empathy to provide value to clients.<sup>19</sup> Particular methods employed in legal design include design thinking methodologies and co-design.<sup>20</sup>

### 1. The Theory of Legal Design

Legal design interventions can be helpfully situated within design theorist Richard Buchanan's four orders of design, introduced in 2001.<sup>21</sup> With these four orders, Buchanan argued that the concept of design no longer requires production of a physical product, but extends to experiences and ecosystems.<sup>22</sup>

Buchanan's first two orders nevertheless reflect the more traditional focus of design. Buchanan sums up these initial orders of design as focused on, first, symbols, and second, things.<sup>23</sup>

*Q&A with Meera Sivanathan (Legal Designer)*, LEGAL FORECAST (Nov. 30, 2017), <https://www.thelegalforecast.com/blog/what-is-legal-design-qa-with-meera-sivanathan-legal-designer>; *The 5 Steps of Design Thinking*, KNCT LAB, <http://www.knctlab.com/blog/5-steps-design-thinking> (last visited Nov. 21, 2020) (describing processes of design thinking).

<sup>18</sup> See Rhys Dipshan, *With 'Legal Design Thinking,' ALT Eyes New Type of Legal Tech Conference*, LAW.COM: LEGALTECH NEWS (Jan. 18, 2018, 10:44 AM), <https://www.law.com/legaltechnews/sites/legaltechnews/2018/01/18/with-legal-design-thinking-alt-eyes-new-type-of-legal-tech-conference/>.

<sup>19</sup> See generally Margaret Hagan, *The State of Legal Design: The Big Takeaways of the Stanford Law + Design Summit*, MEDIUM (Sept. 25, 2017), <https://medium.com/legal-design-and-innovation/the-state-of-legal-design-the-big-takeaways-of-the-stanford-law-design-summit-ee363b5bf109>.

<sup>20</sup> Harvard Law Sch. Ctr. on the Legal Profession, *Designs on the Law: The Arrival of Design Thinking in the Legal Profession*, 5 ADAPTIVE INNOVATION (2019), <https://thepractice.law.harvard.edu/article/designs-on-the-law/> [hereinafter *Designs on the Law*]. See generally Margaret Hagan, *Legal Design As a Thing: A Theory of Change and a Set of Methods to Craft a Human-Centered Legal System*, 36 DESIGN ISSUES 3 (2020).

<sup>21</sup> Richard Buchanan, *Wicked Problems in Design Thinking*, in THE IDEA OF DESIGN: A DESIGN ISSUES READER 3, 7–8 (Victor Margolin & Richard Buchanan eds., 2000) [hereinafter *Wicked Problems*].

<sup>22</sup> Daniel Nylén et al., *Oscillating Between Four Orders of Design: The Case of Digital Magazines*, 30 DESIGN ISSUES 53, 54 (2014), [https://www.mitpressjournals.org/doi/pdf/10.1162/DESI\\_a\\_00278](https://www.mitpressjournals.org/doi/pdf/10.1162/DESI_a_00278).

<sup>23</sup> Richard Buchanan, *Design Research and the New Learning*, 17 DESIGN ISSUES 3, 10–11 (2001), <https://www.ida.liu.se/divisions/hcs/ixs/material/DesResMeth09/Theory/01-buchanan.pdf> [hereinafter *Design Research and the New Learning*].

As for symbols, the first order addresses communication involving symbols and images, such as graphic presentations.<sup>24</sup> This is an important aspect of many legal design initiatives, including the contract example offered by legal designer Charlotte Baker, discussed above.<sup>25</sup> Legal design places a high value on clear and well-designed presentations and implicitly critiques the often-inaccessible way in which legal information is shared.<sup>26</sup>

Buchanan's second order of design, addressing "things," involves engineering and improved product design.<sup>27</sup> Many of the apps currently being generated by and for lawyers—for example, apps designed to ease the discovery process or speed legal filings—fall into this category.<sup>28</sup>

In contrast, the third and fourth orders of design articulated by Buchanan move beyond physical objects and apply design principles to shape experiences.

Buchanan's third order is design that addresses human interactions.<sup>29</sup> In the legal design context, this third order aims at restructuring human interactions within a legal institution while perhaps also enlisting first order design graphics to communicate this shift and second order design efficiencies to implement the restructuring. According to Buchanan, this is called "interaction design" because it focuses on "how human beings relate to other human beings through the mediating influence of products. And the products are more than physical objects. They are experiences or activities or services, all of which are integrated into a new understanding of what a product is

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<sup>24</sup> *Wicked Problems*, *supra* note 21, at 7.

<sup>25</sup> See *supra* text accompanying notes 12–16.

<sup>26</sup> See *Design Research and the New Learning*, *supra* note 23; see also Anti Innanen, *The Third Success Story of Finnish Design Is Legal*, GOOD NEWS FROM FIN. (Oct. 26, 2017), <http://www.goodnewsfinland.com/opinion/third-success-story-finnish-design-legal/> (discussing legal product design such as contracts, exemplifying design orders 1 and 2).

<sup>27</sup> See *Wicked Problems*, *supra* note 21; *Design Research and the New Learning*, *supra* note 23.

<sup>28</sup> For example, the law firm of Murphy & McGonigle hosts a lab that is exploring new ways to deliver services, from proprietary databases to smartphone apps. See *Murphy & McGonigle Innovation Lab*, MURPHY & MCGONIGLE, <https://www.mmlawus.com/innovation-lab/> (last visited Oct. 3, 2020).

<sup>29</sup> *Wicked Problems*, *supra* note 21, at 9.

or could be.<sup>30</sup> On-line dispute resolution systems, which involve human interactions while also employing symbols and things to restructure these interactions, are an example of this third order.<sup>31</sup>

Finally, Buchanan's fourth order of design focuses on transforming systems and the environment within which the other orders exist.<sup>32</sup> A fourth order legal design project might use design methodologies to, for example, transform concepts of access to justice, the nature of legal representation, or even legal principles such as causation or intent.<sup>33</sup> This fourth order is the frontier of legal design and, it is fair to say, has yet to be fully explored.

## 2. What is a Legal Designer?

Legal designers are the human drivers of legal design. Not all legal designers are licensed lawyers, but lawyers who turn to legal design and adopt an identity as legal designers develop a set of skills that combines traditional legal training with insights from the culture of innovation.<sup>34</sup> Specifically, through legal design, lawyers address clients' problems in partnership with end users by explicitly drawing on creative methodologies to augment legal research.<sup>35</sup> Rejecting the idea

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<sup>30</sup> *Design Research and the New Learning*, *supra* note 23, at 11.

<sup>31</sup> *Online Dispute Resolution Moves from E-Commerce to the Courts*, PEW (June 4, 2019), <https://www.pewtrusts.org/en/research-and-analysis/articles/2019/06/04/online-dispute-resolution-moves-from-e-commerce-to-the-courts>.

<sup>32</sup> *Design Research and the New Learning*, *supra* note 23, at 11–12; *see also* Alix Devendra & Cat Moon, *Design Thinking Will Change the Practice of Law*, LEGAL BUS. WORLD (Dec. 12, 2017), <https://www.legalbusinessworld.com/single-post/2017/12/12/Design-Thinking-Will-Change-the-Practice-of-Law> (stating that "we should be pushing ourselves to move from first- and second-order design solutions (such as designing legal documents, communications, and products) to third- and fourth-order solutions (services, interactions and systems)").

<sup>33</sup> For an extensive discussion of the application of fourth order design to complex organizational management cultures, see Richard Buchanan, *Worlds in the Making: Design, Management, and the Reform of Organizational Culture*, 1 SHE JI: J. DESIGN, ECON., & INNOVATION 5 (2015).

<sup>34</sup> *See, e.g.*, Charlotte Baker, *From Lawyer to Legal Designer*, LINKEDIN (Aug. 3, 2018), <https://www.linkedin.com/pulse/from-lawyer-legal-designer-charlotte-baker/>.

<sup>35</sup> *Who's a Legal Rebel?*, A.B.A. J., <http://www.abajournal.com/legalrebels/about/> (last visited Oct. 3, 2020) (describing legal rebels as "the mavericks finding new ways to practice law, represent their clients, adjudicate cases, and train the next generation of lawyers"); *see also* Innovation Working Grp., Task Force on Justice, *Innovating Justice: Needed and Possible*, HIIL 1, 2 (2019), <https://www.hiil.org/wp-content/uploads/2019/02/Task-Force-on->



that more law is the solution to every problem, legal designers expand the scope of legal expertise to include design approaches—particularly third and fourth orders of design—thereby staking out a place for lawyers as key problem-solvers in the innovation space.

Legal designers benefit from training in design techniques. Law school-based law labs and legal clinics around the country are now working to develop curricula and pedagogy to train law students in the methodologies of legal design.<sup>36</sup> Practicing lawyers may find opportunities for design training at local universities or professional organizations.<sup>37</sup> Notably, most lawyers filling leadership roles in the legal design space do not purport to be designers, even though some of them have advanced training in both law and design.<sup>38</sup> Rather, lawyers are often using design methodologies as tools to better accomplish tasks that were once undertaken by lawyers without the benefit of any design input.<sup>39</sup> In contrast to that siloed approach, legal design methods are inherently interdisciplinary; lawyers who adopt this approach collaborate with individuals from other fields and

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Justice-Innovating-Working-Group-Report.pdf (arguing that we "need innovation" to deal with justice problems).

<sup>36</sup> Hagan, *supra* note 2. Examples of courses on legal design include *Introduction to Legal Design*, STAN. L. SCH., <https://law.stanford.edu/courses/introduction-to-legal-design/> (last visited Oct. 3, 2020); *NuLawLab*, NULAWLAB PEDAGOGY, <https://www.nulawlab.org/pedagogy> (last visited Oct. 3, 2020) (discussing NuLawLab's applied design and legal empowerment laboratory seminar); *LPS :: The VLS Course*, LEGAL PROBLEM SOLVING, <http://www.legalproblemsolving.org/> (last visited Oct. 3, 2020). The NuLawLab's pedagogy is extensively discussed in Jackson et al., *supra* note 3.

<sup>37</sup> *Designs on the Law*, *supra* note 20 (describing process by which two practicing lawyers developed expertise in legal design).

<sup>38</sup> See, e.g., *Margaret Hagan*, STAN. L. SCH., <https://law.stanford.edu/directory/margaret-hagan/> (last visited Oct. 3, 2020); *Dan Jackson*, LINKEDIN, <https://www.linkedin.com/in/dan-jackson-66898513> (last visited Oct. 3, 2020); *Caitlin (Cat) Moon*, LINKEDIN, <https://www.linkedin.com/in/caitlinmoon> (last visited Oct. 3, 2020); *Astrid Kohlmeier*, LINKEDIN, <https://www.linkedin.com/in/astridkohlmeier/> (last visited Oct. 3, 2020).

<sup>39</sup> See, e.g., P.A. Henrichsen, *Sample Engagement Letters and Fee Agreements*, 24 GPSOLO 22 (2007) (providing examples of an attorney's form engagement letters and fee agreements). As members of a self-regulated profession, many lawyers view the opportunity to master new areas as a great professional benefit, so it is not surprising that they might have the confidence to engage in design. See, e.g., *Why I Love Being a Lawyer*, A.B.A. J. (Feb. 11, 2011, 11:00 AM), [http://www.abajournal.com/magazine/article/why\\_i\\_love\\_being\\_a\\_lawyer/](http://www.abajournal.com/magazine/article/why_i_love_being_a_lawyer/) (quoting an attorney—Howard Finkelstein—who stated that "[a]s a lawyer, you always have the opportunity to redesign your practice to accomplish different goals").

often bring in non-experts as part of the brainstorming process.<sup>40</sup> This represents a significant departure from approaches to legal work that—sometimes because of ethical constraints—wall-off lawyers from other problem-solvers and modes of expertise.<sup>41</sup>

While legal design is a departure from traditions of legal practice, it is not as radical as it might seem. In fact, legal design has taken hold, in part, because the marriage of design and law is a comfortable union in many important respects. Both design and law are engaged with practical problem-solving on behalf of clients, and both fields gain consumer loyalty (and market advantages) through a human-centered approach.<sup>42</sup> The disparate fields of law and design even use similar language, with lawyers repurposing design terms such as "tailoring" and "balance" as components of legal standards and analyses.<sup>43</sup> For their part, designers often describe design in law-like terms, characterizing designing itself as a form of rhetoric or argumentation.<sup>44</sup>

### 3. Implementing Legal Design Approaches

A primary tool of legal design is "design thinking," a widely-used approach to creative problem solving and innovation.<sup>45</sup> Design

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<sup>40</sup> See Astrid Kohlmeier, *Why Is Legal Design Thinking Important*, LEGAL TECH BLOG (Nov. 15, 2017), <https://legal-tech-blog.de/why-is-legal-design-thinking-important> (describing an interdisciplinary case study involving a Finnish pension fund company).

<sup>41</sup> MODEL RULES OF PROF'L CONDUCT r. 5.4(b) (AM. BAR ASS'N 2020) (stating that "[a] lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law").

<sup>42</sup> Rochoael Soper Adranly, *How Design Taught Me to Be a 'Human-Centered' Lawyer*, MEDIUM (Sept. 22, 2017), <https://medium.com/ideo-stories/how-design-taught-me-to-be-a-human-centered-lawyer-52dc080ade4c>; see *Stanford Legal Design Lab*, LEGAL TECH DESIGN: LEGAL DESIGN LAB, <http://www.legaltechdesign.com/> (last visited Oct. 3, 2020) (identifying Stanford's d.school approach as interdisciplinary and human-centered); *NuLawLab*, NULAWLAB, <http://www.nulawlab.org/> (last visited Oct. 3, 2020) (stating that "[w]e envision a world where everyone is empowered to use the law").

<sup>43</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007) (exemplifying narrow tailoring); *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (exemplifying balancing).

<sup>44</sup> See Jackson et al., *supra* note 3, at 19–22 (analyzing parallels between the rhetoric of law and the rhetoric of design). See generally Richard Buchanan, *Declaration by Design: Rhetoric, Argument, and Demonstration in Design Practice*, 2 DESIGN ISSUES 4 (1985); Glenn Ballard & Lauri Koskela, *Rhetoric and Design*, U. SALFORD MANCHESTER (2013), [http://usir.salford.ac.uk/id/eprint/29473/1/Ballard\\_Koskela\\_Rhetoric\\_and\\_Design.pdf](http://usir.salford.ac.uk/id/eprint/29473/1/Ballard_Koskela_Rhetoric_and_Design.pdf) (describing the relationship between rhetoric and design).

<sup>45</sup> See *LPS :: The VLS Course*, *supra* note 36.

thinking pioneer David Kelly, one of the founders of the Stanford d.school (part of the Hasso Plattner Institute of Design at Stanford University), describes design thinking as follows:

Design thinking utilizes elements from the designer's toolkit like empathy and experimentation to arrive at innovative solutions. By using design thinking, you make decisions based on what future customers really want instead of relying only on historical data or making risky bets based on instinct instead of evidence.<sup>46</sup>

Over the past two decades, design thinking has been adopted in many contexts, from city planning to business marketing.<sup>47</sup> A goal of legal design is to adapt these same methods to the context of law and legal practice.

The mega-law firm Baker McKenzie provides an example of using legal design to create a new environment for resolving legal issues—reflecting a move beyond product design toward Buchanan's third and fourth orders, *i.e.*, designing interactions and experiences.<sup>48</sup> Announcing its "global innovation program" in 2017, Baker McKenzie asserted that its plan to apply design thinking to client services "will challenge the legal industry's traditional capabilities-focused approach."<sup>49</sup> Instead of starting the legal representation conversation by focusing on the clients' (and lawyers') capacities and limitations—such as, what can the client afford, what is its business model, where is it located, what are the lawyers' particular skills and expertise—the law firm begins projects by using empathy to frame the issue to be tackled.<sup>50</sup>

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<sup>46</sup> *Design Thinking*, IDEO U, <https://www.ideo.com/pages/design-thinking> (last visited Oct. 3, 2020).

<sup>47</sup> *See, e.g.*, Abhijeet Kotwal, *Design Thinking for Marketing Campaigns*, MEDIUM (Nov. 21, 2018), <https://medium.com/@abhijeetkotwal/design-thinking-for-marketing-campaigns-a9118f044aec>; *Design Thinking: The Guidebook*, ROYAL CIV. SERV. COMMISSION (2017), <http://www.rcsc.gov.bt/wp-content/uploads/2017/07/dt-guide-book-master-copy.pdf> (explaining strategies for implementing design thinking in the public sector in Bhutan and emphasizing the importance of empathy).

<sup>48</sup> Kerry Thomson, *First Law Firm to Apply Design Thinking on Global Scale*, GLOBAL COMPLIANCE NEWS (Apr. 12, 2017), <https://globalcompliancenews.com/first-law-firm-to-apply-design-thinking-on-global-scale-20170410/>.

<sup>49</sup> *Id.*; *see also* John Alber, *Are Lawyers Really Luddites?*, MEDIUM: RETHINKING LEGAL (Aug. 10, 2017), <https://rethinking.legal/are-lawyers-really-luddites-7c1bb480d608> (describing efforts of King & Wood Mallesons to introduce design thinking into the firm).

<sup>50</sup> *See, e.g.*, *Design Thinking and Legal Marketing: A Win for Law Firms and Their Clients*, NAT'L L. REV. (2016), <https://www.natlawreview.com/article/design-thinking-and-legal-marketing-win-law-firms-and-their-clients> (describing design thinking steps applied in a law firm setting).

As Baker McKenzie lawyers follow through with the design thinking protocol, they then continue to maintain a wide lens in examining a range of approaches as they define the issues before finally figuring client capabilities and constraints into the discussion in the later stages of the problem-solving process.<sup>51</sup>

As developed and applied at the Stanford d.school, the Design Thinking process has five basic steps: (1) Empathize; (2) Define; (3) Ideate; (4) Prototype; and (5) Test.<sup>52</sup>

Some of these steps are parallel, or even identical, to steps often taken by lawyers in a traditional legal practice. For example, "Empathy" may already be embedded in lawyers' processes of working with clients to understand and address their legal issues.<sup>53</sup> Further, similar to the "Define" step in design thinking, "framing" has long had a place in legal practice as lawyers translate clients' concerns into legal frameworks (such as a tort or a contract violation), and then identify persuasive, non-technical frames (such as fairness) that will give clients' concerns heft in a variety of fora.<sup>54</sup>

However, other aspects of the design thinking matrix are more alien to typical legal practice. For instance, in design thinking parlance, the process of defining the issue at stake goes beyond conversation with the client to include real-world contextual observation; a design

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<sup>51</sup> Rikke Friis Dam & Teo Yu Siang, *Stage 3 in the Design Thinking Process: Ideate*, INTERACTION DESIGN FOUND. (Nov. 2019), <https://www.interaction-design.org/literature/article/stage-3-in-the-design-thinking-process-ideate> (encouraging "wild and wacky ideas" during the ideation phase); Rebecca Linke, *Design Thinking, Explained*, MIT SLOAN SCH. MGMT. (Sept. 14, 2017), <http://mitsloan.mit.edu/newsroom/articles/design-thinking-explained/> (advocating that a design thinker should "[h]old nothing back during brainstorming sessions").

<sup>52</sup> Rikke Friis Dam & Teo Yu Siang, *5 Stages in the Design Thinking Process*, INTERACTION DESIGN FOUND. (Aug. 2020), <https://www.interaction-design.org/literature/article/5-stages-in-the-design-thinking-process>; see also Banny Banerjee & Theo Gibbs, *Teaching the Innovation Methodology at Stanford d.school*, in *CREATING INNOVATIVE LEADERS: A GLOBAL PERSPECTIVE* 163 (Banny Banerjee & Stefano Ceri eds., 2016).

<sup>53</sup> Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1274 (1993).

<sup>54</sup> Gwendolyn Leachman, *Legal Framing*, in 61 *STUDIES IN LAW, POLITICS, AND SOCIETY* 25, 31 (Austin Sarat ed., 2013) (setting out a typology of legal frames); Bill Kennedy et al., *Framing in Race-Conscious, Anti-Poverty Advocacy: A Science-Based Guide to Delivering Your Most Persuasive Message*, 43 *CLEARINGHOUSE REV.* 408, 408 (2010) (describing how the race equity movement has "been developing and using framing tools to prepare presentations to client groups, to advocate before local government bodies, and to argue their cases in court").

thinking process involves fieldwork to observe human behaviors and interactions pertinent to the problem that is being addressed.<sup>55</sup> These observations are used to articulate the extreme boundaries of the problem to be resolved.<sup>56</sup> In contrast, traditional lawyers emphasize the client interview, and the client itself, as the primary source of information concerning the issue for which the client seeks legal assistance.<sup>57</sup>

The "Ideation" phase of design thinking is also a point of contrast with more traditional legal work. "Ideation" is defined as the act of generating ideas.<sup>58</sup> In law, ideation typically begins with the question, "how *can* our client achieve X," and involves focused legal research and consultation with members of a highly circumscribed team of subject-matter experts.<sup>59</sup> In a design thinking process, however, the question is reframed as "how *might* our client achieve X," a seemingly small change that opens the door to contemplating a wider range of creative approaches that might initially seem implausible.<sup>60</sup>

In a design thinking exercise, the ideation phase deliberately brings together participants from many disciplines and perspectives, including those who may be wholly unfamiliar with the subject matter and issues involved.<sup>61</sup> For example, in implementing design thinking at Baker McKenzie, the law firm has established the Whitespace Legal Collab, a "hub" for "various experts, not just lawyers,

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<sup>55</sup> See, e.g., *Immersion*, IDEO U: DESIGN KIT, <https://www.designkit.org/methods/immersion> (last visited Oct. 3, 2020).

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

<sup>57</sup> Marjorie Corman Aaron, *Client Science: Advice for Lawyers on Initial Client Interviews*, U. CIN. C.L. SCHOLARSHIP & PUBLICATIONS (2013), [https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1345&context=fac\\_pubs](https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1345&context=fac_pubs).

<sup>58</sup> *Ideation*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/ideation> (last visited Oct. 3, 2020).

<sup>59</sup> See Margaret Ann Wilkinson, *Information Sources Used by Lawyers in Problem-Solving: An Empirical Exploration*, 23 LIBR. & INFO. SCI. RES. 257, 259 (2001) (stating that the initial stage of information gathering "relies very heavily on the formal apparatus of law: primary sources of information including reports of judicial decisions rendered, policies, manuals and forms issued by administrative bodies, laws and regulations issued by governments, and so forth").

<sup>60</sup> See, e.g., *Resources: "How Might We" Questions*, STAN. DSCHOOL <https://dschool.stanford.edu/resources/how-might-we-questions> (last visited Oct. 3, 2020).

<sup>61</sup> Christophe CL., *Key Elements for a Successful Ideation Workshop*, MEDIUM (July 26, 2017), <https://medium.com/linda-by-linagora/key-elements-for-a-successful-ideation-workshop-2e7ec1843be6> (stressing the importance of diverse ideation teams).

to convene and share their unique expertise to solve complex challenges that Baker McKenzie's clients face.<sup>62</sup> Another large law firm that has embraced design thinking, Faegre Baker Daniels ("FaegreBD"), established a Design Lab.<sup>63</sup> Using design thinking as a component of trial preparation, FaegreBD partner David Gross says, firm lawyers "will go into our Design Lab, we'll bring in people, and we'll do the design thinking process of how can we empathize with the jury and what question are we really trying to solve and . . . brainstorm all the different ways to do it."<sup>64</sup>

Likewise, prototyping and testing solutions, key parts of the design thinking process, are not typically included within the scope of assistance provided by lawyers. Instead, lawyers tend to provide directional advice, options, and assessments of legal risk.<sup>65</sup> Lawyers seldom prototype and test the viability of various approaches in the real world before proposing them to the client.<sup>66</sup>

Recognizing these differences, legal designers understand that successful legal design requires more than just a mechanical application of the design thinking sequence to legal problems. For example, Margaret Hagan of the Stanford Legal Design Lab, emphasizes the inclusion of additional tools that enhance communication between legal designers and their clients; she defines legal design as not just law plus design thinking, but as "the cross-discipline of Legal Thinking, Design Thinking, Visual Thinking and User Experience (UX) Design."<sup>67</sup> "Visual thinking" is the practice of using visual processing to think and communicate regarding complex issues.<sup>68</sup> "UX Design" is design

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<sup>62</sup> Mary Rechtoris, *Making Innovation an Art in the Modern Law Firm*, RELATIVITY (Feb. 27, 2019), <https://www.relativity.com/blog/making-innovation-an-art-in-the-modern-law-firm/>.

<sup>63</sup> *Designs on the Law*, *supra* note 20.

<sup>64</sup> *Id.*

<sup>65</sup> See, e.g., Margaret Spencer Dixon, *Project Management for Lawyers (with Forms and Exhibits)*, 64 PRAC. L. 31, 32 (2018) (stating that many of the goals of a lawyer are to "provide sound advice regarding strategy and options . . . [and] to provide information and advice about foreseeable risks and ways to manage those risks").

<sup>66</sup> Margaret Hagan, *Flipping Lawyers from Talking to Doing: Prototype-First Design Process*, OPEN L. LAB (Mar. 24, 2017), <http://www.openlawlab.com/2017/03/24/flipping-lawyers-from-talking-to-doing-prototype-first-design-process/> (noting that "[o]ne of the main points of resistance for lawyers in the design process is getting from talk to action").

<sup>67</sup> *What Is Legal Design Thinking?*, VISUAL CONT., <https://visualcontracts.eu/our-approach/what-is-legal-design-thinking/> (last visited Nov. 21, 2020).

<sup>68</sup> Dave Gray, *What Is Visual Thinking?*, XPLANER, <http://www.xplanner.com/visual-thinking-school/> (last visited Oct. 3, 2020).

that focuses on both consumer usability and pleasure derived from using the product.<sup>69</sup> As discussed in the November 2017 Legal Design Summit in Helsinki, Finland, applying these techniques to legal contexts is not a superficial intervention.<sup>70</sup> Rather, "[d]esigning the way a legal document looks is deeply intertwined with the content of the document, the purpose its drafters are trying to achieve, and its effectiveness."<sup>71</sup>

Using legal design, lawyers focus explicitly on user experiences and employ visual tools and design processes such as iteration and prototyping in order to solve problems in ways that are responsive to human behavior and needs.<sup>72</sup> The expansion of legal design is driven by market forces and supported by the growth of technology, both of which put pressure on traditional models of legal practice; legal design helps rebrand lawyers as forward-looking innovators and industry disruptors.<sup>73</sup> At the same time, the growth of legal design can be seen as part of a fundamental evolution in lawyer-client relationships. Lawyers working in this medium still bring their legal expertise to the table, but they adopt a user-focused, human-centered approach to develop responses to clients' needs and they approach both law itself and modes of delivering legal services as things that can be re-imagined and re-designed.<sup>74</sup>

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<sup>69</sup> *User Experience (UX) Design*, INTERACTION DESIGN FOUND., <https://www.interaction-design.org/literature/topics/ux-design> (last visited Oct. 3, 2020); see also Devendra & Moon, *supra* note 32.

<sup>70</sup> The 2017 Legal Design Summit in Helsinki was the second such gathering convened by that group. For an account of the 2017 summit, see Felix Schulte-Strathaus, *Legal Design Summit: Insights from a Legal Engineer*, ARTIFICIAL LAW. (Nov. 9, 2017), <https://www.artificiallawyer.com/2017/11/09/legal-design-summit-insights-from-a-legal-engineer/> (noting that presentation of legal information was a major topic of the 2017 summit). For a description of a third summit, held in September 2019 in Helsinki, see Goodman, *supra* note 3.

<sup>71</sup> Devendra & Moon, *supra* note 32.

<sup>72</sup> See generally John Alber, *Revolutionizing Law with Design Thinking*, LINKEDIN (July 16, 2016), <https://www.linkedin.com/pulse/revolutionizing-law-design-thinking-john-alber/>.

<sup>73</sup> *Id.*; see also Meera Klemola, *Legal Design: Combining Legal Expertise and Design to Invigorate the Law*, LAWSRING (Jan. 28, 2018), <https://lawspring.org/legal-design-combining-legal-expertise-and-design-to-invigorate-the-law-7ac09b79a182> (concluding that "[f]or several decades, the law has sought a catalyst for collaboration, creativity, innovation and change, and finally it is delivered with legal design").

<sup>74</sup> Klemola, *supra* note 73; see also Kohlmeier, *supra* note 40 (stating that "deep user insight research done by one to one interviews" are crucial to the legal design thinking process).

### B. *Legal Design in Practice: The NuLawLab's Design Process*

The practical implementation of a legal design process is illustrated by a project undertaken by the NuLawLab at Northeastern University School of Law.<sup>75</sup> The project, titled RePresent, is a digital game developed for the purpose of preparing self-represented (*i.e.*, *pro se*) litigants to go to court.<sup>76</sup> With Statewide Legal Services of Connecticut and several other local legal services providers as the lab's clients, the NuLawLab worked closely with court personnel, legal aid lawyers, and *pro se* litigants themselves, as well as game designers and artificial intelligence experts, to develop the product.<sup>77</sup> On the one hand, this is a product that fits into Buchanan's first and second orders focused on symbols and things, but the game is also intended to restructure interactions between *pro se* litigants and courthouse personnel, a third order design intervention.

The problem initially articulated by the organizational clients was the mismatch between their legal resources and the numbers of individuals seeking legal representation.<sup>78</sup> A typical response to this issue might be to develop pipelines for more lawyers or paralegals through pro bono panels, law school clinics, or other training and recruitment mechanisms.<sup>79</sup> But the legal services organizations had already done much to develop these pipelines, and it was simply not

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<sup>75</sup> The NuLawLab is an innovation laboratory based at Northeastern University School of Law. *NuLawLab*, *supra* note 42. While the NuLawLab was an early example, law school-based law labs are now burgeoning. *See, e.g.*, Martha F. Davis, *Institutionalizing Legal Innovation: The (Re)Emergence of the Law Lab*, 65 J. LEGAL EDUC. 190 (2015); *Justice Innovation with Law School Design Labs*, *supra* note 2 (describing the work of law school design labs).

<sup>76</sup> *RePresent Games*, NULAWLAB, <http://nulawlab.org/view/online-simulation-for-self-represented-parties> (last visited Oct. 3, 2020); *see also* Jackson et al., *supra* note 3, at 26–27. The game is available for free download at <https://play.google.com/store/apps/details?id=com.slsct.represent>.

<sup>77</sup> *RePresent Games*, *supra* note 76; *see also NuLawLab*, NULAWLAB: ABOUT, <https://www.nulawlab.org/our-partners> (last visited Oct. 3, 2020).

<sup>78</sup> Interview with Dan Jackson, Executive Director, NuLawLab, in Boston, Mass. (Mar. 9, 2018).

<sup>79</sup> *See generally Report of the Pro Bono Task Force*, LEGAL SERVS. CORP. (2012), <https://www.lsc.gov/sites/default/files/attach/2015/09/Report-ProBonoTaskForce-2012.pdf> (proposing several solutions for increasing the supply of legal services).



enough to meet the need.<sup>80</sup> While expanded access to lawyers is a worthy aim, it is widely recognized that the need for assistance is greater than can be met through a patchwork of legal services.<sup>81</sup>

Embarking on a legal design process, the NuLawLab team looked beyond the initial articulation of the problem as "not enough lawyers."<sup>82</sup> Statewide Legal Services of Connecticut leaders suggested the idea of developing some kind of game that would capitalize on emerging research regarding the ways in which gameplay can promote learning.<sup>83</sup> Before committing to any particular approach, however, the NuLawLab introduced an observation phase, conducting passive observations of self-represented litigants as they interacted with the courts and court staff. These observations ultimately reshaped the problem: litigants were experiencing high levels of stress not because they lacked a lawyer to make legal arguments on their behalf or because they needed to know their legal rights, but because of their unfamiliarity with basic courtroom processes. Self-represented litigants had questions such as: "Can I bring my children to court?"; "Where do I stand during the proceeding?"; "How should I address the judge?"; and even, "Where is the courtroom?". When litigants lacked even this baseline understanding of the proceedings, it was difficult for court personnel and judges to address their legal needs.

Armed with these stories and observations about unrepresented individuals' concerns, the legal design team developed composite profiles of *pro se* litigants reflecting extreme examples of individuals'

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<sup>80</sup> *Id.* at 1–2 (explaining that there is great demand for legal services and limited budget to provide these services).

<sup>81</sup> See Hilarie Bass, *Legal Aid Ensures Equal Justice for All; Congress Must Increase Funding for the Legal Services Corporation*, HILL (Apr. 27, 2018, 2:40 PM), <http://thehill.com/blogs/congress-blog/judicial/385227-legal-aid-ensures-equal-justice-for-all-congress-must-increase> (stating that "[e]ven with the increased funding, 1 million low-income Americans will be turned away from legal aid offices across the country that don't have the budget for all the lawyers and paralegals needed to handle their cases").

<sup>82</sup> Interview with Dan Jackson, *supra* note 78.

<sup>83</sup> See, e.g., Eric Zhi Feng Liu & Po-Kuang Chen, *The Effect of Game-Based Learning on Students' Learning Performance in Science Learning – A Case of "Conveyance Go"*, 103 *PROCEDIA SOC. & BEHAV. SCI.* 1044, 1049 (2013) (finding that "pretest and posttest results demonstrate that the card game significantly increased the student's scientific knowledge related to energy and means of transport"); Juho Hamari et al., *Challenging Games Help Students Learn: An Empirical Study on Engagement, Flow and Immersion in Game-Based Learning*, 54 *COMPUTERS IN HUM. BEHAV.* 170, 175 (2016) (demonstrating that games have a positive effect on engagement and learning).

stress and confusion regarding court appearances.<sup>84</sup> The legal designers then used these profiles to lead an ideation and co-design process that spanned disciplines and perspectives, including judges, lawyers, *pro se* litigants, artists, game designers, and others from the community. Out of this ideation process, the details of the game crystallized. The game would not focus primarily on legal knowledge, but would provide basic information to unrepresented litigants. The elements of the game were co-designed with the range of stakeholders; inexpensive game prototypes were developed and thoroughly tested with intended end-users before the team committed to the final design. Consistent with the central tenets of legal design, the information in RePresent is presented visually, and the game component adds an element of play and enjoyment to user interactions.<sup>85</sup>

### III. THE ROLE OF CLIENT NARRATIVES IN LEGAL PRACTICE

In developing RePresent, the NuLawLab worked on behalf of an institutional client made up of sophisticated service providers who agreed to use a legal design process to resolve a structural mismatch between courts and *pro se* litigants; the problem occurred in a legal context, but was not grounded in law. But legal design is also used in the course of representing individual and institutional clients facing specific legal problems. For example, the lawyers at FaegreBD report that in their Design Lab, "[w]e now do classic design thinking in preparation for our trials."<sup>86</sup> Members of the firm have also "implem[ed] design elements into client meetings," and "us[ed] design to

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<sup>84</sup> "Extreme user" profiles typically combine the most extreme examples of individuals experiencing the problem being studied. Extreme users in the case of the *pro se* litigants would be those who experienced the most stress in the widest range of circumstances, perhaps those who had the least familiarity with legal proceedings. Extreme users are typically composite profiles rather than an actual individual. Focusing on extremes is believed to stimulate innovative thinking. *Method: Extreme Users*, STAN. DSCHOOL, <http://dschool-old.stanford.edu/wp-content/themes/dschool/method-cards/extreme-users.pdf> (last visited Oct. 3, 2020); Rikke Friis Dam & Teo Yu Siang, *Personas – A Simple Introduction*, INTERACTION DESIGN FOUND., <https://www.interaction-design.org/literature/article/personas-why-and-how-you-should-use-them> (last visited Oct. 3, 2020) [hereinafter *Personas*].

<sup>85</sup> *RePresent Games*, *supra* note 76. Initially introduced in Connecticut, the game is now being adapted for use in Maine. See *The RePresent Games*, REPRESENT, <https://www.representgames.org/about> (last visited Oct. 3, 2020). Evaluations of RePresent indicate that it has a measurable impact in reducing the stress experienced by unrepresented litigants. *Id.*

<sup>86</sup> *Designs on the Law*, *supra* note 20.

analyze legal claims."<sup>87</sup> This application of legal design in the course of client representation raises questions about the nature of the lawyer-client relationship, and particularly the lawyer's use of client narratives as a starting point for assisting the client.

Lawyers generally start their work by carefully listening to a client's story.<sup>88</sup> Here is how the website of one law firm in Ohio describes the initial meeting between lawyer and client:

[T]he attorney(s) meeting with you will take time to understand your situation, develop your legal claim(s), and determine with you what our strategy would be to resolve your case. We will take time to answer your questions, separate legal myths from legal facts, and otherwise ease your worries about the unknown. We will provide advice and explanations tailored to your situation that stem from our years of experience, education, and specialized training.<sup>89</sup>

This website also reminds potential clients at the outset that their story will be confidential unless they authorize disclosure or unless other commands (such as a court order) require that their attorney disclose the information.<sup>90</sup> As this website underscores, individual stories are at the core of the trusting relationship between lawyer and client.<sup>91</sup>

The relationship described by this Ohio firm is the iconic lawyer-client relationship, *i.e.*, one-on-one and confidential, supportive, and honest. While such a relationship is generally envisioned in a setting involving individual representation, it is also the model for corporate legal work, where one attorney, or a larger legal team, represents the interests of a business entity.<sup>92</sup> In these relationships, too, clients bring their facts, concerns, and contextual information; lawyers listen, ask

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

<sup>88</sup> See, e.g., *What to Expect at Your First Meeting with an Attorney*, MELISSA GRAHAM-HURD & ASSOCIATES, LLC, <https://www.grahamhurdlaw.com/what-to-expect-at-your-first-meeting-with-an-attorney/> (last visited Oct. 3, 2020).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* This is the crux of the client-centered lawyering movement. See, e.g., John B. Mitchell, *Narrative and Client-Centered Representation: What Is a True Believer to Do When His Two Favorite Theories Collide?*, 6 CLINICAL L. REV. 85, 88 (1999) ("[W]hat else is trial but a story . . . ?").

<sup>92</sup> Tim Baran, *Law Firm Pitch to Corporate Clients: Listen First*, GOOD2BSOCIAL (Feb. 20, 2017), <https://good2bsocial.com/law-firm-pitch-corporate-clients/> (arguing that close listening is the most important part of the law firm "pitch" to a corporate client).

questions, and provide legal analysis and advice that takes into account the client's business goals as well as other factors such as legal constraints. As described below, however, for legal designers, an individual client's story may be a jumping off point rather than a central focus.<sup>93</sup>

### A. *How are Client Narratives Used in Legal Design?*

The protocols of legal design are driven by its underlying goal: innovation. Legal design methodologies do not rely solely on the client to articulate the particular issue to be resolved, since the client's view would be bounded by the client's own narrow capacities and individual experiences. Rather, the legal designer defines the specific problem to be addressed only after observing a range of individuals operating within the environment that the client presents.<sup>94</sup> From these observations, the legal designer develops composite stories that represent extreme users within the system.<sup>95</sup> The composites may not reflect the true experiences of any single consumer or client.<sup>96</sup>

Extreme user stories form the framework within which the legal designer will test alternative approaches.<sup>97</sup> The client's voice will be just one among many as the legal designer solicits the views of a

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<sup>93</sup> See *infra* Part II(A). The practical application of narrative is sometimes called "applied storytelling." For a bibliography of the Applied Storytelling Movement in the legal academy, see J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC: JALWD 247 (2015).

<sup>94</sup> See Owen Byrd, *Legal Analytics v. Legal Research: What's the Difference?*, L. TECH. TODAY (June 12, 2017), <http://www.lawtechnologytoday.org/2017/06/legal-analytics-vs-legal-research/>. Beyond observation, use of new technology such as data analytics may play an important role in identifying the issue to be addressed by a legal designer. See *id.* Because of the resources required, data analytics is most accessible to large firms or corporations, but individual lawyers and legal services offices may also be able to compile data across their caseload that leads to the development of innovative solutions to individual client challenges. See Robert Ambrogì, *Small Firms Are Using Data for Analysis, Too*, A.B.A. J. (Feb. 1, 2015, 6:25 AM), [http://www.abajournal.com/magazine/article/small\\_firms\\_are\\_using\\_data\\_tools\\_for\\_analysis\\_too](http://www.abajournal.com/magazine/article/small_firms_are_using_data_tools_for_analysis_too).

<sup>95</sup> Mawuena Tendar, *Design Thinking, a Miracle Recipe? Not So Much According to IDEO*, NOTEWORTHY – J. BLOG (Dec. 21, 2017), <https://blog.usejournal.com/design-thinking-a-miracle-recipe-not-so-much-according-to-ideo-f072700a55d1>.

<sup>96</sup> *Id.* (stating that "[w]e don't look for averages; we look for 'extreme users' because we look for needs and inspiration"). Composite extreme users are sometimes called "personas." See *Personas*, *supra* note 84.

<sup>97</sup> See Tendar, *supra* note 95; see also text accompanying note 84.

diverse group, including users and non-users of the system.<sup>98</sup> At the same time, the legal designer might employ co-design techniques that give the client and others an equal role in the brainstorming phase of the design process.<sup>99</sup> Baker McKenzie has touted this model, announcing that its new design thinking initiative will include a "co-creation model for services."<sup>100</sup> Similarly, the Netherlands-based justice innovation center, HiiL, uses a co-design approach to involve communities in developing solutions for justice dilemmas that they experience.<sup>101</sup> For instance, ideas that emerged from HiiL's Innovating Justice Boostcamp in Kampala, Uganda include:

E-Migrate (an easy and safe travel agency for migrants and refugees), Evidence and Methods Lab (smart infographics of complex justice problems to promote accountability), Muslim Centre for Justice e-Law App (a legal sms service for Muslim minorities and users of the Qhuadi court), Land Title Search App (a smartphone land title verification tool), and Weetase (a voice-based mobile app to monitor victims of (forced) migration and trafficking).<sup>102</sup>

In the usual design thinking sequence, the legal designer uses the results of collaborative brainstorming to sort through and identify promising interventions.<sup>103</sup> The legal design team, which includes the client in a co-design process along with others from a range of disciplines, then employs these ideas to develop and test prototypes.<sup>104</sup> Testing is accomplished through observation of the ways in which

<sup>98</sup> Rikke Friis Dam & Teo Yu Siang, *Design Thinking: Select the Right Team Members and Start Facilitating*, INTERACTION DESIGN FOUND., <https://www.interaction-design.org/literature/article/design-thinking-select-the-right-team-members-and-start-facilitating> (last visited Oct. 3, 2020) [hereinafter *Design Thinking*] ("Teams may consist of people unfamiliar with each other, with external members brought on board either as specialists or facilitators depending on the availability of skills.").

<sup>99</sup> Marc Steen et al., *Benefits of Co-Design in Service Design Projects*, 5 INT'L J. DESIGN 53, 53 (2011) (stating that the goal of co-design is to "pay special attention to involving users and customers in the design process and putting their experiences central").

<sup>100</sup> Thomson, *supra* note 48.

<sup>101</sup> See, e.g., Nathalie Dijkman, *Innovative Solutions Are Entering the Justice Arena in Uganda*, JUST. L. & ORD. SECTOR (Sept. 19, 2017), <https://www.jlos.go.ug/index.php/component/k2/item/606-innovative-solutions-are-entering-the-justice-arena-in-uganda> (describing engagement of key stakeholders in design process).

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

<sup>103</sup> See TOM KELLEY & DAVID KELLEY, CREATIVE CONFIDENCE: UNLEASHING THE CREATIVE POTENTIAL WITHIN US ALL 23–25 (2013) (describing the ideation and experimentation phase of innovation); see also TIM BROWN, CHANGE BY DESIGN: HOW DESIGN THINKING TRANSFORMS ORGANIZATIONS AND INSPIRES INNOVATION (2009).

<sup>104</sup> See KELLEY & KELLEY, *supra* note 103; BROWN, *supra* note 103.

humans interact with a prototype of the proposed solution or intervention.<sup>105</sup> The results of the testing phase trigger a new round of ideation, co-design, and refinements of the prototyping.<sup>106</sup>

In sum, in the legal design process, the "problem" to be addressed is defined through human observation rather than listening to a singular client story. As illustrated in the development of the RePresent game, composite "extreme user" stories are constructed from this observational data and then used as the basis for ideation. The innovative solution offered by legal designers at the end of the day will reflect the iterative journey taken by the client and legal designers. A successful solution will delight and satisfy the client, but may not address the need the client thought it had at the outset of the relationship with the legal design team.<sup>107</sup>

### *B. Parallels Between the Roles of Client Stories in Legal Design and Policymaking*

Legal design's treatment of client stories departs from the way in which narratives are treated in usual modes of legal representation. Instead, the legal design process uses client stories in ways similar to policymakers' use of constituent stories. These parallels may tell us something about the ways that the legal profession is evolving to meet the demands of the legal marketplace.

"Policymaking" in this discussion refers to the full range of activities that result in public policy development and implementation, from the actions of legislative and executive branches at the federal, state, and local levels of governments to the formulation of policies by government bureaucrats. Lawyers are often involved in policymaking processes as elected government officials, but in that capacity, they are not engaged in legal practice.<sup>108</sup> Rather, a typical oath of

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<sup>105</sup> See, e.g., Margaret Hagan, *Short Book on How to Run User Testing*, LEGAL DESIGN LAB (Dec. 5, 2017), <http://www.legaltechdesign.com/2017/12/short-book-on-how-to-run-user-testing/>.

<sup>106</sup> *Design Thinking*, *supra* note 98.

<sup>107</sup> Delivering "surprise and delight" to clients is a popular marketing approach. E.g., Scott Matthews, *Best Practices: How Brands Can Build Loyalty with 'Surprise-and-Delight' Efforts*, ADAGE (May 6, 2015), <http://adage.com/article/digitalnext/brands-build-loyalty-surprise-delight-strategies/298425/>.

<sup>108</sup> The Congressional Research Service reported that the 115<sup>th</sup> Congress included 168 members of the House of Representatives and 50 U.S. Senators listing "law" as their

office pledges the officials' allegiance to the Constitution and, as appropriate, state and local laws.<sup>109</sup> Nevertheless, lawmakers do act in a representative capacity vis-a-vis their constituents at large and are expected to be responsive to their constituents' collective as well as individual priorities.<sup>110</sup>

Like the client narratives that initiate a legal design process, constituent narratives may serve a critical function in identifying priorities and shaping lawmakers' initial perceptions of the issues.<sup>111</sup> Lawmaking processes are often triggered by individual narratives that communicate urgency and humanize the issues.<sup>112</sup> Meghan's Law, Buster's Law, the Brady Handgun Violence Protection Act, and the Ryan White CARE Act, known as "apostrophe laws," are all examples of the importance of human stories to initiate legislative attention, provide momentum, and justify action.<sup>113</sup> The names attached to these

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occupation. JENNIFER E. MANNING, CONG. RESEARCH SERV., R44762, MEMBERSHIP OF THE 115<sup>TH</sup> CONGRESS: A PROFILE 3 (2018).

<sup>109</sup> See, e.g., Sarah Doar, *The Oath of Office for Local Elected Officials*, MRSC (Dec. 6, 2019), <http://mrsc.org/Home/Stay-Informed/MRSC-Insight/November-2013/The-Oath-of-Office-for-Local-Elected-Officials.aspx>. The question of who or what exactly is a government attorney's client is not a simple question and the answer may depend upon the particular government agency, the particular legal task, and the lawyer's seniority. See, e.g., *Government Counsel and Their Obligations*, 121 HARV. L. REV. 1409, 1412–14 (2008) (reviewing alternative models for identifying government clients).

<sup>110</sup> Alan Rosenthal, *The Good Legislature*, NAT'L CONF. ST. LEGISLATURES: ST. LEGISLATURES MAG. (1999), <http://www.ncsl.org/research/about-state-legislatures/the-good-legislature.aspx> ("One of the major roles of a legislature is representation—representing various constituencies, mainly people in each lawmaker's electoral district, but also organized groups and individuals elsewhere in the state.").

<sup>111</sup> See Deserai Crowe & Michael Jones, *Narratives as Tools for Influencing Policy Change*, 46 POL'Y & POL. 217, 217–18 (2018), <https://repository.library.noaa.gov/view/noaa/20991>.

<sup>112</sup> Co-creation is also increasingly utilized as a means of facilitating participation in legislative and administrative decision-making, with a result that the lawmaking process places less reliance on individual stories and more weight on collective observations and experiences. See Peter van Waart et al., *A Participatory Approach to Envisioning a Smart City*, 24 SOC. SCI. COMPUTER REV. 708, 709 (2015) (describing how government, industry, and citizens can partner together in envisioning the ideal city of the future). Often applied in the context of local government decision-making, this approach has been touted as an aspect of "commoning" in governance—that is, the general engagement of local residents in developing common rules for the common good. See, e.g., Christian Iaione, *Governing the Urban Commons*, 7 ITALIAN J. PUB. L. 170, 183 (2015) (arguing that residents must be given opportunities to "take care of their own city").

<sup>113</sup> In 2013, USA Today reported that some types of "apostrophe laws" were on the wane. Rick Hampson, *'Apostrophe Laws' Named for Kid Victims on the Wane*, USA TODAY (June 12, 2013, 2:51 PM), <https://www.usatoday.com/story/news/nation/2013/06/12/apostrophe->

laws provide a strong indication that they represent true stories and that the legislature's actions respond to real issues affecting individuals in the community rather than reflecting the private agendas of legislators.<sup>114</sup>

Just as legal design approaches cast a wide net for ideas and perspectives beyond those presented by any single client, an individual constituent's story is generally just one part of lawmaking.<sup>115</sup> Both hypothetical and true stories often play a part in the legislative process, along with many other forms of data.<sup>116</sup> The group-focused nature of legislative solutions necessarily dilutes the significance of individual stories. Rather than limit the scope of their work to a single individual's experience, responsible lawmakers develop policies based on composite facts, aggregate data, or hypothetical scenarios that do not represent any one individual's story.<sup>117</sup>

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laws-on-the-wane-/2415963/. Still, in 2015, the Tennessee legislature enacted the Mabry Kate Webb Act, named for an infant who died of a rare disease addressed in the legislation. Cameron Taylor, *3 Bills Impacting Children and Victims Advocates Signed into Tennessee Law*, ABC-WATE (June 10, 2015, 6:31 PM), <https://www.wate.com/news/3-bills-impacting-children-and-victims-advocates-signed-into-tennessee-law/>.

<sup>114</sup> See Katherine Barrett & Richard Greene, *Why Don't More Legislators Use Performance-Informed Information?*, FELS INST. GOV'T (Mar. 1, 2018), <https://www.fels.upenn.edu/recap/posts/1549> ("Far easier to understand than pages full of data are anecdotes. Legislators – and the public as a whole – are often far more easily persuaded by the story of a real human being or a community in distress than they are by statistics."); Scott Thistle, *Making Laws from Stories: Anecdotes Often Motivate Legislators to Write Bills*, BANGOR DAILY NEWS (July 7, 2013), <https://bangordailynews.com/2013/07/07/politics/making-laws-from-stories-anecdotes-often-motivate-legislators-to-write-bills/> (noting that "every lawmaking session is peppered with proposed legislation based on anecdotes").

<sup>115</sup> *A Guide to Evidence-Based Budget Development*, PEW CHARITABLE TR. 1–3 (2016), <https://www.pewtrusts.org/-/media/assets/2016/07/aguidetoevidencebasedbudgetdevelopment.pdf> (asserting that governments are beginning to incorporate anecdotal information into evidence-based approaches to budgeting).

<sup>116</sup> See, e.g., *Federal Highway Administration's Oversight of Structurally Deficient Bridges: Hearing Before the H. Comm. on Transp. and Infrastructure*, 110<sup>th</sup> Cong. 1 (2007) (statement of Hon. Calvin L. Scovel III, Inspector General, U.S. Dep't of Transp.) (combining personal observations with data in wake of bridge collapse in Minneapolis); see also Lisa A. Bero et al., *Science in Regulatory Policymaking: Case Studies in the Development of Workplace Smoking Restrictions*, 10 TOBACCO CONTROL 329, 331 (2001) (finding that most legislative testimony relating to smoking restrictions is not scientific in nature).

<sup>117</sup> DEBORAH STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING 323 (2002) (illustrating how a rational "government uses information and education to bring individual actions into harmony with the public interest").



Like legal designers, policymakers also often approach their task from an interdisciplinary perspective.<sup>118</sup> To some extent, interdisciplinary thinking is inherent in legislative deliberation.<sup>119</sup> Lawyers are prevalent in many policymaking bodies, but legal training is not a pre-requisite for most positions. State legislatures, for example, include individuals with a variety of disciplinary backgrounds and expertise.<sup>120</sup> Beyond the composition of the legislative body itself, legislators also routinely draw on experts from a range of fields during their deliberations.<sup>121</sup> Some legislatures also take advantage of new technologies to experiment with crowdsourcing as a means to broaden constituent participation in lawmaking—an approach that further expands the diversity of perspectives contributing to the problem-solving process.<sup>122</sup> Not surprisingly, concepts of design thinking have been increasingly adopted by policymakers.<sup>123</sup> Design thinking approaches are cited and utilized

<sup>118</sup> Mihir Bholey, *Public Policy and Design: An Interdisciplinary Approach to Improve Policy Performance*, 6 GLOBAL J. FIN. & MGMT. 151, 152 (2014).

<sup>119</sup> See Alison J. Battaglia, *Legislators as Leaders: Investigating and Elucidating the Influence of Gender, Religious Beliefs, and Mindfulness on Legislative Decision Making* 32 (May 2017) (unpublished Ph.D dissertation, Case Western Reserve Univ.). This dissertation is available for download at [https://etd.ohiolink.edu/pg\\_10?0::NO:10:P10\\_ACCESSION\\_NUM:case1492344337818609#abstract-files](https://etd.ohiolink.edu/pg_10?0::NO:10:P10_ACCESSION_NUM:case1492344337818609#abstract-files).

<sup>120</sup> Karl Kurtz, *Who We Elect: The Demographics of State Legislatures*, NAT'L CONF. ST. LEGISLATURES: ST. LEGISLATURES MAG. (Dec. 2015), <http://www.ncsl.org/research/about-state-legislatures/who-we-elect.aspx> (noting that only 19% of state legislators are lawyers).

<sup>121</sup> See, e.g., *State Legislators: Who They Are and How to Work with Them: A Guide for Child Support Professionals*, NAT'L CONF. ST. LEGISLATURES 1 (Apr. 2018), [http://www.ncsl.org/Portals/1/Documents/cyf/ChildSupportProfessionals\\_v02.pdf](http://www.ncsl.org/Portals/1/Documents/cyf/ChildSupportProfessionals_v02.pdf) ("Because of the variety and complexity of the policy issues before them, state legislators often rely on their staff, researchers, experts in the field, lobbyists, practitioners and community members to gather information and develop policies . . ."); see also Sarah Moreland-Russell et al., "Hearing from All Sides" *How Legislative Testimony Influences State Level Policy-Makers in the United States*, 4 INT'L J. HEALTH POL'Y MGMT. 91 (2015) (finding that the credibility and expertise of the source and the objective content of the information presented, such as data, were the most influential elements of legislative testimony).

<sup>122</sup> See, e.g., Sofia Ranchordás & Wim Voermans, *Crowdsourcing Legislation: New Ways of Engaging the Public*, 5 THEORY & PRAC. LEGIS. 1, 2 (2017) ("With the help of technology, it is now possible to locate dispersed information, gather and process complex data in order to improve the legislative process").

<sup>123</sup> Michael Mintrom & Joannah Luetjens, *Design Thinking in Policymaking Processes: Opportunities and Challenges*, 75 AUSTRALIAN J. PUB. ADMIN. 391, 396–97, 399 (2016); Jocelyn Bailey & Peter Lloyd, *The Introduction of Design to Policymaking: Policy Lab and the UK Government*, 5 ANN. REV. POL'Y DESIGN 1, 1 (2017) (observing that "use of design within government institutions is a rapidly accelerating trend of global dimensions").

in a wide variety of policymaking contexts such as urban planning, community revitalization, and design of constituent services.<sup>124</sup>

The acceptability of generalized, composite narratives in a policymaking setting is a significant difference from the centrality of individual stories in traditional legal representation. This distinction reflects the fact that a different set of concerns about the decisionmaker's role are afoot in policy problem-solving than in client representation. Unlike lawyers acting as agents in a representational capacity, policymakers are not bound to any individual client, but are accountable to an entire community and ultimately to a constitutional framework. While true stories play an important role in policymaking, policymakers are free to take action based on generalized narratives and hypothetical accounts. Legitimacy is measured by the transparency, openness, and inclusivity of the deliberative process, rather than responsiveness to any single individual.<sup>125</sup>

In contrast to policymakers, lawyers acting as legal designers for their clients are ethically designated as agents of a particular client or clients.<sup>126</sup> The traditional lawyers' focus on client stories follows from this agency relationship. Although they are engaged in the practice of law, legal designers' approach to problem-solving seems more legislative in nature, departing from a focus on individual stories and looking across groups and disciplines for solutions to a more broadly defined set of problems.

As described in the next section, however, the legal profession has already sanctioned significant variations in the ways of working with clients' stories in the context of (a) "cause lawyering," and (b) on-line legal services.

#### IV. CLIENT STORIES IN INNOVATIVE LEGAL PRACTICE

Despite lawyers' usual focus on individual client stories, there is not a single, uniform approach to client narrative. In fact, a curatorial approach to client stories—utilized in "cause lawyering"—is a

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<sup>124</sup> See Christian Bason, *Design-Led Innovation in Government*, STAN. SOC. INNOVATION REV. at 14, 15–17 (2013).

<sup>125</sup> Wim Voermans et al., *Combining Efficiency and Transparency in Legislative Processes*, 3 THEORY & PRAC. LEGIS. 279, 281 (2015).

<sup>126</sup> See Deborah A. DeMott, *The Lawyer As Agent*, 67 FORDHAM L. REV. 301, 301 (1998) (noting that "the lawyer-client relationship is a commonsensical illustration of agency").

longstanding practice.<sup>127</sup> Further, facilitated by recent changes to legal ethics rules, "unbundling" of legal services to focus on a story fragment, is increasingly common, particularly in on-line legal settings.<sup>128</sup>

### A. *Client Narrative in "Cause Lawyering"*

"Cause lawyering" is defined as lawyering for social change.<sup>129</sup> It is not a new phenomenon. On the political left, cause lawyers can be found at legal organizations such as the NAACP Legal Defense and Educational Fund,<sup>130</sup> the Asian American Legal Defense and Education Fund,<sup>131</sup> and the American Civil Liberties Union (ACLU).<sup>132</sup> On the political right, cause lawyers include advocates working at the Center for Individual Rights (CIR)<sup>133</sup> and the American Center for Law and Justice.<sup>134</sup>

<sup>127</sup> See John Kilwein, *Still Trying: Cause Lawyering for the Poor and Disadvantaged in Pittsburgh, Pennsylvania*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 181, 183–87 (Austin Sarat & Stuart Scheingold eds., 1998) [hereinafter CAUSE LAWYERING] (noting the different approaches to cause lawyering). See generally Renee Knake, *The Lawyer as Trusted Curator*, PROF. RESP.: A CONTEMP. APPROACH (Mar. 17, 2013), <https://contemporaryprofessionalresponsibility.com/?s=lawyer+as+trusted+curator> (explaining the curatorial approach).

<sup>128</sup> See Stephanie Kimbro, *Using Technology to Unbundle in the Legal Services Community*, HARV. J. L. & TECH. OCCASIONAL PAPER SERIES 1 (2013), <http://jolt.law.harvard.edu/assets/misc/Kimbro-UsingTechnologytoUnbundleLegalServices.pdf>.

<sup>129</sup> See Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in CAUSE LAWYERING, *supra* note 127, at 3 (asserting that cause lawyers "commit themselves and their legal skills to furthering a vision of the good society"). Note that cause lawyering is a subset of public interest work, but not all public interest legal work will be in the nature of cause lawyering. Much of the individual representation work involved in legal aid representation, for example, might fall outside of definitions of cause lawyering.

<sup>130</sup> NAACP LEGAL DEF. & EDUC. FUND, <https://www.naacpldf.org/about-us/> (last visited Oct. 3, 2020).

<sup>131</sup> ASIAN AM. LEGAL DEF. & EDUC. FUND, <http://www.aaldef.org/> (last visited Oct. 3, 2020).

<sup>132</sup> AM. CIV. LIBERTIES UNION, <http://www.aclu.org> (last visited Oct. 3, 2020).

<sup>133</sup> CTR. FOR INDIVIDUAL RTS., <https://www.cir-usa.org/> (last visited Oct. 3, 2020); see also TIM J. WISE, AFFIRMATIVE ACTION: RACIAL PREFERENCE IN BLACK AND WHITE 70 (2005) (asserting that the CIR is on the conservative side of the political spectrum).

<sup>134</sup> AM. CTR. FOR LAW & JUSTICE, <https://aclj.org/> (last visited Oct. 3, 2020); see also *Petition to Stop the Radical Left from Using a Pandemic to Force Its Agenda*, AM. CTR. L. & JUST., <https://aclj.org/radical-left/stop-the-radical-left-from-using-a-pandemic-to-force-its-agenda> (last visited Oct. 3, 2020) (demonstrating how the American Center for Law and Justice is on the political right).

Cause lawyering shares with legal design an approach that involves the distancing of clients from the narratives at the center of the matter at issue. However, cause lawyering employs this approach at different stages of the lawyering process as compared to legal design. In cause lawyering, clients and stories are disaggregated at the beginning of the representation process, then later united when the lawyers identify the plaintiff or plaintiffs who present the "best" stories.<sup>135</sup> In contrast, in legal design, individual stories and observations trigger the process, but these stories are then separated from particular individuals as part of the problem-solving approach.

Cause lawyers often begin their representation work by identifying a problem or injustice that they want to address, independent of any particular client.<sup>136</sup> Only after defining the problem do cause lawyers develop ideal stories and find clients who will move those in power—courts, legislatures, media—to address the issue. For example, when the CIR, a conservative cause lawyering firm, decided to challenge the use of affirmative action in the University of Michigan's admissions, the lawyers first developed the profile of someone they viewed as a desirable plaintiff (*e.g.*, white, Michigan resident, strong academic record, not admitted to University of Michigan, able to withstand media scrutiny).<sup>137</sup> Sympathetic Michigan State legislators sent out a call for "applicants" for the position of plaintiff.<sup>138</sup> With their pre-set profile in hand, CIR lawyers interviewed students on Michigan campuses to identify potential complainants who fit the profile and would be suitable representatives for the cause.<sup>139</sup> Ultimately, individuals who CIR identified as ideal plaintiffs became the actual plaintiffs in *Grutter v. Bollinger*<sup>140</sup> and *Gratz v. Bollinger*.<sup>141</sup>

Cause lawyers on the political left take similar approaches. For example, the first-named plaintiffs in *Obergefell v. Hodges*, the U.S.

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<sup>135</sup> See Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 136, 136–39 (2015).

<sup>136</sup> See *id.*

<sup>137</sup> See WISE, *supra* note 133, at 69–70; see also *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

<sup>138</sup> STONE, *supra* note 117, at 404 (describing press release soliciting plaintiffs). See generally BARBARA A. PERRY, THE MICHIGAN AFFIRMATIVE ACTION CASES (2007).

<sup>139</sup> STONE, *supra* note 117, at 404 (stating that CIR lawyers "interviewed a dozen finalists from a pool of one hundred 'applicants' for the job of plaintiff").

<sup>140</sup> 539 U.S. 306 (2003).

<sup>141</sup> 539 U.S. 244 (2003).

Supreme Court case that established constitutional protections for marriage equality,<sup>142</sup> were carefully selected based on criteria such as the length and stability of their relationship and the hardships they had endured because they were denied access to the legal status of marriage.<sup>143</sup> Jim Obergefell was not the first, or the only, potential plaintiff who might have challenged restrictions on marriage equality.<sup>144</sup> Rather, the leading lawyers in this arena (*e.g.*, the ACLU, Lambda Legal, GLBTQ Legal Advocates & Defenders, and Supreme Court experts from the private bar) developed their own ideal client narrative for the case; they then sought plaintiffs whose realities fit into this winning frame.<sup>145</sup> In most legal cases, the stories that lawyers present in court are dictated by clients' imperfect facts.<sup>146</sup> But, in instances of cause lawyering, clients are chosen because their stories best conform to a narrative crafted by the cause lawyers to suit the purposes of the social movement's public education, courtroom, and organizing goals.<sup>147</sup>

Still, even cause lawyers must deal in realities. They cannot go to court to litigate a hypothetical; by the time they reach court, they must have actual clients who present relevant facts and have a stake in the outcome of the matter.<sup>148</sup> Cause lawyers cannot always control the progress of cases and issues through the court system, and they may need to accept a less sympathetic client simply because that

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<sup>142</sup> 135 S. Ct. 2584 (2015).

<sup>143</sup> For a cogent analysis of the unintended consequences of plaintiff selection in same-sex marriage cases, see Godsoe, *supra* note 135, at 136–41. Godsoe argues that the emphasis on plaintiffs who do not confront the public's (and court's) biases reinforces the idea that individuals must "act straight" in order to earn marriage rights. *Id.* at 138–39, 154.

<sup>144</sup> See *Baker v. Nelson*, 409 U.S. 810 (1972) (dismissing the appeal of a same-sex marriage equality case); Godsoe, *supra* note 135, at 136–37.

<sup>145</sup> See Godsoe, *supra* note 135, at 141–44, 153.

<sup>146</sup> Nevertheless, within the bounds of essential truth, a lawyer has the latitude to emphasize certain aspects of a story or provide additional explanatory facts or background information that help shape a narrative that favors their client before different forums, from the court to the media. See Philip N. Meyer, *Vignettes from a Narrative Primer*, 12 LEGAL WRITING: J. LEGAL WRITING INST. 229, 230–31 (2006).

<sup>147</sup> Godsoe, *supra* note 135, at 137–38.

<sup>148</sup> See MODEL RULES OF PROF'L CONDUCT r. 3.1, 3.3 (AM. BAR ASS'N 2020). That is not to say that lawyers may not themselves serve as litigants. For example, in *Legal Services Corp. v. Velazquez*, legal services lawyers joined with indigent clients to challenge restrictions on the use of federal funds to litigate cases involving welfare reform. 531 U.S. 533, 536 (2001).

client's case is going forward for reasons beyond their control.<sup>149</sup> Further, they cannot knowingly present false information regarding their clients.<sup>150</sup> Regardless of whether they are working for a cause, lawyers acting in a representational capacity cannot proceed in court based on a compelling story that may exist somewhere in the real world but is not presented by their clients.<sup>151</sup>

Importantly, the working methods of cause lawyers represent an evolution in lawyers' use of client narrative. In cause lawyering, lawyers curate client stories, privileging certain clients that fit their ideal, and then employing their stories as vehicles to promote social change.<sup>152</sup> These stories are not first uncovered by lawyers in conversation with clients, but start as lawyer-generated hypotheticals to which the selected clients will ideally conform. Cause lawyers' work often begins, then, by devising client stories independently of actual clients—a practice that differs from the traditional idea of the lawyer-client relationship and paves the way for legal design approaches that also work with client stories in new ways.

### B. Client Stories and On-Line Legal Services

The lawyer-client narrative model is also evolving in response to growing pressure from technology. The public no longer has difficulty accessing legal information. General legal information, and even legal advice, is available on every smartphone.<sup>153</sup> On-line services such as LegalZoom and Rocket Lawyer offer a substitute for private lawyers when creating wills, incorporating businesses, or completing

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<sup>149</sup> See Godsoe, *supra* note 135, at 143–44; Raymond H. Brescia, *Creative Lawyering for Social Change*, 35 GA. ST. U. L. REV. 529, 545 (2019) (discussing other factors, aside from whether or not the client is sympathetic, that impact an attorney's decision about pursuing a case, such as the cost of litigation on the client).

<sup>150</sup> MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2020).

<sup>151</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT r. 1.2, 1.4 (AM. BAR ASS'N 2020). Note that the engagement of a client is assumed and required in legal representation. As a client's agent, lawyers are in many instances ethically required to act only with their client's consent. *Id.*

<sup>152</sup> Sarat & Scheingold, *supra* note 129, at 4 (noting that cause lawyering often attenuates the lawyer-client relationship); see also Scott L. Cummings, *Rethinking the Foundational Critiques of Lawyers in Social Movements*, 85 FORDHAM L. REV. 1987, 2015 (2017) (discussing critiques of cause lawyering and arguing that the role of lawyers in social movements should be reframed).

<sup>153</sup> See, e.g., LAWHELP.ORG, <https://www.lawhelp.org/> (last visited Oct. 3, 2020).

other common legal tasks for both individual and business clients.<sup>154</sup> According to one source, a substantial percentage of business filings nationwide are now accomplished through use of on-line legal services.<sup>155</sup>

As on-line legal advising spreads, lawyers' engagement with individual stories confronts the need for generalizations and shortcuts facilitated by technology and demanded by consumers seeking quick and inexpensive answers to legal questions.<sup>156</sup> When consumers begin the process of obtaining legal assistance on-line from LegalZoom, for example, they share their story by responding to a series of short computer-generated questions.<sup>157</sup> Following that, they are offered the opportunity to purchase a packet of standardized documents and general legal information relevant to their issue.<sup>158</sup> For many, such generic assistance will be sufficient, particularly for sophisticated consumers or repeat players.<sup>159</sup>

However, because an in-person legal consultation is often wanted by consumers who seek reassurance and affirmation as much as expert advice, services such as LegalZoom do provide consumers with access to individual consultations with lawyers.<sup>160</sup> For LegalZoom, phone

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<sup>154</sup> LEGALZOOM, <https://www.legalzoom.com/> (last visited Oct. 3, 2020); ROCKET LAW., <https://www.rocketlawyer.com/> (last visited Oct. 3, 2020).

<sup>155</sup> William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 489 (2013) (according to SEC filings, twenty percent of all limited liability company filings in the State of California in 2012 were done not by lawyers, but by use of LegalZoom).

<sup>156</sup> See Chris Johnson, *Leveraging Technology to Deliver Legal Services*, 23 HARV. J. L. & TECH. 259, 262, 271, 275 (2009).

<sup>157</sup> See, e.g., Lauren Moxley, *Zooming Past the Monopoly: A Consumer's Rights Approach to Reforming the Lawyer's Monopoly and Improving Access to Justice*, 9 HARV. L. & POL'Y REV. 553, 557 (2015) (describing LegalZoom's business model).

<sup>158</sup> *Id.*; see *Legal DIY Websites Are No Match for a Pro*, CONSUMER REP. (Sept. 2012), <https://www.consumerreports.org/cro/magazine/2012/09/legal-diy-websites-are-no-match-for-a-pro/index.htm>.

<sup>159</sup> See Julee Fisher, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel*, 34 IND. L. REV. 121, 125–26 (2000); Catey Hill, *Don't Buy Legal Documents Online Without Reading This Story*, MARKETWATCH PERS. FIN. (Nov. 27, 2015, 9:29 AM), <https://www.marketwatch.com/story/dont-buy-legal-documents-online-without-reading-this-story-2015-11-23>.

<sup>160</sup> See *Attorney Advice*, LEGALZOOM, <https://www.legalzoom.com/attorneys/> (last visited Oct. 3, 2020); Lacey Ricks et al., *My Story: The Use of Narrative Therapy in Individual and Group Counseling*, 9 J. CREATIVITY IN MENTAL HEALTH 99 (2014) (discussing how telling one's story is often a way to move beyond a personal impasse and is a common technique in therapeutic situations).

consultations of thirty minutes per legal matter are available at a flat rate, with additional charges for assistance on more complex legal matters.<sup>161</sup> These consultations are not intended to create broader lawyer-client relationships, which would trigger additional ethical obligations on the part of the participating lawyers;<sup>162</sup> rather, the consultations are intended to provide generalized advice based on limited facts or limited scope representation focused on discrete issues.<sup>163</sup> LegalZoom attracts participating lawyers by stating that it will diversify their practice, provide a flexible schedule, and enable them to "help real people and make a real difference."<sup>164</sup>

A typical lawyer in the LegalZoom network is Attorney MG, the principal of a small Rhode Island firm that includes two other practitioners licensed in both Rhode Island and Massachusetts.<sup>165</sup> A graduate of a well-regarded law school in New Jersey, Attorney MG writes in his LegalZoom profile that "I pride myself on listening carefully to each client, providing them with sound legal guidance on their options, and explaining how they can overcome their challenges . . . . Over the years, I have learned that the best way to serve my clients is to listen first, and then to discuss solutions."<sup>166</sup>

Many of the attorney profiles on LegalZoom offer similar sentiments, and the great majority of consumers providing on-line ratings register positive experiences with the lawyers in the service.<sup>167</sup> Yet the on-line ratings provided by LegalZoom consumers indicate how difficult it can be to form a trusting relationship when the lawyer is consulting over the phone with an unfamiliar individual, and has little prior factual background on the issues involved.<sup>168</sup> The minority of consumers who offer lower ratings regularly comment on the feeling that the attorney on the phone is not listening intently, is

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<sup>161</sup> *Attorney Advice*, *supra* note 160.

<sup>162</sup> See Moxley, *supra* note 157, at 578–80.

<sup>163</sup> *Id.*

<sup>164</sup> *Join Our Attorney Network*, LEGALZOOM, <https://www.legalzoom.com/join-attorney-network.html> (last visited Oct. 3, 2020).

<sup>165</sup> The attorney's initials were used to avoid singling him out; his profile and information is typical of those on LegalZoom.

<sup>166</sup> *Meet the Attorney: MG*, LEGALZOOM (on file with the author).

<sup>167</sup> For access to reviews, see LEGALZOOM, <https://www.legalzoom.com/attorneys/> (on file with the author).

<sup>168</sup> Rating from Arri47 (on file with the author).



distracted, and is just watching the clock until thirty minutes marks the end of the session.<sup>169</sup>

As unbundling and on-line legal services proliferate, there are fewer and fewer occasions for relationship-building, deep listening, independent research of the client's legal issues, consultation with colleagues, and narrative development. Small wonder, then, that robot lawyers are nipping at the heels of the LegalZoom model, ready to provide legal advice even faster and at a cheaper price.<sup>170</sup>

Some in the legal profession are resisting these changes. For instance, on-line legal services have been the subject of numerous complaints based on allegations of the unauthorized practice of law (UPL) and fee-sharing with non-lawyers.<sup>171</sup> At the same time, however, several prominent commentators have urged the legal profession to move beyond technical complaints against on-line services and instead adjust to a new reality. For example, leading ethicists Gillian Hadfield and Deborah Rhode argue that rigid application of UPL rules frustrates innovation in the legal field.<sup>172</sup> They assert that "more open and flexible professional models" are available that would permit greater innovation in the delivery of legal services, opening the door to different levels of professional service and training while also maintaining important ethical norms.<sup>173</sup> Along the same lines, Ian Dodd, leader of the legal analytics group Premonition, argues that the legal profession should be prepared to shed the "knowledge" jobs associated

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

<sup>170</sup> See Cellan-Jones, *supra* note 6 (describing robot lawyers outperforming human lawyers in identifying viable insurance claim matters); Shannon Liao, 'World's First Robot Lawyer' Now Available in All 50 States, VERGE, (July 12, 2017, 2:44 PM), <https://www.theverge.com/2017/7/12/15960080/chatbot-ai-legal-donotpay-us-uk>.

<sup>171</sup> See, e.g., Raymond H. Brescia et al., *Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice*, 78 ALB. L. REV. 553, 583–85 (2015) (describing lawsuits challenging LegalZoom); Matthew Hector, *New Jersey Regulators Say Lawyers Can't Participate in Avvo Client-Linking Service*, 105 ILL. B.J. 12 (Sept. 2017); Alberto Bernabe, *Avvo Joins the Legal Market; Should Attorneys Be Concerned?*, 104 GEO. L.J. ONLINE 184 (2016).

<sup>172</sup> Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191, 1215 (2016).

<sup>173</sup> *Id.* at 1191, 1215–23 (outlining several options for alternative approaches to legal regulation in the American context).

with law and to retain the "wisdom" jobs, *i.e.*, jobs that require judgment, human empathy, and intuition.<sup>174</sup>

Developing the capacity for legal design is one way that lawyers are innovating and expanding their emphasis on the services that human lawyers are uniquely well-equipped to offer to clients.

## V. CONCLUSION: REFLECTING ON LEGAL DESIGN'S PLACE IN THE LEGAL PROFESSION

Parts II and III of this article presented contrasting models of using client stories in legal work—from traditional client-lawyer relationships to cause lawyering to on-line legal advice—to show that the legal profession has already accepted some innovations in how client stories are identified, developed, and utilized. Even though the origin of the legal design approach is very different than that of cause lawyering, legal designers are in some ways continuing on a curatorial path first pioneered by these social movement lawyers. Legal design's treatment of client narrative can be seen as part of a continuum with roots in more accepted modes of legal representation.<sup>175</sup>

Given that, can legal design really claim to be transformative for the legal profession?

The legal design movement's reliance on extreme user stories, data analytics, co-creation, and interdisciplinary problem-solving has yet to be widely scrutinized by either scholars or legal practitioners.<sup>176</sup> Rather, observers generally assume that the result of legal design processes will be innovation, and that innovation is, by definition, in the public interest and for the public good. For example, in 2014, Margaret Hagan wrote in the ABA Journal:

Design can be a main driver of legal innovation—in uncovering new services that lawyers can offer clients, defining new legal ventures that will serve consumers, and in creating new roles for lawyers to play. It

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<sup>174</sup> Cellan-Jones, *supra* note 6 (quoting Ian Dodd: "The knowledge jobs will go, the wisdom jobs will stay."). See generally RICHARD SUSSKIND, *THE END OF LAWYERS* 273 (2010) (opining that "solicitors and in-house lawyers whose work is largely routine are those most threatened" in the future).

<sup>175</sup> Anna-Marie Marshall & Daniel Crocker Hale, *Cause Lawyering*, 10 ANN. REV. L. & SOC. SCI. 301, 304 (2014) (describing the NAACP LDF campaign).

<sup>176</sup> A recent special issue of the journal "Design Issues," titled *The Rise of Legal Design*, is among the first extended scholarly treatments of legal design. *Special Issue: The Rise of Legal Design*, 36 DESIGN ISSUES 1 (2020).

also can reinvigorate lawyers' current work practice—building stronger relationships with clients, improving your communication with them, and putting a priority on the human experience of the clients and the lawyers.<sup>177</sup>

In the ABA Journal article, Hagan seems to be contemplating legal design activities that fall within Buchanan's first and second orders of design, using communications and product innovations to streamline and improve legal systems. This is the kind of legal design work that Hagan has pioneered at the Stanford d.school: institutional design challenges that bring innovative ideation techniques to bear on physical legal spaces, such as courthouses, and intellectual legal spaces, such as contracts, and therefore benefit from lawyers' input and expertise.<sup>178</sup>

Yet the role of legal design in the legal profession is still developing, and as it expands, the transformative potential becomes clearer. Baker McKenzie's adoption of legal design and the integration of design thinking into other firms' practices indicate a growing appetite for using legal design as a tool of client representation and innovation, moving along the continuum to Buchanan's fourth order of design.<sup>179</sup> Applying this frame, legal design might transform notions of legal representation by re-designing the legal environment. For instance, legal designers working with clients might develop new concepts of liability, new ideas for corporate entities, or new mechanisms for resolving disputes, within which the other orders of design—perhaps embodied in redesigned contracts and courthouses—might reside.

Even in a fourth order design process, however, legal design's fundamental human centeredness and its treatment of client stories

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<sup>177</sup> Margaret Hagan, *Design Thinking and Law: A Perfect Match*, L. PRAC. TODAY (Jan. 14, 2014), [https://www.americanbar.org/content/newsletter/publications/law\\_practice\\_today\\_home/lpt-archives/2014/january14/design-thinking-and-law/](https://www.americanbar.org/content/newsletter/publications/law_practice_today_home/lpt-archives/2014/january14/design-thinking-and-law/) [hereinafter *Design Thinking and Law*]; see also Robert Cullen, *Lawyers Can Innovate with Design Thinking*, L.J. NEWSL. (Mar. 2017), <http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/03/01/lawyers-can-innovate-with-design-thinking/?slreturn=20180201025754>.

<sup>178</sup> For example, the Projects page for the Stanford Design Lab lists projects such as improved legal communication and court messaging. *Our Projects*, STAN. DESIGN LAB, <http://www.legaltechdesign.com/our-projects/> (last visited Oct. 3, 2020).

<sup>179</sup> See Thomson, *supra* note 48. Other large firms active in this space include King & Wood Mallesons and Seyfarth Shaw. See Alber, *supra* note 49 (King & Wood Mallesons); Joshua Kubicki, *Why Design Matters to Seyfarth*, MEDIUM (Aug. 12, 2015), <https://medium.com/rethink-the-practice/why-design-matters-to-seyfarth-4765db7cbfa6>.

remain tethered to the overarching values of the legal profession.<sup>180</sup> A close parallel to the client-centeredness of legal practice, human-centeredness ensures that legal design is shaped around human needs while also making sure that the client's dignity and autonomy is recognized and respected.<sup>181</sup> Legal design deliberately departs from individual client stories, but at the same time, it incorporates the limitations on innovation and problem-solving that are implicit in the concepts of empathy and human-centeredness at the core of design thinking.<sup>182</sup> By insisting on human-centered design approaches, legal design methodologies substitute (or augment) client-generated narratives with close observations of human behavior and empathy with human experiences. Clients' individual stories may not be at the center of a legal design process, but clients' needs are. In that sense, client narratives are enhanced and more fully realized through the expansive process of legal design.

As the legal design movement goes forward, a focus on theorizing the nature of a human-centered legal design process will be critical to the continued legitimacy of the growing movement. Key points to be assessed are how human-centeredness can be ascertained, assured, and evaluated; how it can be more formally inserted into legal design processes; and whether there should be limits in how lawyers may, or may not, use clients' stories to inform their problem-solving on clients' behalf. It would not be too bold to suggest that a legal design process might itself be a key way to develop the framework needed to explore these questions.

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<sup>180</sup> For an excellent article addressing design thinking as a tool for re-envisioning legal systems, see Victor Quintanilla, *Human-Centered Civil Justice Design*, 121 PA. ST. L. REV. 745 (2017). The author focuses on design thinking as a way to improve civil justice rules and institutions, using the example of the Federal Rules of Civil Procedure. *Id.* However, he does not address legal design as an approach to legal practice and legal representation. *Id.*

<sup>181</sup> See, e.g., Richard Buchanan, *Human Dignity and Human Rights: Thoughts on the Principles of Human-Centered Design*, 17 DESIGN ISSUES 35 (2001).

<sup>182</sup> See, e.g., *Design Thinking and Law*, *supra* note 177; *Design Thinking*, *supra* note 46.