

Editorial

Enhancing Clinical Legal Education: Facing Challenges and Exploring Possibilities

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In our spring edition, readers will benefit from an analysis of the variety of ways in which clinical legal education can be enhanced. Contributors consider how social justice teaching can be developed and the role clinics can play in supporting access to justice in the local community. We also delve into ways in which clinics can enhance reflection, legal analysis and our students' ability to both understand and implement approaches which might build trust with their clients.

Firstly, Jacqueline Weinberg's article explores the challenges of instilling in students the notion that social justice is important. One challenge is the expansion of clinical legal education and growth of externships where students are increasingly placed in law firms where their clients do not face barriers to access to justice. She explores how these challenges can be overcome to enhance students' awareness of the importance of social justice and ensure that it remains a value they retain as future practitioners.

Another way in which social justice can be instilled in our students is through Exceptional Case Funding (ECF) clinics and this is the subject of Emma Marshall's article. She reflects on how setting up an ECF clinic offers students an opportunity to be involved with access to justice challenges in practice, whilst simultaneously improving access to legal aid by helping members of the public who need to access such funding. In her article she argues that ECF clinics serve an important function in supporting individuals to make applications, develop the students' legal skills and gain direct experience of access to justice issues.

Students also gain experience of access to justice issues from undertaking a clinical module which involves volunteer work at their local Citizens Advice. In an article from Lyndsey Bengtsson, Callum Thomson, and Bethany A'Court, the benefits and challenges of the module are explored through a semi structured interview with the academic responsible for the module's design and implementation. It is argued that the module not only develops students' professional skills, but also empowers students to better understand access to justice challenges and enables them to play a key part in supporting their local community.

Gemma Smyth, Dusty Johnstone, Jillian Rogin's article evaluates a trauma informed educational module for law students in clinical settings with clients who experience low income. Using open questions alongside a scenario, the authors analyse the effectiveness of the module and present their findings on how students interpret client behaviour before and after receiving trauma informed training. The results

indicate that the students' ability to identify indicators of trauma in their clinical work increased, as did their ability to understand and implement approaches which might build trust with clients.

Also considering ways in which the students' clinical experience can be enhanced, Omar Madhloom explores how unregulated law clinics can engage with immigration clients. Although unregulated law clinics in England and Wales are prohibited from directly offering immigration advice, he argues that this should not be a barrier to teaching immigration law. In this article, he provides an insight into how using Kant's ethics as a focus can provide students with a framework for identifying their moral duties and serve as a useful analytical tool for enhancing student reflection and analysis of the law.

Finally, we have a 'From the Field' Report from Rachel Dunn, Siobhan McConnell and Lyndsey Bengtsson which provides information about the creation of a new Policy Clinic network and an upcoming free workshop hosted by CLEO. The workshop will take place on 13th May 2021 via Zoom to share ideas for the network and future Policy Clinic/work ideas. The network aims to bring together academics who are, or want to, create impactful work through their teaching and engage with this kind education. All academics who are interested in this area, or who are involved in Policy Clinics/work and who wish to share best practice, are welcome to attend the workshop.

In our winter Special Issue, we benefited from an initial analysis of the experience of law teachers living through the unprecedented challenge of the global pandemic and rapidly adjusting their practice to meet the needs of both their students and clients. Providing a platform for us all to discuss the current challenges, and the extent to which they can be turned into opportunities, is this year's IJCLE conference. The conference is organised in partnership between the Global Alliance for Justice Education and Association for Canadian Clinical Legal Education and will take place on 16-18 June 2021.

The conference provides an opportunity to interact with fellow clinicians across the world in our new symposia. The conference also features the usual interactive workshops. For more information and instructions please see the attached link:

<https://northumbria.ac.uk/about-us/news-events/turning-challenges-into-opportunities>

The deadline for submission of your proposals and to take part in the conference is 7th May 2021. Delegates are encouraged to submit their articles to the IJCLE for review following this conference. We hope to build upon the Special Issue with a future edition which focuses on clinics and their response to the Coronavirus pandemic.

PREPARING STUDENTS FOR 21ST CENTURY PRACTICE: ENHANCING SOCIAL JUSTICE TEACHING IN CLINICAL LEGAL EDUCATION

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Abstract

Social justice has always played an important role in clinical legal education (CLE).¹ Clinicians are aware that students need to acquire the necessary legal skills and strategies related to client-centred lawyering, process choice and procedural justice. This paper shows that increasingly, despite clinicians' recognition of the value of teaching social justice in CLE, those who promote it face various challenges in instilling in students the notion that social justice is important. This paper discusses some of these challenges, including, that as experiential education expands, students are being offered clinical placements in the private sector where clients do not face the barriers in accessing justice similar to those in community settings. It therefore becomes imperative to encourage students to retain the notion that social justice is an important value. This paper makes suggestions for how these challenges can be

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¹ Refer to Adrian Evans et al, *Best Practices: Australian Clinical Legal Education* (Report for Office of Teaching and Learning, 2013). See also Weinberg, Jacqueline, 'Keeping Up with Change: No Alternative to Teaching ADR in Clinic. An Australian Perspective' (2018) *International Journal of Clinical Legal Education* 1.

overcome to enhance students' awareness of the importance of social justice and ensure that it remains a value they retain as 21st century practitioners.

Introduction

Students undertake CLE to learn what lawyers do in practice.² Students engage with real-life clients and manage their matters, learning practical legal skills under the supervision of qualified legal practitioners ('clinical supervisors').³ Students learn about the various technical, ethical and procedural obligations with which lawyers must comply. Notably, the value of law clinics extends well beyond their pedagogical function; these clinics play a vital role in the advancement of access to justice, as they serve disadvantaged and marginalised members of the community who could not otherwise afford a lawyer. During their placements at law clinics, students are encouraged to reflect critically on the nature and meaning of access to justice, including how and why it is constrained and how it might be fostered. Students are guided to develop the skills and strategies that are fundamental to their ability to manage clients and establish trusting lawyer–client relationships, all of which are essential to their future careers as legal practitioners with a 'justice' focus.

² Adrian Evans et al (n 1).

³ Adrian Evans et al (n 1). See also Jeff Giddings, *Promoting Justice through Clinical Legal Education* (Justice Press, 2013).

This paper argues that retaining a social justice mission in CLE has become challenging for clinicians today. These challenges arise for various reasons, including that experiential learning in law schools has expanded into the private sector, where clients do not face barriers to accessing justice similar to community contexts. As such, it becomes more difficult to instill in students the notion that social justice is an important value to retain. Also, students' interests in employability has lead them to focus on seeking work in the private sector with the risk that they develop the notion that social justice is no longer a value they need to aspire to. This paper argues that despite these challenges, social justice teaching remains an important component of CLE. As such, clinicians need to focus consciously on this teaching. This paper discusses some of the best-practice protocols and methods that can be used to enhance social justice teaching in CLE so that students develop a deep understanding of social justice, which in turn will strengthen their ability to manage client matters and enhance their lawyer–client relationships in their future legal practice. This paper begins by providing context for social justice teaching in CLE. It then goes on to define the concept of social justice, which is essential to better teach students the notion of 'justice readiness'.

Social Justice Teaching in CLE

A longstanding relationship exists between CLE and social justice, both nationally and internationally.⁴ As McKeown and Hall state, 'CLE has a long and persistent tradition of seeing the formation of "social justice" clinicians as a principal educational goal'.⁵ Since its inception, CLE has established the dual foci of providing access to justice to disenfranchised members of the community and teaching law students practical legal skills.⁶ The primary aim of CLE is for students to engage in clinical work while being educated about the practical function of the law.⁷ CLE enables students to experience the practice of law and thus gain an appreciation of how it functions in a real-world setting.⁸ Students' involvement in the legal process is intended to help them develop practical legal skills, including critical and analytical thinking, ethical conduct, social values and responsibility.⁹ These skills encompass several aspects that are captured under the umbrella term 'social justice'.¹⁰

⁴ Paul McKeown and Elaine Hall, 'If We Could Instil Social Justice Values Through CL, Should We?' (2018) 5(1) *Journal of International and Comparative Law* 143. See also Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011).

⁵ Paul McKeown and Elaine Hall, 'If We Could Instil Social Justice Values Through CL, Should We?' (2018) 5(1) *Journal of International and Comparative Law* 143. See also Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011).

⁶ McKeown and Hall (n 4). See also Frank Bloch and MRK Prasad, 'Institutionalising a Social Justice Mission for Clinical Legal Education: Cross-national Currents from India and the United States' (2006) 13 *Clinical Law Review* 165.

⁷ *Ibid.*

⁸ Refer to Evans et al (n 1).

⁹ *Ibid.*

¹⁰ *Ibid.* See also Deborah Rhode, 'Pro Bono in Principle and in Practice' (2003) 53(3) *Journal of Legal Education* 413; Dakalo Singo and Alicia Raymond 'Clinical legal education and social justice — A perspective from the Wits Law Clinic' (2018) *Stellenbosch Law Review* Volume 29, Part 2 p. 295-313.; Chris Ashford and Paul McKeown (eds), *Social Justice and Legal Education* (Cambridge Scholars, 2018).

South African clinical academics, Dakalo Singo and Alicia Raymond, suggest that clinical aims and learning outcomes should be designed to accommodate this approach.¹¹ However, Singo and Raymond warn that although clinicians often argue that social justice, as a concept, cannot be divorced from the clinical teaching methodology and is an inherent by-product of CLE programs, it is not enough to make vague averments that clinics and CLE play a role in social justice.¹² Rather, social justice must be specifically and overtly incorporated into and made a learning outcome of CLE programs.¹³

Byron supports this notion, suggesting that clinics perpetuate a learning environment in which law students either acquire or fail to acquire essential social justice teaching.¹⁴ To prevent the latter circumstance, clinicians need to ensure that the CLE program involves social justice teaching.¹⁵ This must be done 'at curriculum planning level together with the formulation of educational objectives and learning outcomes of both the law school or faculty and the CLE program'.¹⁶ Before social justice teaching can be

¹¹ Dakalo Singo and Alicia Raymond 'Clinical legal education and social justice — A perspective from the Wits Law Clinic' (2018) *Stellenbosch Law Review* Volume 29, Part 2 p. 295-313.

¹² Singo and Raymond (n 11).

¹³ Ibid. See also Spencer Rand, 'Teaching Law Students to Practice Social Justice: An Interdisciplinary Search for Help Through Social Work's Empowerment Approach' (2006) 13 *Clinical Law Review* 463.

¹⁴ IP Byron, 'The Relationship Between Social Justice and Clinical Legal Education: A Case Study of the Women's Law Clinic, Faculty of Law, University of Ibadan, Nigeria' (2014) 20 *International Journal of Clinical Legal Education* 568. See also YA Vawda, 'Learning from Experience: The Art and Science of Clinical Law' (2004) 29(1) *Journal of Juridical Science* 131.

¹⁵ Ibid. See also Stephen Wizner, 'Is Social Justice Still Relevant?' (2012) 32(2) *Boston College Journal of Law & Social Justice* 345.

¹⁶ Ibid 568.

included in the clinic curriculum, it is important to ensure that clinicians have a clear understanding of what social justice means.

Definitions of Social Justice

Given that the central aim of CLE is to instil social justice awareness in students, there is a need for clarity as to what social justice means.¹⁷ However, defining the term 'justice' and clarifying the concept 'social justice' with absolute authority may be an impossible task.¹⁸ Singo and Raymond argue that 'it is equally impossible for a clinician to teach law students meaningful lessons regarding social justice without clear understanding of what the term and concept entail'.¹⁹ It is thus necessary to identify distinguishable elements of social justice with as much clarity as possible to formulate a definition.²⁰

When reviewing definitions of social justice, it is clear that this term is a debated concept that is applied differently in different contexts.²¹ There are many perspectives of social justice. In the South African context, MacQuoid-Mason defines social justice as 'the fair distribution of health, housing, wealth, education, and legal resources on an affirmative action basis to disadvantaged members of the community'.²² Byron

¹⁷ Singo and Raymond (n 11) at 304.

¹⁸ *Ibid.*

¹⁹ *Ibid* 309.

²⁰ *Ibid.*

²¹ *Ibid.* Also refer to Evans et al (n 1) 98.

²² David McQuoid-Mason, 'Teaching Social Justice to Law Students Through Clinical Legal Education and Community Service: A South African Experience' in Mutaz Qafisheh and Stephen Rosenbaum (eds), *Experimental Legal Education in a Globalised World: The Middle East and Beyond* (Cambridge Scholars, 2016).

further suggests that social justice adheres to ‘the natural law that all persons, irrespective of ethnic origin, race or religion are to be treated equally and without prejudice’.²³ Singo and Raymond describe social justice as a ‘system of values and conscientiousness, predicated on an innate sense of justice and Ubuntu, which enjoin every socially responsible person to take positive action for the betterment of fellow human beings and society at large’.²⁴ Singo and Raymond stress that the ultimate aim is ‘to attain a basic set of entitlements for all people, which at the very least must include human dignity, freedom, equality, and justice for all members of society’.²⁵

In the US, Lawton posits that social justice is often viewed as a ‘code for socialism and as antithetical to classical liberal ideas of individual liberty’.²⁶ Social justice is viewed as ‘normative’, which suggests that ‘laws and policies should be designed so as to create a just and equitable society’.²⁷ Bellow and Kettleon hold the view that a public interest lawyer as ‘an attorney who provides subsidised legal services, on a full-or almost full-time basis, to those who would otherwise be under- or unrepresented’.²⁸ Similarly, Solorzano and Yosso believe that advocating for social justice means

²³ Byron (n 14) 567.

²⁴ Singo and Raymond (n 11) 302.

²⁵ Ibid.

²⁶ Julia Lawton, ‘The Imposition of Social Justice Morality in Legal Education’ (2016) 4 *Indiana Journal of Law and Social Equality* 57.

²⁷ Ibid 58.

²⁸ Gary Bellow and Jeanne Kettleon, ‘From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice in Lawyer’s Ethics and the Pursuit of Social Justice’ in Susan D Carle (ed), *Lawyers Ethics and The Pursuit of Social Justice* (New York University Press, 2005). See also Michelle S Jacobs, ‘Pro Bono Work and Access to Justice for the Poor: Real Change or Imagined Change?’ 48 *Florida Law Review* 509.

'transforming the system by changing the structures of the system, which disempower underrepresented minority groups'.²⁹

According to Evans et al., in Australia, the idea of social justice is 'comfortably accepted as a legitimate progressive social policy position'. There is a general, contemporary idea of social justice as:

The provision to all people of basic human needs including income, housing, education and health care; equal enjoyment of human rights, including non-discrimination, freedom of expression and movement, the right to liberty and the right to live free from violence; and some redistribution of resources to maximise the position of the worst-off.³⁰

Whatever definition of social justice one adopts, certain distinguishable elements are evident: equality, human dignity, freedom, basic education, healthcare and justice. The notion that society should redistribute wealth and accept some responsibility for the wellbeing of disadvantaged members of society is also fundamental to any such definition.³¹ Further, social justice means that able members of society should challenge political, economic, societal, legal and other structures that oppress the less

²⁹ Daniel Solorzano and Tara Yosso, 'Maintaining Social Justice Hopes within Academic Realities: A Freirean Approach to Critical Race/LatCrit Pedagogy' (2000) 78(4) *Denver University Law Review* 595.

³⁰ Evans et al (n 1) 98.

³¹ *Ibid.*

advantaged.³² As Singo and Raymond state, 'any definition of social justice would therefore need to incorporate at least the aforementioned elemental factors'.³³

CLE and Community Legal Centres

The longstanding association between CLE and community legal centres (CLCs) has contributed to the notion that social justice has its origins in the fight against poverty, injustice and the underrepresentation of minority interests in the legal process.³⁴ Clinics fit well within CLCs, as CLCs are 'committed to striving for equitable access to the legal system and justice, and the equal protection of human rights'.³⁵ Three essential aspects of CLC work are the provision of legal advice and the conduct of casework for disadvantaged clients and communities, the provision of community legal education, and the promotion of law and policy reform.³⁶ CLCs mostly provide legal assistance with tenancy, credit and debt, administrative law, social security, criminal law, family law and domestic violence matters.³⁷ Students practising in legal clinics associated with CLCs are exposed to the law as it affects disadvantaged clients. These clinics take a holistic and interdisciplinary approach to understanding clients'

³² Ibid.

³³ Singo and Raymond (n 11) 300.

³⁴ See Jeremy Cooper and Louise Trubek, 'Social Values from Law School to Practice: An Introductory Essay' in Jeremy Cooper and Louise Trubek (eds), *Educating for Justice: Social Values and Legal Education* (Ashgate, 1997) 5. See also Alicia Alvarez, 'Community Development Clinics: What Does Poverty Have to Do with Them?' (2007) 34 *Fordham Urban Law Journal* 1269.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid. See also National Association of Community Legal Centres Australia, *Annual Report 2012/13* (Web Page, 2016) <perma.cc/9W9H-76KL>.

legal problems, whereby several professionals (from social workers to business advisors) help clients to achieve their goals.³⁸ Teaching students within the community context encourages them to think critically about the role of law in society and how it can be used to further social justice.³⁹

Walsh adopts the view that CLE programs are one of the primary forums in which social awareness among students can be promoted.⁴⁰ Walsh notes that CLE exposes students to people facing challenges, and students come to learn of the 'multiple layers of disadvantage faced by these people, including non-legal ones'.⁴¹ By working with and taking responsibility for disadvantaged clients in CLE programs, students may begin to feel socially responsible for disadvantaged people in general.⁴² Walsh further notes that CLE introduces students to 'role model public interest lawyers and provides students with proof that they are able to use their knowledge to promote social justice, and to assist those in need'.⁴³

³⁸ See Anna Cody and Barbara Schatz, 'Community Law Clinics: Teaching Students, Working with Disadvantaged Communities' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011) 167.

³⁹ *Ibid* 168.

⁴⁰ Tamara Walsh, 'Putting Justice Back into Legal Education' (2007) 17(1-2) *Legal Education Review* 119.

⁴¹ *Ibid* 121. See also Irene Styles and Archie Zariski, 'Law Clinics and the Promotion of Public Interest Lawyering' (2001) 19 *Law in Context* 65.

⁴² Walsh (n 40). See also Stephen Wizner, 'Beyond Skills Training' (2001) 7 *Clinical Law Review* 327.

⁴³ Walsh (n 40). See also Irene Styles and Archie Zariski, 'Law Clinics and the Promotion of Public Interest Lawyering' (2001) 19 *Law in Context* 65.

Although the nature of the relationship between CLE and community settings has meant that social justice has commonly been viewed within the context of the economically disadvantaged members of society; it has become apparent this context might need to be broadened. Some students may practice in private settings, where clients do not face the obstacles to accessing legal service that are prevalent in community settings. It becomes a challenge then to ensure that such students are still aware of the value of applying a social justice approach to their practice.

Challenges of Social Justice Teaching

Historically, both in Australia and worldwide, CLE has required students to engage in live-client experiential learning by providing pro bono legal services to low-income clients.⁴⁴ In the US, law schools have invested heavily in instilling a ‘social justice morality’ in their students.⁴⁵ Lawton notes that they have done so in their ‘pro bono requirements’,⁴⁶ ‘experiential learning opportunities’⁴⁷ and by providing more funding to students working in the public interest than to those working in business

⁴⁴ Refer to Richard Grimes, ‘Legal Literacy, Community Empowerment and Law Schools—Some Lessons from a Working Model in the UK’ (2003) 37 *Law Teacher* 273; Paul Bergman, ‘Reflections on US Clinical Education’ (2003) 10(1) *International Journal of the Legal Profession* 109; Peggy Maisel, ‘Expanding and Sustaining Clinical Legal Education in Developing Countries: What We Can Learn from South Africa’ (2007) 30(2) *Fordham International Law Journal* 374; Frank Bloch and Mary-Anne Noone, ‘Legal Aid Origins of Clinical Legal Education’ in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011); Jeff Giddings, *Promoting Justice through Clinical Legal Education* (Justice Press, 2013).

⁴⁵ Refer to Peter Joy, ‘Political Interference in Clinical Programs: Lessons from the US Experience’ (2005) 8 *International Journal of Clinical Legal Education* 83; Lawton (n 26) 67.

⁴⁶ Lawton (n 26) 67.

⁴⁷ *Ibid.*

disciplines.⁴⁸ Such investments appear to reflect law schools' attempts 'to convince law students of the validity of working in the public interest for social justice'.⁴⁹ More recently, US law schools have recognised that they may need to revise the focus of their education mission from developing 'legal thinkers' to producing 'job-ready' graduates.⁵⁰

Similarly, in Australia, a major review of higher education in 2008 and the government's response to this review acknowledged the need for universities to prepare graduates for the world of work.⁵¹ Experiential education in Australia has traditionally involved students engaging in live-client clinics with a poverty law focus; however, more recently, there has been a growth in offerings such as externship clinical placement programs⁵² and work-integrated learning (WIL),⁵³ mostly in the private sector. In both externship placements and WIL, students work in host

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Refer to David Rigg, 'Embedding Employability in Assessment: Searching for the Balance Between Academic Learning and Skills Development in Law: A Case Study' (2013) 47 *The Law Teacher* 404.

⁵¹ Refer to Denise Bradley et al, *Review of Australian Higher Education: Final Report* (Canberra, 2008); Giddings, J. & Weinberg, J. (2020). Experiential legal education: Stepping back to see the future. In C. Denvir (Ed.), *Modernising legal education* (pp. 38–56). Cambridge University Press.

⁵² Refer to Evans et al (n 1) ch 2. Evans et al refer to the term 'externships' to describe 'the form of clinical legal education where individual students are placed in an independent legal practice, community legal centre, government agency or not-for-profit organisation': at 56.

⁵³ Evans et al (n 1) refer to 'work-integrated learning' as 'a curriculum design, which combines formal learning with student exposure to real professional, work or other practice settings': at 43. For a broader discussion on the program risks of WIL, refer to Craig Cameron et al, 'The Program Risks of Work-Integrated Learning: A Study of Australian University Lawyers' (2018) 40(1) *Journal of Higher Education Policy and Management* 67. See also Janice Orrell, *Good Practice Report: Work-integrated Learning* (Australian Learning and Teaching Council, 2011); Stephen Billett, *Integrating Practice-based Experiences into Higher Education* (Springer, 2015).

organisations to gain the knowledge, understanding and skills considered essential to workplace practices.⁵⁴

Due to the expansion of experiential learning in law schools and new clinical externship opportunities both nationally and internationally, students are being offered a variety of clinical placements in community contexts and the private sector. Students can choose to participate in clinics at which they will perform pro bono legal services with a social justice focus or in the private sector. Notably, clients in the private sector do not generally face the same barriers to accessing justice as those in community settings. Students may choose externship placements in private settings for several reasons, including that they simply are not interested in engaging in social justice.⁵⁵ After all, students have their own legitimate interests for attending law school;⁵⁶ for example, they may wish to help the vulnerable and impoverished or to pursue careers in corporate law, providing legal services to the privileged.⁵⁷ According to Lawton, American law schools often accentuate this notion by creating a competitive environment in which the ‘best’ students are those who receive the ‘best’ grades and are offered the most coveted jobs in large private law firms.⁵⁸ As Lawton posits, ‘students cannot accept sole responsibility for these choices as law schools are

⁵⁴ Refer to Evans et al (n 1).

⁵⁵ Refer to Lawton (n 26) 70.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

subtly perpetuating this preference for working in the private industry by focusing courses on individual needs rather than the public good'.⁵⁹

It therefore appears that although clinical educators have long held the belief that the value of clinical experience for students is in the exposure they gain by interacting and engaging with social justice issues, the expansion of experiential education into the private setting has caused some academics to question whether a new perspective is needed.

Is a New Perspective Needed?

Lawton contends that clinicians should guard against 'indoctrinating students' or 'imposing [their] social justice moralities on law students'.⁶⁰ She cautions legal educators against 'pushing students into a particular practice area based on the educators' moralities'⁶¹ and notes that they should expand students' ideas and train them to see context and recognise the need for perspective.⁶² Similarly, McKeown and Hall warn clinicians 'not to impose [their] own moral perspective on [their] students but to provide students with the framework to critique the world in which they live and strive to develop their own moral position'.⁶³ Students should be offered opportunities for exposure to different areas of law 'to determine for themselves their

⁵⁹ Ibid 71.

⁶⁰ Lawton (n 26) 73.

⁶¹ Ibid.

⁶² Ibid.

⁶³ McKeown and Hall (n 4) 179.

morality and what role they want this morality to play in their professional lives'.⁶⁴ This is arguably even more crucial with respect to courses on private law and the expansion of experiential learning in the private sector.

Kosuri argues that if increased experiential learning opportunities for students are a real objective of law schools, and clinics are viewed as 'the pinnacle of those opportunities, then broadening the portfolio of clinical offerings to include those that are not focused on social justice should be a valid proposition'.⁶⁵ Kosuri stresses that law school clinics can no longer presume that a social justice mission (to represent the indigent and underrepresented about poverty law issues) is the only legitimate goal for clinic clients and matters;⁶⁶ rather, leaders of clinical programs should accommodate different models of clinics, thereby expanding clinical education to more students and 'unleashing the next phase of innovation and creativity in law school education'.⁶⁷ Clinical opportunities should be provided to every interested law student, and the notion that clinics are only for 'public interest' students or special factions of students should be abandoned.⁶⁸ Kosuri views the greatest contribution of CLE as not merely 'creating a haven for public interest-oriented law students or in promoting social justice causes, but rather in a methodology that teaches students how

⁶⁴ Ibid.

⁶⁵ Praveen Kosuri, 'Losing My Religion: The Place of Social Justice in Clinical Legal Education' (2012) *Boston College Journal of Law and Social Justice* 338.

⁶⁶ Ibid.

⁶⁷ Ibid 337.

⁶⁸ Ibid 338.

to learn from experience, whatever that experience may be'.⁶⁹ For example, in a 'finance clinic', students may represent businesses seeking to acquire early-stage investment from financial sponsors.⁷⁰ Kosuri acknowledges that this type of clinic is 'devoid of traditional social justice issues',⁷¹ but suggests that it could still be viewed as a 'legitimate clinical offering providing students with a rich experience learning what motivates people and how to align interests to achieve a desired outcome'.⁷² Kosuri is not advocating that social justice be removed from all clinics, but that there should be a more 'expansive and inclusive view of what clinics can do for law students'.⁷³ Finally, Kosuri adds that 'clinicians should strive to provide a portfolio of opportunities that appeal to a wide array of students as more students are driven to clinics looking for competitive advantages when they enter the workforce'.⁷⁴

Not all scholars agree with Kosuri's view that certain clinical settings (e.g., externships and those with a more corporate focus) are 'devoid' of social justice considerations. Clinical educators, like Cole, have suggested that these clinics can still support a social justice mission for the following three reasons:

⁶⁹ Ibid. See also Jeanne Charn, 'Service and Learning: Reflections on Three Decades of the Lawyering Process at Harvard Law School' (2003) 75 *Clinical Law Review* 77–8; Quintanilla et al, 'Experiential Education and Access-to-Justice within U.S. Law Schools: Designing and Evaluating an Access-to-Justice-Service Learning Program within the First-Year Curriculum' (2019) 7(1) *Indiana Journal of Law and Social Equality* 1.

⁷⁰ Kosuri (n 65) 338.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

First, many people experience the need for social justice on a daily basis. Second, most law students enter law school open to the idea that part of being a lawyer is serving the public good. Third, is the view held by most lawyers, law teachers, and law schools that a lawyer's role is defined, at least in part, by his or her obligation to serve the public and work towards social justice.⁷⁵

According to Cole, it is the role of the supervising lawyer to commit to social justice and persuade students of the value and practicality of social justice work.⁷⁶ Horrigan takes this point further, suggesting not only that social justice considerations are central to corporate work, but also that lawyers have an obligation to consider the relationship between big business and poverty; they may even have an obligation to fight poverty.⁷⁷ As Horrigan states:

⁷⁵ Liz Ryan Cole, 'A Special Focus to Help Understand and Advance Social Justice' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011) 327. See also JP Ogilvy, Leah Wortham and Lisa Lerman (eds), *Learning from Practice: A Professional Development Text for Legal Externs* (Thomson/ West, 2007)

⁷⁶ Cole (n 88).

⁷⁷ Bryan Horrigan, 'The Role of Lawyers in Steering Corporate Governance and Responsibility towards Addressing Social Injustice and Inequality' in PD Maynard and N Gold (eds), *Poverty, Justice and The Rule of Law: Report of the Second Phase of the IBA Presidential Task Force on the Financial Crisis* (International Bar Association, 2013) 139. See also Bryan Horrigan, *Corporate Social Responsibility in the 21st-century: Debates, Models and Practices Across Government, Law and Business* (Edward Elgar, 2012).

It is the role of the global legal profession to embrace action on poverty abroad and at home as an integral part of the profession's own socio-ethical, professional and even legal responsibilities.⁷⁸

Horrigan views it as the responsibility of lawyers 'to connect the threads between what lawyers and business enterprises do (or not do) and the endgame of alleviating and even eliminating poverty'.⁷⁹ According to Horrigan, there is no reason for private lawyers and other businesses not to care about 'what happens to people afflicted by poverty';⁸⁰ rather, their focus should provide a 'new lens' that allows lawyers and others to 'see some conventional aspects of their work in an unconventional perspective'.⁸¹ Horrigan encourages lawyers to reframe their lawyerly roles and responsibilities in fighting poverty and use their roles in the public, private and community sectors to make a difference to poverty.⁸² This may include connecting their work as lawyers in areas of corporate governance and finance to make a difference to poverty alleviation.⁸³ Arguably, Horrigan's focus on fighting poverty aligns with the social justice ethos of CLE. It follows that if lawyers in corporate and private legal settings adopt Horrigan's suggestions and reframe their roles, then students placed in these settings will benefit from exposure to the social justice

⁷⁸ Horrigan (n 77) 143.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid* 144.

mission. In such circumstances, clinicians with views similar to Kosuri will have to reconsider whether a 'finance clinic' should (or actually can) be completely 'devoid of traditional social justice issues'.⁸⁴

Having regard to these arguments and the challenges clinicians may face to the education of students about social justice, there are ways these obstacles can be overcome. While it may not be possible to expect all students to engage in clinical placements that are focused entirely on social justice nor that the lawyers with whom they engage will be attending to such issues, nonetheless, instilling in students the message that social justice is a system of values and a consciousness that is predicated on an innate sense of justice remains important.⁸⁵

Social Justice Teaching Remains Important

If social justice is to remain one of the central missions of CLE, students should be encouraged to be value-driven or possess a sense of social justice regardless of where they receive their clinical teaching.⁸⁶ The risk of not doing so is that students will fail to appreciate that social justice is important and assume that a social justice ethos is

⁸⁴ Kosuri (n 65) 331.

⁸⁵ Refer to Singo and Raymond (n 11) 302. See also Bryan Horrigan, 'Designing and Implementing an Enhanced Clinical Program in the Age of Disruption. Part One: The Environment for Clinic' (2019) 26(2) *International Journal of Clinical Legal Education* 75; Bryan Horrigan, 'Designing and Implementing an Enhanced Clinical Program in the Age of Disruption. Part Two: The Environment for Clinic' (2020) *International Journal of Clinical Legal Education* 204.

⁸⁶ Singo and Raymond (n 11). See also Supporting Social Justice Through Student Supervision Practices' in Chris Ashford & Paul McKeown (eds), *Social Justice and Legal Education*, 2018, Cambridge Scholars Publishing, 43-64.

essentially an optional attribute. In law schools in which the curriculum focuses on corporate units (and other units lacking in social justice orientation), Singo and Raymond warn that there is a 'tacit institutional discouragement for law students to pursue social justice ambitions'.⁸⁷ This ultimately leads students to believe that a successful law graduate is someone who gains a position in a corporate and/or commercial private law firm rather than a law firm focusing on social justice issues.⁸⁸ It follows that if social justice is to retain its prominence in clinical teaching, no matter whether students engage in poverty-focused live-client clinics or private law firms, they should be made aware that the values that underlie social justice are values that any legal practitioner (and responsible member of society) should possess.⁸⁹ These are values that are essential for every socially responsible person to hold for the betterment of fellow human beings and society at large.⁹⁰ Students engaging in clinical programs need to be provided with opportunities to develop a sense of social responsibility and to recognise injustice in society and the legal system.

Byron supports this notion, suggesting:

CLE inculcates in students a sense of professionalism, a spirit of community lawyering and social justice. Lawyers should see themselves as trustees of

⁸⁷ Ibid 310.

⁸⁸ Ibid. See also Lawton (n 26).

⁸⁹ Singo and Raymond (n 11).

⁹⁰ Ibid 302.

justice. On them lies the fiduciary responsibility to see to it that the legal system provides, as far as is practically possible, justice for all citizens, not only for the rich and powerful. On the other hand, law teachers should realise that the students they teach will be advocates, judges, political persons and so they have a responsibility through their teaching to ensure their students commit to social justice.⁹¹

In this way students become justice ready (i.e., able to provide options for their clients to access justice).⁹² Social justice teaching is aligned with preparing students for justice readiness. As Aiken explains:

Everything a lawyer does has to do with justice or injustice, sometimes on the surface and sometimes in the background. Justice is about doing, and clinicians are among the only faculty in law schools who teach students how to 'do' law. Therefore, clinical faculty ought to pull back the curtain and reveal the injustice; they ought to teach within a context of justice, showing the effect that all lawyers have on society.⁹³

⁹¹ Byron (n 14) 567.

⁹² Refer to Jeremy Cooper and Louise Trubek (eds), *Educating for Justice: Social Values and Legal Education* (Ashgate 1997); Stephen Wizner and Jane Aiken, 'Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice' (2004) 73 *Fordham Law Review* 997; Evans et al (n 3) 98.

⁹³ Jane Aiken, 'The Clinical Mission of Justice Readiness' (2012) 32 *Boston College Journal of Law & Social Justice* 233.

Aiken suggests that law schools need to do more than strive to teach students to be 'practice ready';⁹⁴ but rather students need to be 'justice ready'—to be aware of injustice and committed to fighting it in their legal careers.⁹⁵ Justice-ready graduates can recognise injustice and appropriately evaluate the consequences of their actions in a way that mere practice readiness does not teach.⁹⁶ Clinics must move students beyond being just practice ready and prepare them 'to identify injustice when they see it and develop the skills and strategic thinking to remedy it'.⁹⁷ Clinicians must determine which skills and knowledge will improve students' ability to identify injustice.⁹⁸ Further, they must develop and implement teaching interventions to ensure that students acquire these skills.⁹⁹ As Aiken concludes, 'clinicians can help their students make a commitment to justice in their lives as lawyers. The tools just need to be refined'.¹⁰⁰

Within the clinical context, structured methods and models can be implemented to develop and maintain a more uniform approach to focus on issues of social justice. As supervision plays a crucial role in clinical teaching, an effective way to implement these methods and models is to support supervisors to focus on issues relating to access to justice and social justice.

⁹⁴ Ibid.

⁹⁵ Ibid 234. See also Jane Aiken, 'Provocateurs for Justice' (2001) 7 *Clinical Law Review* 294.

⁹⁶ Aiken (n 93).

⁹⁷ Ibid 235.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid 236.

The Role of Supervision in Social Justice Teaching

Supervision is viewed as the cornerstone of best practice in CLE.¹⁰¹ Giddings posits that effective supervision is ‘integral to harnessing the rich learning potential of clinic experiences and as such plays a valuable role in providing students with a deeper understanding of social justice concepts and the complex nature of public policy debates’.¹⁰² Clinics are particularly well suited to generating discussions relating to concepts such as fairness, justice, due process and ethical awareness.¹⁰³ Supervisors have a critical role in guiding students to understand the implications of the “disorienting moments” they encounter where a social justice-oriented clinical experience challenges student understandings, particularly the impact of laws on marginalised people.¹⁰⁴ Davys and Beddoe identify the need to focus on supervision as a ‘reflective learning process rather than one of direction and audit’.¹⁰⁵ According to these writers, supervision should involve a process of ‘teaching a way of thinking rather than teaching a set of techniques’.¹⁰⁶ Supervisors can use frameworks that

¹⁰¹ Refer to Jeff Giddings, *Promoting Justice through Clinical Legal Education* (Justice Press, 2013). See also Jeff Giddings, ‘The Assumption of Responsibility: Supervision Practices in Experimental Legal Education’ in Mutaz Qafisheh and Stephen Rosenbaum (eds), *Global Legal Education Approaches: Special Reference to the Middle East* (Cambridge Scholars, 2012).

¹⁰² Jeff Giddings, ‘It’s More Than a Site: Supporting Social Justice Through Student Supervision Practices’ in Chris Ashford and Paul Mckeown (eds), *Social Justice and Legal Education* (Cambridge Scholars, 2018).

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.* See also Quigley, Fran, ‘Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law Clinics’ (1995) 2 *Clinical Law Review* 37, Susan Brooks, ‘Using a Communication Perspective to Teach Relational Lawyering’ (2015) 15 *Nevada Law Journal* 477.

¹⁰⁵ Allyson Davys and Liz Beddoe, ‘The Context of Professional Supervision’ in Allyson Davys and Liz Beddoe (eds), *Best Practice in Professional Supervision: A Guide for the Helping Professions* (Jessica Kingsley, 2010) 18.

¹⁰⁶ *Ibid.* 20.

recognise and address the social justice dimensions of both their supervision role and the legal work in which they engage.¹⁰⁷

Within the clinical setting, students are given opportunities to learn legal skills to promote access to justice; however, if they are to explore larger issues of systemic injustice, deep exploration and learning is required.¹⁰⁸ Students need to engage in critical reflection and introspection to develop greater insight into, make a long-term commitment to and take responsibility for justice.¹⁰⁹ Reflection is a critical step in the transformative learning process.¹¹⁰ Aiken stresses that clinicians must teach 'reflective skepticism' in which students learn 'to understand that knowledge is constructed, and to gain the ability to challenge assumptions and explore alternatives'.¹¹¹ To provoke reflective thinking, clinicians identify cases that are likely to stimulate transformative learning and create opportunities for students to reflect on their experiences.¹¹² By

¹⁰⁷ Ibid.

¹⁰⁸ Refer to Liz Curran, Judith Dickson and Mary-Anne Noone, 'Pushing the Boundaries or Preserving the Status Quo? Designing Clinical Programs to Teach Law Students a Deep Understanding of Ethical Practice' (2005) 8 *International Journal of Clinical Legal Education* 104; Barry, Margaret Martin, Jon C Dubin and Peter Joy, 'Clinical Education for This Millennium: The Third Wave' (2000) 7 *Clinical Law Review* 1.

¹⁰⁹ Aiken (n 93).

¹¹⁰ Ibid.

¹¹¹ Ibid 288. See also Kevin Kerrigan, 'How Do You Feel About This Client?' A Commentary on the Clinical Model as a Vehicle for Teaching Ethics to Law Students' (2007) *International Journal of Clinical Legal Education* 37; Anna Cody, 'What Does Legal Ethics Teaching Gain, if Anything, from Including a Clinical Component?' (2015) 22(1) *International Journal of Clinical Legal Education* 1.

¹¹² Aiken (n 93).

reflecting, students can critically analyse their current assumptions to determine if their world view is accurate.¹¹³

A structured approach to supervision ensures that clinical teaching focuses on social justice learning.¹¹⁴ Without clear guidance and support, students will struggle to appreciate the complexities and practicalities of the environment in which they are working.¹¹⁵ This may be accentuated when students are dealing with particularly challenging matters and adopt unsuitable practices as a result.¹¹⁶ Clients may suffer if students fail to gather key information and address all of the legal issues.¹¹⁷ Further, without clear and supportive supervision, students may receive insufficient feedback and are unlikely to develop reflective practices.¹¹⁸ As Evans et al. observe, 'the confidence that builds from being effectively supported and appropriately challenged is critical to clinic students'.¹¹⁹

¹¹³ Ibid, citing Michael Christie et al, 'Putting Transformative Learning Theory into Practice' (2015) 55(1) *Australian Journal of Adult Learning* 11.

¹¹⁴ Ibid 1255. See also Allyson Davys and Liz Beddoe, *Best Practice in Professional Supervision: A Guide for the Helping Professions* (Jessica Kingsley, 2010).

¹¹⁵ Giddings, Jeff and Michael McNamara, 'Preparing Future Generations of Lawyers for Legal Practice: What's Supervision Got To Do With It?' (2014) 37(3) *University of New South Wales Law Journal* 1226

See also Ross Hyams, Susan Campbell and Adrian Evans, *Practical Legal Skills* (Oxford University Press, 4th ed, 2014).

¹¹⁶ Giddings and McNamara (n 115).

¹¹⁷ Ibid. See also Barry, Margaret Martin, Jon C Dubin and Peter Joy, 'Clinical Education for This Millennium: The Third Wave' (2000) 7 *Clinical Law Review* 138.

¹¹⁸ Giddings and McNamara (n 115).

¹¹⁹ Evans et al (n 1).

Evans et al. stress that for supervisors to provide students with clear guidance, they need to be aware of the best methods for teaching those skills and strategies.¹²⁰ Clinical pedagogy encourages clinical educators to focus on promoting those learning opportunities that are particularly well suited to clinic contexts, including ethics and values, skills development and legal problem-solving.¹²¹ To promote structured learning, the clinical learning framework emphasises the importance of program design, particularly the articulation of clear objectives and assessment criteria and the effective provision of feedback.¹²²

Strategies for Social Justice Teaching

When interacting with students in the clinical setting, it is essential for supervisors to actively engage with students about social justice in order to ensure students are made aware of their clients' needs and interests and, in this way, understand their clients' circumstances more deeply.¹²³ Supervisors should discuss with their students social justice issues that could impact on clients' options for dispute resolution such as societal concerns, equity, self-determination and social responsibility.¹²⁴ These discussions might include the clients' socio-economic circumstances, whether the

¹²⁰ Ibid 124.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Refer to Cooper, Jeremy, 'Social Values from Law School to Practice: An Introductory Essay' in Jeremy Cooper and Louise Trubek (eds), *Educating for Justice: Social Values and Legal Education* (Ashgate, 1997) 5.

¹²⁴ Douglas, Susan, 'Humanising Legal Education: Lessons from ADR' (2012) 23(3) *Australasian Dispute Resolution Journal* 216.

clients are literate, can speak English as a first language or require special communication methods, all developing the students' awareness of the clients' lack of access to justice and social inequality. Supervisors engage with students on a level beyond skills training to involve them in discussions regarding inequality of resources, and encouraging a sense of responsibility for using the law to challenge injustice and to provide options for their clients to access justice.¹²⁵

For the purposes of providing an example of how social justice teaching can be enhanced within the clinical context, we can look at a common matter encountered in law clinics, where a client seeks advice regarding a traffic infringement.

Traffic Infringement Case Study

Factual scenario: A woman visits the CLC for advice about a parking infringement she has received. The client is a single mother with four children, all under 18. The client had received a fine of \$480 when she had collected her two youngest children (aged five and seven) from school and exceeded the 40km/hr speed limit outside the school (she was recorded travelling at 60km/hr). The client cannot afford to pay the fine and is seeking assistance in having the fine waived. The client is distressed during the interview and seeks advice on how to deal with this matter.

¹²⁵ Douglas, Kathy, 'Shaping the Future: The Discourses of ADR and Legal Education' (2008) 8(1) *Law and Justice Journal* 118.

In this instance, the supervisor guides the student to apply critical and analytical thinking, by encouraging the student to look closely at the client's needs and adopt a client-centred approach. The supervisor engages with the student about the client's social and financial circumstances that may have contributed to the infringement, and her consequent ability to pay the fine. Other factors to be considered include, her ability to understand the legislation and the legal process and her inability to speak fluent English, which impacts on her ability to write a letter to get a review of the fine and waiver. The supervisor encourages the student to consider whether the client requires any support from a financial counsellor, social worker or external agency during the process. Additionally, the supervisor might provide the student with strategies for communicating the advice to the client. This includes addressing any language-related constraints and whether the client might require an interpreter to better comprehend the advice.¹²⁶

The supervisor addresses the barriers to access to justice, such as the client's socio-economic circumstances, communication difficulties, and general inability to understand and navigate the legal system.¹²⁷ In this way, the supervisor engenders in the student an understanding of the hardships the client faces due to her

¹²⁶ Refer to Giddings, Jeff, 'The Assumption of Responsibility: Supervision Practices in Experimental Legal Education' in Mutaz Qafisheh and Stephen Rosenbaum (eds), *Global Legal Education Approaches: Special Reference to the Middle East* (Cambridge Scholars, 2012).

¹²⁷ Giddings, Jeff, 'It's More than a Site: Supporting Social Justice Through Student Supervision Practices' in Chris Ashford and Paul McKeown (eds), *Social Justice and Legal Education* (Cambridge Scholars, 2018)

circumstances and focuses on the client's interests or needs, in order to explore alternative options to litigation for resolving the client's matter. Stephen Wizner cautions:

It [is] not enough to simply provide students with the opportunity to experience the real world through the representation of low-income clients [it is important] to also sensitise the students as to what they were seeing, to guide them to a deeper understanding of their client's lives and to help students develop a critical consciousness imbued with a concern for social justice.¹²⁸

To improve supervisors' fostering of students' awareness of social justice, supervisors must first appreciate the central role they play in helping students learn in a clinic or placement environment¹²⁹ and in explaining the limitations of the law and legal processes.¹³⁰ Giddings suggests that training workshops 'that aim to place effective supervision at the forefront of experiential learning for supervisors are a valuable opportunity for building relationships between law schools and the supervisors involved in their clinical and placement programs'.¹³¹ Such workshops challenge

¹²⁸ Stephen Wizner, 'Beyond Skills Training' (2001) 7 *Clinical Law Review* 327. See also Stephen Wizner, 'The Law School Clinic: Legal Education in the Interests of Justice' (2001–2002) 70 *Fordham Law Review* 1929.

¹²⁹ Wizner (n 128).

¹³⁰ *Ibid* 63.

¹³¹ Giddings (n 102) 64.

assumptions around the quality of supervision and emphasise the importance of effective preparation of students for the supervision relationship.¹³²

It follows that if supervisors in clinical settings are going to be responsible for students' social justice learning, they may require more understanding of appropriate supervision techniques. Skills workshops have been held at various CLE conferences, focusing on training to support supervisors.¹³³ These workshops provide a guided and structured approach for supervisors to integrate social justice teaching into their practices.¹³⁴ Clinical educators are encouraged to adopt an integrative framework to support students to incrementally develop knowledge, values, skills and the capacity to learn from experience.

Integration of Methods

The Best Practices Report endorses an integrated approach, referring to the value of seeing experiential education 'as part of a connected whole'.¹³⁵ When the objective is

¹³² Ibid. See also Supporting Social Justice Through Student Supervision Practices' in Chris Ashford & Paul McKeown (eds), *Social Justice and Legal Education*, 2018, Cambridge Scholars Publishing, 43-64.

¹³³ Ibid. Skills workshops have been held at national and international clinical legal education conferences. Refer to <<https://www.monash.edu/law/home/cle/clinical-legal-education-conference>>.

¹³⁴ Giddings (n 102) 60. See also Jennifer Lyman, 'Getting Personal in Supervision: Looking for that Fine Line' (1995) 2 *Clinical Law Review* 211; Jenifer Gundlach, 'This is a Courtroom, Not a Classroom: So What Is the Role of the Clinical Supervisor?' (2006) 13 *Clinical Law Review* 279; Carolyn Grose, 'Flies on the Wall or in the Ointment—Some Thoughts on the Role of Clinic Supervisors at Initial Client Interviews' (2008) 14 *Clinical Law Review* 415. See also Liz Ryan Cole and Leah Wortham, 'Learning from Practice' in JP Ogilvy et al, *Learning from Practice: A Professional Development Text for Legal Externs* (Thomson/West, 2007).

¹³⁵ Refer to Evans et al (n 1) 97. See also Kenneth Kreiling, 'Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical

for students to develop proficiency in the application of professional skills, students should have 'repeated opportunities to perform the tasks to be learned or improved upon until they reach the desired level of proficiency'.¹³⁶ Before taking on substantial professional responsibility, students need to be prepared via supervision that directly emphasises the significant duties lawyers owe both to clients and the administration of justice.¹³⁷ As students develop their skills and become more confident, they can be allowed to take greater control over their future learning as they determine for themselves the best ways to approach issues and problems.¹³⁸ Role play is one method that can be effectively integrated into the clinical framework to prepare and support students' social justice learning.¹³⁹ Role play as a learning and teaching strategy can be described as the 'signature pedagogy' of CLE as it provides the opportunity for deep learning through active, authentic experiences that simulate real-world contexts.¹⁴⁰

Supervision' (1981) 40 *Maryland Law Review*; Malcolm M Combe, 'Selling Intra-curricular Clinical Legal Education' (2014) 48(3) *The Law Teacher* 281.

¹³⁶ Evans et al (n 1) 142. See also Jennifer Lyman, 'Getting Personal in Supervision: Looking for that Fine Line' (1995) 2 *Clinical Law Review* 211.

¹³⁷ Evans et al (n 1).

¹³⁸ Evans et al (n 1).

¹³⁹ Lee Shulman, 'Signature Pedagogies in the Professions' (2005) 134 *Daedalus* 52; Deborah Maranville et al, 'Re-Vision Quest: A Law School Guide to Designing Experiential Courses Involving Real Lawyering' (2012) 56(2) *New York Law School Law Review* 517.

¹⁴⁰ Refer to Douglas (n 1); Hyams, Campbell and Evans (n 186); Paul S Ferber, 'Adult Learning Theory and Simulations—Designing Simulations to Educate Lawyers' (2002) 9 *Clinical Law Review* 417.

Role Play and Clinical Pedagogy

The Best Practices Report describes CLE as ‘a pedagogy that places students in real-life environments. It is a form of experiential learning where students learn by doing and then reflecting’.¹⁴¹ Similarly, simulation-based activities help students to understand and consolidate their learning experiences. When designed and implemented in a coherent and structured way, simulation can be used to complement and support other learning and teaching methodologies.¹⁴² As Grimes states, ‘[simulation] is not a “one-off act” that is then followed by problem solving learning and/or clinical activity, instead, it can be seen as a strategic part of an educational plan in which the student is required to assume part-responsibility for how he or she learns’.¹⁴³ In CLE, simulation can be used to develop learning opportunities for students and implemented in a pedagogic model that uses ‘problem’ analysis (and to an extent problem-solving) as the baseline for the delivery of clinical programs.¹⁴⁴

While ‘clinic’ is a generic term to describe the context in which students learn through

¹⁴¹ Refer to Evans et al (n 1). See also Hugh Brayne et al, *Clinical Legal Education: Active Learning in Your Law School* (Blackstone Press, 1998) 2; RA Bush, ‘Using Process Observation to Teach Alternative Dispute Resolution: Alternatives to Simulation’ (1987) 37 *Journal of Legal Education* 46; Elliot Milstein, ‘Clinical Legal Education in the United States: In-House Clinics, Externships, and Simulations’ (2001) 51(3) *Journal of Legal Education* 375.

¹⁴² Richard Grimes, ‘Faking it and Making it? Using Simulation with Problem-Based Learning’ in *Legal Education: Simulation in Theory and Practice*, edited by Caroline Stevens, et al., Taylor & Francis Group, 2014 ProQuest Ebook Central, <http://ebookcentral.proquest.com/lib/monash/detail.action?docID=1825708>. See also Barry, Margaret Martin, ‘Clinical Supervision: Walking That Fine Line’ (1995) 2(1) *Clinical Law Review* 137; Beddoe, Liz and Allyson Davys, ‘The Context of Professional Supervision’ in Allyson Davys and Liz Beddoe (eds), *Best Practice in Professional Supervision: A Guide for the Helping Profession* (Jessica Kingsley, 2010).

¹⁴³ Grimes (n 142).

¹⁴⁴ *Ibid* 182.

exposure to real or realistic casework, simulation can be considered a form of a clinic.

As Grimes states:

The learning comes from direct experience of working with clients (actual or fictional), but is used here in the specific context of real (or, as it is often described, 'live') clients. What renders the whole 'clinical' is the opportunity provided to the student to deconstruct that experience and to actively reflect, as an individual and as a team, on what has happened (or not) and why. Clinic is therefore learning by doing and learning through reflecting on that 'doing'.¹⁴⁵

Similarly, Mccoid-Mason states that simulation is a 'flexible tool that can enhance learning and teaching by engaging and motivating students through hands-on exercises that draw on real or realistic case studies'.¹⁴⁶ Simulation can be viewed as a strategic part of an educational plan in which a student assumes active responsibility for how they learn.¹⁴⁷ Role play might be used to give students a feel for the nature of an adversarial system, the complex nature of client/lawyer relations, the extent of police powers or the contractual and statutory responsibilities of landlords and their tenants.¹⁴⁸

¹⁴⁵ Ibid 172.

¹⁴⁶ Ibid 175.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid 172.

Employment case study

For the purposes of providing an example of how role play can be used to enhance social justice teaching, we can look at a role play scenario of an employment matter. Students are able to assume the roles of any of the parties in the dispute: the employee (client), the employer, or the lawyers advising the employee and employer.

Factual Scenario: A client visits the clinic seeking advice about a workplace incident. He was employed to clean an office building after working hours (usually from 12am). He was required to meet three other cleaners at the building at 11:45pm to be allocated floors to clean each night. On the night in question, the client reported to work late, arriving at 1:00am. The client informed the student that this was because he was responsible for his children until his wife returned from her job, and she had arrived late. The client explained his lateness to his manager the next morning. When he reported to work the following evening, the manager informed him that he would only receive pay for the hours he had worked and at a reduced rate. When the client asked why, he was told 'as you were late, you have no right to ask questions' and 'you will lose your job if you utter another word'. The client is distressed during the interview. Specifically, he wishes to know if he was able to claim full pay for the shift, how this could be done and whether he could lose his job.

The rationale for providing students with this type of scenario is to get students to work through the dispute, which involves a multitude of issues, both legal and non-

legal. The aim is not for students to attempt to resolve the problem, but rather to identify the issues, research the relevant law and endeavour to explain how the legal process might impact on the given scenario.¹⁴⁹ Through this analysis, students will assess outcomes and critically consider the law in relation to the dispute from the perspectives of all parties.¹⁵⁰

The student playing the role of the client is invited to consider how the client's circumstances may impact on the resolution of the dispute.¹⁵¹ This includes addressing any language-related constraints on the client's understanding of the advice.¹⁵² The client's ability to understand and speak English and whether a telephone interpreter is needed to convey advice to the client.¹⁵³ Also, whether the client requires any

¹⁴⁹ Refer to Evans (n 1). See also Hyams, Ross, 'On Teaching Students to 'Act Like a Lawyer': What Sort of Lawyer?' (2008) 13 *International Journal Clinical Legal Education* 25; Hyams, Ross, Susan Campbell and Adrian Evans, *Practical Legal Skills Developing Your Clinical Technique* (Oxford University Press, 4th ed, 2014).

¹⁵⁰ Refer to James, Colin, 'Seeing Things As We Are. Emotional Intelligence and Clinical Legal Education' (2005) 8 *International Journal of Clinical Legal Education* 123. See also Hyams, Ross and Fay Gertner, 'Multidisciplinary Clinics: Broadening the Outlook of Clinical Learning' (2012) 17 *International Journal of Clinical Legal Education* 25.

¹⁵¹ Refer to Field, Rachael and Roy Alpana, 'A Compulsory Dispute Resolution Capstone Subject: An Important Inclusion in a 21st Century Australian Law Curriculum' (2017) 27 *Legal Education Review* 73. See also Fisher, Tom, Judy Gutman and Erika Martens, 'Why Teach Alternative Dispute Resolution to Law Students? Part 2: An Empirical Survey' (2007) 17(1-2) *Legal Education Review* 67; Gutman, Judy and Matthew Riddle, 'ADR in Legal Education: Learning by Doing' (2012) 23(3) *Australasian Dispute Resolution Journal* 189.

¹⁵² Refer to Ojelabi, Lola Akin, 'Communication and Culture: Implications for Conflict Resolution Practitioners' (2008) 19(3) *Australasian Dispute Resolution Journal* 189. See also Rand, Spencer, 'Teaching Law Students to Practice Social Justice: An Interdisciplinary Search for Help through Social Work's Empowerment Approach' (2006) 13 *Clinical Law Review* 459; Stevenson-Graf, Lindsey, 'Clinical Programs, Social Justice and Transformation through Student Learning' (2019) 44(3) *Alternative Law Journal* 232.

¹⁵³ Refer to Styles, Irene and Archie Zariski, 'Law Clinics and the Promotion of Public Interest Lawyering' (2001) 19 *Law in Context* 65.

support from social workers or external agencies during the process. Focusing on the parties' respective interests will focus the students' minds on the relative strengths and weaknesses of the matter from all perspectives and assist students to contemplate realistic outcomes for their clients.¹⁵⁴ Students are encouraged to reflect and consider external influencing factors such as the suitability of dispute resolution processes, the ability of clients to self-represent at these forums and therefore engage with wider issues, such as public policy concerns and access to justice.¹⁵⁵

One of the principal advantages of using simulation as a clinical teaching method is that it provides a safe environment in which students can learn.¹⁵⁶ No client confidentiality concerns need to be safeguarded; the use of simulated situations makes it easier to provide students with scaffolds to support them as they begin to engage with the issues and interests raised by particular legal situations; and students can be prepared for their later contact with real clients, particularly in relation to skills such as interviewing.¹⁵⁷ Simulation, therefore has the capacity to expose students to the

¹⁵⁴ Refer to Sullivan, William M et al, *Educating Lawyers: Preparation for the Profession of Law* (Report, 2007). See also Sylvester et al, 'Problem-Based Learning and Clinical Legal Education: What Can Clinical Educators Learn from PBL?' (2004) 4/6 *International Journal of Clinical Legal Education* 39.

¹⁵⁵ Refer to Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011) 253. See also Tokarz, Karen and V Nagaraj, 'Advancing Social Justice through ADR and Clinical Legal Education in India, South Africa and the United States' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011) 253; Liz Ryan Cole, 'A Special Focus to Help Understand and Advance Social Justice' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011) 324.

¹⁵⁶ Giddings (n 102) 85.

¹⁵⁷ *Ibid.* See also Paul S Ferber, 'Adult Learning Theory and Simulations—Designing Simulations to Educate Lawyers' (2002) 9 *Clinical Law Review* 417; Gregory Baker, 'Do You Hear the Knocking at the Door? A "Therapeutic Approach to Enriching Clinical Legal Education Comes Calling"' (2006) 28

complex intergroup and interpersonal dynamics of lawyering.¹⁵⁸ As Giddings further states:

[Simulation exercises] can assist students to better understand their own feelings: why they are likely to over-identify with their client's perspective, come into conflict with the representatives of the other party, forget ethical precepts and have their judgement clouded by strong feelings.¹⁵⁹

Overall, role play engages students in social justice learning, enhancing their understanding of it and increasing their appreciation of its importance.¹⁶⁰ By integrating methods such as role play into social justice teaching, students are encouraged to engage with their learning.¹⁶¹ Not only do clinics provide a rich source of potential material for simulation, they also provide opportunities for clinic students to observe real outcomes and reflect on what happened and why.¹⁶² Role play enables

Whittier Law Review 379; D Maranville, 'Passion, Context, and Lawyering Skills: Choosing Among Simulated and Real Client Experiences' (2007) 7 *Clinical Law Review* 123.

¹⁵⁸ Giddings (n 102). See also Schrag and Meltsner (n 8).

¹⁵⁹ Giddings (n 102) 36–7.

¹⁶⁰ Singo and Raymond (n 11) 299.

¹⁶¹ Singo and Raymond (n 11) 300. See also Ference Marton and Roger Saljo, 'On Qualitative Differences in Learning—2: Outcomes as a Function of the Learner's Conception of the Risk' (1976) 46 *British Journal of Educational Psychology* 115; Deborah Maranville, 'Passion, Context, and Lawyering Skills: Choosing Among Simulated and Real Client Experiences' (2000) 7(1) *Clinical Law Review* 123; Ferber (n 218).

¹⁶² For further reading in this area refer to Evans et al (n 1) ch 7; C Maughan and J Webb, 'Taking Reflection Seriously: How Was It For Us?' in C Maughan and J Webb (eds), *Teaching Lawyers' Skills* (Butterworths, 1996); Ross Hyams, 'Assessing Insight: Grading Reflective Journals in Clinical Legal Education' (2007) 17 *James Cook University Law Review* 25; Rachel Spencer, 'Holding up the Mirror: A Theoretical and Practical Analysis of the Role of Reflection in Clinical Legal Education' (2012) 17 *International Journal of Clinical Legal Education* 181; Michele Leering, 'Encouraging Reflective Practice:

students to understand and perform important lawyering tasks, such as questioning, listening, consolidating issues and problems and engaging in creative legal analyses.¹⁶³ In this way, students develop the essential legal practice skills to enable them to problem solve and think critically about their approach to advising clients.

A Classroom Component

The classroom component of clinics can further support student learning.¹⁶⁴ According to the Best Practices Report, each clinic should include classes that enable students as a group to examine the broader context of law and the legal system.¹⁶⁵ The goal of the classroom component is inextricably linked to the overall goals of the program.¹⁶⁶ In line with best practice, clinical programs often include seminars to support students' learning in practice areas, reflective practice and legal ethics. In designing a clinical curriculum that includes seminars focusing on social justice

Conceptualising Reflective Practice for Legal Professionals' (2014) 23 *Journal of Law and Social Policy* 83.

¹⁶³ Refer to Lee Shulman, 'Signature Pedagogies in the Professions' (2005) 134 *Daedalus* 52; Deborah Maranville et al, 'Re-Vision Quest: A Law School Guide to Designing Experiential Courses Involving Real Lawyering' (2012) 56(2) *New York Law School Law Review* 517.

¹⁶⁴ Evans et al (n 1).

¹⁶⁵ Evans et al (n 1).

¹⁶⁶ Ibid, citing Mary Jo Ester, 'Designing and Teaching the Large Externship Clinic' (1998–1999) 3 *Clinical Law Review* 347, 348. See also Roy Stuckey, 'Ensuring Basic Quality in Clinical Courses' (2000) 1 *International Journal of Clinical Legal Education* 49; Roy Stuckey et al, *Best Practices for Legal Education: A Vision and a Road Map (US Best Practices)* (Clinical Legal Education Association, 2007); Sally Kift, '21st Century Climate for Change: Curriculum Design for Quality Learning Engagement in Law' (2008) 18(1–2) *Legal Education Review* 1; Jonny Hall and Kevin Kerrigan, 'Clinic and the Wider Law Curriculum' (2011) 16 *International Journal of Clinical Legal Education* 37.

teaching, students are provided with seminars that are devoted to particular skills or processes (interviewing) with simulation and/or real case experience.¹⁶⁷

By example, seminars on intercultural competency are important to enhance students' understanding and awareness of being a culturally competent lawyer.¹⁶⁸ This seminar can cover strategies that enable students to understand, communicate, collaborate and work effectively with clients and other stakeholders (court, social workers, health professionals) irrespective of the ethnicity of person, their religious beliefs, sexual orientation, disability, class and education. This seminar can include discussion and training on how to work with interpreters when providing legal assistance to clients, including strategies for students when working with interpreters.¹⁶⁹

Additionally, a seminar on legal ethics, encourage students to focus on ethical issues that may impact on their interaction with clients, such as confidentiality and conflict

¹⁶⁷ For further reading in this area refer to Refer to Liz Curran, Judith Dickson and Mary-Anne Noone, 'Pushing the Boundaries or Preserving the Status Quo? Designing Clinical Programs to Teach Law Students a Deep Understanding of Ethical Practice' (2005) 8 *International Journal of Clinical Legal Education* 104; Barry, Dubin and Joy (n 9); C Menkel-Meadow and B Moulton, *Beyond the Adversarial Model: Materials on Negotiation and Mediation* (West Publishing, 2007); Kevin Kerrigan, 'How Do You Feel About This Client?' A Commentary on the Clinical Model as a Vehicle for Teaching Ethics to Law Students' (2007) *International Journal of Clinical Legal Education* 37; Anna Cody, 'What Does Legal Ethics Teaching Gain, if Anything, from Including a Clinical Component?' (2015) 22(1) *International Journal of Clinical Legal Education* 1.

¹⁶⁸ Olejabi (above n 152). See also Carrie Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"' (1991) 19(1) *Florida State University Law Review* 3.

¹⁶⁹ Refer to Gregory Baker, 'Do You Hear the Knocking at the Door? A "Therapeutic Approach to Enriching Clinical Legal Education Comes Calling"' (2006) 28 *Whittier Law Review* 379; D Maranville, 'Passion, Context, and Lawyering Skills: Choosing Among Simulated and Real Client Experiences' (2007) 7 *Clinical Law Review* 123.

of interest.¹⁷⁰ During this seminar, students can be provided with scenarios containing ethical dilemmas, which through discussion, they can consider alternative means to resolve.¹⁷¹ Students are encouraged to respond and they should not be fearful that their answers will be 'correct' or 'wrong', rather they are provided with supportive ethical frameworks within which they can work in future practice.¹⁷²

Similarly, a seminar on dispute resolution processes enhances students' understanding of the importance of seeking alternative options for resolving clients' disputes.¹⁷³ These seminars may include videos to enhance social justice teaching.¹⁷⁴ Douglas et al. suggest that an effective way to incorporate technology into teaching is to combine videos with an online discussion of practice skills and then ask the students to demonstrate these skills in role plays.¹⁷⁵ Students are provided with

¹⁷⁰ Liz Curran, Judith Dickson and Mary-Anne Noone, 'Pushing the Boundaries or Preserving the Status Quo? Designing Clinical Programs to Teach Law Students a Deep Understanding of Ethical Practice' (2005) 8 *International Journal of Clinical Legal Education* 104.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ Refer broadly to Beryl Blaustone, 'Training the Modern Lawyer: Incorporating the Study of Mediation into Required Law School Courses' (1992) 21 *Southwestern University Law Review* 1317; Pauline Collins, 'Student Reflections on the Benefits of Studying ADR to Provide Experience of Non-adversarial Practice' (2012) 23 *Australian Dispute Resolution Journal* 209. See also James Nikolas, 'Logical, Critical and Creative: Teaching "Thinking Skills" to Law Students' (2012) 12(1) *QUT Law & Justice Journal* 66.

¹⁷⁴ Refer to Judy Gutman and M Riddle, 'ADR in Legal Education: Learning by Doing' (2012) 23 *Australasian Dispute Resolution Journal* 194; Kathy Douglas, Josephine Lang and Meg Colasante, 'The Challenges of Blended Learning Using a Media Annotation Tool' (2014) 11(2) *Journal of University Teaching and Learning Practice* 3–4.

¹⁷⁵ Kathy Douglas, Tina Popa and Christina Platz, 'Teaching Mediation Using Video and Peer Discussion: An Engaged Video Learning Model' (2019) 29(3) *Australasian Dispute Resolution Journal* 182. Also refer to Kathy Douglas and Belinda Johnson, 'Legal Education and E-Learning: Online Fishbowl Role-Play as a Learning and Teaching Strategy in Legal Skills Development' (2010) 17(1) *eLaw: Murdoch University Electronic Journal of Law* 28; Michele Ruyters, Kathy Douglas and Siew Fang

readings prior to the seminars to engage in advance preparation to ensure greater participation and cooperation in the seminars. Their feedback is encouraged, ensuring they gain a deeper understanding of the topics. This enhances students' social justice learning, as they 'become active rather than passive learners'.¹⁷⁶

Conclusion

Although CLE has long focused on preparing law students to enter practice with a deeper understanding of social justice issues and the skills necessary to assist persons in accessing justice, this well-established mission has been increasingly challenged. With the expansion of CLE and the growth of externships, clinical students are increasingly placed in corporate settings or private law firms in which social justice may not be the central ethos. Clinicians have differing views in this regard. Kosuri argues that while clinics offer a rich experience that cannot be replicated by other forms of experiential learning, not all clinical law programs need to include social justice teaching to be recognised as CLE.¹⁷⁷ Cole challenges these views and argues that these clinics can still support a social justice mission and reinforce lessons about social justice that will carry on into the rest of the students' professional life.¹⁷⁸ Clinical pedagogy incorporates a social justice mission that enables students to explore and

Law, 'Blender Learning Using Role-Plays, Wikis and Clogs' (2011) 4(4) *Journal of Learning and Design* 45.

¹⁷⁶ Douglas et al (n 176) 46.

¹⁷⁷ Kosuri (n 65).

¹⁷⁸ Cole (n 75).

reflect on the issues that affect access to justice. In doing so, these programs teach students skills in communication, problem-solving, critical thinking and conflict management.

Despite the challenges that exist, this paper has explored ways in which social justice can be retained as a key focus of CLE developing students' understanding of social justice and conflict management. This paper has highlighted the effective ways that social justice teaching can be included in the clinical curriculum.

Notably, supervisors play a critical role in this teaching with methods including role play, simulation-based exercises, seminars and skills teaching, all intended to introduce students to the knowledge and skills needed to become critical thinking client-centred practitioners.¹⁷⁹ The suitability of these methods will depend on the clinic type, the model of CLE and the resources available. To ensure a standardised approach to social justice teaching, clinicians need to be trained in the aspects and theories of social justice and its connection to clinics. A focus on client-centred lawyering and access to justice will enhance students' ability to manage conflict and establish trusting lawyer-client relationships in whichever context they practice. In this way, CLE can ensure that law students continue to develop a deep understanding

¹⁷⁹ Refer to Julie Macfarlane, 'The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law' (2008) 61 *Journal of Dispute Resolution* 61; Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Press, 2008).

of the importance of retaining social justice as a focus for their future as 21st-century legal practitioners.

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IMPROVING ACCESS TO JUSTICE THROUGH LEGAL AID: EXPLORING THE POSSIBILITIES OF 'EXCEPTIONAL CASE FUNDING' CLINICS IN UNIVERSITY LAW SCHOOLS

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Abstract

This article focuses on the role of universities in establishing law clinics to assist individuals to make Exceptional Case Funding (ECF) applications. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) removed many categories of civil matters from the scope of legal aid, reducing the number of people entitled to state-funded legal advice and assistance. To replace provision for the categories removed from scope, LASPO introduced ECF to provide a 'safety net' for cases where human rights would be breached if legal assistance was not available. To obtain legal aid through the ECF scheme, legal aid providers or individuals must apply to the Legal Aid Agency, the department of government within the Ministry of Justice that deals with the administration of legal aid. The article considers how analysis of ECF clinics can contribute to knowledge about the work of universities in facilitating access to justice through clinical legal education, particularly in the context of cuts to legal aid expenditure. It argues that ECF clinics present an opportunity to involve students

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while engaging — rather than replacing — the responsibility of the British state to provide legal aid.

Keywords: LASPO, legal aid, exceptional case funding, university law clinics, access to justice.

Introduction

When the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into effect in 2013, it had a significant impact on the availability of free legal advice and representation in England and Wales. The LASPO Act was introduced to implement a fundamental reform of the legal aid system (Ministry of Justice 2011), which formed part of the austerity measures intended to reduce public spending. One of the immediate effects of LASPO was the significant reduction in the number of people receiving legal aid, and statistics released by the Ministry of Justice exposed the extent of the cuts: in 2012 legal aid was granted for 925,000 cases, which reduced to 497,000 cases the following year, a drop of 46 per cent (Ministry of Justice 2014). Government spending on legal aid dropped from £2.51 billion in 2010/11, to £1.55 billion by 2016 (Ministry of Justice 2017a, p. 51).

LASPO can be viewed as part of a longer trajectory of changes that have reduced the public funding of the British legal aid system over the past two decades

(Sommerlad and Sanderson 2013), but when the legislation came into effect in 2013, LASPO had a particularly significant impact in reducing the availability of legal aid. In this respect, it is noteworthy that legal aid was first introduced as part of the welfare state by the Legal Aid and Advice Act 1949, to ensure that those who could not afford to pay for a legal representative would not be excluded from the justice system (Sommerlad 2004). Prior to LASPO, legal aid was available for most civil proceedings with a few exceptions. The introduction of the Act effectively reversed this, taking many categories of civil law out of scope, and reducing the availability of legal aid for significant areas of family, housing, debt, welfare benefits, discrimination, community care and immigration law.

Where categories of law were removed from the scope of legal aid, LASPO extended an Exceptional Case Funding (ECF) scheme, intended to provide a 'safety net' for cases where human rights would be breached if legal assistance was not available (House of Lords Debate 5 March 2012). Under the ECF scheme, legal aid lawyers or individuals (as 'direct applicants') can apply to the Legal Aid Agency – the government department within the Ministry of Justice that deals with the administration of legal aid – setting out the reasons that they require legal aid. However, the accessibility of the ECF scheme, and the impact of LASPO more generally, has been subject to heavy criticism by human rights organisations (Amnesty International 2016), legal practitioners (The Law Society 2017, Legal Aid Practitioners Group 2017) and academics (Cobb 2013; York 2013; see also Journal of Social Welfare

and Family Law 2017). The number of ECF applications has been consistently much lower than predicted by the government prior to the introduction of LASPO, with low grant rates, particularly in the initial years of the scheme (The Law Society 2017, p.21), leaving many people who arguably should be eligible for legal aid unable to access it.

This article examines one way in which university law clinics can engage directly with the practical challenges of the legal aid system under LASPO by setting up clinics to support individuals to make ECF applications. The research presented here examines a collaborative project between Public Law Project (PLP), a national legal charity that promotes access to justice for marginalised and disadvantaged groups, and the Community Law Clinic at the University of Exeter, which established an ECF clinic to support individuals to access legal aid. Using data collected during the process of setting up the clinic, the article reflects on the findings of the project, and suggests that ECF clinics offer an important opportunity to engage students with access to justice in practice, whilst also improving access to legal aid by increasing the availability of support for people who need to access ECF.

1.1 University law clinics and access to justice

University law clinics have been primarily established in the UK to provide students with important opportunities for practical ‘hands-on’ experiences of law as part of the learning process (Grimes 2000; Marson *et al.* 2005; Turner *et al.* 2018), although most also offer services that provide access to justice for the community (Drummond and

McKeever 2015). In the context of legal aid cuts, the increasing demand for free legal services is one of many tensions that must be managed in the day-to-day running of university law clinics. The backdrop of significant increases to student tuition fees in recent years, and the associated expectations of students as consumers, places student experience as an important motivation for the work of university law clinics (Bleasdale-Hill and Wragg 2013). Some of the advantages of university law clinics for student learning are that students are able to apply the law in practice, gaining knowledge of how the law works, as well as the legal skills used by practitioners, such as interviewing and client care.

Previous academic research has sought to understand how cuts to the public funding of legal services have had an impact on the operation of university law clinics in the United Kingdom, and the practical implications for access to justice in the context of the reduction of services previously funded by the state. A study of university law clinics by Orla Drummond and Grainne McKeever (2015) highlights the tensions that exist within university law clinics as a result of competing concerns for student education and access to justice. Drummond and McKeever's research demonstrates the range of perspectives and motivations that exist for conducting clinical legal education, and describes how some law school staff take the view that access to justice should be the business of the state rather than universities, whilst others wish to fulfil the critical role of supporting access to justice for their local communities (Drummond and McKeever 2015, p.32). The research found that 69% of

clinics thought that universities should provide access to justice services, whilst 90% of respondents were actually involved in the delivery of such services. Although many university law clinics seek to balance an interest in providing learning opportunities for students while also providing an important service to the community, there are limitations on the assistance that can be provided by law schools. Drummond and McKeever recommend that universities would require external support from government to support the development of the access to justice potential of law clinics.

Despite some of the challenges for university law clinics engaging in access to justice work, this article takes inspiration from research that celebrates the potential of academic and community partnerships for the protection of basic rights (Boylan *et al.* 2016). In this article it is argued that the changes to legal aid brought into effect by LASPO, although controversial, may also be seen to open up and enable opportunities for law schools to engage in clinical work that reinforces, rather than removing or redirecting, the notion of state responsibility for access to justice. The evidence presented below demonstrates how the politics of responsibility for advice provision plays out through university settings, by considering the ways in which clinics engage with the problems of facilitating access to justice through the ECF scheme, as well as the opportunities that ECF clinics offer for improving access to legal aid and some of the challenges of the work.

1.2 Exceptional Case Funding and legal aid for immigration matters

The idea of setting up a legal aid clinic within the Law School at the University of Exeter began to form in December 2016. A small group of academics, practitioners and community representatives started discussions about how to support a local refugee charity, Refugee Support Devon, which was finding it difficult to secure free immigration advice for its service users. Immigration is a broad category of law, which includes asylum, but most immigration work was removed from the scope of legal aid by LASPO with only specific types of case remaining in scope. According to Schedule 1 of LASPO, matters that remain eligible for legal aid include asylum applications, asylum support applications, applications for victims of trafficking, assistance for those held in immigration detention and some judicial review cases. Legal aid for other categories of immigration must be applied for via the ECF scheme.

The accessibility of the ECF scheme has been problematic, with much lower rates of applications and grants through the scheme than initially predicted by the government. Prior to the introduction of LASPO, the government estimated that the scheme would receive 5,000-7,000 applications a year, of which 53-74% would be granted, a target that it has failed to meet (The Law Society 2017). The number of ECF applications made by legal aid providers and individual members of the public remains relatively low compared to the predicted figures, and the overall rates of success for ECF applications have only slowly started to increase over the last few

years. In the first year after LASPO there were 1,516 applications for non-inquest² cases, with 16 applications granted (Ministry of Justice 2017b). The following year the total number of applications fell to 1,172 applications, although there were 119 applications granted, which was higher than the first year of the scheme.

Since the introduction of the ECF scheme the overall number of applications and successful applications has increased and immigration matters now have the highest rate of applications and grants across all areas of civil law. In 2019/20, there were 3,747 applications for ECF, of which 2,525 were for immigration matters (67.39%). Of the applications made for immigration matters, there were 2,035 grants of ECF, establishing a success rate of over 80% (Ministry of Justice 2020). In comparison, in the same financial year there were just 439 applications for family law and much lower application rates across other categories of law (*ibid.*). The average grant rate across all other categories, excluding inquest cases, was just 32.95% (*ibid.*).

The restrictions on legal aid funding have contributed to the growth of immigration 'advice deserts' across England and Wales,³ as well as compounding the issues in areas where there was already a shortage of immigration advice (Burrige and Gill 2017). Academic work has described how the changes to legal aid contracts under LASPO created a crisis of capacity within the immigration advice sector, with

² Non-inquest ECF is the focus here as a form of ECF was already available for inquest cases prior to LASPO. All figures provided relate to non-inquest cases.

³ The analysis here is limited to the legal aid scheme in England and Wales, as Scotland and Northern Ireland operate as separate jurisdictions.

legal aid providers are often unable to meet demand for immigration legal aid (Wilding 2019). The South West of England is one area of the country in which the availability of legal aid for immigration matters is very limited, which is a situation that has been worsened by LASPO. Prior to LASPO there had been a small number of legal aid providers with immigration and asylum contracts in Devon, but most of these contracts ended when general immigration work was removed from the scope of legal aid. There is currently only one organisation with a legal aid contract for the category of immigration and asylum in Devon, whilst Devon's neighbouring counties of Cornwall, Somerset and Dorset have no legal aid contracts for immigration and asylum work (*ibid.*).

Applying for ECF does not directly increase the availability nor capacity of legal aid providers, but where individuals successfully make direct applications to the Legal Aid Agency it can help to secure the assistance of a legal aid provider that may otherwise be unable to take on the case. Research conducted by the charity Rights of Women found that there is very little help available for people who need to make an ECF application, with very few legal aid providers who undertake ECF applications (2019, p.10). The low grant rates for ECF across many areas of civil law mean that there is little incentive for legal aid providers, who already work within the context of a system under strain, to make ECF applications. Funding is only retrospectively provided for the time spent on an application if ECF is granted, and the applications themselves are complex and time-consuming. In light of this, setting up projects to

improve the number of applications and grants of ECF is a significant gap that university law clinics and other pro bono projects can help to address.

1. Methodology

The interest in establishing an ECF clinic at the University of Exeter was motivated by concerns about the availability of legal aid for immigration advice in the local area. In discussing the potential of the project, it was felt that law students would have much to offer in assisting individuals with ECF applications. The organisations involved in the project had observed that often individuals are unaware that they can apply for funding, or would be unable to make an application themselves, unless they can find an adviser to assist, which can be difficult even once ECF is secured. The project also offered a valuable opportunity for law students to put their developing legal skills into practice.

2.1 Setting up the research

When seeking information about the ECF scheme for Refugee Support Devon and its service users, it became apparent that the information provided on the government website, intended to assist individuals to make ECF applications, was limited. The steering group for the clinic approached PLP, a national legal charity with a particular interest in promoting access to justice, which has done considerable work to improve access to ECF since the introduction of LASPO. Between 2013 and 2017, PLP's Legal

Aid Support Project assisted individuals to make applications for ECF, resulting in litigation setting out the systemic issues of the scheme in the cases of *Gudanaviciene & others v the Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622 and *I.S. v the Director of Legal Aid Casework and the Lord Chancellor* [2015] EWHC 1965 (Admin) and [2016] EWCA Civ 464. PLP also has a website with resources offering practical information to help legal aid providers and members of the public who wish to apply for ECF, and it provides training to organisations. PLP maintains that the ECF scheme 'remains inaccessible in practice for many people, particularly those who are trying to apply without the assistance of a legal aid provider' (Public Law Project 2018a, p.2), based on its considerable experience of advocacy in this area. For this reason, PLP was keen to support the development of an ECF clinic at the University of Exeter.

PLP was particularly interested in the feasibility of developing a model that could be adopted by university law schools in setting up their own ECF clinics. As a charity, PLP had previously conducted a piece of research with university law clinics to look at how they support access to justice in public law matters (Public Law Project 2018b). With PLP's input in setting up the ECF clinic, the research was designed to collect data on the process of establishing the clinic, which included recording a detailed field diary of the process of, as well as speaking to other university law clinics in England and Wales with experience of making ECF applications or an interest in doing so.

The discussions that initially took place between the University of Exeter and PLP highlighted some of the potential practical problems that could arise from the project. For example, cases need to be triaged to ensure that ECF is appropriate and that cases ineligible for ECF can be referred to other services. Such examples might include when a matter falls within the usual scope of legal aid or where an applicant falls outside general eligibility requirements for legal aid, such as the means test. In addition, immigration advice is strictly regulated, and it is a criminal offence for anyone who does not have appropriate accreditation to provide immigration advice. ECF applications are exempt from this regulation (Office of the Immigration Services Commissioner 2016), but it remains necessary to ensure that immigration advice is not inadvertently provided in the course of assisting an individual to make an application for ECF.

2.2 Conducting the research

The research on ECF clinics was conducted on behalf of PLP between September 2017 and February 2018, although field notes from the months prior to September helped to contextualise the findings of the research, as the clinic constituted part of a larger research project about access to immigration advice in the South West. A formal agreement between PLP and the University of Exeter was put in place, which helped to make a distinction between the work of the two organisations and how each was involved in the project. The process of setting up the clinic was documented, with detailed notes recorded about the discussions and processes involved. Field notes

were collected from the early discussions in November 2016 onwards, and in February 2018 the observations were written up to include minutes from planning meetings and discussions among member of the steering group, to provide reflection on how the ideas had progressed. In total the observations collected were saved in a document of just under 11,000 words. Analysis of these observations enabled detailed reflection on the process of establishing the clinic.

The data that was collected included observations from the process of setting up the clinic at Exeter, feedback from volunteers and Refugee Support Devon, the partner organisation for the project, as well interviews with other university law clinics. Clients of the ECF clinic were not asked to participate in the research due to the short timescale for the research and the focus on the organisational aspects of supporting ECF applications. An online survey was sent to 53 university law school pro bono projects in England and Wales by PLP in December 2017. The list was compiled from the LawWorks website (LawWorks 2015), which has a database of law clinics. The questionnaire requested feedback from law schools either running, setting up or considering ECF projects. Participants were encouraged to respond in other formats if they felt that would be more appropriate, for example by email or telephone contact. Despite the best efforts of the researcher to make the survey easy to respond to, very few replies were received. There was a total of six responses, with three of those from law clinics willing to participate in the research. Two of the universities that agreed to participate were already assisting individuals with ECF applications

(The Immigration Human Rights Project at City University, and Swansea University) and the other was interested in setting up a project (University of Huddersfield). It is not possible to definitively provide a reason for the low number of responses, although the negative responses that were received indicated that ECF was not relevant to the services provided by the clinics.

Alongside the observations, feedback from the students and staff involved in the Exeter ECF clinic was gathered at the end of the research period. A questionnaire was sent to the eight students involved in the project and responses were collected anonymously. From this, three responses were received, and the other professionals on the steering group for the project were provided with the opportunity to give feedback through an online web form. The original intention was to hold a focus group at the end of the project, but the busy timetables of everyone involved meant this was not possible. The opinions and input of the other members of the steering group were present in the observations that were compiled, and one additional response was received from Refugee Support Devon, the local charity that was a partner organisation for the clinic.

The findings of the research were compiled in a report published by PLP, which was made available on its website. In the sections that follow, the significance of these findings is explained, particularly in relation to why ECF clinics have an important function providing support to individuals who do not have a legal adviser to make a

legal aid application on their behalf, and how ECF clinics have grappled with the challenges of the post-LASPO legal aid system.

3. Findings: The work of ECF clinics

The limited availability of legal aid providers in England and Wales, particularly those that make ECF applications on behalf of their clients, means that the support that university law clinics offer individuals in making applications for ECF can be of considerable benefit to the community and improve the accessibility of legal aid. The government's website encourages individuals to make their own applications for ECF (Legal Aid Agency 2014), but at the time of the research the number of applications from direct applicants was lower than the number of applications made by providers, and direct applicants also had lower grant rates than provider applications. For example, in the financial year 2016/17 prior to the research, there were 1,243 non-inquest applications to the LAA that were made by providers, with a 57% grant rate.⁴ In the same year there were just 348 non-inquest applications by individuals, with a 34% grant rate. The Legal Aid Agency does not publish data on the support that direct applicants receive from charities or pro bono projects, so it is not possible to compare

⁴ Based on data provided by email by the Ministry of Justice, 22 March 2018. Statistics also published by the Ministry of Justice, see Ministry of Justice, 2018. *Legal aid statistics: October to December 2017. Legal aid statistics England and Wales more detailed data October to December 2017*. Available at: <https://www.gov.uk/government/statistics/legal-aid-statistics-october-to-december-2017>.

the number of successful applicants who have received this type of assistance for an ECF application to those who have not received any help.

Although individuals or legal aid providers can apply for ECF, direct applicants who do not have the assistance of a legal adviser may be subject to particular barriers in making a successful application. The application form for ECF is complex to fill out and requires technical knowledge of the relevant areas of law and legal processes, including the eligibility criteria for ECF (see also, Public Law Project 2018c). One barrier is the technical nature of ECF applications, and the legal framing that they require, particularly in terms of the need to set out how an individual's rights would be breached in the absence of legal aid. Some groups face other specific barriers, such as those with low levels of literacy in English, and people with learning disabilities or health conditions that may impair their ability to complete an application. It is often people who could not make an ECF application themselves that are most in need of legal assistance, but these groups also likely to be excluded by the system if they are unable to find a legal aid provider to assist with an ECF application. Although the Legal Aid Agency suggests that individuals can apply themselves, in practice this may not always be possible, or may be more likely to result in an unsuccessful application for legal aid where individuals are unable to provide all of the information required without assistance.

3.1 The location and scale of ECF clinics

The potential scale of any project is closely related to the existing advice infrastructure of an area. Consequently, the number of advice agencies and legal aid providers available to make and receive referrals in a local area can be an important consideration for the operation of ECF clinics. In Exeter, there was a slow start to the project, and although from the outset the steering group recognised that the project was likely to deal with relatively small numbers of enquiries, in the initial months it became clear that considerable work would need to go into generating referrals by raising the profile of the project. Initiating conversations with local charities and legal aid providers was an important part of the process. In comparison, the Immigration and Human Rights Project in London, a collaboration between City University and No 5 Chambers, was able to secure a number of referral agencies that work with the service by identifying individuals that need to make an ECF application and helping them to secure a legal aid provider once ECF is granted. As Jennifer Blair, an Immigration Barrister at No 5 Chambers involved in the running of the project, explained:

We don't arrange [a legal aid provider] before making an application, but we know that referral agencies sometimes would. We (student volunteers) do not have the contacts to do this. There are vast disparities in the quality of legal advice out there and the student volunteer will not know how complex the case is compared with other

cases in the field. In general, once ECF is granted we signpost the client back to the referral agency for help finding a solicitor. In a few cases, volunteers have been keen to help and I have provided a list of solicitors to try. Cases are then placed. (Jennifer Blair, Immigration Barrister).

The project in London completed 28 ECF applications in two years, with a 91% grant rate. They reported that they had three partner organisations, and virtually all of their referrals came from London.

In contrast to London, there were difficulties for the project in Exeter due to the limited number of legal aid providers in the region that could take on immigration cases. This was identified as a key risk for the project by the staff at Refugee Support Devon:

[There is a] risk of giving wrong expectations to clients, and not being able to find a solicitor that could take a case on. There is a big lack of legal advice in this area. (Nelida Montes de Oca, Casework Coordinator).

Swansea Law Clinic described a similar difficulty around securing legal aid providers in the region of South Wales. Swansea Law Clinic also identified ECF as a way to improve access to advice by working with and complementing existing services (Richard Owen, Director of Swansea Law Clinic). The University of Huddersfield does

not currently run an ECF service, but recognised the potential value of establishing a service within their existing pro bono scheme in order to assist firms that were unable to make ECF applications, or only able to make a small number on a selective basis (i.e. only making the applications most likely to be granted). The Director of the Legal Advice Clinic at the University of Huddersfield noted that any work on ECF applications through the law clinic may still be selective, but would not have the same financial constraints as law firms that only get paid for successful applications (Phil Drake, Director of the University of Huddersfield Legal Advice Clinic). Thus, in areas where there is limited legal aid capacity, ECF clinics can potentially complement existing services that may otherwise be unable to take referrals for cases that require ECF.

The location of any project in relation to existing advice infrastructure is not the only factor likely to influence the size and capacity of a clinic, but as demand and resources will also determine the viability of a clinic the potential to create referral pathways, or to generate a caseload and to make onward referrals, is an important consideration for setting up ECF clinics. The research identified two distinct advantages for setting up clinics in the context of advice deserts where there is limited advice provision. First, universities as research institutions are well placed to monitor and report on the situation where access to advice is limited. In locations from which low numbers of ECF applications are made, ECF clinics can increase these numbers or provide commentary on why the number of applications is low. Second, setting up ECF clinics

can open up conversations about ECF in locations where services are lacking, raising awareness of the ECF scheme among those who may otherwise not be able to access it. As the project in Exeter also generated referrals, it helped to make the local need for ECF more visible by establishing conversations around the issue.

3.2 Training and supervision

The level of supervision and input of specialist lawyers varies between clinics, but there are clear benefits to having legal expertise built into the process for making ECF applications. For example, at the Immigration and Human Rights Project at City University and No 5 Chambers, students are given training and support from lawyers, but largely take responsibility for the operation of the clinic, as explained by the barrister involved in the project:

The students take on an ECF application. They are trained, and it is for them to meet the client, explain the forms, provide an advice letter and then — once the information is collected — provide a covering letter. Their work (the attendance notes and letters they write) are saved on the drop box, which is moderated by student directors. It is predominantly a student led project with support from the university, chambers and partnership with referral agencies. If there are questions about the content of letters they can ask the student directors, but often these are passed onto me. We are in the

process of establishing a monthly drop-in surgery to develop more in depth (and one-stop) feedback from a lawyer. Thus far it's been by email. (Jennifer Blair, Immigration Barrister at No 5 Chambers).

This evaluation of the process demonstrates how the input of lawyers can help to direct students in developing ECF applications, allowing them to offer their developing legal skills for the benefit of the community at the same time as the process being an important learning opportunity for students.

At the University of Exeter, law students were supervised in every session spent with a client. A qualified lawyer would not be present in every client meeting, but the input from the practitioners involved in the project was important for developing the training materials and setting up the model for taking instruction from a client, drafting the documents and checking the content where necessary. At Swansea University, the Clinic Director interviews clients initially, and then students carry out a follow up interview, particularly as the clinic was in the process of becoming established:

As we are in a pilot stage the Clinic Director interviews the client initially and then students do a follow up interview. The students draft applications, which are

supervised by the Clinic Director. The students work in pairs. (Richard Owen, Director of Swansea Law Clinic).

For the clinics in both Exeter and Swansea, the training delivered benefitted from being based on the ECF training provided by PLP as a charity with a great deal of knowledge about the ECF process. The training in Exeter provides general guidance about the operation of the clinic and how to work with clients, as well as specific information about the ECF process. The ECF training at the University of Exeter covers the history of LASPO and the introduction of ECF, including the main changes to the legislation and guidance on how to make ECF applications. For example, specific details about the timeframe for decision-making by the Legal Aid Agency, the evidence required to support applications, and how to include relevant case law. It also gives participants the chance to discuss anonymised case studies to practise applying the eligibility criteria.

All three established clinics that participated in the research did not only have specialist knowledge of specific areas of law, they also had specific knowledge of the ECF scheme itself (the project at City University is supervised by an immigration barrister, who has significant experience of ECF). The combination of general points of law and legal practice, and very specific information about the ECF scheme, would not necessarily be available to direct applicants without the support of an organisation or legal aid provider. And although there is the potential to provide individuals with

such knowledge, for example, PLP have produced a guide for direct applicants, law students have the benefit of already having an understanding of legal processes. As one participant commented, 'quite often with applications there's a certain technique — it's not necessarily what you say, and it's how you say it' (Phil Drake, Director of the University of Huddersfield Legal Advice Clinic). Law students are already in the process of learning the technique of putting forward legal arguments, which is of great benefit for making ECF applications.

The regulation of immigration advice means that opportunities to engage in its provision without being a qualified adviser are limited. As ECF applications for immigration cases are not regulated by the Office of the Immigration Services Commissioner, making applications on behalf of individuals is an area of immigration work that law schools can engage in without having to put substantial regulatory frameworks in place. The fact that ECF applications are not included within the definition of regulated immigration advice was a factor in setting up the projects in Exeter and Swansea, although the risk of student volunteers providing immigration advice must still be mitigated. Students can assist individuals to complete the ECF form and compile the evidence, but putting in place additional practical arrangements, such as recording an attendance note, is important to demonstrate that any assistance provided is limited to the ECF application process and not the provision of immigration advice. Since it is a criminal offence to provide immigration advice without the appropriate regulation, safeguarding students — who are likely to

pursue a career in law — from inadvertently providing unregulated advice is essential.

The operational ECF clinics that participated in the research all focused on immigration, in part due to the recognition of the need for legal services in this area, but also because it can be easier to focus on one specialist area of law due to the practicalities of triaging referrals and ensuring their suitability for ECF. For example, the project in London reported why their work was usually limited to immigration:

We are the City University and No5 Chambers Immigration Human Rights Project, so we are focused on migrants' rights. We have done one or two family law cases, but I understand it is harder to get ECF in those areas. The family ECF applications have been in relation to migrants. We are not limited to immigration ECFs if there were good reasons for one in another area, but it is harder to ensure the clients have good legal advice first (for example, in a family case I had to ask one of my colleagues to provide a pro bono advice, which we could do on occasion but obviously not in every case). (Jennifer Blair, Immigration Barrister at No 5 Chambers).

The specific focus on one area of law also makes the training and supervision of students easier. Although law students can bring general legal skills to the process of making an ECF application, focusing on one area of law can make projects more

manageable from a supervisory perspective. The different types of specific knowledge required to make an ECF application may vary depending on the area of law. For example, understanding what is likely to be a successful immigration application does not necessarily equate to being able to write a successful family application. Building expertise in a particular area of law can allow students to be more effective in identifying the relevant facts of a case and translating them into an ECF application. Having said this, towards the end of the research, the Exeter ECF clinic identified a need to assist with ECF applications in other areas of law, particularly family law where ECF applications and grant rates are much lower than immigration. In either case, being able to identify law school staff or partner organisations with the expert knowledge to train and supervise students is likely to be a significant consideration for any ECF clinic.

Finally, the sensitive nature of the types of cases presented to ECF clinics means that the safeguarding of students and clients is a key consideration in the day-to-day running of the clinics. The Director of Swansea Law Clinic noted that some of the cases referred to the clinic had been 'harrowing' (Richard Owen, Director of Swansea Law Clinic). At Exeter, this was also an important consideration, and sessions often ended with an opportunity to debrief the students, which gave the students a chance to talk about anything they had found particularly challenging, problematic or upsetting.

3.3 Student learning and benefits to the wider community

From a student learning perspective, ECF clinics provide an important opportunity for students to apply their legal training to real-life scenarios, and to develop knowledge of the legal aid system and legal practice. The focus on access to justice within ECF clinics reflects the view expressed by Frank Dignan, that a clinic providing access to justice to all members of society can provide ‘an opportunity for students to think about the practical aspects of the provision of legal services to those who cannot pay for them’, which also has the potential to enhance academic understanding of these issues through the practical knowledge gained by students (2011, p.81). For example, the ECF process provides insight into how the civil legal aid system works, because submitting an ECF application requires students to compile relevant documents in a similar way to how legal aid lawyers compile and present legal aid applications for their clients. The value of ECF clinics is not, however, limited to the practical legal skills acquired by students. All of the clinics that participated in the research had an interest in access to justice, and an important part of setting up the ECF clinic at the University of Exeter was to provide students with sufficient training and supervision in order to enable them to compile applications on behalf of individuals, to allow the legal skills and expertise developed in the university setting to be shared with the community.

Previous literature demonstrates that law clinics can be a valuable format for teaching students about the ethical demands of being a lawyer if consideration is

given to how students will be trained and provided with opportunities to explore ethical obligations through clinic activities (Kerrigan 2007; Bleasdale-Hill and Wragg 2013). The work of ECF clinics allows students to learn about access to justice in practice by witnessing how individuals encounter the justice system and the challenges of the legal aid system. The work of the clinic at Exeter was often emotionally demanding due to the accounts given by clients of their personal situations and this was further intensified by the hours spent labouring over the technical details of the ECF applications compiled, and, in some cases, the to-and-fro in correspondence with the Legal Aid Agency in order to get ECF granted. Most of the cases seen in the Exeter clinic involved people in urgent situations, whether due to destitution or the threat of removal from the UK. The delays in getting responses from the Legal Aid Agency — which in some cases were refusals that then needed to be challenged — contributed to the practical challenges of running the clinic. However, feedback from one volunteer highlighted how experiencing some of these issues in practice was an important motivation for furthering their interest in the legal aid system:

I have found the client interaction extremely valuable. Gaining knowledge of the practical application of different areas of law, like the human rights act, has also been hugely valuable. It has given me real experience of interacting with clients, enhanced

my knowledge of different areas of law and made me more passionate about the problems surrounding legal aid. (Student Volunteer, University of Exeter ECF Clinic).

The students that chose to volunteer in the project at Exeter already had some interest in immigration law, but some became very engaged in the project not only to assist individuals, but to help raise awareness of ECF by contacting local firms and community support organisations, encouraging referrals to the clinic. Setting up ECF clinics may, therefore, be motivated by a desire to provide students with practical experience to develop professional skills, which can be a significant factor for universities establishing law clinics (Marson *et al.* 2005; Turner *et al.* 2018), but ECF clinics are also a way of engaging students in the practical and ethical demands of access to justice as a social issue.

The value of the work done by ECF clinics may then not be viewed as limited to the immediate benefit to individuals who are granted ECF, but also comes from engaging law students in the politics of legal aid and the struggle to ensure that the legal needs of those without money to pay for legal services are met. The value of the work of the clinics for general community benefit need not be considered entirely separately from the benefits of the student learning experience, as ECF clinics provide students with an opportunity to learn about access to justice *by doing* access to justice work.

3.4 Challenges for ECF clinics

As well as the benefits of ECF clinics for members of the public and student learning, the research also highlighted three particular challenges. First, the management of resources available within the institution and the capacity of staff and volunteers. Second, managing external partnerships with other, usually very busy, local advice agencies and legal aid providers. And finally, dealing with problems arising from the administration of the ECF scheme itself, including delays to applications, in the context of other internal and external resource constraints and the pressing needs of the clients being assisted. The relationship between these three challenges will now be further explained.

Managing the capacity of ECF clinics can be challenging where universities are relying on already busy staff and students to carry out and supervise the work. Recruiting new students each year, as well as managing a caseload (and client expectations) can be particularly demanding. The project in London, which was the most established service that took part in the research, explained how student recruitment needed to be carefully negotiated:

We increased from the pilot to 30 trainees in the second stage. In the third intake we have decided to reduce the number of trainees — we are currently training 18 but there are usually some immediate drop outs after training, so we really want around 12 committed people — and the smaller group will allow us to assign cases on a rota

and monitor them more closely. (Jennifer Blair, Immigration Barrister at No 5 Chambers).

In Exeter, having only a small number of referrals brought additional challenges (the clinic dealt with five cases in its first year), as eight students received training but there were not enough referrals to the clinic were made to engage all of the student volunteers in the first few months of the project. When cases did come up, they were often at short notice, and finding a time for everyone to meet with the client (two volunteers and a supervisor), was sometimes not possible.

At the Exeter clinic the need to ensure good quality applications (as well as the safeguarding of students and clients) resulted in time-intensive supervision. Students were supported during meetings with clients, as well as in the drafting stage of an application. If a client meeting takes an hour to an hour and a half, and cases may require two or three meetings, the time of two students plus a supervisor could amount to a considerable number of cumulative hours just spent with the client. The students would then spend additional time drafting the documents, which would need to be checked. Combined with the length of time it took to receive Legal Aid Agency decisions, and requests for further information that could extend the period between submitting an application and receiving a decision, this meant that the resources needed to support one case could be considerable (for example, around 6-8

hours supervision time),⁵ and it could also make it difficult to predict the size of caseload that the clinic would be able to facilitate at any given time.

The most appropriate way of dealing with the challenge of an unpredictable number of referrals is to initiate an ECF clinic on a small scale and build it up over time. Richard Owen, Director of Swansea Law Clinic, explained that because their referrals for ECF applications come from a partner organisation, it is hard to identify the exact demand in the region. Here he explains how the project was started on a small scale in addition to other pro bono work recently established through the Law Clinic:

The Clinic was only established in January 2017. It began with a miscarriage of justice project and prison law clinic. Since October 2017, we have had face-to-face client interviews mainly in housing, employment, relationship breakdown and equality issues, following which clients get an initial advice and assistance letter. There are currently four students involved with the work on ECF applications. It is less than other clinical work which has thirty-six students, but we have just started. (Richard Owen, Director of Swansea Law Clinic).

⁵ Accurate time recording was not carried out at the time of the research, so this figure is based on an estimate including work subsequently done by the clinic. Rights of Women (2019) reported that their caseworkers spent 9 hours on average preparing an ECF application.

Building a project over time means that the immediate potential benefits of ECF for clients may be limited by the reality of the potential caseload, and there are related considerations of how this is likely to be restricted by the capacity constraints of local advice infrastructure (i.e. the organisations able to provide or take referrals), as well as university resources, including the amount of staff supervision time available.

Discussion: The value of ECF clinics from an access to justice perspective

NGOs have a growing interest in how university law clinics can support access to justice (LawWorks 2017), with funders such as the Legal Education Foundation supporting significant work in this area, including PLP's report on Public Law in Clinical Legal Environments (Public Law Project 2018b). Identifying the opportunities that ECF clinics offer as part of clinical legal education programmes is an important contribution to discussions about the role of university law clinics in access to justice work and the benefits that they can offer to the wider community. The expansion of university law clinics to assist members of the public with legal issues is important at a time where the decline of legal aid has left many people facing significant barriers to accessing the justice system without legal representation. However, university law clinics are under increasing pressure to provide access to justice in the absence of state funding, and clinics would require significant additional resources to meet this demand (Drummond and McKeever 2015). Where other pro bono advice services may aim to at least in part replace services previously funded by legal aid, ECF clinics offer

a route to directly challenge the effects of legal aid by increasing the number of people able to access ECF for areas of law that are now outside the usual scope of legal aid.

ECF clinics are beneficial from a student learning perspective not only for allowing students to apply their developing legal skills to support access to justice, but also by engaging them in the challenges of the legal aid system and providing the opportunity to learn about how access to justice issues impact the communities that they live in. Raising awareness of the challenges of the civil justice system, as well as the developing creative ways to address such challenges, is an important part of the work done by ECF clinics. Engaging students with the ECF scheme and conversations about the operation of the legal aid system also provides an important point of learning. Teaching students about civil legal aid, by providing students with a chance to encounter the legal aid system, can be an important part of longer-term strategies to develop future lawyers who care about access to justice and the accessibility of legal services.

Despite the advantages of ECF clinics, the research also found that engaging with the ECF scheme demonstrates the ways in which the scheme itself often limits the possibilities of fair and effective access to justice by preventing individuals from being able to access legal aid. The experience of running the clinic in Exeter was that the ECF scheme is problematic from an access to justice perspective in terms of its administration by the Legal Aid Agency, including the time and technical expertise required to make an application, and the delays faced by applicants. The issues

encountered when assisting individuals to make applications often made the project more difficult to manage in terms of the resources and capacity of university volunteers. These challenges presented a tension between the aim of promoting access to the ECF scheme to ensure that those in need of advice can secure it and enabling a deeply flawed system to function.

Despite the challenges of the ECF system, attempting to improve access to the scheme remains important because if people do not apply for ECF when they need it, the statistics will continue to show a low level of take up for the scheme, which is then assumed to indicate a low level of demand rather than demonstrating the reality of the need for a more accessible and sustainable legal aid system. The research summarised above focuses primarily on immigration law, as that was the main focus of the clinics that participated in the research. Immigration is also the area of law in which most ECF applications are currently made and granted. However, since the research was conducted, the University of Exeter ECF clinic has assisted individuals with ECF applications for family law and welfare benefits. Given the lower application and grant rates in these areas, as well as the other categories of civil law where ECF was introduced and because the overall number of ECF applications continues to fall short of the government's original predictions for the scheme each year, there is considerable scope to expand the work of ECF clinics to support access to justice.

Conclusion

ECF clinics can be viewed as one strategy for increasing access to legal aid, rather than establishing alternative services in response to the gaps left by the LASPO cuts. Where legal aid providers are unable to make ECF applications, university law clinics (and potentially other pro bono projects, although that is not the scope of the research presented here) can provide an important service to the public by assisting individuals to apply for ECF directly to the Legal Aid Agency. The potential to support direct applicants with the process of applying for ECF comes with the caveat that the individuals still need to find a legal aid provider to take their case on, which is not always easy given the context of advice deserts. In cases where providers are unable to make ECF applications themselves, ECF clinics can help to connect individuals with their entitlement to legal aid, which may otherwise be unrealised. Law students are able to put their developing legal skills into practice before they are qualified, and first-hand experience of access to justice issues may prove to be important for the future development of a generation of legal aid lawyers who are committed to access to justice. In response to the funding cuts introduced by LASPO, ECF clinics are one way of improving access to justice, but at the same time refusing to accept the burden of responsibility for advice provision in the context of the reductions of state funding for legal aid.

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**THE LAW IN THE COMMUNITY MODULE AT NORTHUMBRIA UNIVERSITY-
WORKING IN PARTNERSHIP WITH CITIZENS ADVICE AS AN EFFECTIVE
TEACHING TOOL**

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Abstract

This article discusses the Law in the Community module, which has recently been introduced into the curriculum at Northumbria University. In this module, the students attend fortnightly workshops with their university tutor and volunteer each week at their local Citizens Advice. The aims of the module are to develop the students' knowledge and professional skills and appreciation of access to justice challenges, whilst simultaneously advising members of the community through their volunteer work at the Citizens Advice. The purpose of this paper is twofold: firstly, to present and discuss data from a semi-structured interview with the academic responsible for the design and delivery of the module during the first year of its inception. Secondly, to evaluate the pedagogical benefits and the benefits to the wider community.

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Key Words: Clinical Legal Education, Law in the Community, Legal Education, Citizens Advice, Access to Justice

Introduction

The Student Law Office (SLO)² at Northumbria University has, for over 20 years, provided law students with the opportunity to develop their professional skills by providing free legal advice and assistance to members of the public.³ The Law in the Community module has recently been introduced into the curriculum and provides an alternative clinical option to the SLO module⁴ to the law students. In this module, the students learn through a combination of fortnightly workshop groups with their University tutor and conduct volunteer work each week at the local Citizens Advice where they provide legal advice, assistance and/or legal education, under their supervision, to the organisation's service users. Northumbria University remunerates Citizens Advice for each student they supervise.

² For further information about the SLO please see the webpage <https://www.northumbria.ac.uk/about-us/academic-departments/northumbria-law-school/study/student-law-office/> accessed 4 July 2020.

³ C Sylvester, J Hall and E Hall (2014) 'Problem-based learning and clinical legal education: What can clinical educators learn from PBL?' *International Journal of Clinical Legal Education* Vol 4, pp.39-63; Dunn, R (2017). 'The knowledge, skills and attributes considered necessary to start day one training competently and whether live client clinics develop them' Doctoral thesis, Northumbria University

⁴ The SLO provides a full representation assistance to members of the public. Students in their third year of the LLB Hons and MLaw Exempting degree undertake the SLO as a full year module. The module is also available to the Legal Practice Course students as a 12 week module in the second semester.

Citizens Advice is a charitable organisation which provides free, confidential and impartial advice to the local community on diverse areas including welfare benefits, family, housing and employment law.⁵ Legal aid cuts introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO),⁶ together with cuts to charitable organisations,⁷ has resulted in a significant loss or reduction of legal services. The volunteer work undertaken by the students in this module increases the capacity of Citizens Advice to provide advice and assistance to those who may not otherwise be able to access legal services,⁸ whilst simultaneously allowing the students to develop their knowledge of the law and professional skills under this model of clinical legal education (CLE).

⁵ For further information, see the webpage <https://www.citizensadvice.org.uk> accessed 4 December 2020.

⁶ The reforms being implemented through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) <http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted> accessed 4 December 2020.

⁷ D Morris and W Barr (2013) 'The impact of cuts on legal aid funding on charities' *Journal of Social Welfare and Family Law* Vol 35 (1) pp79-94. See also Citizens Advice 'Citizens Advice Submission to the Justice Enquiry into the impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012' <https://www.citizensadvice.org.uk/about-us/policy/policy-research-topics/justice-policy-research/access-to-justice-policy-research-and-consultation-responses/access-to-justice-consultation-responses/jsc-inquiry-into-the-impact-of-changes-to-civil-legal-aid/> accessed 9 December 2020.

⁸ For a discussion on whether clinical legal education fills a gap in legal aid see E Campbell (2014) 'Pro bono is great education for law students but they shouldn't fill the gap left by legal aid cuts' published in *The Conversation*, <https://theconversation.com/pro-bono-is-great-education-for-law-students-but-they-shouldnt-fill-gap-left-by-legal-aid-cuts-34323> accessed 4 December 2020. See also D Nicholson (2006) 'Legal Education or Community Service the Extra Curricular Student Law Clinic' *Web Journal of Current Legal Issues*, <http://www.bailii.org/uk/other/journals/WebJCLI/2006/issue3/nicolson3.html> accessed 4 December 2020.

This article adds to the sparse literature in this area through an exploration of the design and implementation of this clinical module, including an evaluation of the pedagogical benefits and benefits to the wider community. The article will first set out the key features of the module. The second part will set out the methodology adopted in this article. The third part will discuss the design and implementation of the module, presenting data as a case study from a semi-structured interview with the academic responsible for its design and who was module leader during its first year. The aims of the module will be explored, together with challenges faced during the design and implementation stages. The fourth part of this article will analyse the benefits and limitations from a student and community perspective from the authors' own experience of teaching this module during its first two years.

Introducing the Law in Community Module

Working with Citizens Advice as a Model of CLE

Law schools working in partnership with external organisations and indeed, Citizens Advice is not a new concept in CLE.⁹ There is an increasing use of Citizens Advice as

⁹ For an example of law schools working in partnership with external organisations, see L Bengtsson and A Speed (2019) 'A Case Study Approach. Legal Outreach Clinics at Northumbria University' *International Journal of Clinical Legal Education* Vol 26 No 1 pp.179-215; M Castles (2016) 'Marriage of convenience or a match made in heaven? Collaboration between a law school clinic and a commercial law firm' *International Journal of Clinical Legal Education*, Vol 23, pp. 7-47; L Bleasdale-Hill and P Wragg (2013) 'Models of Clinics and Their Value to Students, Universities and the Community in the post 2012 Fees Era' *International Journal of Clinical Legal Education*, Vol 19, pp.257-270.

a means of furthering CLE; for example, in the University of Plymouth¹⁰, Birmingham City University¹¹, University of Central Lancashire¹², Lancaster University¹³, University of Northampton¹⁴, among many others. Notwithstanding the increasing prevalence of such a partnership, there appears to be no typical module structure or uniform link with Citizens Advice. Universities differ in their approach, from students volunteering and receiving a Citizens Advice qualification/accreditation, to the module being mandatory, or the Citizens Advice providing ad hoc assistance and experience for the student. The approach of the Law in the Community module at Northumbria University is considered in the Case Study section below.

This model of CLE with universities working in partnership with Citizens Advice not only prepares students for the world of work¹⁵ but supports unmet legal need in the local community.¹⁶ Access to justice is often the subject of debate among academics, practitioners, the judiciary, government and the public more generally, particularly so

¹⁰ University of Plymouth, 'Law Clinic: work-based learning and volunteering' (2018/2019) https://www.plymouth.ac.uk/uploads/production/document/path/9/9747/Law_Clinic_Handbook.pdf accessed 24 August 2020.

¹¹ Birmingham City School of Law, 'Legal Advice and Representation Unit' <https://www.bcu.ac.uk/law/student-experience-and-employability/legal-advice-representations-unit> accessed 24 August 2020.

¹² University of Central Lancashire, 'Law Clinic Student Support' https://www.uclan.ac.uk/students/support/law_clinic.php accessed 24 August 2020.

¹³ Lancaster University, 'Law Clinics' <https://www.lancaster.ac.uk/study/why-lancaster/law-clinics/> accessed 24 August 2020.

¹⁴ University of Northampton, 'Pro Bono Advice Clinic' <https://www.northampton.ac.uk/about-us/services-and-facilities/pro-bono-advice-clinic/> accessed 24 August 2020.

¹⁵ C Sparrow 'Reflective Student Practitioner – an example integrating clinical experience into the curriculum' (2009) *International Journal of Clinical Legal Education* Vol 14 (4) pp 70-76.

¹⁶ *Ibid.* See also B Waters and J Ashton (2018) 'A study into situated learning through community leadership partnership' *International Journal of Clinical Legal Education*, Vol 25(2), pp. 4-47; F S Bloch (ed.) (2011) *The Global Clinical Movement: Educating Lawyers for Social Justice*, (New York: Oxford University Press).

since the introduction of LASPO on 1 April 2013. A key aspect of a person's access to justice is the ability to receive legal advice and assistance, whether privately paying, through insurance or by way of state support. The concept of the state making payments to lawyers to act for members of the public is not a new concept. The formal legal aid system was introduced on the recommendation of the Rushcliffe Committee following the second World War, wherein it was stated that, *'legal aid should be available in all courts to a wide income group and at a scale of contributions for those who could pay something towards costs but free for those who could not'*.¹⁷ Richardson and Speed note that the benefits of legal representation for a client cannot be overstated; clients, *'often lack the experience and skill required to identify the key issues in dispute and put forward their strongest legal arguments'* and, *'legal aid is often regarded as the fourth pillar of the welfare state, alongside health, education and social security'*.¹⁸ The introduction of LASPO systematically dismantled aspects of the welfare state.¹⁹ It is appreciated that the Conservative - Liberal Democrat Coalition government needed to reduce the financial deficit for the United Kingdom, which had reached £956.4 billion in 2009/2010²⁰, but such drastic measures for the justice system have impeded access to justice. It was

¹⁷ K L Richardson and A K Speed (2019) 'Restrictions on legal aid in family law cases in England and Wales: creating a necessary barrier to public funding or simply increasing the burden on the family courts?' *The Journal of Social Welfare and Family Law*, Vol 41(2), pp. 135 – 152.

¹⁸ K L Richardson and A K Speed (2019) 'Restrictions on legal aid in family law cases in England and Wales: creating a necessary barrier to public funding or simply increasing the burden on the family courts?' *The Journal of Social Welfare and Family Law*, Vol 41(2), pp. 135 – 152.

¹⁹ B Waters and J Ashton (2018) 'A Study into Situated Learning through Community Legal Companionship' *International Journal of Clinical Legal Education* Vol 25(4) pp. 4-47.

²⁰ G Heung (2017) 'The Underprivileged See No Light in LASPO Act 2012' *Legal Issues Journal* 23 (5) , pp. 26.

envisaged in 2013 that the proposed cuts to legal aid would result in annual savings by the state of £220 million.²¹ There may be a cost saving, though this saving is reversed somewhat by the effects of the Covid-19 pandemic. Even just within the criminal courts, *'the government will need to devote additional spending to the criminal courts for up to two years after the crisis: £55m–£110m per year for two years would be sufficient to clear the backlog...and return waiting times to 2019/20 levels'*²², which is, *'somewhat ironic that this is the exact same amount that it was hoped would have now been saved through the civil and criminal legal aid reforms, although stage 1 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) review has indicated that the real amount saved to date is much lower'*.²³

There are serious non-financial consequences that must be addressed if the justice system is to continue functioning. In consequences of the dismantling of the system, the most foreseeable non-financial impact was the increase in self-representing litigants (otherwise known as litigants in person).²⁴ There is a greater likelihood of litigants in person suffering access to justice issues compared with legally represented

²¹ Ministry of Justice, 'Transforming legal aid: delivering a more credible and efficient system', (9 April 2013), page 5 <https://www.justice.gov.uk/downloads/consultations/transforming-legal-aid.pdf> accessed 17 July 2020

²² The Institute for Government, 'The criminal justice system: How government reforms and coronavirus will affect policing, courts and prisons', page 8 (28 April 2020) https://www.instituteforgovernment.org.uk/sites/default/files/publications/criminal-justice-system_0.pdf accessed 25 August 2020.

²³ A Speed, C Thomson, and K Richardson (2020) 'Stay home, stay safe, save lives? An analysis of the impact of COVID-19 on the ability of victims of gender-based violence to access justice' *The Journal of Criminal Law*, <https://doi.org/10.1177/0022018320948280>

²⁴ A Speed and K Richardson (2020) 'Restrictions on legal aid in family law cases in England and Wales: creating a necessary barrier to public funding or simply increasing the burden on the family courts?' *The Journal of Social Welfare and Family Law* Vol 41(2), pp 135 – 152.

parties, worsened by the erosion of legal aid eligibility, most notably in civil and private law family cases. There was a fall in civil law cases from, 724,243 prior to LASPO, to 258,460 in 2015/2016.²⁵ The Lord Chief Justice provided data on the rise of litigants in person to Parliament in January 2019 for private law family cases, whilst acknowledging the dearth of statistics pre-2012/2013, particularly for defended civil claims.²⁶ The lack of data hinders the prospect of a comparative analysis of pre-LASPO and post-LASPO statistical data. In the financial year 2012/2013, the Lord Chief Justice provided that, *'a total of 58% of parties were recorded as having legal representation in private law cases that had at least one hearing. In 2017/2018...this had reduced to 36% of parties'*.²⁷ The reduction in representation was noted as similar for both applicants and respondents.²⁸ *'In 2012/2013, 72% of applicants and 46% of respondents had legal representation, compared with 45% of applicants and 28% of respondents in 2017/2018.'*²⁹ Given the withdrawal of legal aid for advice and representation, there needed to be a plug for this gap in legal assistance. The plug should be made by government, though this is unlikely in a system realistically

²⁵ G Heung (2017) 'The Underprivileged See No Light in LASPO Act 2012' *Legal Issues Journal* 23 (5), pp. 28.

²⁶ Lord Burnett of Maldon, 'Statistics on Litigants in Person' (25 January 2019) <https://www.parliament.uk/documents/commons-committees/Justice/correspondence/250119-LCJ-statistics-litigants-in-person.pdf> accessed 13 July 2020

²⁷ Lord Burnett of Maldon, 'Statistics on Litigants in Person' (25 January 2019) <https://www.parliament.uk/documents/commons-committees/Justice/correspondence/250119-LCJ-statistics-litigants-in-person.pdf> accessed 13 July 2020

²⁸ Lord Burnett of Maldon, 'Statistics on Litigants in Person' (25 January 2019) <https://www.parliament.uk/documents/commons-committees/Justice/correspondence/250119-LCJ-statistics-litigants-in-person.pdf> accessed 13 July 2020

²⁹ Lord Burnett of Maldon, 'Statistics on Litigants in Person' (25 January 2019) <https://www.parliament.uk/documents/commons-committees/Justice/correspondence/250119-LCJ-statistics-litigants-in-person.pdf> accessed 13 July 2020

propped up by goodwill of the professionals therein, so it inevitably falls to law clinics, charities and other pro bono services to plug said gap. In other jurisdictions, there is a mandatory contribution to pro bono work by lawyers; for instance, pro bono work is a condition for admission to the New York Bar and lawyers are required to dedicate a small proportion of hours to pro bono work in Australia.³⁰ Waters and Ashton recognise that, '*initiatives have...been explored and implemented by the Ministry of Justice through investment in Personal Support Units (PSU), LawWorks, Law for Life and the Royal Courts of Justice Advice Bureau*'.³¹ In consequence of general austerity measures and the cuts to legal aid, there is greater use of law clinics and services akin to Citizens Advice by the public. Richardson and Speed note:

*Whilst these organisations provide a valuable service, they can by no means fill the gap left by legal aid because they are often unable to assist in complex or urgent matters. For example, the purpose of law school clinics is to provide a practical, educational benefit to its students, alongside providing free legal advice to the community. The cases those clinics take on therefore have to be suitable for students with little to no prior practical legal experience.*³²

³⁰ G Heung (2017) 'The Underprivileged See No Light in LASPO Act 2012' *Legal Issues Journal* 23(5), pp. 50.

³¹ B Waters and J Ashton (2018) 'A Study into Situated Learning through Community Legal Companionship' *International Journal of Clinical Legal Education* Vol 25 (4), pp.4-47.

³² K L Richardson and A K Speed (2019) 'Restrictions on legal aid in family law cases in England and Wales: creating a necessary barrier to public funding or simply increasing the burden on the family courts?' *The Journal of Social Welfare and Family Law*, Vol 41(2), pp. 135 – 152.

Clinics are often unable to assist in complex matters, but that does not preclude the possibility entirely.³³ For instance, Sussex University won Advice Project of the Year from Citizens Advice in 2018.³⁴ Of the 722 people helped over the academic year, 532 were “complex cases”, though this phrase is not defined in the award announcement and is a subjective term.³⁵ This demonstrates the importance of clinics joining forces with Citizens Advice, who can advise on a wide range of complex legal issues.

Citizens Advice is a vital service which offers legal advice and assistance to the public in 2,540 locations across England and Wales, with 21,400 volunteers and 8,150 members of staff.³⁶ The service helped 2.8 million people in 2018/2019 in person, or by telephone, email or web chat.³⁷ Furthermore, in 2018/2019, Citizens Advice saved the government and public services at least £485 million.³⁸ Citizens Advice clients are often ‘the most disadvantaged in society with the greatest needs.’³⁹ Indeed a 2015

³³ K L Richardson and A K Speed (2019) ‘Restrictions on legal aid in family law cases in England and Wales: creating a necessary barrier to public funding or simply increasing the burden on the family courts?’ *The Journal of Social Welfare and Family Law*, Vol 41(2), pp. 135 – 152

³⁴ University of Sussex, ‘Sussex law students win ‘Advice Project of the Year’ from Citizens Advice’ (29 October 2018) <http://www.sussex.ac.uk/broadcast/read/46413> accessed 17 July 2020

³⁵ University of Sussex, ‘Sussex law students win ‘Advice Project of the Year’ from Citizens Advice’ (29 October 2018) <http://www.sussex.ac.uk/broadcast/read/46413> accessed 17 July 2020

³⁶ Citizens Advice, ‘introduction to the Citizens Advice service’ <https://www.citizensadvice.org.uk/about-us/introduction-to-the-citizens-advice-service/> accessed 13 July 2020

³⁷ Citizens Advice, ‘Our impact’ <https://www.citizensadvice.org.uk/about-us/difference-we-make/impact-of-citizens-advice-service/all-our-impact/> accessed 3 December 2020

³⁸ Citizens Advice, ‘Making a Difference: our impact in 2018/19’ https://www.citizensadvice.org.uk/Global/Public/Impact/ImpactReport_2019_V6.pdf accessed 13 July 2020

³⁹ Citizens Advice, ‘Our impact’ <https://www.citizensadvice.org.uk/about-us/difference-we-make/impact-of-citizens-advice-service/all-our-impact/> accessed 3 December 2020

study showed that seven out of ten of their clients live in poverty.⁴⁰ Arguably, law schools should raise awareness of unequal access to justice and also to '*implement strategies aimed at ameliorating these*'.⁴¹ This wealth of experience within Citizens Advice and significant insight into charitable working within the access to justice arena can only benefit students and the local community. The public can attend Citizens Advice on an ad hoc basis for initial advice, application drafting and signposting to relevant services for full representation. Citizens Advice seek to partner with local organisations to extend their reach in assisting the public with accessing justice.

Key Features of Northumbria University's SLO Law in Community Module

Within Northumbria University, all students studying the LLB (Hons), LLB (Hons) with Business and LLB (Hons) with International Business degree may choose the Law in Community module as a second semester option during their third year. If they choose this as a module, it is worth 20 credits of their mark for the year.⁴² The module was introduced in the academic year 2018-2019 as an alternative clinical option to the

⁴⁰ Citizens Advice, 'Briefing Local Citizens Advice Income Profile' <https://www.citizensadvice.org.uk/Global/Public/Impact/Client%20poverty%20briefing%20-%20England%20and%20Wales%20-%20June%202015.pdf> accessed 3rd December 2020.

⁴¹ L Carasik (2016) 'Justice in the Balance: An Evaluation of One Clinics Ability to Harmonise Practical Skills, Ethics and Professionalism within Social Justice Mission' *Southern California Review of Law and Social Justice* 16, pp23. See also E Campbell and V Murray 'Mind the Gap: Clinic and the Access to Justice Dilemma' *International Journal of Legal and Social Studies* Vol 2(3) pp. 94-106.

⁴² Along with this module, the students also complete a dissertation which is worth 60 credits during the second semester.

year-long 60 credit SLO module. During the first year of this module, 30 students chose this option and in the second year, there were 22 students. The module involves six, two-hour workshops, which take place within the law school with the students' University tutor and also weekly attendance for one day at the Citizens Advice under the supervision of members of staff who work there. The students therefore gain the benefit of learning from multiple supervisors.⁴³

Whilst at Citizens Advice, the students are involved in giving advice to clients at the daily face-to-face drop-in sessions. At these sessions, up to 60 members of the public can attend and be advised on a range of legal issues. The students are also involved in giving telephone advice to clients. They are exposed to a diverse range of practice areas, including welfare benefits, debt, employment, consumer protection, housing, immigration, tax and travel. They also undertake a wide range of activities on behalf of their clients, which involves some, or all, of the following:

- Interviewing clients, taking instructions and advising clients
- Undertaking legal research
- Drafting client statements and court documents
- Preparing case strategies and identifying appropriate next steps in relation to a case

⁴³ For a discussion on the benefits of learning from multiple supervisors see L Bleasdale-Hill and P Wragg (2013) 'Models of Clinics and Their Value to Students, Universities and the Community in the post 2012 Fees Era' *International Journal of Clinical Legal Education*, Vol 19, pp.257-270 and also L Bengtsson and A Speed (2019) 'Legal Outreach Clinics at Northumbria University' *International Journal of Clinical Legal Education* Vol 26 (1) pp 179- 215.

- Producing a legal information leaflet or a factsheet for members of the public
- Engaging in campaign work around the law or legal practice

At the end of the module, the students are assessed by way of a portfolio, which is securely stored at the offices of Citizens Advice throughout the module and only brought into the University on the specified hand in day. The portfolio contains both their workshop work and live client work undertaken at Citizens Advice throughout the module.⁴⁴ The same assessment criteria are applied for both the workshop work and work undertaken at Citizens Advice.⁴⁵ Within their portfolio, the students also include a reflective journal, which represents the student account and associated reflections on the module. Morrison notes that a reflective journal offers '*personal, academic, professional and evaluative development*'.⁴⁶ Allowing the students to reflect in a journal as the module progressed is more authentic than asking a student to write an essay at the end. As Crowley highlights, the student reflective journal leads to the development of self-awareness, '*inculcating a greater awareness of their personal and academic development*.'⁴⁷

⁴⁴ The workshop work is printed at the University and put on their portfolio when they next attend Citizens Advice. In terms of their live client work, clients are asked to sign an agreement authorising the students to put the work they have done on the case into their portfolios. This is explained in further detail during the case study.

⁴⁵ The assessment criteria for the portfolio is divided into 7 grade descriptors: knowledge and understanding of the law/legal practice, written communication skills, research skills, case and task management and strategising, teamwork skills including contribution to community based project and workshops, oral communication skills and reflective analysis and insight.

⁴⁶ K Morrison (1996) 'Developing reflective practice in higher degree students through a learning journal' 21(3) *Studies in Higher Education* pp., 317-332 DOI: [10.1080/03075079612331381241](https://doi.org/10.1080/03075079612331381241)

⁴⁷ L Crowley (2020) 'The Family Law Clinic at UCC Understanding the Law in the Classroom and Beyond' *International Journal of Clinical Legal Education* Vol 27 (3), pp 175-228.

Methodology

A two-hour semi-structured interview took place with the academic responsible for designing and implementing the module, Ana Speed.⁴⁸ The interview was recorded and transcribed. The data from the interview will be presented as a case study arising from the long interview method of data collection. Woodside, who also refers to McCracken, states that the typical features of long interviews include⁴⁹:

(a) a two to six-hour, face-to-face meeting with the interviewer and respondent; (b) interviewing the respondent in his or her life space, that is, the environment related to the topic under study; (c) asking open-ended, semi-structured questions with deeper exploration of unexpected topics related to the study as opportunities occur; (d) tape recording of responses (when not disruptive) during the interview; (e) verification of responses by triangulation of research methods (e.g., comparing answers with data from direct observation and documents); and (f) developing thick descriptions of individual cases (individual customers' buying and using behavior[s]).

Woodside's identified indications of the long interview method are used within this study. As aforesaid, the two-hour semi-structured interview took place with the academic responsible for designing and implementing the module. The limited ability

⁴⁸ Ana Speed is a Solicitor Tutor in the Student Law Office at Northumbria University.

⁴⁹ A G Woodside, *Case Study Research : Core Skills in Using 15 Genres*, Emerald Publishing Limited, 2016, pp 274, ProQuest Ebook Central, <https://ebookcentral.proquest.com/lib/northumbria/detail.action?docID=4717024>.

to generalise is a particular disadvantage of long interview data collection using one participant,⁵⁰ though generalising is not the main purpose of this study; rather the aim is to evaluate the Law in the Community module to assist with development of the module at Northumbria University and to showcase the possibility of this model being used in other aspects of CLE or at other universities. This approach, therefore, does not necessarily affect the validity and value of case study research from a generalisability perspective, which was highlighted by Johansson (2003), Merriam (2009) and Stewart (2014), as cited by Harrison et al.⁵¹

A framework of questions was used to guide the interview and to address key considerations, such as how the module was designed, the impetus for its introduction and any challenges faced during the design and implementation. In consequence of the Covid-19 pandemic, the participant was interviewed over Microsoft Teams, which is akin to the 'life space' that was adopted towards the end of the module as a result of the prohibition on persons entering the University and Citizens Advice during the UK lockdown period. As regards the third of Woodside's typical features, the participant was asked open-ended questions to facilitate a semi-structured interview, thereby allowing the participant to develop their responses and allowing the

⁵⁰ A G Woodside, *Case Study Research : Core Skills in Using 15 Genres*, Emerald Publishing Limited, 2016, pp. 277, ProQuest Ebook Central, <https://ebookcentral.proquest.com/lib/northumbria/detail.action?docID=4717024>.

⁵¹ H Harrison, M Birks, R and J Mills (2017), 'Case Study Research: Foundations and Methodological Orientations', *Forum Qualitative Sozialforschung / Forum: Qualitative Social Research*, 18(1), Art. 19, <http://nbn-resolving.de/urn:nbn:de:0114-fqs1701195>.

interviewer not to be curtailed by a fixed structure, but to further explore unexpected topics related to the study. The ability to learn the reasons for certain responses and to use probing questions is an advantage of this research method.⁵² As regards the fourth of the typical features, there was a recording taken of the interview to allow considerable analysis of the responses. The verification of the responses by triangulation of research methods arises from the authors' observations from teaching on the module, as well as from anonymous feedback of the students in the ordinary module appraisal and from materials used in the development and progression of the module, including the module handbook and workshop materials. This approach is a particular strength of using the long interview research method, which also seeks to mitigate the inherent potential issue of researcher bias, often associated with case studies and this method of data collection.⁵³ The descriptions, evaluations and consequent developments that follow in this article satisfy the final typical feature of the long interview method outlined by Woodside.

The study received ethical approval from Northumbria University and the academic who agreed to the interview signed an informed consent form. The consent form

⁵² A G Woodside, *Case Study Research : Core Skills in Using 15 Genres*, Emerald Publishing Limited, 2016, page 276, ProQuest Ebook Central,

<https://ebookcentral.proquest.com/lib/northumbria/detail.action?docID=4717024>

⁵³ A G Woodside, *Case Study Research : Core Skills in Using 15 Genres*, Emerald Publishing Limited, 2016, page 275, ProQuest Ebook Central,

<https://ebookcentral.proquest.com/lib/northumbria/detail.action?docID=4717024>

reminded the participant that she could withdraw from the interview at any stage and her participation was voluntary. Permission was given to record the interview.

The qualitative data from the semi-structured interview and the authors' views, open a window to the value of this module.⁵⁴ However, future research involving a survey or interviews with staff at Citizens Advice, a client questionnaire to the service users and focus groups with the student volunteers over a few years is needed to build upon this research.

The next part of the article sets out the data from the semi-structured interview with Ana Speed, the academic responsible for the design and implementation of the module.

Case Study

The Design and Implementation of the Law in Community Module

During the summer of 2018, Ana was tasked with the design and implementation of the Law in Community Module (the module). She highlighted that the aim of the module is for students to gain the practical legal experience and develop their

⁵⁴ S Rahman (2017) 'The Advantages and Disadvantages of Using Qualitative and Quantitative Approaches and Methods in Language "Testing and Assessment" Research: A Literature Review' *Journal of Education and Learning* 6(1), pp.102-112.

professional skills. She explained that *'Northumbria University intended to provide law students with a clinical experience, whether they were undertaking the LLB or MLaw degree.'*

The SLO, at the time, did not have capacity to supervise LLB students in addition to MLaw students, so the Law in Community module was created to enable students to obtain practical legal experience and develop their professional skills.

The addition of the module was a useful tool in maintaining the number of students in the SLO. Without such a module, there would have been around a further six to eight firms, which would have required additional staff supervision and additional live client enquiries. Furthermore, the module gives students another clinical option, one which is shorter alongside a dissertation to the year-long SLO module.

As well as aiming to provide the students with a clinical experience, Ana explained that *'clinical modules typically receive a very high feedback rate'* which was further inspiration for designing this module. She believes that the high level of feedback is due to a combination of the fact that students tend to build relationships with supervisors, which they would not do on an ordinary black letter law module and secondly it is such a different way of learning to what students are used to. These modules boost student satisfaction rate, thus benefitting the law school and University as a whole. There is a greater focus on student satisfaction with the introduction of the National Student Survey and the Teaching Excellence Framework (TEF).⁵⁵

⁵⁵ For specifications see <https://www.gov.uk/government/publications/teaching-excellence-and-student-outcomes-framework-specification> accessed 3 December 2020.

Offering a Law in the Community module, coupled with a dissertation, can impact positively on student satisfaction.

Due to the nature of the module and the fact that an external organisation is involved, there was an abundance of additional legal and administrative duties and challenges to comply with at design and implementation stage. Ana described this as *'3 months' full time worth of work'*. The help from her clinic team and those who engage in pedagogical research at Northumbria University *'was invaluable'*. Others had already designed clinic modules, so they were willing to provide constructive assistance. The Director of the Student Law Office and the colleague responsible for designing the Street Law module were able to offer their input and assisted Ana with determining the appropriate workload and level of assessment for a 20-credit module.

The first task for Ana when designing the module was to find a partner organisation with which to work, to provide the students with a clinical experience and this involved a consideration of all those organisations with which the University had previously and currently worked. Ana was aware that there may be potentially 60 students that would be enrolled on the module. There was one organisation who *'stood out in terms of meeting capacity and live client experience'* and who *'is famous for providing pro bono advice to people who cannot afford legal advice or assistance elsewhere'*. This organisation was Citizens Advice. They were very receptive when they were initially approached by the University to be the partner organisation for this module. Citizens Advice agreed based on the fact the students would help increase their

capacity to advise members of the public and they received remuneration in return. There was also the potential of volunteer retention if the students lived locally and were able to continue after their degree.

Having identified the partner organisation, funding needed to be secured. A proposal was put forward to an external funder, an alumnus of Northumbria University, and it was agreed that the nature of the module was fitting with the funder's objectives. The fund is managed by the University and is treated as a budget to pay Citizens Advice annually. This creates further administrative duties, for example invoicing to remunerate Citizens Advice, which needs to be done through the University procurement process and tendering, being a public sector organisation.

As with any new module, proposal forms needed to be completed and signed off and standard University documentation needed to be written such as, the module handbook, the workshop materials, and the assessment criteria. In addition, there was legal documentation and documentation of Citizens Advice. The documentation included a legal agreement between the University and Citizens Advice, a privacy policy, which allowed the students to obtain consent from the clients of Citizens Advice to enable them to place confidential work on their portfolios, and a confidentiality agreement, which was signed by every student. Citizens Advice also

have several policies and procedures that the students were required to read and to which they were to adhere.⁵⁶

In addition, before starting Citizens Advice, the students are asked to complete an online training course, covering several core areas, including reception duties, knowledge of the law, interviewing, conducting research, negotiating and recording cases. At the end of the online training, there is an online assessment, and the students must attain 80% for a pass. The students cannot begin their volunteer work at Citizens Advice until they have completed the training course and passed the assessment. Ana explained that the intention is that by completing the same training as the volunteers already at Citizens Advice and having access to the same resources, the students will '*hit the ground running*'. Ana made the online training available around 6 weeks before the module started, however a challenge during the first year was that some students instead completed this in the first few weeks of their volunteering, and this reduced the ability to undertake live client work straight away. Ana explained that the number of policies and procedures with which the students were expected to familiarise themselves, in addition to the online training course, understandably left many students feeling as if there had been an "*information overload*" before the module had properly commenced.

⁵⁶ These included the following: Clear Desk Policy, Client Confidentiality Policy, Dealing with Aggressive or Abusive Clients Policy, Health and Safety Policy, Equality and Diversity Policy, Dress Code Policy.

At the very start of the module, an induction lecture took place. During this lecture, Ana introduced the module and ensured that the students signed all the necessary forms to take over to Citizens Advice⁵⁷. Ana then took the students to Citizens Advice to introduce them to the staff, and the students were then given a tour of the building.⁵⁸ At this point, the students agreed with Citizens Advice the day that they would attend each week based upon their University timetables and availability of supervisors at Citizens Advice. This presented another challenge, as Citizens Advice had capacity to supervise 6 students per day and it transpired that there were some days that were more convenient than others for the students. All students were scheduled for a suitable day to attend Citizens Advice during each week of the module.

With regards to their scheduled day, Ana acknowledged that she had not been completely clear about how to deal with students missing a week through illness. Citizens Advice were at capacity most days, so students could not rearrange their missed session. She, therefore, had to adopt a '*strict line*' of refusing student requests to rearrange, which was better than using discretion to decide which excuse was appropriate for missing a week. This was useful, as between January and March, she had '*around 20 requests from students to change sessions.*' The reasons for the requests ranged from illness, to family deaths, to work commitments. The answer remained

⁵⁷ Namely the Confidentiality Declaration, the Student Advisor Agreement which sets out the roles and commitments of the students and Citizens Advice, Training Record, Emergency Contact Form and Risk Assessment Form

⁵⁸ This tour was also mandatory to comply with Citizens Advice's healthy and safety policy.

the same for each request: Citizens Advice do not have capacity. A further consideration had to be the additional administration of changing sessions for students, whether that be administration for Ana, or for staff at Citizens Advice. All questions and requests had to be made to Ana direct, save for questions relating to the actual work, so that a consistent line could be taken. Although there were no disabilities, chronic illnesses or disabilities disclosed at the time, if this were to arise in future, this would need special consideration in line with the university's DSSR procedure and in cooperation with student support and relevant programme leaders. Bespoke arrangements could then be developed to cater for the individual students' needs.

For Ana, the main challenge in designing the module was GDPR⁵⁹, confidentiality and data security. The clients that the students advised remained the clients of Citizens Advice, as opposed to the University's clients. There had to be a way, therefore, for the students to collect client data from their volunteer work at Citizens Advice to use on their portfolios. Permission had to be obtained from the University for the students to use hard copy personal files, rather than electronic files, to satisfy GDPR, client confidentiality and data security. This meant a departure from the standard university electronic portfolio; therefore, a special exception had to be granted. For the special exception to be granted, Ana had to show that she had exhausted all other options, including use of the popular software, PebblePad.

⁵⁹ General Data Protection Regulations 2016.

Online platforms, such as PebblePad, are not sufficiently secure and bespoke to protect confidentiality of client information. Furthermore, students could have opened PebblePad on their home devices, which may not be a confidential environment. With a hard copy portfolio, students could only print it out, or would have to purposefully breach confidentiality by emailing the work from Citizens Advice, which would be an issue for Citizens Advice, rather than the University. It was agreed that the students would have to print and compile hardcopy portfolios and bring them to the University from Citizens Advice on the day that they were due to be submitted for assessment.

An added challenge was how to get the students' portfolios from Citizens Advice to the University at the end of the module for marking, as there were concerns around lost files and students taking files home. In this regard, it was '*drilled in*' to students at their induction lecture and at regular intervals throughout the module, that their files must always be kept at Citizens Advice and at no point must they take them away from there, as it would breach client confidentiality. The only exception to this was on their very last day when they were directed to walk directly over to the University from Citizens Advice. Ana explained '*I went as far as to say that they should collect their files in a rucksack, zipped up*' and they were only allowed to put client information into their portfolios if the clients had signed the relevant consent form. Indeed, this is a limitation of the portfolio, as some students may not obtain or receive consent from clients to allow their information to be included within the portfolio.

Regular review meetings were set up to take place between the University and Citizens Advice, to deal with any challenges or concerns. If something of concern arises, the organisation emails the concern to the University. Ana explained that this worked well as feedback was forthcoming. However, more can be done to obtain feedback from the clients, and this could be developed with Citizens Advice.

In addition to the administration associated with the clinical experience at Citizens Advice, the fortnightly workshops at the University also had to be designed. As well as wanting the students to develop their practical skills, *'a key learning outcome on this module was understanding their experience in context.'* Ana wanted the students to *'contextualise their experience'* and develop *'an understanding of the issues surrounding access to justice.'* This theme runs throughout the workshop tasks. Students are given questions around access to justice to discuss and are set written tasks to complete following their workshops to develop their social justice awareness and appreciate the valuable role that they play in supporting unmet legal need. These workshops were designed by Ana to allow the students to situate their experience, consider their role and explore what access to justice barriers are faced by individuals.

Within the workshops, Ana was also keen to include an opportunity for students to reflect on their work at Citizens Advice and to consider feedback from their external supervisor. The module was therefore designed so that Citizens Advice provide not only day-to-day feedback to the students, but also two summaries of students' performances with a mark of 1 to 5 in relation to how the students are

performing. Ana also highlighted that in theory, if a student does not attend Citizens Advice, but does attend the University workshops, the supervisor would '*still have sufficient work on which to assess them, including reflective tasks detailing how they deal with the case, presentations, research report, blog article and legal writing*'. This would allow the workshop tutor to assess the students against the requisite skills. The workshop tutor would also still see work from the portfolio, which should have written feedback on it from the supervisors at Citizens Advice. Oral feedback could be written down by the students and included within the portfolio.

Ana was asked what she would change if she was to redesign the module. She said firstly, she would have had the students attend Citizens Advice for half a day every week rather than one full day. The students fed back that an introductory lecture, a workshop every two weeks and volunteering at Citizens Advice one day a week was a high workload for a 20-credit module, with which Ana agreed. Ana stated that it became apparent midway through the module's first year that half a day a week would be better and would '*still be an appropriate amount of work*' with a '*similar level of experience*'". Ana accepts that this may not be quite as extensive, but the students would still be carrying out the same tasks and types of work on the cases that they are working on by going in for half a day a week.

Ana also feels that there needs to be a way to streamline the administration attached to the module but states:

Maybe I have the blinkers on because I designed the module but unfortunately, I can't envisage a way of streamlining that process while still adhering to the legal, GDPR requirements and making sure everything runs smoothly between us and the partner organisation.

Also, there is 'an ongoing obligation on the module leader to liaise with the in-house university law department to ensure documents remain up-to-date', including privacy policies and adhere to GDPR, as well as compliance with procurement and tendering. Inevitably, this can be time consuming to work through the documentation and to draft and approve agreements. A report must also be provided each year to the external funder to detail how the module has progressed, including feedback from Citizens Advice and students about the module overall. The ongoing administrative duties is an issue that must be anticipated and managed by those contemplating developing similar modules.

Analysis of the Law in Community Module

As well the financial benefit to Citizens Advice, the module increases their capacity to advise and assist members of the community, thereby supporting unmet legal need.⁶⁰

⁶⁰ The literature is well established on the community benefit of CLE. See, for example, S Wizner (2001) 'Beyond Skills Training' 7 *Clinical Law Review* pp. 327-340; A Sedillo Lopez (2001) 'Learning through Service in a Clinical Setting: the Effect of Specialization on Social Justice and Skills Training' *Clinical Law Review* 7, pp. 307-326; J Giddings (2008) 'Contemplating the Future of Clinical Legal Education' *Griffith Law Review* 17(1); W. Warren H. Binford (2008-09) 'Reconstructing a Clinic' *Clinical Law Review* 15, pp. 283.

In theory, the students should be of the same standard, if not better, as the existing volunteers at Citizens Advice, having completed two years of a law degree, completed the same training and having been provided with the same resources. This increases the capacity of Citizens Advice to assist with those unable to obtain legal advice and assistance elsewhere. During the first year of the module, the students advised a total of 475 clients and in the second year, a total of 73.⁶¹ The impact of the module to the community attracted media attention in two local newspapers where the students' work in helping '*plug the legal aid gap*' was reported.⁶² This also had reputational benefits to the University. It is important to acknowledge, as Ana mentioned, that the students only provide one-off advice to clients, so '*it's only as good as one-off advice can ever be*'. However, in the authors' experience of CLE, one-off advice can often be sufficient to resolve the client's problem and if not, the clients gain the benefit of being referred onto an organisation who may be able to help further.⁶³ There may be a perceived risk of referral-fatigue when clients are signposted to third party services, however the clients are aware that they are accessing Citizens Advice rather than a

⁶¹ The number in the second year is substantially lower as a result of the fewer students who participated in the module and also the fact the module was cut short by 4 weeks as a result of the COVID19 pandemic. The COVID19 pandemic resulted in the students moving to online teaching and they could no longer undertake their volunteer work at Citizens Advice. The students completed the module by working on a simulated enquiry with their University tutor.

⁶² The Chronicle 'Legal aid cuts and nightmares leave citizens depending on law students' accessible at <https://www.chroniclive.co.uk/news/north-east-news/legal-aid-cuts-benefits-nightmares-15973512> accessed 21 November 2020 and The Journal 'Students help plug the legal aid gap' 24 March 2019, <http://thejournal.newspaperdirect.com/epaper/viewer.aspx> accessed 21 November 2020.

⁶³ See L Bengtsson and A Speed (2019) 'A Case Study Approach. Legal Outreach Clinics at Northumbria University' *International Journal of Clinical Legal Education* Vol 26 (1) pp.179-215 for a discussion on how students giving one off advice at a local law firm could often refer clients on for further help and the benefits of this.

service known for providing, or potentially providing, longer term legal services and retainers. It is important to ensure that clients are aware of the extent of the assistance being provided to them. It is important to explicitly document the limitations of the service, just as CLOCK does with its Community Care Letter, though it is acknowledged that CLOCK perhaps requires greater emphasis through not providing legal advice⁶⁴.

The benefits of CLE to students are well established,⁶⁵ however the model adopted in the Law in the Community module ensures that students gain an appreciation of the access to justice challenges faced by their clients by going into the local community⁶⁶ and contextualising their experiences in the fortnightly workshops. Their legal knowledge, professional skills and understanding of professional conduct rules develop as a result of participating in the fortnightly workshops and volunteering at Citizens Advice. From the authors' experience of teaching the workshops, each one effectively focuses upon all valuable skills that the students will need for both legal

⁶⁴ Ben Waters and Jeanette Ashton, 'A Study into Situated Learning through Community Legal Companionship' (2018) 25 Int'l J Clinical Legal Educ 4, 29

⁶⁵ The literature on CLE and its educational benefits are extensive. See for example R Grimes (1995) 'Legal Skills and Clinical Legal Education' Web Journal of Current Legal Issues Vol. 3; R MacCrate (2004) "Yesterday, Today and Tomorrow: Building the Continuum of Legal Education and Professional Development" Clinical Law Review, Vol. 10; J Giddings (2008) 'Contemplating the Future of Clinical Legal Education', Griffith Law Review Vol. 15, pp.15; J Hall, K Kerrigan (2011) 'Clinic and the Wider Law Curriculum', International Journal of Clinical Legal Education, Vol. 15, available at: <http://www.northumbriajournals.co.uk/index.php/ijcle/issue/view/15>; R Dunn (2017). The knowledge, skills and attributes considered necessary to start day one training competently and whether live client clinics develop them. Doctoral thesis, Northumbria University.

⁶⁶L Bengtsson and A. Speed (2019) 'A Case Study Approach. Legal Outreach Clinics at Northumbria University' International Journal of Clinical Legal Education Vol 26 (1) pp.179-215

practice and other professions; notably, written and oral communication skills, negotiation and research to name a few.⁶⁷

A study by Walsh suggests that students lose their desire to engage in social justice as they continue their studies.⁶⁸ Evans highlights the importance of class content and reading, and supervision and reflection to ensure that social justice aspects of law are incorporated into clinical teaching.⁶⁹ As previously discussed, the design of the workshop tasks allows students to develop their social justice awareness. In addition to this, working at Citizens Advice gives the students the opportunity to participate in policy work and to provide public legal education to Citizens Advice clients.⁷⁰ Participation in policy work allows the students to contribute to law reform.⁷¹ This gives students the opportunity to see how laws can be influenced and leads them to

⁶⁷ For example, in workshop 1, students are tasked with taking part in an 'auction'. In groups, the students are provided with a list of skills and a 'sum of money'. The task involves formulating a strategy for which values/skills they will bid on and the sum of money they are prepared to pay for each skill/value. The workshop tutors found that this inevitably involved negotiation between the students within their groups when they were deciding the level of importance of each skill/value, prior to bidding in the auction. In workshop 3, students develop their written communication skills through a task where they are asked to discuss in groups the purpose of written correspondence and consider what could make written correspondence poor. The students' verbal communication skills are also developed throughout the workshops when they are tasked to present their work to the workshop tutor and the whole group.

⁶⁸ Tamara Walsh, 'Putting Justice Back into Education' (2007) 17(1) *Legal Education Review* 119, 131.

⁶⁹ Adrian Evans et al *Australian Clinical Legal Education: Designing and operating a best practice clinical program in an Australian law school* (ANU Press 2017) 122.

⁷⁰ It has been argued for years that students should undertake policy work: see for example S H Leleiko (1979-80). *Clinical Education, Empirical Study and Legal Scholarship*. *Journal of Legal Education*, 30(1), pp. 149. See also R Dunn and R Glancey (2019). Using legal policy and law reform as assessment in A Bone and P Maharg (Eds) *Critical Perspectives on the Scholarship of Assessment and Learning in Law* (pp.139-163). ANU Press.

⁷¹ R Dunn, L Bengtsson and S McConnell (2020) 'The Policy Clinic at Northumbria University: Influencing Policy/Law Reform as an Effective Educational Tool for Students' *International Journal of Clinical Legal Education* Vol 27(2), pp. 68-102.

being more engaged, as they see it *'may have a positive impact in generating change.'*⁷² Policy work also helps foster a social justice ethos, allowing students to identify any contentious issues and areas for reform.⁷³ A social justice ethos is instilled in the students and as Rosas argues, students who experience pro bono work while in law school are likely to continue to do so in their future careers as lawyers.⁷⁴ Policy work develops similar professional skills to that in live client work; however, they are developed from the perspective of research and law reform.⁷⁵ Students gain an appreciation as to why their participation in both the policy work and live client work can have a wider impact on society.⁷⁶

The partnership between the University and Citizens Advice also enriches the student learning experience as the students learn from, and work under, at least two supervisors.⁷⁷ Giddings argues that a learning environment can be diluted where the

⁷² L Curran (2007) 'University Law Clinics and their value in undertaking client-centred law reform to provide a voice for clients' experiences' *International Journal of Clinical Legal Education*, Vol 12, p107-108.

⁷³ L F Smith (2011) 'Fostering Justice Throughout the Curriculum' *Georgetown Journal on Poverty Law and Policy*, Vol 18(1), pp. 427.

⁷⁴ C M Rosas (2002) 'Mandatory Pro Bono Publico for Law Students: The Right Place to Start,' *Hofstra Law Review* Vol. 30 (3), Article 18 1069, 1078

⁷⁵ R Dunn, L Bengtsson and S McConnell (2020) 'The Policy Clinic at Northumbria University: Influencing Policy/Law Reform as an Effective Educational Tool for Students' *International Journal of Clinical Legal Education* Vol 27(2), pp. 68-102.

⁷⁶ R Dunn, L Bengtsson and S McConnell (2020) 'The Policy Clinic at Northumbria University: Influencing Policy/Law Reform as an Effective Educational Tool for Students' *International Journal of Clinical Legal Education* Vol 27(2), pp. 68-102.

⁷⁷ L Bleasdale-Hill and P Wragg (2013) 'Models of Clinics and Their Value to Students, Universities and the Community in the post 2012 Fees Era' *International Journal of Clinical Legal Education*, Vol 19, pp.257-270. See also L Bengtsson and A Speed (2019) 'Legal Outreach Clinics at Northumbria University' *International Journal of Clinical Legal Education* Vol 26 (1) pp. 179- 215.

supervision is focused on controlling casework rather than student learning.⁷⁸ The Law in the Community module arguably alleviates these concerns through its supervision model. Citizens Advice supervisors provide continuous feedback to the students on their work and performance alongside controlling the casework, which is a system analogous to many law clinic environments. However, in addition, the University workshop tutors facilitate the learning and development of skills and this is their sole focus, ensuring a rich learning environment. This not only provides students with more support and the opportunity to develop their skills, but as Ana highlights, it is also reflective of practice. Rather than being assessed by a single supervisor, which is common practice in legal clinics, they are provided with feedback from multiple supervisors at Citizens Advice, as well as their workshop tutor, who are likely to have different styles and approaches.

The module also allows the students to gain experience and an appreciation of what it is really like to be a legal practitioner in order to decide whether this is the career that they want⁷⁹ and specifically, the different areas of law in which they could practice. During their time at Citizens Advice, the students may be exposed to a wide variety of issues and areas of law. Indeed, during the first two years of the module, the students advised in areas of: welfare benefits, debt, finance, employment law,

⁷⁸ J Giddings (2008) 'Contemplating the Future of Clinical Legal Education' *Griffith Law Review* 17 (1), pp.1-26 at 17

⁷⁹ P Childs, N Firth and H D Rijke (2014) 'The gap between law student career aspirations and employment opportunities' *The Law Teacher* Vol 48 (1) pp. 51-68. J Marson, A Wilson and M Van Hoorebeek (2005) 'The Necessity of Clinical Legal Education in University Law Schools: A UK Perspective' *International Journal of Clinical Legal Education* Vol 7, pp. 29-43.

consumer, education, health, housing, immigration, relationships, tax and travel. As Curran highlights, students who are afforded experience in different areas of law may *'have more choices about the areas of law they may wish to practice in.'*⁸⁰ The students may also advise and assist a number of clients on the same area of law. Gaining experience in the same area of law is equally beneficial, as they are exposed to the same problem, but from different perspectives.⁸¹ If a student is interested in a particular area of law, they are informed by the University Tutor at the outset that Citizens Advice will try to ensure that they gain experience in that area, however this is not guaranteed. The students are ultimately asked to advise and assist on where the legal need may be.

It is important to note that the clinical experience embedded in this module could also be considered as a limitation. As this module is part of an LLB degree, the students may not have any desire to progress into a career as a lawyer. Students may feel that this clinical experience has been imposed on them. However, as noted above, the workshops and work undertaken at Citizens Advice develop key skills, which are valuable in professions, other than law. As Kemp et al state *'There are many ways in*

⁸⁰ L Curran (2004) 'Innovations in an Australian Clinical Legal Education Program: Students Making a Difference in Generating Positive Change' *International Journal of Clinical Legal Education*, Vol 6, pp.162-176 at pp.174.

⁸¹ E Winkler (2013) 'Clinical legal education: a report on the concept of law clinics', https://www.academia.edu/40214205/Clinical_Legal_Education_A_report_on_the_concept_of_law_clinics accessed 4 December 2020.

*which students can be given experience of law in the real world and provided with transferrable skills which they can then use in occupations other than being a lawyer.'*⁸²

This means that the module is undoubtedly beneficial to students in terms of employability.⁸³ Employability is 'a critical issue for both government and Higher Education Institutions'.⁸⁴ It is also important for Teaching Excellence and Student Outcomes Framework (TEF) and its emphasis on post-graduate employment.⁸⁵ Law students enter a competitive employment market on completion of their degree. Practical work experience during their law degree increases self-confidence, practical experience and consequently, employability.⁸⁶ Many students are working alongside their studies, which is a barrier to gaining unpaid legal work experience⁸⁷ and some students would not necessarily have the confidence to put themselves forward for

⁸² Clinical Legal Education and Experiential Learning: Looking to the Future <https://hummedia.manchester.ac.uk/schools/law/main/news/Clinical-Legal-Education-Final-Report28.09.2016.pdf> accessed 3 December 2020

⁸³ For a discussion on the benefit of CLE in enhancing student's skill profile see R Hyams (2008) 'On teaching students to "act like a lawyer": What sort of lawyer?' *International Journal of Clinical Legal Education* Vol 13, pp. 21-32; S Caplow (2006) 'Clinical Legal Education in Hong Kong: A Time to Move Forward' *Hong Kong Law Journal* Vol 26, pp. 229; F Dignan (2011) 'Bridging the Academic/Vocational Divide: The Creation of a Law Clinic in an Academic Law School' *International Journal of Clinical Legal Education* Vol 15, pp. 75-84.

⁸⁴ V Saunders and K Zuzel (2010) 'Evaluating Employability Skills: Employer and Student Perceptions' *Bioscience Education* Vol 15 (1) pp1-15, p1.

⁸⁵ The proportion of graduates in employment or further study after six months of graduation is one of the six metrics to rate Universities for the TEF.

⁸⁶ F. Cantatore (2015) 'Boosting Law Graduate Employability: Using a Pro Bono Teaching Clinic to Facilitate Experiential Learning in Commercial Law Subjects' *Legal Education Review* Vol 25(1), pp. 147- 172. See also L Bleadale Hill and P Wragg (2013) 'Models of Clinics and their Value to Students, Universities and their Communities in the post 2012 fees ERA.' *International Journal of Clinical Legal Education* Vol 19, pp.257-270.

⁸⁷ J Alexander and C Boothby (2019) 'Stakeholder perceptions of clinical legal education within an employability context' *International Journal of Clinical Legal Education* Vol 25 (3) pp. 53-84.

work experience⁸⁸. This module gives students the opportunity to undertake work experience within an organisation as part of their degree, thereby allowing them to develop skills and enhance their CVs. In addition to these employability benefits to students through the work experience gained at Citizens Advice, students could also benefit in terms of employability through forming and continuing relationships with Citizens Advice. Indeed, as highlighted by Ana, this one was of the reasons for Citizens Advice agreeing to be the partner organisation. These continued relationships would also provide long term benefits to Citizens Advice in terms of capacity. As regards the Solicitors Qualifying Exam, it is noted that time spent 'at a voluntary or charitable organisation such as Citizens Advice...' ⁸⁹ can constitute as qualifying work experience. A solicitor or compliant officer for legal practice (COLP) would be required to confirm that the candidates qualifying work experience. It is pertinent to note that the solicitor or COLP is not assessing competence as a solicitor; rather, that the work experience has taken place. The competence to practice is assessed by the SQE.

Although the benefits to students, Citizens Advice and the wider community have been highlighted, there were some lessons learnt from the module's first year. The initial administration required at the first induction lecture, as highlighted by Ana,

⁸⁸ J Alexander and C Boothby (2019) 'Stakeholder perceptions of clinical legal education within an employability context' *International Journal of Clinical Legal Education* Vol 25 (3) pp. 53-84.

⁸⁹ Solicitors Regulation Authority, 'Qualifying work experience for candidates' <https://www.sra.org.uk/trainees/qualifying-work-experience/qualifying-work-experience-candidates/> accessed 19 February 2021.

and the online training required, could not be streamlined in the second year. All administration and training were necessary. However, in response to the students in the first year feeling that there was an *'information overload'*, a short video was produced in the second year which, in the authors' view, helped with this issue. The video was produced between Northumbria University and Citizens Advice and was an excellent way of reducing information that needed to be given to the students on this module. The video gave an overview of what they should expect during their time at Citizens Advice and what is expected of them. Students respond particularly well to video as an educational tool⁹⁰ and indeed, informal feedback from the students was that they found this helpful at the outset.

Another change to the module in the second year was that the students' time at Citizens Advice was reduced from one day per week to half a day. From the authors' perspective, this was an appropriate and positive change. The students gained the same experience of client drop-in sessions and undertook the same range of tasks.

Overall, from the first few years of the module running, the participating students valued the blend of workshops and volunteer work at Citizens Advice and the opportunity to develop their professional skills whilst promoting access to justice. Informal feedback from the students was that they feel that they developed valuable

⁹⁰ R Kay (2012) 'Exploring the use of video podcasts in education: A comprehensive review of the literature' *Computers in Human Behavior* Vol 28 pp. 820-831

skills for the world of work and gained a direct insight into the access to justice many clients faced who attended the drop-in service:

'It's been challenging yet interesting module. I personally find that the knowledge gained will be a life changer in the future.'

'The practical nature of the module, with direct access to client advisory work at Citizens Advice, provides a fantastic opportunity to develop a range of interpersonal professional skills through experiential learning. These skills are further developed through university workshops and assessed tasks, focusing students' development on the legal practitioner context.'

Conclusions

The Law in Community module was designed with the aim of engaging law students in a model of CLE which ensures they understand their experience in the vital context in which Citizens Advice operates. Through the blend of workshops and weekly volunteer work at Citizens Advice, the students not only develop their professional skills, but also contribute to the greater public good. Through the method of a long interview, this article provides an insight into the design and implementation of the module, together with challenges faced and lessons learnt. Future research would be beneficial in this area; including client questionnaires to measure community benefit and student performance from the clients. Interviews with supervisors at Citizens

Advice to obtain their views on the module and focus groups with the students to measure student perceptions on the value of the module would also be beneficial.

The authors would recommend that other Law Schools consider implementing a similar Law in the Community module into their curriculum. Whilst we should all be realistic as to the administrative time and documentation involved, this model not only develops students' professional skills, but also empowers students to better understand access to justice challenges and enables them to play a pivotal part in supporting their local community.

TRAUMA-INFORMED LAWYERING IN THE STUDENT LEGAL CLINIC SETTING: INCREASING COMPETENCE IN TRAUMA INFORMED PRACTICE

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1

Introduction

Research in clinical law,² critical legal studies,³ and therapeutic jurisprudence⁴ has spotlighted serious challenges that clients face when they encounter the law, particularly when they have experienced previous trauma. Lawyers who fail to recognize and effectively respond to clients' trauma may struggle to communicate, interpret narrative, and build trust – all of which are foundational to the lawyer-client relationship. Trauma is common across human experience, with more than 70% of the general population reporting at least one traumatic life experience and 30% reporting

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² See for example: Sarah Buhler, "'Don't Want to Get Exposed': Law's Violence and Access to Justice" (2017) 26:1 J L & Soc Pol'y 68.; Sarah Buhler, Sarah Marsden & Gemma Smyth, *Clinical Law: Practice, Theory, and Social Justice Advocacy* (Toronto: Emond, 2016).; Stephen Wexler, "Practicing Law for Poor People" (1970) 79:6 Yale LJ 1049.; Austin Sarat, "'The Law is All Over': Power, Resistance and the Legal Consciousness of the Welfare Poor" (1990) 2:2 Yale JL & Human 343.

³ See for example Patricia J Williams, *The Alchemy of Race and Rights* (Cambridge, Mass: Harvard University Press, 1991); Derrick A Bell, *Race, Racism, and American Law*, 5th ed (New York: Aspen Publishers, 2005); Patricia Monture-Angus, *Thunder in my Soul* (Halifax, NS: Fernwood Publishing, 1995).

⁴ See for example, David B. Wexler and Bruce J. Winick, *Essays in Therapeutic Jurisprudence* (Durham, NC: Carolina Academic Press, 1991).

four or more.⁵ Although trauma is not a unique experience, it is experienced more often, and with greater impact, by people who are marginalized within dominant power structures. This makes trauma particularly relevant for lawyers who work with populations that are systematically marginalized, often in intersecting ways – as is the case for many clients who seek support from student legal aid clinics.⁶

Drawing on a growing body of research on trauma informed approaches in lawyering, psychology, and pedagogy, the co-authors – two legal clinicians/academics and a social psychologist – developed and evaluated a trauma informed educational Module for law students working in clinical law settings with clients experiencing low income. The impetus for this project was the observation that law students struggled to comprehend how their clients' thoughts and behaviours could be psychosocial manifestations of trauma, and adapt their legal practice accordingly. To address this, we approached this work using the neurobiology of trauma as the pedagogical frame. Our goal in using this framework was to provide a pathway to understanding trauma that was grounded in the hard sciences. We hoped that the relative indisputability of

⁵ Corina Benjet et al, "The Epidemiology of Traumatic Event Exposure Worldwide: Results from the World Mental Health Survey Consortium" (2016) 46:2 *Psychological Medicine* 327.

⁶ Student legal aid clinics provide legal services in legal areas that disproportionately impact people living in poverty. Students are supervised by practicing lawyers and typically work in clinics for pay or credit. In the model we are most familiar with, the clinic experience is accompanied by a class or other teaching and learning space that allows for substantive education on legal and client-facing issues as well as space for reflection and critical dialogue. The clinics in this survey represent client in the following legal areas: immigration and refugee, social benefits, criminal, and employment.

basic brain functioning would offer an alternative narrative for clients' sometimes confusing, challenging, and even self-defeating behaviours, thereby lessening victim blaming.⁷ We also attempted to avoid a purely deficit-based approach to legal practice in which clients' trauma experiences result in "problem" behaviours; rather, we reframed these experiences as useful coping mechanisms that can require different approaches to lawyering. Due to the realities of legal clinic schedules, the Module is short and targeted for implementation in the context of students' immediate needs. Using open questions alongside a scenario, we evaluated this Module through a pre and post-test analysis to assess how students interpreted client behaviour before and after receiving trauma informed training. Before explaining the results of our analysis, we review the background to our work, including the relevant literature and theory that influenced this project. Although we had quite a specific goal in mind, the results of this project demonstrate the potential wide-ranging benefits of trauma informed lawyering, and support its place as a central component of legal clinic training and practice.

⁷ These two examples are associated with trauma behaviours noted in M Lynne Jenkins, "Teaching Law Students: Lessening the Potential Effects of Vicarious Trauma" (2013) 37:1 *Man LJ* 383 at 407. See also Lynette Parker, "Increasing Law Students' Effectiveness when Representing Traumatized Clients: A Case Study of the Katherine & George Alexander Community Law Center" (2007) 21 *Geo Immigr LJ* 163 at 170, where the author notes that: "This avoidance [of trauma experiences] translates into missed appointments, chronic lateness, failure to produce requested documents, and avoidance of the law student's questions." Jean Koh Peters and Susan J Bryant, "Five Habits for Cross-Cultural Lawyering" in Kimberly Barret and William George, eds, *Race, Culture, Psychology and Law*, (Thousand Oaks, CA: Sage Publications Inc., 2005)

Why Neurobiology in the Context of Trauma Training?

We believe that what differentiates our approach to trauma informed lawyering is less about the method of delivery, and more about our decision to use the neurobiology of trauma as the theoretical and practical framework. We have personally found great insight and benefit in using the neurobiology of trauma in both clinical practice and in supporting survivors of sexual assault.

Our previous experiences and education taught us that neurobiology has much to offer when it comes to interpreting challenging and confusing behaviour. For example, it reveals that our bodily responses to trauma are often inverse to our expectations about what should happen when trauma occurs. We hypothesized that perhaps a neurobiological framework could have the same effect in a clinical legal context.

We had two primary goals in teaching the neurobiology of trauma. The first was to explain, in simple terms, the brain structures and neurochemicals that are active during traumatic events. The second was to explain the subsequent effect these have on cognitive functioning both during and after a traumatic event. For example, we sought to address the interplay between our brains and memory when we experience

trauma, given the degree to which client success is often determined by perceptions of recall accuracy and credibility. As Lynette Parker notes,

[c]lients who have experienced trauma also have difficulty during trial preparation, exhibiting patterns of forgetfulness and avoidance. For example, the client may have difficulty remembering specific facts or incidents, either because he has blocked the events or because discussing the events forces him to re-live the traumatic experiences, which the client wants to avoid.⁸

Memory, particularly in the context of trauma, is complicated and can contravene our common-sense expectations – for example, we often expect that intense traumatic memories will be deeply encoded and easy to recall. Although this is possible, it is often not the case. Even at the best of times, regardless of whether a client has experienced significant trauma, memory is highly susceptible to influence. It can be affected by a confluence of factors, including the passage of time, and literature shows that consistency in recall and accuracy of recall are not necessarily correlated.⁹ For

⁸ Parker, *ibid* at 171.

⁹ Aileen Oeberst, “If Anything Else Comes to Mind... Better Keep it to Yourself? Delayed Recall is Discrediting – Unjustifiably” (2012) 36:4 L & Human Behaviour 266.; William J Friedman, “Memory for the Time of Past Events” (1993) 113:1 Psychological Bulletin 44.; Hilary Evans Cameron summarizes this research thus: “‘The consistent finding’, across all of the research to date, ‘is that after about 2 weeks, individuals have difficulty accurately dating their past experiences, suggesting that date of occurrence information is typically not retained in memory’ – and our trouble only increases as time passes ” in “Refugee Status Determinations and the Limits of Memory” (2010) 22:4 Intl J Refugee L 469 at 471.

people who are already psychologically vulnerable, the effects are even more marked.¹⁰ Hilary Evans Cameron provides a helpful review of literature on memory for survivors of natural atrocities, genocide, and other traumatic events.¹¹ She cites concentration camp survivors who were unable to accurately date when they were imprisoned, or even the season.¹² Memory is also susceptible to frequency bias. If we can remember an event, we tend to report that it happened frequently, and humans often confuse how frequently an event happened with how frequently they thought about it.¹³ Recall of event duration is also usually inaccurate, depending on the context.¹⁴

For lawyers, the implications of memory research are troubling as so much of legal practice relies on the perceived accuracy of recall. Psychological research has shown that the stories we are most likely to believe are the ones that are presented as clear, consistent, and chronological – and yet, ironically, this is at odds with the actual encoding of traumatic memory in the brain. The encoding of traumatic memories is

¹⁰ Dr Juliet Cohen, "Errors of Recall and Credibility: Can Omissions and Discrepancies in Successive Statements Reasonably be Said to Undermine Credibility of Testimony?" (2001) 69 *Medio-Legal Journal* 25-34.

¹¹ Michael C Hansen, "January 1986 Northeastern Ohio Earthquake", *Ohio Geology Newsletter* (Summer 1986) 2-5.; Sven-Åke Christianson & Birgitta Hübner, "Hands Up! A Study of Witnesses' Emotional Reactions and Memories Associated with Bank Robberies" (1993) 7:5 *Applied Cognitive Psychology* 365.

¹² Willem A Wagenaar and Jop Groeneweg, "The Memory of Concentration Camp Survivors" (1990) 4:2 *Applied Cognitive Psychology* 77.

¹³ Gillian Cohen and Rosalind Java, "Memory for Medical History: Accuracy of Recall" (1995) 9:4 *Applied Cognitive Psychology* 273.

¹⁴ Christopher DB Burt, "Reconstruction of the Duration of Autobiographical Events" (1992) 20:2 *Memory and Cognition* 124.

fragmented and disorganized, particularly in the immediate aftermath of an event.¹⁵ The science of traumatic memory is contrary to the beliefs and expectations of inexperienced lawyers and students, who are likely to read confusion, and lack of clarity or linear thought as indicators of disingenuous behaviour or unreliability.¹⁶ We recognize that most lawyers do not have an extensive background in biology and a neurobiological framework has the potential to be abstract and overwhelming. We do believe, however, that when presented simply and tied to concrete examples it has the potential to challenge firmly held, stigmatizing beliefs about trauma survivors and their “problematic” behaviour, for example, when a client changes their story on the witness stand.

The definition of trauma that we used in the Module was influenced by working definitions that have been adopted by other legal clinics, as well as critical literature on the topic. Sarah Katz and Deeya Halder defined both trauma and traumatic event as follows:

¹⁵ Jessica D Payne et al, “The Biopsychology of Trauma and Memory” in Daniel Reisberg & Paula Hertel, eds, *Series in Affective Science: Memory and Emotion* (New York: Oxford University Press, 2004) 76. See for example Joyce W Lacy & Craig EL Stark, “The Neuroscience of Memory: Implications for the Courtroom” (2013) 14:9 *Nature Reviews* 649.

¹⁶ See for example Jean R Sternlight & Jennifer Robbennolt, “Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients” (2008) 23 *Ohio St J Disp Resol* 437. The authors review common misconceptions that lawyers have about their clients premised on faulty assumptions about memory, perception, decision-making, and communication and review basic psychological principles relating to all of these phenomena.

[a]n event is defined as traumatic when it renders an individual's internal and external resources inadequate, making effective coping impossible. A traumatic experience occurs when an individual subjectively experiences a threat to life, bodily integrity or sanity.¹⁷

Judith Lewis Herman emphasizes the relational elements of trauma, writing that "traumatic events overwhelm the ordinary systems of care that give people a sense of control, connection, and meaning."¹⁸ Trauma is both an experience and an ensuing, ongoing response to that experience. Psychologist Bonnie Burstow has addressed the complexity and depth of this response, describing it as "[a] concrete physical, cognitive, affective, and spiritual response by individuals and communities to events and situations that are objectively traumatizing."¹⁹ What is experienced as trauma, and the effect that it has on our bodies and behaviours, may be influenced by the developmental age of the victim, personal characteristics, and situated contextual factors including social, familial, economic, political, and other circumstances. Trauma is not necessarily exclusive to a single isolated event, but can also develop as a consequence of daily experiences of racism, sexism, homophobia, transphobia,

¹⁷ Sarah Katz & Deeya Haldar, "The Pedagogy of Trauma informed Lawyering" (2016) 22 *Clinical L Rev* 359 at 364.

¹⁸ Judith Lewis Herman, *Trauma and Recovery: The Aftermath of Violence – from Domestic Abuse to Political Terror* (New York: Basic Books, 1992) at 33.

¹⁹ Bonnie Burstow, "Toward a Radical Understanding of Trauma and Trauma Work" (2003) 9:11 *Violence Against Women* 1293 at 1304.

ableism, and poverty. In this sense, trauma and traumatic events can include insidious experiences of systemic inequities including:

...the daily awareness of the possibility of rape or assault, the daily struggles to stretch insufficient wages so that the family eats, encountering yet another building that is not wheelchair accessible, and seeing once again in people's eyes that they do not find you fully human.²⁰

Trauma is inherently political as it occurs within circumstances that are inextricable from the political mediation of the contexts that propagate trauma. Consequently, understanding the ways in which insidious trauma can work to produce traumatic stress requires an understanding of intersectionality and intersectional subordination.²¹ Kimberly Crenshaw describes intersectional subordination as something that: "need not be intentionally produced; in fact, it is frequently the consequence of the imposition of one burden that interacts with pre-existing vulnerabilities to create yet another dimension of disempowerment."²² This concept of intersectionality is important in thinking about definitions of trauma, defining what constitutes a traumatic event, insidious trauma, and trauma informed approaches.

²⁰ *Ibid* at 1308.

²¹ Kimberly Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43:6, *Stanford L Rev* 1241.

²² *Ibid* at 1249.

Truly understanding trauma and the experience of trauma requires us to consider the specific life circumstances of the person subjected to it.

In legal aid clinics where experiences of marginalization and oppression are inevitable, this is of particular importance. In fact, Sara Gold argues that lawyers working with people experiencing poverty “should presumptively adopt a trauma informed practice approach regardless of the subject matter of the representation.”²³

Legal aid clinics work with people in areas of law including criminal, social benefits, residential tenancies, criminal injuries, family, employment, human rights, and immigration and refugee.²⁴ Common to all clients is the lived experience of poverty. Because of the intersectional nature of poverty, higher than average groups of clients are racialized, Indigenous, sole support mothers, live with a disability, and/or have experienced abuse in many forms.²⁵ Some have experienced homelessness or are precariously or inappropriately housed. Many are over-policed. The evident disparities and disempowerment experienced by legal clinic clientele due to trauma can confound and frustrate students, which makes key tenets of lawyer-client relationship building such as trust, empathy, and understanding difficult to establish.

²³ Sara Gold, “Trauma: What Lurks Beneath the Surface” (2018) 24 *Clinical L Rev* 201 at 201.

²⁴ Here we are referencing Legal aid clinics in Ontario, the context within which two of the authors have worked.

²⁵ See for example: Canada, *Stop Family Violence: Breaking the Links Between Poverty and Violence Against Women*, prepared by Jane Gurr et al., (Ottawa: Public Health Agency of Canada, 2008) online: <https://www.canada.ca/en/public-health/services/health-promotion/stop-family-violence/prevention-resource-centre/women/violence-against-women-resource-guide/reality-poverty-violence.html>.

Our work was informed by other clinics that have introduced trauma informed practices. Lynne Jenkins, for example, described her experience introducing training on vicarious trauma to law students at the Barbra Schlifer Clinic in Toronto, Canada, a legal aid clinic specializing in violence against women.²⁶ We also learned from the Katharine and George Alexander Community Law Centre (KGACLC) which has experimented with and tested a wide range of approaches to trauma informed lawyering.²⁷

Theory and approaches to trauma in psychology are vast and we cannot hope to meaningfully engage all of this literature. Therefore, we relied on a “harm reduction” approach to client engagement in which we employed well-established findings in psychology to minimize harm to clients. Our goal was twofold. First, we aimed to reduce the likelihood that student lawyers will blame future clients for the behaviours they exhibit, and, second, we aimed to reduce the likelihood that they will contribute to client revictimization. We also drew from positive psychology, which emphasizes the value of strengths-based approaches. We have found fault with methods that rely upon purely deficit-based approaches to working with clients, which we believe can lead to its own form of paternalistic treatment. In our Module we emphasized that clients and communities who have experienced trauma are able to meaningfully

²⁶ Jenkins, *supra* note 8.

²⁷ Parker, *supra* note 7.

engage with supports and should be recognized for their resiliency. After all, if they have made it to your office, they have survived.

Our work was informed by a particular approach to lawyering – namely, an anti-oppressive approach to practice that recognizes the individual and structural barriers inherent in systems of colonialism, patriarchy, racism, sexism, heterosexism, cisnormativity, ableism, classism, and ageism. We also attempted to construct a training curriculum with critical theory woven throughout. For example, we incorporated materials on institutions-as-trauma including residential schools and government income maintenance programs, immigration and other legal systems in which constant surveillance, scrutiny, and bureaucracy act as forms of trauma.

Trauma Informed Approaches

Trauma informed approaches are those that consider the potential breadth of a client's experience and its differential effects on their behaviour. Trauma informed approaches also urge lawyers to pay attention to their own experiences of trauma, be it direct or vicarious, as it relates to their client work. Katz and Halder write that

[t]he hallmarks of trauma informed practice are when the practitioner, here a law student, puts the realities of clients' trauma experience at the forefront in engaging

with clients and adjusts the practice approach by the individual client's trauma experience. Trauma informed practice also encompasses the practitioner employing modes of self-care to counterbalance the effect the client's trauma experience may have on the practitioner.²⁸

Becoming trauma informed means understanding how trauma occurs and its consequences, as well as being educated about the political context in which it has arisen. It means "...[b]eing educated about the impact of interpersonal and political violence and victimization on an individual's life and development."²⁹ This means understanding the ways that gender, ability, class, sexual orientation, and racism, might intersect with trauma and how it is experienced and interpreted. In addition to the lawyer-client interaction, a trauma informed approach to client services "...acknowledges the prevalence and impact of trauma and attempts to create a sense of safety for all participants, whether or not they have a trauma-related diagnosis."³⁰ There are multiple ways trauma might manifest in the relationship between the client and the legal organization as a whole. Ideally, a trauma informed approach must be undertaken holistically in order to try to ensure that everyone is working to create a safe atmosphere and do no further harm to clients.

²⁸ Katz & Halder, *supra* note 17 at 361.

²⁹ *Ibid* at 369.

³⁰ *Ibid.*, citing Substance Abuse and Mental Health Services Administration, *Essential Components of Trauma Informed Judicial Practice* (2013), online: SAMHSA <https://www.nasmhpd.org/sites/default/files/JudgesEssentials_5%201%202013finaldraft.pdf>

Methods

We piloted the Module on three occasions in three locations (Toronto and Windsor, Ontario, and Saskatoon, Saskatchewan). Participants at each location were law students in legal clinics. On each occasion we invited attendees to participate in the evaluation, which involved the completion of pre and post-test qualitative surveys comprised of open-ended questions, as well as a scenario analysis. We treated the responses to the qualitative survey as formative feedback and refined the Module after each presentation.

The overarching goal of the Module was to increase competence in trauma informed practice and subsequently decrease the likelihood that student lawyers would, in the future, compound the existing trauma of their clients. This outcome, however, is methodologically challenging to measure. Consequently, we made the decision to evaluate shifts in students' beliefs and knowledge as a proxy for potential outcomes. Specifically, we compared pre and post-test evaluations for an increased ability to identify client behaviours that may be indicative of prior traumatic experience. We also evaluated students' ability to identify incidents and social structures that may exacerbate traumatic experiences.³¹

³¹ These goals are not dissimilar to the goals listed in Jenkins' article, "(1) to teach law students to identify clients who have been victims of trauma; (2) to provide students with techniques for effectively representing these clients; and (3) to teach students the concept of vicarious trauma and techniques for self-care." Jenkins, *supra* note 8 at 181.

The purpose of the pre-test³² was to provide us with a base understanding of students' experiences with clients to date, and to examine the apriori explanations they offered for client behaviour. We asked participants to provide examples of client interactions they found challenging and to reflect upon the source of these challenges. The questions were designed to assess whether students relied upon client-blaming narratives to explain client behaviour, as we hypothesized they would. Participants were also asked to identify their own feelings and thoughts in response to their perceptions of client behaviour. Finally, we asked participants to consider a hypothetical scenario with a client and offer an interpretation of the client's behaviour and suggestions for how they would respond to this specific situation.

In the post-test survey we assessed the participants' overall perceptions of the training and, specifically, whether they perceived it to be an effective tool for understanding client behaviour. We also assessed whether the training was effective in teaching them to identify indicators of trauma and strategies for working with clients who have experienced trauma. We asked them to respond a second time to the hypothetical scenario from the pre-test. This allowed us to compare responses and determine whether the Module was effective in providing students with a trauma informed analysis of client behaviour and strategies for working with clients. Additionally, we asked questions that were intended to draw out students' feelings about working with

³² See Appendix A.

clients who have experienced trauma, as well as questions about managing potential for vicarious trauma.

Participants were informed of the training and research by email and were contacted by a research assistant with an invitation to participate. It was explained that attendance at the training was mandatory, but participation in the research was voluntary. Participants were provided with a link to the online pre-test evaluation, which they were required to complete prior to the beginning of the training session. Following the training, the research assistant administered the post-test. Participants who brought their laptops had the option of completing it online or they could complete a paper version.

We have chosen to report the findings from two of the three sites. We excluded the data from the first administration of the Module due to a low response rate and poorly detailed responses. The first time we delivered this training we asked participants to complete the pre-test survey online, in advance of the training, and many forgot to do it. Following the training they were eager to take their short lunch break and rushed through their responses. Subsequently, we adjusted the procedures and built in time at the beginning and end of the training to complete the evaluations and provided lunch. In total, the responses of 19 participants from two sites were included in the analysis.

Analysis

Responses to the qualitative survey and scenario analysis were subjected to both experiential and critical thematic analysis.³³ Experiential research takes the reported experiences and observations of the participant at face value and prioritizes their interpretation of events. For example, when we asked participants to identify challenging client behavior we were prioritizing their subjective experience of ‘challenging’ behaviour. We also analyzed the data critically, however, by interrogating the underlying meaning and assumptions in the responses. Further, we looked for a shift in participants’ responses from pre to post-test and found an increase in their own critical analysis of their experiences with clients, which was consistent with the goals of the Module.

Each of the three authors participated in the analysis. We followed the principles of thematic analysis which guide the researcher to become intimately familiar with the data. In the process of reading and re-reading we began coding the data by noting recurring observations and patterns that we subsequently organized into themes. Once we had completed our individual analyses, we compared our findings and organized our themes. From this, we collectively determined the most salient themes and assigned labels to describe the them. Major themes identified include the

³³ Virginia Braun and Victoria Clarke, “Using thematic analysis in psychology” (2006) 3:2 *Qualitative Research in Psychology* 77.

following: shifting from emotion-driven, hesitant responses [to clients] to confident, strategic responses; increased empathy and perspective taking vis a vis neurobiology; and concern for how to implement trauma informed practice given the practical constraints of most clinic settings.

Pre-test Findings

The pre-test findings confirmed that students experienced many encounters with their clients to be frustrating. Frustration arose from multiple sources including: the client not being forthcoming with information; client anger with the legal system and the legal process; clients' unrealistic and unmanageable expectations; a lack of trust in the law student; clients missing multiple meetings and not prioritizing their legal matter; and a general lack of cooperation. The students attributed their frustration to the behaviour of the client, as opposed to stemming from their approach to working with the client. In other words, students engaged in what can be described as "client-blaming" in their description of their own frustrations with the encounter. Encapsulating all of these themes, two students remarked as follows:

[c]lient would not follow procedures and became frustrated when they did not attain the results they were looking for.³⁴

³⁴ Pre-Test Survey at 5.

[c]lient was very rude and did not appreciate the time the lawyers and students were putting into their file. She wanted to be treated as if she was the only client to the clinic and was frustrated that her turn around rate on her matter was not within a day or two (but rather was taking weeks – this was a complicated matter).³⁵

The student participants' responses suggested that they struggled to empathize with the clients' perspectives and offer non-blaming explanations for frustrating client behaviours. The student participants demonstrated a consistent presumption that clients should be able to behave reasonably, rationally, and comprehend bureaucratic delays and limitations. It was evident that the students had expectations about what constituted reasonable client behaviour. For example, clients were often deemed unreasonable if they engaged in behaviour or sought remedies that were not aligned with what the student lawyer believed to be the best course of action. One student described their experience working with client settlements as,

I had some clients who frustrated me because their egos got in the way of finding a solution. Their pride and need to "win" the dispute made it impossible to reach a settlement, even if the settlement was in the client's best interest. ³⁶

³⁵ Pre-Test Survey at 5.

³⁶ Pre-Test Survey at 18.

When clients failed to act in the expected ways, students also attributed the behaviour to the difficult nature of the client. In the example above the student determined that the clients' actions were self-defeating and attributed them to the client's ego.

The student lawyers frequently failed to recognize the inaccessibility of legal procedures as being relevant in their client interactions. When asked about interactions with clients that evoked frustration one student complained of a client, "not understanding the limits of the law and not willing to compromise expectations."³⁷ The majority of students did not reflect on their own part in the lawyer-client relationship, nor the role of the legal system. Interestingly, in analyzing the problems described by students the researchers found many possible explanations for client behaviours besides trauma. Nonetheless, trauma informed training was ultimately still useful in combating biases and assumptions regarding clients' behaviour beyond those traditionally attributable to trauma.

The student lawyers also demonstrated a tendency to perceive their clients as disingenuous and this perception took multiple forms. Assessment of client credibility was imbued with insinuations and explicit suggestions that the client was lying, not being forthcoming, or changing their story. Responses focused again on the client and

³⁷ Pre-Test Survey at 18.

their motivations for lying or not telling the whole truth. One student remarked that they interpreted a client to be disingenuous when,

a client [was] just telling me what I want to hear... not the truth... [it] frustrated [me] because they are hurting themselves in the long run and wasting my time.³⁸

In this vein, when the students were unable to glean linear stories from their clients, or received accounts that contained internal contradictions, they often questioned the credibility of the client rather than reflecting upon the context and their relationship with the client. One student commented,

[o]ften times I had to take down details of events that happened. When the details start to contradict too much or have too many holes, that's when I start questioning the client's claims.³⁹

While research participants did not commonly describe their clients as "lying" to them (indeed, some were at pains to avoid this term), they provided considerable detail illustrating the perception that the client exaggerated, embellished, or provided

³⁸ Pre-Test Survey at 19.

³⁹ Pre-Test Survey at 19.

inconsistent accounts in order to gain a particular outcome. As one student remarked, “I’ve never felt that clients were lying, but somewhat exaggerating or embellishing their stories to gain refugee status.”⁴⁰

Students also interpreted the client as being disingenuous when the client focused on “non-legal” issues and attributed the inability of the client to ‘focus’ on the client’s ulterior motive. Students had difficulty conceptualizing the relevance and breadth of the “non-legal” elements that pervade the lawyer-client relationship and are essential to their role in supporting clients. As one student described:

where after [a] year of service and no progress, it seemed the client was simply interested in socializing or looking for an outlet to share their troubles, rather than seek the services we provided. [I] felt a bit trapped, as we could not dismiss the client outright, yet we weren’t able to fully commit to a resolution because there was little we could do to resolve it.⁴¹

As this quote indicates, students grappled with the divide between what they perceived as legally relevant and what was relevant to the client. The relevance of

⁴⁰ Pre-Test Survey at 22.

⁴¹ Pre-Test Survey at 19.

building rapport and trust was often absent from student descriptions of encounters with clients that were outside the scope of “legal” support. Another example being a student describing a frustrating encounter as follows:

[t]he client was very agitated, and the information he shared that was not related to his case was concerning. At the beginning I felt very overwhelmed by the client. [N]ot sure how to react o[r] take the information that he shared about other individuals that had nothing to do with his case.⁴²

Student lawyers seemed to expect that clients would have the capacity to discern what was “legally” relevant and what was a “non-legal” issue. The student lawyers were left exasperated when clients would not adhere to this distinction and would seek support for issues that the students perceived as being beyond the scope of assistance they could provide. The student lawyers struggled to comprehend the multi-faceted nature of their role in supporting and referring clients.

To better assess the pre-training attitudes and thought processes of students regarding their client interactions, we provided a hypothetical scenario describing a client, Aisha, (outlined in full in Appendix B) who engages in behaviours that could be

⁴² Pre-Test Survey at 6.

perceived as frustrating, confusing, or unusual. In responding to the scenario, the student lawyers demonstrated some empathy for the Aisha's circumstances, but the focus of the frustration was still directed towards her. The students generally recognized that Aisha was in distress but were less clear about the source of the distress and what to do about it. Some participants felt the best approach was to emphasize to Aisha why they were questioning her, in hopes of greater cooperation. Students described feeling frustrated, fearful, concerned, and nervous in their evaluation of the hypothetical encounter with Aisha.

The pre-test responses to the hypothetical scenario and open-ended questions indicated that students often felt unsure about how to respond to a client's behaviour. Many students felt at a loss about the role of emotion in their client encounters – both their own emotions and those of the client. One respondent noted that “[t]he biggest red flag is when a person is questioned about a detail or problem and all of their responses are about emotions and not the facts.”⁴³ The student here dichotomizes emotion and legal facts, not understanding that the two may be interrelated and, indeed, a source of useful information rather than a ‘red flag’. The pre-tests further highlighted ways in which student lawyers misunderstand clients’ emotional responses to serious trauma. They were often unsure of how to respond when a client

⁴³ Pre-Test Survey at 19.

exhibited an unexpected or seemingly unsuitable response to serious trauma – such as laughing, being quiet, or having a neutral expression.

The data suggested that the students felt ill-equipped to manage their own emotional responses to client trauma, and to set appropriate boundaries. One student remarked that “I have often wanted to cry and did everything to hold it back because it did not feel appropriate.”⁴⁴ The student lawyers revealed that they did not feel equipped to respond to appropriately respond to client disclosures of trauma, which exacerbated the struggle to manage their own potential vicarious trauma. A need for an increase in proper training was a resounding theme across student responses, noted by one student as follows:

[c]ertainly, clients have had to recount [past] incidences of their own violence against others, or the feeling of having their children threatened with sexual violence. The emotions these stories provoke in my clients are incredibly difficult to respond to appropriately for me given my obvious youth and lack of proper training.⁴⁵

⁴⁴ Pre-Test Survey at 20.

⁴⁵ Pre-Test Survey at 20.

The pre-test findings highlighted that 'client blaming' behaviour was central to students' interpretations of difficult client interactions and that students often felt ill-equipped in their ability to adequately respond to clients' needs. The need for trauma informed training in law clinic settings was undeniably evident from student's pre-test evaluations. The researchers hypothesized that using evidence-based trauma informed training could begin to fill this need and would provide students with alternative explanations that would increase empathy and understanding. Beyond building law students' capacity to understand the impacts of trauma, the training Module was developed to provide tangible strategies for supporting clients through the legal process with sensitivity to manifestations of trauma and the skills to manage potential impacts of vicarious trauma.

Post-test Findings

Our post-test findings indicated that research participants overwhelmingly felt that the training Module was effective, and indicated willingness to implement trauma informed practice in their work. Most students found that the Module was a valuable supplement to their work and that the tips and strategies discussed were relevant and helpful. Many students commented on the usefulness of the neurobiological framework of the training. They also noted the value of the discussions around client interviewing and that the emphasis on being attentive to the

individual experience of the client was helpful. In relation to the usefulness of the training one student indicated the importance of:

[b]eing able to identify barriers to collecting information (i.e. recall and memory issues, certain behaviours) and working with clients to overcome those barriers so that they can tell their story.⁴⁶

The post-test findings highlighted a number of common themes including: a complete shift from a client-blaming approach to an inward focus on making adjustments to the method of lawyering. The student lawyers identified specific strategies that they felt would help them cope with client trauma and be more effective in their practice. These included rapport building, grounding, breathing, and drawing the client in, which reflected a substantial shift in how the student lawyers focused their attention and perceived the task at hand. The students focused less on “what needs to get done”, including obtaining an “accurate set of facts”, and instead focused on seeing each client as an individual whom they needed to work with and support in order to build and maintain a working lawyer-client relationship. There was less of a dichotomy present in separating ‘legal’ and ‘non-legal’ issues and more of a recognition that providing support to a legal client is a holistic and incremental process.

⁴⁶ Post-Test Survey at 6.

The student lawyers also showed an increase in their own sense of efficacy, or belief that they have the capacity to appropriately respond to clients. The ability to understand encounters with clients and to employ strategies to foster the lawyer-client relationship enabled what one student described as a “sense of empowerment to deal with clients who have experienced trauma.”⁴⁷ Another respondent remarked that,

[t]oday’s session made me understand that a behaviour that I may not consider it to be ‘normal’ may have a root cause, and a specific reason as to why a client is acting in a certain way.⁴⁸

Students were able to situate themselves in a way that opened them up to understanding client perspectives and barriers. We believe that by giving students the capacity to identify barriers and potential setbacks that arise as a consequence of client trauma, their potential frustration can be reduced and understanding and compassion can be increased. Students were encouraged to consider reframing the questions they posed to clients, to reduce the perception of judgement, and to be more attentive to possible signs of trauma from client interactions. The neurobiological approach

⁴⁷ Post-Test Survey at 6.

⁴⁸ Post-Test Survey at 8.

appeared to be helpful in terms of understanding trauma but also as a mechanism for employing empathy instead of client blaming:

[u]nderstanding where my clients are coming from when they are expressing feelings that seem 'irrational' or overwhelming to me. I thought this was hugely helpful and that I can hopefully be a better support/listener than I have been in the past. I really really appreciated the session...⁴⁹

A trauma informed approach helped to contextualize multiple forms of client behaviour from emotional responses to clients missing appointments:

[l]earning strategies to ensure that clients feel that meeting with you is a safe space. I particularly enjoyed learning about the idea that if a client has difficulty showing up for appointments it might be because of something here making them feel unsafe as that idea had never occurred to me.⁵⁰

⁴⁹ Post-Test Survey at 6.

⁵⁰ Post-Test Survey at 4.

By contextualizing client behaviours as potential responses to trauma, students were more open to different interpretations of why a client may act or engage in particular ways.

I think I understand better why my clients have strong emotional reactions, difficulty remembering, and are really quick to perceive threats from things like discrepancies in paperwork.⁵¹

The sense of empowerment that resonated with many post-test responses did not solely relate to the client but was also explicit in reference to the student's own sense of well-being and self-care. Many of the student lawyers noted how their own state of well-being has the potential to directly affect their relationships and interactions with clients. One student, when asked what they found most helpful about the training, remarked that:

[d]iscussing different techniques and methods to use when faced with difficult situations and clients. Also the whole piece on self-care and understanding the impact

⁵¹ Post-Test Survey at 10.

the client stories can have on us, and in order to serve them well, you need to make sure that you are in a good mental space.⁵²

In the pre-test students expressed feeling ill-equipped and felt that they lacked the proper training to navigate certain difficulties with clients. The training provided students with introductory tools and strategies needed to help them gain competence and the confidence to effectively communicate with and support clients. Students described the expectation of an increased ability to manage highly emotional responses from clients, as well as their own emotions.

When asked about whether the training helped students understand 'difficult' client behaviours students said: "Yes. I think I have a far better understanding and can be less unintentionally judgmental of my clients."⁵³ The training helped students become more reflexive in how they may interpret or respond to a client. Another student said that "the discussion of so-called 'unusual' behaviours (i.e. laughing discussing trauma) was better explained",⁵⁴ which highlights the important piece of how the training helped ground the unexpected responses and affect trauma can illicit that are contrary to what might be expected. It may reduce students' feelings that the client is

⁵² Post-Test Survey at 4.

⁵³ Post-Test Survey at 9.

⁵⁴ Post-Test Survey at 9.

lying or being disingenuous and instead frame a possibly unexpected or inappropriate response as linked to the experience of trauma.

Students were also asked to identify anticipated challenges to a trauma informed approach. Students identified time constraints and structural and systemic barriers as presenting challenges to effective interviewing, to properly undertaking training and research, and to establishing a trusting relationship with clients. In terms of structural barriers and systemic constraints, students identified the role of the lawyer within the traditional legal framework as being a barrier to effectively implementing trauma informed practices. Two students also identified the supervision provided by lawyers in the clinic setting as a barrier. One noted:

[r]eflecting on my past practice, the factor that impeded some of the strategies was that the team, in particular long-tenured staff, were showing signs of vicarious trauma, such as indifference and dismissal of signs of trauma in clients. Therefore, it was more difficult to make the structural changes needed so clients felt better...⁵⁵

In the reassessment of the post-test scenario involving Aisha, participants focused much more on rapport and trust building, validating feelings (both their own and

⁵⁵ Post-Test Survey at 8.

those of the client) and employing trauma informed strategies when faced with highly emotional situations. One student reassessed Aisha as follows:

[s]he seems mistrustful of the situation and in distress - in addition to the factors she is dealing with: possibly, violence, discrimination, disability, addiction, other forms of victimization.⁵⁶

The post-test responses showed more patience and attentiveness to the time it would take to build a supportive relationship and were less concerned with keeping conversations narrowly focused on what they perceived as the relevant 'legal' issues. Students were more ready to empathize with the stress that clients experience as they navigate bureaucratic legal processes and indicated greater willingness to take the time to explain things or reschedule appointments at the client's convenience. Finally, many students expressed a desire for more experience with hands-on and interactive training exercises to continue their learning of practical trauma informed methods to client interactions. In short, the Module was successful in its stated goals.

⁵⁶ Post-Test Survey at 16.

Limitations and Challenges

There were several limitations in evaluating the effectiveness and conclusiveness of our findings. There were some responses that indicated that the student lawyer did not learn anything from the training – for example, there was no shift in their responses from the pre to the post-test. However, in these cases it appeared that the students had pre-existing knowledge and experience with the topics we discussed; indeed, some of these students showed higher levels of compassion and empathy in their pre-test responses.

We experienced several challenges in designing this Module. The first, and perhaps most obvious, is the limitation of time. Given the complexity of this subject area, a full semester course would be an ideal format for preparing students to effectively work with clients. Alternatively, some combination of a course with practical supports from lawyers and psychologists would be beneficial (see the KGACLC example, above). However, we were also quite practical in our approach, understanding that the intensity of clinic programs often only allows for shorter engagements. We also aimed to create a Module that could be replicated fairly easily term-after-term, without a large expenditure of resources.

As noted previously, in developing the Module we were guided by Katz and Haldar's⁵⁷ work on trauma informed lawyering, which emphasizes the importance of understanding and preventing vicarious trauma. We addressed this topic at the end of the Module and included a self-assessment tool adapted for lawyers and discussed how to identify and manage vicarious trauma. However, this was one of the most challenging sections to meaningfully address, particularly because many legal environments are not supportive of self-care and wellness. We were also attuned to critical perspectives on wellness, especially the important role that systems and structures can play in either supporting or undermining wellness. In their examination of the role of systems in building resilience, Jessica Shaw and co-authors outline why focusing on the individual as opposed to systemic and structural considerations is misguided. They note that "...by maintaining a heavy focus on the individual, researchers, practitioners, and policy makers miss the systemic causes of the problem and forgo the ability to develop effective solutions."⁵⁸ We did not do service to this topic, and this remains an area of development for future iterations of the Module.

In reflecting on and improving the Module, we have re-engaged with discourses of decolonization that focus on decolonization and reconciliation as being anti-violence

⁵⁷ Katz & Haldar, *supra* note 17.

⁵⁸ Jessica Shaw et al, "Beyond Resilience: Why We Need to Look at Systems Too" (2016) 6:1 *Psychology of Violence* 34 at 36.

work.⁵⁹ Trauma informed approaches are necessarily rooted in notions of decolonization as anti-violence work and relationship building.⁶⁰ Moving forward, the Module could be more explicitly framed as a practice of relationship building and as a method of decolonizing, drawing on Indigenous scholarship in these areas to strengthen the theoretical framing of the work. Although we sought to provide an intersectional analysis of trauma there was only limited influence of this approach in the post-test findings. Thoughtfully addressing the role of structural oppression should be an ongoing task for legal educators and perhaps speaks to our need for lengthier or repeated Modules.

Most importantly, we could not assess whether the students' learning translated into actual changes in practice. The shift in identifying behavioural manifestations of trauma and developing more empathetic and compassionate attitudes towards client interactions will hopefully guide the clinical practice of our student participants. However, a more extensive and longitudinal evaluation method of post-training application is needed. Additionally, we had no control group. While we suspect that

⁵⁹ Jeffery G Hewitt, "Decolonizing and Indigenizing Your Research" (Lecture delivered at the Faculty Writing Retreat, University of Windsor, 29 August 2018), [unpublished].

⁶⁰ See for example: Jeffery G Hewitt, "Land Acknowledgment, Scripting and Julius Caesar" (2019) 88:1 SCLR 27; National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Volume 1a, online: https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf; Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: TRC, 2015).

the neurobiological framing was largely responsible for the shifts evident in the post-test data, our research did not measure the neurobiological approach as compared to other approaches to teaching students about trauma. Further research in this area would be useful.

For researchers and clinicians interested in this project, we recommend that the participants have at least some amount of legal practice experience with clients before taking this Module. We have presented this Module to students with no client-facing experience, and have observed that there is a marked difference between students who can draw on personal experiences and struggles (the “disorienting moment”⁶¹) with clients before taking the Module. We strongly believe that the ability to reflect on previous experience is key to successful learning in this context. This format also provided us with a ready-made “community of practice” when presenting this Module – a group of learners who worked together previously and would return to that environment afterwards. This practice context meant we had learners who were more easily able to connect with one another and engage in a horizontal pedagogical design, where students engaged both with the instructor and with one another. Students were also able to immediately apply what they learned in practice, which we heard informally was of great benefit. Again, this warrants further empirical

⁶¹ Fran Quigley, “Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics” (1995-1996) 2:1 Clinical L Rev 27.

examination.

Conclusion

Engaging law students in trauma informed lawyering is a means of fostering a more productive lawyer-client relationship and, at minimum, is an educational approach that attempts to do no further harm. Drawing on neurobiology to explain brain functioning and responses to trauma allowed law students to connect with the material in a manner that our prior approaches did not achieve. The use of pre-test and post-test surveys allowed us to analyze the effectiveness of the Module and we conclude that the creation and implementation of the Module for training law students achieved our primary goals. Students' ability to identify indicators of trauma in their work with clients increased, as did their ability to adjust their responses to what they previously experienced as 'difficult' client behaviour. Students also appeared better prepared to understand and implement approaches that might assist in building trust with clients. Students were less likely to demonstrate client blaming attitudes and beliefs and were more adept at understanding their interactions with clients. As well, we were able to offer the students a framework for conceptualizing the social and political structures that produce trauma, and to locate trauma as both individual and structural. Lastly, we saw growth in the ability of students to employ empathy instead of blame. With many students commenting positively on the impact that the neurobiological approach had on their thinking, we conclude that this

approach was an effective mechanism for introducing trauma informed practice. While trauma informed training is not a panacea, our research indicates that even a truncated, three-hour training on trauma drawing on neurobiology has the potential to counter and disrupt client-blaming attitudes.

As experiential learning is becoming an increasingly important aspect of law school education, more work needs to be done to prepare students to do client-facing work. We hope to develop further educational opportunities – whether through short trainings or through deep curricular reform – to better equip law students to build healthy relationships. Such training will not only foster more productive lawyer-client relationships, but it will hopefully promote healthy professional identity development. While this particular Module was focused specifically on students in a legal clinic context, it is equally applicable to the many lawyers practicing in areas with clients who have experienced trauma. We hope this approach is more widely employed for the benefit of clients and lawyers alike.

Appendix A: Survey Instrument for Students

Pre-Test Survey

Please indicate the appropriate response:

1. What is your year in law school?

1 2 3 Other: _____

2. Do you have previous experience working in a legal clinic?

Yes No

If *yes*, how many semesters of previous clinic experience do you have?

1 2 3

Please indicate if your previous clinic experience was as an employee, volunteer, or for course credit: _____

3. Prior to this term, have you had previous experience working with clients as a student lawyer?

Yes No

4. How would you describe your level of experience with legal practice?

None Novice Some Significant

5. This semester, how many clients have you worked with to date?

6. On a scale of 1-10, with 1 being 'Not At All', how familiar are you with trauma informed practice?

1 2 3 4 5 6 7 8 9 10

7. Have you ever had interactions with clients that left you feeling frustrated? Can you describe an example?

8. Have you ever interpreted a client's behaviour as being problematic or disingenuous? If so, can you describe an example? How did the interaction make you feel?

9. Have you ever been left feeling like you do not know how to respond to a client's behaviour or emotions? If so, can you describe an example?

10. Have you ever felt as though a client was lying to you? If so, explain why?

Post-Test Questions

1. On a scale of 1 to 10, how effective do you feel today's training was?

1 2 3 4 5 6 7 8 9 10

2. What about the training do you think will be most helpful in your clinical practice?

3. On a scale of 1 to 10, with 1 being not at all motivated, how motivated are you to implement trauma informed strategies in your clinical practice?

1 2 3 4 5 6 7 8 9 10

4. What challenges might prevent you from implementing trauma informed strategies in your practice?

5. Did this training help you to understand so called “difficult” client behaviours?

6. Have you developed any different interpretations of your client’s behaviours?

7. Do you feel more able to identify potential trauma behaviours?

8. Has the training helped you to identify strategies to better work with clients who have experienced trauma behaviours? If so, can you describe any strategies that you might employ moving forward?

9. Is there anything that could be done to improve this training?

APPENDIX B

Pre- and Post-Test Scenario

Please re-read the following scenario and reflect on what you learned during the training. Please respond to the questions and provide as much detail as possible.

Aisha is scheduled to attend her first appointment with you. From your intake information, you know she identifies as female, her first language is Arabic, she is in receipt of social entitlements (disability), and she is 30 years old. She said she needed help with Criminal Injuries Compensation (Ontario)/ Compensation for Victims of Crime (Saskatchewan).

Aisha is two hours late. On the phone, she had said she wanted help because she wants to claim compensation because she was a victim of a crime. When she comes in, you ask her to sign a retainer. She stares at you. You can't tell if she understands what you are saying. You ask if she might need an interpreter. She refuses.

When you start asking questions about the reasons why she is applying for compensation, her hands begin to shake visibly. She won't look at you directly. She

shifts in her chair often , slurs her words and you think you catch a smell of alcohol on her breath. Yet, she is clear when you ask her more general questions such as her address and contact information. When you ask her questions about the reason she is seeing a lawyer, she says she has a lot of back pain and says she doesn't remember much about the event itself. After 30 minutes, she stands up angrily and says "These questions are ridiculous. Why are you making a bit deal about this anyway?" and stands up to leave.

1. What is your assessment of Aisha's situation?
2. Describe how you would respond to Aisha in this situation?
3. Are there specific strategies that you would use to respond to Aisha?
4. What emotions do you feel when you imagine being in this scenario?

UNREGULATED IMMIGRATION LAW CLINICS AND KANT'S COSMOPOLITAN RIGHT: CHALLENGING THE POLITICAL STATUS QUO

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Abstract

Unregulated law clinics in England and Wales are prohibited from directly offering immigration advice and assistance. This article argues that this restriction should not be a barrier to teaching immigration law. Kant's duty-based ethics and his cosmopolitan right can provide a useful normative framework for challenging the political status quo in relation to the regulation of law clinics and policies affecting migrants. It is argued that introducing normative values into Clinical Legal Education can address the limitations of the conventional 'hired-gun' model and engender students to a more holistic approach to lawyering. In other words, a model which promotes the causes of third parties.

Keywords: clinical legal education; cosmopolitanism; hired-gun; immigration law; Kant.

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Introduction

Unregulated law clinics in England and Wales are prohibited from directly offering immigration advice and assistance. This article argues that this restriction on the services clinics can offer should not be a barrier to teaching immigration law. Kant's duty-based ethics and his cosmopolitan right can provide a normative framework for challenging the political status quo in relation to the regulation of law clinics and policies affecting migrants. It is argued that introducing normative values into Clinical Legal Education (CLE) can address the limitations of the conventional 'hired-gun' model and engender students to a more holistic approach. In other words, a model which promotes the causes of third parties.

Normative values are concerned with how things 'ought to be' (Schwieler & Stefan Ekecrantz, 2011: 60). In the context of CLE, normative values address questions such as 'what is just and fair?', 'do clinic students owe moral duties to non-clients?', and 'do students have a moral duty to engage in law reform?'. Adopting a values-based approach in CLE can contribute to the development of a 'mature moral identity' and fostering an attribute necessary for effective citizenship (Webb, 2010: 9). The term 'values' tends to have a variety of meanings, for present purposes it is regarded as a particular type of belief about what an individual holds valuable, namely human dignity.

Kant's moral philosophy, which is committed to respecting the dignity of all persons, will be applied to CLE to critique the United Kingdom's (UK) current laws and

policies towards migrants. These policies first entered the political debate in May 2012, when the then Home Secretary, Theresa May, announced the government's aim 'to create, here in Britain, a really hostile environment for illegal immigrants' (Kirkup & Winnett, 2012). The overarching objective was to make life as difficult as possible for migrants whom the Home Office deemed to be potentially illegal. This policy was not limited to controlling immigration through border control but also included an internal approach. According to Webber (2019: 77), the immigration policies have:

[T]he avowed aim of making life impossible for migrants and refugees who do not have permission to live in the UK, and which remove such migrants from the rights to housing, health, livelihood and a decent standard of living, liberty, freedom of assembly and association, family and private life, physical and moral integrity, freedom from inhuman or degrading treatment, and in the final analysis the right to human dignity and to life.

There are two main reasons for using the UK's 'hostile environment' policies as a case-study for developing students' analytical skills. Firstly, unregulated law clinics, unless they are partnered with non-government organisations (NGOs) or immigration lawyers, are prohibited from offering immigration advice and assistance. This prohibition can prove to be a barrier to teaching immigration law and theory. Secondly, ethics of immigration (Carens, 2015) can add value to CLE by providing a framework, in the form of normative ethics, for challenging the political status quo. Although there are various forms of cosmopolitanism, this article will draw on Kant's

theory of cosmopolitanism, the right to hospitality, and his duty-based approach (deontology) to moral decision-making. Deontology is one of several ethical theories² used in CLE. While a CLE curriculum grounded in comparative legal ethics, that includes Kantian philosophy, would better serve the aims of law clinics and CLE, the contribution of Kant's ethics will be the focus of this article.

In the absence of legal obligations, from a student's perspective, towards clients and third parties, Immanuel Kant's theory of ethics, which is the major theory within the deontological tradition (Eberle, 2012: 13), can provide CLE students with a useful framework for identifying their moral duties. Kant's philosophy deals with ethical duties owed by the individual moral agent. He grounds his system upon principles of universality; our moral obligations must be applicable to all people at all times and in similar situations. Kant's critique of the right to hospitality of non-citizens and the duties of the state towards visitors will be applied to the UK's 'hostile environment' policies to develop legal ethics beyond the dominant lawyer-client model found in live-client clinics. This article is based on the premise that there is a need for students to be provided with an ethical framework that promotes respect for the dignity of all individuals, irrespective of their nationality, gender, sexual orientation or any other characteristic.

This article will proceed in seven sections. Section one will argue that the conventional lawyering model, with its value-neutral approach, is inadequate in terms of

² Other ethical theories include consequentialism, ethics of care, intuitionism, and virtue ethics.

promoting normative values. Public interest lawyering, namely cause lawyering, is a more appropriate pedagogic approach for promoting normative values such as duties towards third parties. Sections two and three identify moral cosmopolitanism as the normative framework for enhancing cause lawyering. Section four will examine Kant's deontological ethics and his theory of cosmopolitanism. This section will outline the value of incorporating Kant's concepts of autonomy, respect and dignity to developing the cause lawyering model. Section four will also analyse Kant's cosmopolitan right in order to outline a moral framework for critiquing law and policies affecting migrants. Sections five and six will describe the regulatory framework regarding immigration law and the UK's 'hostile environment' policies. The final section will apply Kant's theory to CLE.

1. Clinical Legal Education and legal ethics

CLE is generally understood to mean the provision of pro bono legal services to real-life clients, under the supervision of academic members of staff (Giddings, 2013). While there is no universally accepted definition of CLE, Giddens (2013: 14) puts forward the following explanation:

Clinical legal education involves an intensive small group or solo learning experience in which each student takes responsibility for legal or law-related work for a client (whether real or simulated) in collaboration with a supervisor. Structures enable each student to receive feedback on their contributions and to take the opportunity to learn from their experiences through reflecting on matters including their interactions with

the client, their colleagues and their supervisor as well as the ethical dimensions of the issues raised and the impact of the law and legal processes.

CLE, as a form of experiential learning, can include a diverse range of teaching methods such as placements, case-studies, and simulations. Consequently, the teaching of law and policies affecting migrants can form part of a CLE curriculum through non-live client models. The value of CLE, as a vehicle for teaching immigration law, is that it not only serves to bridge the gap between theory and practice but can also develop practical skills, 'with the incorporation of the affective domain needed for sensitive and ethical client care' (McAllister, 1997: 3). However, the aim of teaching legal ethics is not to create 'moral whizz-kids' (Hursthouse, 2013: 650), but to provide students with conceptual tools that allow them to address the question: 'how should we respond to this situation?' (Herring , 2017: 4) and more specifically, 'do we owe a moral duty to others?'. With regards to incorporating conceptual tools, such as values, into the curriculum, Webb argues that '[i]f it is to take values seriously, legal education has to become more experiential' (Webb, 2010: 21). This can be achieved through a variety of pedagogies such as CLE, problem-based learning, and simulations. The focus of this article is the role CLE in relation to incorporating normative values.

1.1 The 'hired-gun' model

While a certain amount of guidance for resolving ethical dilemmas can be found in the professional codes of conduct, teaching these rules and duties does little to promote a critical approach to their content (Nicolson, 2018: 88). This article addresses the ethics component of CLE by incorporating a deontological dimension that goes beyond the traditional lawyering model. This aim is achieved through the use of a case-study centred on the UK's immigration law and policies. The analysis of this case-study requires a normative framework, which the dominant conventional lawyering model lacks. Legal advice and assistance in law clinics incorporates both the conventional lawyering model and its alternative: the public interest lawyering model.

Lawyers in the conventional model are considered to be detached professionals. In other words, neutral partisans who are not associated with the morality, causes, or beliefs of their clients (Chen & Cummings, 2013: 274). The 'hired-gun' approach is often associated with lawyers in private practice, where the lawyer, in exchange for a fee, defends a client's rights and puts forward the best possible defence. This is carried out without any consideration on the impact on third parties (Herring, 2017: 29). The hired-gun metaphor promotes a value-neutral model where lawyers act as amoral mouthpieces for their clients and zealously pursue their clients' self-interests (Pearce & Wald, 2016: 601). Defenders of this model view the concept of partisanship as being central to the role of the lawyer (Pepper, 1986: 617-18). According to Fried, a lawyer

must display 'hyper zeal' in pursuing a client's case, even if this might appear to be unethical (Fried, 1976). The hired-gun approach was recently criticised by the Solicitors Regulation Authority (SRA)³ (2018: 3):

[A]lthough solicitors must advance their clients' cases, they are not 'hired guns' whose only duty is to that client. They also owe duties to the courts, third parties and to the public interest'.

However, the SRA omits to offer any guidance on how these competing interests should be balanced or how a lawyer should determine the meaning of 'public interest'.

An alternative model to the 'hired-gun' approach, that has the potential to address the SRA's concerns regarding duties to third parties and to the public interest, is 'public interest lawyering'.

1.2 Public interest lawyering

Generally, a public interest lawyer is one who is alert to something or someone beyond their commitment to their client (Chen & Cummings, 2013: 278). Public interest lawyers embrace a cause which sets them apart from the value-neutral technician who adheres to the conventional model of lawyering. Public interest lawyers who advocate for a cause, such as immigration rights, are driven by a moral commitment (Chen & Cummings, 2013: 279). Cause lawyering, therefore, aims to 'reconnect law and

³ The regulatory body for solicitors in England and Wales.

morality' (Sarat & Scheingold, 1998: 3) by challenging the central activity of the legal profession, namely the provision of legal services in exchange for payment. This is achieved through amending aspects of the social, political, or economic status quo. A normative framework provides students with a conceptual tool to critique law and policies affecting both clients and non-clients. This framework can facilitate the examination of broader issues such as the impact law and social institutions have on individuals and the extent to which laws and policies hinder or promote persons from realising their life goals. Such analysis goes beyond the narrow confines of the conventional lawyering model. A moral framework that can contribute to the theory of public interest lawyering, in CLE, is Kant's theory of ethics and his cosmopolitan right to hospitality.

2. Cosmopolitanism

'Cosmopolitan', derived from the Greek words kosmo and politēs ('citizen of the world'), is a normative ideal used in various disciplines such as education (Papastephanou, 2016), global health justice (Ruger, 2018), moral philosophy (Van Hooft, 2014), and international law (Pierik & Werner, 2010). Cosmopolitanism is distinguished from globalisation which is associated with the global spread of capitalism and a deregulated market society (Litonjua, 2008: 254). Globalisation has been criticised for promoting neoliberal policies (Knyght et al, 2011) that encourage self-interest (Jordà et al, 2010). Cosmopolitanism, on the other hand, promotes the

ideal that every individual, regardless of their citizenship status or other affiliation, enjoys equal moral standing (Brock, 2009: 3). Philosophers from Kant to Jacques Derrida associate cosmopolitanism with hospitality to the stranger. Similar to CLE, there is no universally accepted definition of cosmopolitanism. However, Thomas Pogge (1992: 48) outlines three elements shared by cosmopolitan theories:

First, individualism: the ultimate units of concern are human beings, or persons—rather than, say, family lines, tribes, ethnic, cultural, or religious communities, nations, or states. The latter may be units of concern only indirectly, in virtue of their individual members or citizens. Second, universality: the status of ultimate unit of concern attaches to every living human being equally—not merely to some sub-set, such as men, aristocrats, Aryans, whites, or Muslims. Third, generality: this special status has global force. Persons are ultimate units of concern for everyone—not only for their compatriots, fellow religionists, or such like.

Pogge's definition is useful to CLE because it draws attention to the moral status of a person as an 'ultimate units of concern'. Moral cosmopolitanism, therefore, views all individuals as members of a single moral community and they owe moral duties to all other individuals, irrespective of their nationality, background, or religion. Cosmopolitanism allows students to adopt the view that 'there exists a global community which all people, by virtue of their humanity, are members' (Van Hooft, 2014: 6). Cosmopolitanism, therefore, gives rise to moral duties towards individuals outside our immediate community, such as non-citizens. Moral duties can enhance

CLE in three ways. Firstly, it views 'all humans as worthy of equal moral concern' and advocates 'impartiality and tolerance' (Kleingeld, 1999: 507). Impartiality towards clients may be absent due to the fact that 'unconscious racism and biases often play a role in our everyday decisions' (Lyon, 2012: 758). Thus, incorporating cosmopolitan values into CLE can assist in addressing issues of bias towards clients. This can be achieved through a moral duty-centred approach that promotes self-reflection. Secondly, moral cosmopolitanism provides students with a normative framework for critiquing the content of the professional codes of conduct. Thirdly, it creates a duty towards all persons irrespective of whether they are clients or not. This duty towards clients and third parties can be applied to CLE to engage students in law-reform by providing a 'voice' for those who may not have access to legal representation or who may not be able to access a clinic's services.⁴ Thus, moral cosmopolitanism is closely aligned with the public interest lawyering model. It is necessary to briefly outline Kant's deontological and cosmopolitan theories in order to illustrate their application in CLE.

⁴For a discussion on how CLE students can use casework to inform work on law reform, see Curran (2007).

3. Kant's Ethical Theory

Kant's duty-based approach to moral reasoning is known as deontology, which is derived from the Greek words for deon (duty) and science (or study) of (logos) (Alexander & Moore, 2016). Deontology can be contrasted with consequentialism, an umbrella term, that describes ethical theories that frame morality of actions on the types of consequences produced. Examples of consequentialist theories are utilitarianism, egoism, and nationalism (Cohen, 2004: 6). Deontology, on the other hand, places duty, both to one's self and to others, at the heart of morality. For deontologists, an action is deemed to be morally right or wrong not because of the consequences it produces but because it conforms to a specific moral law or principles. In other words, actions are judged not on the cause or effect they produce but on what our duty demands. To apply Kant's theory of ethics to CLE it is necessary to identify the source of this moral duty and what it entails.

By rejecting the consequences of an action as the basis of morality, Kant viewed reason as the foundation of morality. A moral individual is one who is able to deliberate on, and act upon, valid reason. To determine the right moral reason, Kant formulated the Categorical Imperative (CI) as his supreme principle of morality. At the heart of the CI is the concept of a good will, 'A good will is not good because of what it effects or accomplishes – because of its fitness for attaining some proposed end: it is good through its willingness alone – that is in itself' (Kant, 1948: [4: 394]). A good will relates to an individual's capacity to recognise and to act from a duty to follow the moral law.

A good will is always good regardless of the consequences it produces, whether intended or not, or even if it fails to produce the intended results (Kant, 1948: 17). In the context of CLE, a good will compliments the professional codes of conduct, which are predominantly consequentialist in nature (Madhloom, 2019), by reminding students to reflect on moral duties such as respecting their own autonomy and that of their clients, being mindful of paternalism towards their clients, and holding the state accountable for morally impermissible actions (Madhloom, 2019).

For an action to be morally good it should not only conform to the moral law but must also be done from a duty towards the moral law (Kant, 1948: [4: 390]). To illustrate this point, Kant gives the example of a grocer who refrains from acting dishonestly towards his customers by overcharging them (Kant, 1948: [4: 397]). Kant argues that there is a difference between a grocer whose actions are in conformity of what is expected of him as a seller, but not necessarily done from a duty to the moral law, and one who conducts his business from the intention to act honestly. It is only in the latter case, acting from duty and the principle of honesty, that the grocer's action can be said to have moral worth. Kant expounds on this point by providing another example, which is of direct relevance to law clinics: that of a person who is not inclined to 'help those in distress' (Kant, 1948: [398]). Their action has moral worth where they, out of duty to the moral law, perform acts which benefits those in distress (Kant, 1948: [4:397]). Kant (1948: [4: 398]) contrasts this example with that of a person who is naturally disposed to assist those in distress:

I maintain that in such a case an action of this kind, however right and however amiable it may be, has still no genuinely moral worth. It stands on the same footing as other inclinations – for example, the inclination for honour, which if fortunate enough to hit on something beneficial and right and consequently honourable, deserves praise and encouragement, but not esteem; for its maxim lacks moral content, namely the performance of such actions, not from inclination, but *from duty*.⁵

A person's moral worth, whether a client or not, is not dependent on inclinations or feelings. What drives a person's actions is recognition of duty, rather than the consequences of an action. It is this reasoning which led Kant to reject utilitarianism. The moral worth of an action is not judged by the consequences it produces or intended effect but by the fact that it was motivated by duty. The concept of duty helps shift the focus from the amoral 'hired-gun' approach to a more public interest lawyering model which promotes the examination of our duties towards ourselves, our clients, and society.

Kant's CI raises the question 'why are only acts that are motivated by duty possess moral worth?'. This 'motivational rigorism' (Timmermann, 2009: 58) is a result of Kant's interest in developing an account of ethics that is concerned with a person's character. Clinic students who, out of duty for the moral law, show care for third parties, whom they do not owe any legal duties towards, can be said to have moral worth. Incorporating the concept of a moral duty towards clients and third parties can

⁵ Emphasis in the original. This applies to all subsequent quotes.

promote a critique of law and policies affecting those individuals and groups such as migrants and non-citizens. To determine our duties to the moral law, it is necessary to examine Kant's supreme principle of morality.

4. Kant's supreme principle of morality: The Categorical Imperative

Kant formulated the CI to distinguish between right and wrong actions. The CI is an unconditional command that is binding irrespective of the outcome or whether it serves a benefit, either directly or indirectly, to us personally. Although Kant insists that there only one CI, he provides various formulations of it each with a different emphasis:

1. The Formula of Universal Law: *'Act only on that maxim through which you can at the same time will that it should become universal law'* (Kant, 1948: [4: 421]);
2. The Formula of Humanity: *'Act in such a way that you always treat humanity, whether in your own person or in the person of another, never simply as a means, but always at the same time as an end'* (Kant, 1948: [4: 429]);
3. The Formula of Autonomy: *'the Idea⁶ of the will of every rational being as a will which makes universal law'* (Kant, 1948: [4: 431]; and

⁶'Idea' with a capital 'I' refers to Kant's technical term. An Idea is a rational concept which arises out of our knowledge of the empirical world, yet seem to point to a transcendent realm. Once such Idea is 'the greatest possible human freedom according to laws, by which freedom of every individual is consistent with the freedom of every other' (Kant, 2015: [A316/B372]).

4. The Formula of Kingdom of Ends: 'Act on the maxims of a member who makes universal laws for a merely possible kingdom of ends' (Kant, 1948: [4: 439]).

The various formulations of the CI will be briefly discussed to illustrate their application in critiquing laws and policies affecting migrants.

4.1 The Formula of Universal Law

The CI, according to Kant, is the principle for achieving consistency and universalisation of our maxims. A maxim is a 'subjective principle of action...on which the subject *acts*' (Kant, 1948: n 51). The CI can provide students with a conceptual tool to determine whether their maxim, which underpins their actions, can be applied universally, that is, to everyone including themselves. Maxims are useful in that they identify contradictions (Kant, 1948: [4: 424]):

Some actions are so constituted that there cannot even be *conceived* as a universal law of nature without contradiction let alone *willed* as what *ought* to become one. In the case of others we do not find this inner impossibility, but it is impossible to *will* that their maxim should be raised to the universality of law of nature, because such a will would contradict itself.

There are two types of maxims: those that are contradictory when they are applied, and those that cannot be willed to be universally applied. Kant provides the example of willing a world in which we do not help 'others who have to struggle with great

hardship' (1948: [4: 423]). There is clearly no contradiction in conceiving of such a maxim when applied universally. The maxim is not self-defeating in the same manner that it is possible to envisage such a society. However, *willing* a principle in which we do not help those suffering hardships, such as clients who are unable to access legal assistance, would result in a conflict with itself; there may come a time when we may need help from others, but none would be forthcoming as we could have willed that we do not receive any assistance. Thus, the Formula of Universal Law allows students to reflect on actions beyond the conventional value-neutral lawyer-client model. It promotes reflection on laws and policies that disadvantage certain groups such as migrants.

4.2 The Formula of Humanity

In relation to the second formula, 'humanity' includes the capacity to set ends for oneself (Korsgaard, 1996: 110). This capacity is a feature of a person's freedom, understood as the ability to self-govern. In other words, the freedom to engage in self-directed rational behaviour and to set ends for ourselves (Johnson & Cureton, 2019). To exercise freedom to set ends for oneself (positive freedom) clients must be free from interference such as coercion and deception (negative freedom). Christine Korsgaard writes (1996: 140-141):

According to the Formula of Humanity, coercion and deception are the most fundamental forms of wrongdoing to others – the roots of all evil. Coercion and

deception violate the conditions of possible assent, and all actions which depend for their nature and efficacy on their coercive or deceptive character are ones that others cannot assent to...Physical coercion treats someone's person as a tool, lying treats someone's reason as a tool. That is why Kant finds it so horrifying; it is a direct violation of autonomy.

For Kant (1948: [4: 447]), a free or autonomous individual is one whose motives and actions are in accordance with the moral law. However, it is permissible to use coercion in certain circumstances if the aim is to promote positive freedom (Kant, 1996: [6:231]):

[I]f a certain use of freedom is itself a hinderance to freedom in accordance with universal laws...coercion that is opposed to this (as a *hindering of a hinderance to freedom*) is consistent with freedom in accordance with universal laws...it is right.

The state can limit our freedom provided the purpose is to promote freedom generally, such as criminalising theft and murder. Kant articulates the linkage between rights, freedoms, and equality by stating that the 'civil state' (Kant, 2006: [8:290]) ought to be based on the following principles (Kant, 2006: [8:290]):

1. The freedom of every member of society as a human being.
2. The equality of each member with every other as a subject.
3. The independence of every member of the commonwealth as a citizen.

With regards to freedom, 'the member of the commonwealth, is entitled to this right...as a human being to the extent that the latter is a being capable of rights in general' (Kant, 2006: [8:290]). A 'state' is defined as 'a union of a multitude of human beings under laws of right' (Kant, 1996: [6: 230]). Kant uses 'state' and 'peoples' (Kant, 1996: [6: 312]) synonymously suggests that states and their peoples have the same duties towards migrants that they owe towards their own. Thus, it can be argued that unregulated law clinics owe a duty to third parties. He defines 'right' as 'the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom' (1996: [6: 313]). This 'universal law of freedom' or 'the universal principle of right' maintains (Kant, 1996: [6: 230]):

Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law. or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law'.

Individuals are, therefore, free to act in whatever manner they see fit, provided their actions do not interfere with the freedom of others. A client's ability to set 'ends' for themselves gives rise to the notion of respect in relation to the 'rational choices, the plans, and intentions we and others may form' (Nelson, 2008: 104). Stephen Darwall distinguishes between two types of respect: 'appraisal respect' and 'recognition respect' (Darwall, 1977). Appraisal respect involves a positive appraisal of a person either as a person or in relation to their engagement of a particular enterprise. This type of respect is determined following an evaluation of other individuals to

determine whether the person, when judged by objective standards, has special merit and deserves our respect (Darwall, 1977: 39). The latter refers to the attitude of regard for others which is due to their being persons, and as such, worthy of being respected by virtue of the fact that they are persons deliberating on their actions. Recognition of respect is 'not how something is to be evaluated or appraised, but how our relations to it are to be regulated or governed' (Darwall, 2006: 123). Unlike appraisal respect, recognition respect requires that we demonstrate respect for others not because of our appraisal of them but because we are morally obliged to do so (Allan & Davidson, 2013: 347). In other words, recognition respect does not require fulfilling a standard of evaluation appropriate to the individuals. Darwall's recognition respect captures Kant's notion of respect which must be afforded to every individual (Kant, 1996: [6:464]):

I cannot deny all respect to even a vicious man as a human being; I cannot withdraw at least the respect that belongs to him in his quality as a human being, though though by his deeds he makes himself unworthy of it.

We ought to have recognition respect even for people whom we do not have appraisal respect for. This creates a moral justification for defending the guilty⁷ on the ground that respect is not a matter of degree based on the recipient, for example a client, of our respect having met some standard of assessment (Johnson & Cureton, 2019). This raises the question as to why we are obliged to morally respect every person no matter

⁷ In relation to the ethics of criminal defence, see (Mitchell, 1980); (Markovits, 2003); (Seleme, 2013).

their character or actions. According to Kant, respect towards others is necessary due to their dignity (Kant, 1948: [4: 435]). Sandel (1996: 82) equates dignity with a person's capacity as an autonomous agent to choose their ends for themselves. Following Sandel's interpretation, autonomy presupposes an individual's ability to make choices free from external constraints. In the context of CLE, external constraints on personal autonomy include undue influence from a student advisor as well as laws that prevent people from realising their life goals. The concept of a person's dignity is further explored in Kant's Formula of Autonomy.

4.3 The Formula of Autonomy

Autonomy, Kant (1948: 4: 436) writes, 'is the ground of the dignity of human nature and of every rational nature'. As a human moral creature, what Kant calls 'homo noumenon' (1996: 6: 434), a person exists in the moral realm of dignity. It is this dignity, inherent in every person, that demands respect because 'every man has a legitimate claim to respect from his fellow men and is in turn bound to respect every other' (1996: 6: 462). Kant (1948: [4: 435]) differentiates things which can have a 'price' and can be exchanged for something else, and things with a 'dignity' which are 'exalted above all price' and have no equivalent. Individuals possess unconditional value compared to other things, such as material goods, which can be valued by persons. Clients and third parties are, therefore, not to be valued simply as a means to the ends of others but as ends in themselves by virtue of their dignity. An example of

using a client as means is where a student volunteers in a clinic purely out of self-interest as opposed to altruistic reasons. For Kant (2015: [5:88]), a person's value as a rational being is linked to their autonomy:

A human being alone, with him every rational creature, is an *end in itself*: by virtue of the autonomy of his freedom he is the subject of the moral law...such a being...is to be used never merely as a means but as at the same time an end.

Dignity, as a universal concept, is possessed by every individual due to their autonomy and is grounded in the requirement to treat others, including their own person, 'as ends in themselves' (Bognetti, 2005: 89-90). However, historically, individuals outside one's national borders were not considered to have moral standing (Chadwick & O'Connor, 2015: 26). Individuals with moral standing are those who are considered to be moral agents. For Kant (1948: [4: 435]), a moral agent is one who possesses dignity. Moral agency is essential to being a rational agent (Bowie, 1999: 45). In relation to the concept of rationality, Kant writes (1948: [4: 429]):

Rational nature exists as an end in itself. This is the way in which a man necessarily conceives his own existence: it is therefore so far a *subjective* principle of human actions. But it is also the way in which every other rational being conceives his existence on the same rational ground which is valid also for me; hence it is at the same time an *objective* principle, from which as a supreme practical ground, it must be possible to derive all laws for the will.

This highlights Kant's assertion for the necessity of respecting all rational individuals because rationality is a product of an individual's freedom and enables them to act as moral agents (Kant, 1948: [4: 447]). Freedom permits individuals to act on laws they formulate themselves rather than being subjected to causal laws. Therefore, moral agency is what gives individuals dignity (Bowie, 1999: 45). The concepts of freedom and dignity can be useful analytical tools for critiquing the principle that lawyers must act with independence (SRA, Principle 3) and acting in their clients' best interests (SRA, Principle 7). Taking into consideration a person's freedom and dignity allows students to be mindful of a client's dignity by virtue of them being autonomous persons. This dignity-centric approach to client care may prevent students from being paternalistic when advising their clients. A further advantage of this approach is that it allows students to reflect on the impact of law and policies, which restrict freedom, on persons who are outside their immediate community. This is achieved by incorporating into CLE the concept of a moral community that transcends geographical boundaries, namely Kant's 'kingdom of ends'.

4.4 Formula of Kingdom of Ends

Kant's third formula requires that actions be considered as if their maxims provide a law for a hypothetical 'kingdom' (1948: [4: 433]). A 'kingdom' is 'a systematic union of different rational beings under common laws' (1948: [4: 433]). A kingdom of ends is an ideal community of rational beings living in harmony with one another. Unlike

'humanity', which every person possesses, a kingdom of ends is an ideal which every person should strive to achieve (Hildebrand, 2017: 23). This formula conceptualises Kant's ideal community where the authority that legislates moral laws and norms are binding on everyone. These norms are derived from rational standards accessible to all the community's members and accord with their dignity (Hildebrand, 2017: 23). The Formula of the Kingdom of Ends acts as a domain for the normative framework necessary for a cosmopolitan community. In his essay 'Toward Perpetual Peace' (TPP), Kant argues that, '[t]he growing prevalence of a (narrower or wider) community among the peoples of the earth has now reached a point at which the violation of right at any one place on the earth is felt in all places' (Kant, 2006: [8: 360]). It would seem that Kant anticipated the current climate change (European Commission, 2020a) and refugee crises (European Commission, 2020b) whereby catastrophes in one part of the world may have consequences on other nations (Mader & Schoen, 2019). This can create a realisation in students that they 'are not citizens just of specific nation-states but are also citizens of the world' (Van Hooft, 2009: 4).

4.4.1 Kant's cosmopolitan right

In TPP, Kant (2006: [8: 358]) equates the idea of a 'Cosmopolitan Right' to 'hospitality' which he defines as 'the right of a stranger not to be treated in a hostile manner by another upon his arrival on the other's territory'. Kant (2006: [8: 357]) limits his cosmopolitan right to 'Universal Hospitality'. The use of the word 'universal' implies

that this cosmopolitan right is a type of CI valid for everyone (Saji, 2009: 126). Thus, any person can exercise the right to arrive on any land. However, Kant's cosmopolitanism, which is a right as opposed to philanthropy (Kant, 2006: [8: 358]), is not an absolute right. A stranger can be turned away provided this can be achieved without their death (Untergang) and the stranger must not be treated with hostility, 'so long as he behaves in a peaceable manner in the place he happens to be' (Kant, 2006: [8: 358]). Under this right, non-citizens can claim the 'right of resort', which everyone possesses 'by virtue of the right of common possession of the surface of earth' (Kant, 2006: [8: 358]). The right of resort is merely an entitlement to present oneself in the lands of others. Kant's cosmopolitan right is not 'a right to *make a settlement* on the land of another nation (*ius incolatus*)' (1996: [6: 353]). A non-citizen's right to 'make a settlement' can only be secured through a special contract (Kant, 1996: [6: 353]). Kant elaborates on this conditional requirement by stating that it requires 'a special, charitable contract stipulating that he be made a member of the household for a certain period of time' (Kant, 2006: [8: 358]).

Kant's hospitality model, which is limited to a right to visit (Besuchsrecht) rather than a right to residence (Gastrecht), has been described as being 'inappropriate' (Cavallar, 2002: 323) and 'empty' (Benhabib, 2004: 36). Derrida criticises Kant for providing a restricted right to hospitality that gives rise to a precedent for the special conditions imposed on refugees and asylum seekers (Derrida, 2001). This criticism appears, at first glance, justified when we consider that in relation to a stranger's right to visit, the

state has the authority to refuse entry with respect to non-citizens, and thereby overriding a stranger's right to hospitality. However, Derrida's (2001) reading of Kant, namely the exclusion of asylum seekers in Europe, is unjustified because Kant's laws of hospitality explicitly hold that visitors should not be turned away if it results in their 'death' (Kant, 2006: [8: 358]). Kant's narrow conception of the right to hospitality can be disregarded in relation to CLE because this right which 'pertains...only to conditions of the possibility of *attempting* to interaction with the old inhabitants' (Kant 2006: [8 358]), was primarily aimed at restricting European colonisation (Kant, 2006: [8: 358]; see also Brown, 2-14: 684):

If one compares with this the inhospitable behaviour [sic] of the civilized states in our part of the world, especially the commercial ones, the injustice that the latter show when visiting foreign lands and peoples (which to them is one and the same as conquering those lands and peoples) takes on terrifying proportions.

Kant (2006: [8: 358]) restricts the right of hospitality to visiting other countries. For European states this meant colonisation and 'oppression of the native inhabitants'. Kant's cosmopolitanism was, therefore, mainly concerned with restraining colonial rule and aggression (Kleingeld, 1998: 76). He (Kant, 1996: [6: 353]) attempts to introduce a further limit on European colonialism by excluding from the right to visit 'a right to *make a settlement* on the land of another nation (*ius incolatus*)'. Although Kant did not explicitly mention the rights of refugees and economic migrants, the plight of

refugees in eighteenth-century Europe⁸ is unlikely to have escaped his attention. In an early draft for TPP Kant (cited in Kleingeld, 1998: 78) argues that ‘a ship seeking a port of refuge in a storm, or a stranded group of sailors cannot be chased away from the beach...where he saved himself and sent back into imminent danger...instead, he must be able to stay there until there is a favourable opportunity to leave’. Here, Kant not only anticipates the rights of refugees but also the principle of non-refoulement established in the twentieth century (Kleingeld, 1998: 77; on the rights of refugees, see Goodwin-Gill & McAdam, 2007). Under customary international law and the Convention Relating to the Status of Refugees (1951 and 1967) (the Refugee Conventions), states are prohibited from removing individuals from their jurisdiction when there are substantial grounds for believing that an individual would be at risk of harm upon return, including persecution, torture or other serious human rights violations based on their ‘race, religion, nationality, membership of a particular social group or political opinion’ (Article 33 of the Convention Relating to the Status of Refugees 1951). Using the Refugee Convention as a frame of reference, Kant’s theory of cosmopolitanism ‘has some room for limits on the range of legitimate reasons for rejection’ (Kleingeld, 1998: 77). Thus, a state’s laws, which prevent individuals from exercising their right to hospitality, are discriminatory and contrary to the CI.

As stated previously, a stranger should only be turned away if it can be carried out without causing their death (Kant, 2006: [8:358]). Can the state refuse entry to an

⁸For an account of refugees in eighteenth-century Prussia see Hans Fenske, ‘International Migration: Germany in the Eighteenth Century’ (1980) 13(4) *Central European History* 332.

asylum seeker if this would not result in death on return to their country of origin? Kant's right to hospitality appears to allow such an action on the part of the state. However, Pauline Kleingeld (1998: 76) argues that Kant's term 'Untergang', which she interprets as 'destruction',⁹ can include 'mental destruction or incapacitating physical harm'. It is, therefore, possible to widen Kant's cosmopolitanism to include migrants who would suffer or are at risk of suffering 'destruction', as interpreted by Kleingeld, if they were to be deported. This interpretation of Kant's cosmopolitanism does not imply that states lose their powers to exclude non-citizens. On the contrary, Kant (2006, [8: 359]) himself supported China and Japan in their attempts to limit interaction with European traders. Kant's cosmopolitanism supports state sovereignty in four ways. Firstly, it permits states to limit interaction with non-citizens. Secondly, migrants can be turned away provided this can be achieved without causing their destruction (broadly defined). Thirdly, non-citizens do not have an a priori right to settle, they only have a right to visit. Fourthly, the right to hospitality can be revoked if a migrant fails to behave in a peaceable manner. Kant does not explain what constitutes 'behaves peacefully', but presumably what he had in mind was a visitor adhering to the norms and laws of the host state. Conversely, he limits state sovereignty by requiring a state to fulfil four conditions (Saji, 2009: 127). Firstly, every non-citizen is to be treated equally and without hostility provided they behave peacefully. Secondly, as long as a non-citizen behaves peaceably, they should not be

⁹ In some translations this term is interpreted as 'death'.

forced to conform to the people of the state simply because they have entered the state's territory (Saji, 2009: 128). Thirdly, but unlike the first two conditions which are unconditional, a stranger can enter into a specific contract to '*make settlement in the land of another nation*' (Kant, 1996: [6: 353]). Finally, admission is obligatory if refusal of entry will lead to the individual's destruction.

Kant's cosmopolitanism is a useful analytical tool for teaching immigration law in CLE because it affirms an individual's humanity through respect for their autonomy and the requirement to afford them hospitality, albeit on the condition that an individual behaves peacefully. It provides a framework for recognising that individuals have a moral right to travel within a global community and not to be treated with hostility. Kant's Kingdom of Ends and his theory of cosmopolitanism can develop public interest lawyering by introducing a deontological approach to cause lawyering. Kant's CI can, therefore, provide the foundation of our moral duties towards society and acts as a framework for critiquing the law. To demonstrate the application of Kant's ethics to CLE, it is necessary to provide a brief overview of the current regulatory framework regarding the provision of immigration advice and assistance.

5. Law clinics and regulation of immigration advice and assistance

In England and Wales, the Office of the Immigration Services Commissioner (OISC) regulates the provision of immigration advice and services in the UK. 'Immigration advice' and 'immigration services' are defined in s. 82(1) of the Immigration and

Asylum Act 1999 (IAA 1999). Section 84(2) of the IAA 1999 allows persons to provide immigration advice and services provided they are authorised to practise by a designated qualifying regulator. The SRA, which derives its regulatory authority from the Law Society, is a designated qualifying regulator. Anyone in England and Wales is permitted to offer legal advice, provided they do not 'hold' themselves out to be a qualified person. However, only a qualified person may provide immigration advice or services. A person who offers immigration advice or immigration services in contravention of s. 84 of the IAA 1999 is guilty of a criminal offence. The IAA 1999, therefore, prohibits unregulated university law clinics from offering immigration advice and services. The OISC's Position Statement (2018) justifies this framework of regulation on the grounds that 'those seeking immigration advice and/or services in the UK should receive them from persons who are fit and competent'. However, this argument can apply to law clinic clients generally in that unregulated clinics are permitted to offer legal support to vulnerable clients without the need for regulation. Section 84 of the IAA 1999 could, therefore, be amended to allow unregulated clinics to provide immigration advice and assistance. To apply a cosmopolitan approach to clients and third parties, in CLE, it is necessary to examine the relevant law affecting certain migrants.

6. The United Kingdom's 'hostile environment'

The UK's policies on immigration control were translated into legislation by the Immigration Acts of 2014 (IA 2014)¹⁰ and 2016 (IA 2016).¹¹ The government sought, through the IA 2014, to make it 'harder for illegal immigrants to rent accommodation' (United Kingdom. Parliament, 2014). Sections 22 – 28, inclusive, of the IA 2014 create an obligation on landlords of private rental accommodation to conduct checks for the purpose of establishing that tenants have the 'right to rent'¹² in the UK. Landlords who rent to illegal migrants without conducting these checks will be liable for a civil penalty. In *R (on the application of Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542, the Court of Appeal held the scheme to be compatible with European Convention on Human Rights (ECHR) Article 14¹³ in conjunction with Article 8.¹⁴ The Court upheld the legality of the right to rent scheme that requires landlords to check the immigration status of tenants. Despite finding that the scheme did, to an extent, increase the risk of discrimination, Hickinbottom LJ (*R (on the application of Joint Council for the Welfare of Immigrants) v*

¹⁰ Received Royal Assent on 14 May 2014.

¹¹ Received Royal Assent on 12 May 2016.

¹² Right to rent means simply that the occupier has a right to rent a property in the UK.

¹³ *The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

¹⁴ 1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Secretary of State for the Home Department [2020] EWCA Civ 542, para. 75), delivering the leading judgment, stated:

I am satisfied that, as a result of the Scheme, some landlords do discriminate against potential tenants who do not have British passports, and particularly those who have neither such passports nor ethnically-British attributes such as name. By “as a result of the Scheme”, I mean that, but for the Scheme, the level of discrimination would be less. Almost all of the evidence – notably the evidence from mystery shopping exercises and surveys – points clearly in that direction.

The Court concluded that those who do have a right to rent, but not a British passport, were subject to discrimination based on their nationality. However, the Court highlighted that this discrimination is not a rational or logical outcome of the scheme. According to the Court (*R (on the application of Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542, para. 151), the scheme is a ‘proportionate means of achieving its legitimate objective’ and, therefore, justified.

Section 38 of the IA 2014 also requires temporary migrants to make contributions to the National Health Service (NHS).¹⁵ Uthayakumar-Cumarasamy (2020: 133) criticises this ‘weaponization’ of the UK health service:

‘[H]ostile environment’ policies are designed to be most detrimental to some of society’s most marginalized and vulnerable, such as undocumented migrants and

¹⁵Umbrella term for the publicly-funded healthcare systems of the UK.

unidentified victims of trafficking, creating an underclass whilst more privileged groups continue to benefit from access to healthcare.

The IA 2016 extends the scope of the 'hostile environment' policy by introducing new sanctions on illegal workers, preventing certain migrants from accessing housing, and new measures to deport illegal immigrants.

In April 2013, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into effect. LASPO, which was introduced, inter alia, in response to increasing pressure on the legal aid budget, resulted in funding cuts to legal aid and narrowed the scope and financial eligibility criteria. Three areas of law that have suffered extensive scope cuts as a result of LASPO are housing, welfare benefits and immigration. Consequently, many individuals who would previously have been eligible for legal aid have been unable to gain legal assistance to pursue their cases in court or at a tribunal (Law Works, 2018).

Immigration lawyers have also been the target of the government's immigration policies. The Civil Legal Aid (Remuneration) (Amendment) (Coronavirus) Regulations 2020 (Coronavirus Regulations 2020),¹⁶ which amend the fee regime for legal aid providers, have been criticised for not adequately reflecting the work required by immigration lawyers. According to the Immigration Law Practitioners' Association (ILPA) the new fee regime 'will inevitably deter people from taking on

¹⁶ Came into force on 8 June 2020.

the more complex cases, which require the most work' (ILPA, 2020). The next section will apply Kant's philosophy to CLE.

7. Applying Kantian ethics to CLE

Kant's theory of ethics is a useful analytical tool for enhancing student reflection and analysis of the law for three reasons. Firstly, it is committed, through the CI, to the equal moral worth of rational individuals, regardless of their nationality, religion, or any other characteristic. In other words, individuals are considered 'equal' irrespective of their citizenship and background (Barry, 1998: 145). This ethical framework demands that we show concern not just for our fellow citizens but for all human beings, especially those who are affected by poverty, war, climate change or injustice. Secondly, we have a moral duty to promote a person's autonomy, including our own. Thirdly, students are encouraged to reflect on whether maxims leading to coercive laws and policies that restrict the freedom and autonomy of certain migrants, can be willed to be a universal law.

The University of Bristol's CLE < <http://www.bristol.ac.uk/law/law-clinic/> > programme introduces Kant's theory of ethics to students through lectures that outline the various formulations of the CI. This ensures students gain an awareness of a deontological approach to legal ethics. The emphasis in the lectures is on the dignity and autonomy of all persons, as opposed to focusing solely on clients. Prior to the workshops, students are provided with pre-reading material on cosmopolitanism,

Kant's ethics, the regulation of legal services, and the relevant laws and policies affecting migrants. Seminar questions are designed to promote analysis and critique of the law and policies through a cosmopolitan lens. The starting point of critique of the UK's policies is whether migrants have a moral right to hospitality. As stated above, non-citizens have a moral right to visit and must not be turned away if this would result in their destruction. Students are then asked to examine the impact the IA 2014 and 2016 have on non-citizens' autonomy. Policies that prevent a person from accessing employment, housing, legal advice, and medical care not only prevent her from realising her life goals but also cannot be morally justified according to Kant's theory of cosmopolitanism which creates a right to hospitality.

A deontological approach to legal practice can also draw attention to the fact that certain migrants are prevented from accessing legal advice because of the restrictions placed on unregulated law clinics and the fee structure introduced by the Coronavirus Regulations 2020. Reflecting on the impact of the law on third parties has the potential to enhance students' reflective practice and critical analysis. With regards to developing public interest lawyering in CLE, Kantian's theory of ethics can direct the student's attention to the fact that they, as moral agents, have a role to play in law and policy reform in relation to unjust practices. Kant (2006: [8: 304]) argues that citizens have the right to inform their governments of any injustices and petition for redress and reform. This right ensures that we owe a moral duty not just to clients but also to those who do not fall within the scope of a clinic's work such as asylum

seekers. This creates a moral right, as far as clinics are concerned, to engage in policy reform. A clinic can inform the state of any injustices and petition for reform through partnering with NGOs and immigration law firms.

The University of Bristol's Law Clinic fulfils this moral duty by partnering with Bail for Immigration Detainees (BID) < <https://www.biduk.org/pages/2-about-us> >, an independent charity that exists to challenge immigration detention in the UK. This partnership allows students to apply cosmopolitan theory to assist BID with policy reform and research reports. This facilitates an understanding and appreciation of some of the issues facing migrants. Analysing the issues facing migrants provides students with the opportunity to develop their nascent emotional intelligence (Douglas, 2015) through exposure and analysis of the laws and policies affecting migrants. Thus, even though immigration law is regulated, clinic students can still take an active role in promoting the causes of third parties.

8. Conclusion

This article has demonstrated that unregulated law clinics can engage, albeit indirectly, with immigration clients through a cosmopolitan approach grounded in a duty towards all individuals. Kant's cosmopolitanism theory adds value to CLE by firstly recognising the dignity of both clients and third parties. Secondly, there has been a gradual shift in recent years towards a more social justice-oriented approach in CLE (Nicolson, 2016; McKeown & Ashford, 2018). Kant's CI can contribute to this

approach by introducing a normative framework for students to pursue social and political justice which focuses on the autonomy and freedom of all rational persons. Thirdly, Kant's cosmopolitan right, which refers to 'conditions of universal hospitality' (Kant, 2006: [8: 357]), recognises that individuals ought to be free to move to different parts of the world and, thus, providing a norm for assessing situations which result in oppression, such as barriers to trade and interaction (Nascimento, 2016: 108). Fourthly, cosmopolitanism promotes the ideal that individuals ought to be free from national, cultural, and political biases (Waldron, 1999; Caney, 2005; Nussbaum, 2010). Law students and individuals generally are susceptible to confirmation bias, ego-centric and self-serving biases (Adler, 2005; Eigen & Listokin, 2012; Stark & Milyavsky). This issue of bias in CLE is of particular relevance given that the SRA states that a solicitor is under an obligation to 'act with independence' (SRA, Principle 3). A student's heuristic bias may affect their ability to maintain impartiality and independence towards their client. CLE programmes have been criticised for minimising the importance decision-making skills, namely 'study of the cognitive strategies needed to properly identify and prioritize goals, to process information free of psychological biases that undermine objectivity, and to creatively generate potential solutions to a problem' (Rand, 2003: 733). Kant's cosmopolitanism allows students to address discrimination, whether their own or resulting from a social institution such as the Home Office, towards clients and third parties who happen to be members of a different nationality, ethnicity, or any other form of identity designed to label individuals as members of discreet groups. Fifthly, cosmopolitanism fosters a

moral obligation 'to the worldwide community of human beings' (Nussbaum, 2010: 155). This allows students to reflect on duties beyond those prescribed by the professional codes of conduct: duties towards their clients, the court, and, in limited circumstances, towards third parties. A cosmopolitan moral obligation, on the other hand, provides students with an opportunity to reflect on issues beyond their immediate community, such as climate change, refugee crisis, and the Covid-19 pandemic. Limiting the scope of universalizability to ones' own community or country risks 'educating a nation of moral hypocrites, who talk the language of universalizability but whose universe has a self-servingly narrow scope' (Nussbaum, 2010; 160). Moreover, the Formula of Universal Law creates a moral duty, incumbent on individuals not to act selfishly by disregarding the plight of others. This formula, therefore, promotes public interest lawyering.

Finally, cosmopolitanism can add value to the legal profession beyond CLE. It can develop legal practice by engaging lawyers in three levels of analysis. The first level focuses on an individual's (client, lawyer, or third parties) autonomy and dignity. Second, the organisational level promotes reflection on corporate social responsibility, and the moral permissibility of in-house policies that benefit only a small number of stakeholders in an organisation. The third level concerns duties towards the moral community, be it a law firm, immediate community, or other jurisdiction.

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BUILDING A POLICY CLINIC NETWORK – CLEO WORKSHOP 13th May 2021

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Defining Policy Clinics

Policy Clinics/work are not a new concept and there have been many other legal educators who have established this kind of work.¹ There is no set definition of Policy Clinics, nor a prescription of what they should and shouldn't, or can and cannot, do. It may be that you are already doing this kind of work at your institution without realising it. We take a very liberal stance with policy and law reform education, *taking it to mean any pedagogic methods which incorporate or fully embrace the contribution to policy and/or law reform as an end result*. This can be through a full credited module, policy work incorporated into an already established module, or extra-curricular activities, such as responding to consultation papers.

Some modules may incorporate elements of it, for example, by assessing students on a report outlining an area of law which should be reformed and sending it to a relevant

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¹ For example, please see William Wesley Patton 'Getting Back to the Sandbox: Designing a legal policy clinic' (2011) 16 *International Journal of Clinical Legal Education* 96; Michael Coper, 'Law Reform and Legal Education: Uniting Separate Worlds' (2007-2008) 39 *University of Toledo Law Review* 233; Liz Curran, 'Innovations in an Australian Clinical Legal Education Program: Students Making a Difference in Generating Positive Change' (2004) 6 *International Journal of Clinical Legal Education* 162

stakeholder, e.g. local MP.² Some supervisors and students in Live Client Clinics will experience an area of law or policy which is not working well in practice, and do further law reform work to try and change it.³ Others will do smaller projects, such as client newsletters to external organisations. At Northumbria Law School, and other institutions such as the Open University, we have a full Policy Clinic, whereby students undertake empirical and desk-based research for non-governmental organisations (NGOs) and researchers. Ultimately, no work big or small aiming at influencing policy and law reform, which engages students in the process, should go unnoticed or undervalued.

Why do Policy Clinic?

We have written elsewhere about why law teachers should consider Policy Clinics/work and the benefits this brings to students.⁴ Policy Clinics/work allows students to engage with the kind of research they may not have the opportunity to elsewhere on their programme, for example empirical work or large-scale projects for external clients. Through this, they develop a range of skills, such as project

² Rachel Dunn and Richard Glancey, 'Using legal policy and law reform as assessment.' 139-163. Found in Bone, A. and Maharg, P. (Eds) *Critical Perspectives on the Scholarship of Assessment and Learning in Law*. (2019 ANU Press)

³ Liz Curran, 'University Law Clinics and their value in undertaking client-centred law reform to provide a voice for clients' experiences' (2007) 12 *International Journal of Clinical Legal Education* Volume 105; Jeff Carolin, 'When Law Reform is Not Enough: A Case Study on social Change and the Role that Lawyers and Legal Clinics Ought to Play' (2014) 23 *Journal of Law and Social Policy* 107

⁴ Rachel Dunn, Lyndsey Bengtsson and Siobhan McConnell, 'The Policy Clinic at Northumbria University: Influencing Policy/Law Reform as an Effective Educational Tool for Students' (2020) 27(2) *International Journal of Clinical Legal Education* 68

management, oral and written skills, teamwork and data management.⁵ Further to the skills gained and developed through Policy Clinics/work, students are also given the opportunity to make their voices heard and contribute to how the law *can be*, not just how it is already. Students can see how their work '*may have a positive impact in generating change*'⁶ and thus develop a social justice ethos. Through this social justice ethos, they can realise how they can be drivers of change, both during their education and later in their careers. As MacCrimmon and Santow highlight '*while it is crucial for students to learn how to identify and apply legal rules, this should not be the sum total of their skills set.*'⁷ Thus, Policy Clinics/work can be a vehicle for opening conversations with students as to how the law should be and actively work together to influence it.

Further to the student benefits, it also creates opportunities for universities to engage with NGOs, build research and policy networks and be at the forefront of influential research. An added bonus for universities is that anyone who can research can teach or supervise Policy Clinics/work, as there is no need for practising certificates or specific qualifications. This opens up clinical activity to those it may have been previously closed to and brings together academic and clinical staff where there may

⁵ Ibid.

⁶ Liz Curran, 'University Law Clinics and their value in undertaking client-centred law reform to provide a voice for clients' experiences' (2007) 12 International Journal of Clinical Legal Education Volume 105

⁷ Les McCrimmon and Edward Santow, 'Justice Education, Law Reform and the Clinical Method' 211-224. Found in Frank S. Bloch, *The Global Clinical Movement: Educating Lawyers for Social Justice*, (2010 Oxford University Press)

have previously been tensions.⁸ Policy Clinics can be integrated into already established Live Client Clinics and Policy Work can be integrated into any already established modules or extra-curricular activities.

Policy Clinic Network

During a Connecting Legal Education Session with Rachel Dunn (Northumbria University) and Liz Hardie (Open University), there was a lot of interest in Policy Clinics and how to establish one.⁹ It was decided that a loose network would be created for academics to come together, from all disciplines. The aim of the network is to share best practices and experiences from policy work, help academics to engage with this kind of teaching, and discuss ways in which the network can go forward. There will be a Teams site academics can join, which will feature research and documents relating to Policy Clinics/work, which can be used to establish or extend the work at interested institutions. It will also be a place where academics can talk, meet and share ideas. An ultimate aim of the network is to have Policy Clinics and students work together to create national and international research.

⁸ For example, Frank Bloch, 'The case for clinical scholarship' (2004) 4 *International Journal of Clinical Legal Education* 7; Paul McKeown and Rachel Dunn, 'The European Network of Clinical Legal Education: The Spring Workshop' (2015) 22(3) *International Journal of Clinical Legal Education* 312

⁹ For more information, please see the ALT Blog post: <http://lawteacher.ac.uk/connecting-legal-education/connecting-legal-education-being-the-change/>

Clinical Legal Education Organisation (CLEO) Workshop

On 13th May, CLEO are hosting a free 1 hour Zoom workshop on Policy Clinics/work and we would love to see as many academics there as possible. The aim of the session is to bring together likeminded academics who are, or want to, create impactful work through their teaching and engage with this kind education. The session will start with a short presentation from Siobhan McConnell, Lyndsey Bengtsson and Rachel Dunn on what policy clinic and law reform work is, highlighting the work done at Northumbria University. Attendees will then be put into break out groups to discuss the work they do at their institutions or are planning to do. We will come together at the end to share ideas for the network and future Policy Clinic/work ideas. Attendees are encouraged to share their contact details, to be added to the Teams site and set up an informal CLEO mailing list.

For more details on the CLEO Workshop and to register, please visit:

<https://www.cleo-uk.org/events/>