

Editorial

The Clinical is Political

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Our winter issue has serendipitously gathered a collection of papers that reflect clinicians' engagement with society. Our recent and fantastically successful (thank you Monash colleagues and all participants!) was all about [Adding Value](#) and in this issue our authors demonstrate the range of ways in which this can be done. I am positing that we are all political in our actions, whether or not we consider ourselves to be, since we are interacting moment by moment with our societies and each micro-interaction, as well as each '4 star impact' is a part of our political contribution. Seamus Heaney's 1966 poem 'Digging' speaks to the dignity of all kinds of labour and in this spirit we offer you many kinds of action, many ways to make a clinical mark on the world, many tools with which to dig.

By God, the old man could handle a spade.

Just like his old man.

My grandfather cut more turf in a day

Than any other man on Toner's bog.

*Once I carried him milk in a bottle
Corked sloppily with paper. He straightened up
To drink it, then fell to right away
Nicking and slicing neatly, heaving sods
Over his shoulder, going down and down
For the good turf. Digging.*

*The cold smell of potato mould, the squelch and slap
Of soggy peat, the curt cuts of an edge
Through living roots awaken in my head.
But I've no spade to follow men like them.*

*Between my finger and my thumb
The squat pen rests.
I'll dig with it.*

From 'Death of a Naturalist'

There are so many causes and issues competing for our attention. Appropriately enough, Adrian Evans starts us off to actually save the world with his Greenprint for a Climate Defence Clinic, focusing on opportunities both to inform students and to harvest their enthusiasm for this fight.

Yvette Maker, Jana Offergold and Anna Arstein-Kerslake highlight an emerging area of clinical work in equalities, looking at the work done in Melbourne's disability rights clinic.

Next, Jill Alexander and Carol Boothby look at equality from the students' point of view, considering the impact on employability for clinic students, who may otherwise lack opportunities for work experience.

Janet Thompson Jackson and Susan R. Jones consider how clinic can support businesses, both in terms of the advantages to society of better businesses from a purely functionalist legal point of view and also in terms of providing support for businesses to consider how to be better, technologically, socially and environmentally.

Many clinical colleagues across the world are actively involved in immigration work, though in some countries there are jurisdictional limits to what clinics can do. In our Practice report, Frances Ridout, Deirdre Gilchrist and Jeremy Dunn report on the work at Queen Mary University of London where an active and positive engagement with the Office of the Immigration Services Commissioner has led to new insights and practice – an object lesson of how to 'dig in' to the possibilities.

Finally in this edition, a focus on tools: if we are going to dig then as well as spades we might need hoes, picks and shovels. Paul Dargue's review of *Empirical Legal Research In Action* reminds us to look beyond our accustomed tools to what might be revealed if we picked up another.

Research Opportunity

Promoting Wellbeing through Clinical Legal Education

Calling all Legal Academics and Clinical Legal Educators!

Are you actively involved in teaching a clinical subject?

Have you taught a clinical subject in the past?

Have you contributed to teaching a clinical subject?

A research team at Monash Law Faculty would like to invite you to complete brief questionnaire which provides an indication of your motivational orientation. Your involvement will contribute to clinical legal education scholarship, and it will help the research team to explore ways in which clinical legal education might be associated with law student wellbeing. You may also benefit from reflecting on your own motivations for teaching!

For further information please contact:

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There are so many wonderful clinical events for 2019!

The Association for Canadian Clinical Legal Education (ACCLE) will be returning to Western University, Faculty of Law, for their 10th Annual Conference,

“Looking Back, Moving Forward: Future Challenges for Clinical Legal Education in Canada”.

June 12-14, 2019. The call for [proposals](#) closes on 31st January 2019

ENCLE – IJCLE 2019

Comenius University, Bratislava, Slovakia

3-5thJuly

Improving the Future: using Clinical Legal Education to educate Lawyers for a Just Society

In this year's conference we look at a core goal of Clinical Legal Education – Justice. As the world faces unprecedented challenges in terms of climate, challenge to the rule of law and political and social upheaval, the conference provides an opportunity to consider and plan for the role of Clinical Legal Education in this new environment.

As always papers are welcomed from the broad spectrum of Clinical Legal Education and particularly on the following themes:

- The role of Clinic in maintaining liberty rights and advancing the rule of law
- Climate change and environmental justice through Clinical Legal Education
- Educating future lawyers – in what ways can clinic shape future lawyers' aspirations and contributions to a just society?
- Researching the impact of clinic
- Interdisciplinary approaches to advancing justice and educating for a just society
- Technological innovation in the pursuit of a just society: access and information for all in the law

Taking part

Presentations at IJCLE/ENCLE can take one of three formats, each with its own structure and proposal application form:

- PechaKucha
 - These short presentations are timed and rely on strong visuals. Please follow [this link](#) to learn more. A PechaKucha consists of 20 slides timed to change every 20 seconds, so each presentation lasts 6 minutes and 40

seconds. Each presenter in PechaKucha session will be assigned a 10 minute slot to allow for a question to be posed. We anticipate that PechaKuchas will consist of short introductions to new work, methodological innovations or insights from the field.

- Paper presentation
 - These will be in traditional conference paper format with a twenty minute presentation followed by questions. Please indicate which conference theme(s) your paper addresses to aid the programming team.
- Interactive seminar
 - These sessions will be 45 minutes long and will involve active participation from the audience as well as input from the presenters and will be designed to generate discussion and new learning for the participants and convenors.

Key Dates

Papers open for submission January 2019

Deadline for submission of papers 29.3.19

Confirmation of paper accepted no later than 30.4.19

Conference Registrations Open 28.2.19

GAJE's 10th Worldwide Conference

will take place in Bandung, Indonesia from the 4th through the 10th of December 2019 on the campus of Pasundan University. Once again, the conference will consist of two parts: a General Conference, with plenaries and concurrent sessions on various themes and topics (4-8 December), and a Training-of-Trainers (TOT) workshop on practical aspects for implementing justice education, including clinical teaching methods (9-10 December).

Further information about the conference, including a call for proposals, registration, and other program details will be announced in early 2019.

GREENPRINT FOR A CLIMATE JUSTICE CLINIC:

LAW SCHOOLS' MOST SIGNIFICANT ACCESS TO JUSTICE CHALLENGE

Adrian Evans, Monash Law School, Australia

Introduction

The obvious existential challenge posed by global warming is also an access to justice challenge. As natural resource pressures caused by larger populations are exacerbated by climate catastrophes, corruption increases, law and legal systems lose impact and respect for the rule of law heads downhill. Arguably, as this descent becomes established, more individuals and more groups turn away from law and legitimate enterprise and towards terrorism, organised crime and populist or angry self-interest.

Despite the Paris Accords of 2015¹, there is little prospect of willing government action in defence of climate, at least in the limited time available. Global emissions are continuing to rise absolutely and per capita, year by year.² Australia is among the 'leaders' here,³ with no unconditional commitment in either major party to make the necessary and profound cuts to emissions, significantly beyond those agreed to in Paris.⁴ Populist and conservative forces are still in a position to frustrate and delay and remain unconvinced by or hostile to broad

¹ The *United Nations Framework Convention on Climate Change* (UNFCCC) received its strongest affirmation in the Paris Agreement of 2015. See <https://unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement>

² Peter Hannam and Nicole Hasham "'Next decade critical' to save a warming planet', *The Age*, 9 Oct 2018, p5.

³ Lisa Cox, 'Australia on track to miss Paris climate targets as emissions hit record highs', *The Guardian* Australia, 14 September 2018 at <https://www.theguardian.com/australia-news/2018/sep/14/australia-on-track-to-miss-paris-climate-targets-as-emissions-hit-record-highs>

⁴ David Crowe, 'There is no will to find a way', *The Age*, 9 Oct 2018, p 5.

and penetrating concepts of sustainability. Those who hold these opinions are strong in both centrist Australian parties have a deep-seated confidence in the fundamental neo-liberal passion for unrestricted economic growth; and they may also just be more excited or even thrilled, by the images of expansion, for their own sake.

Nevertheless, resistance to such growth is, or needs to be, a major part of the socially responsible law school's mission and profile, especially through its clinical programs. Individuals and communities who are increasingly damaged by steadily rising temperatures, drought and flood have few straightforward means of legal redress. Even if those who suffer most from our deteriorating climate have some funds, they are often blocked in seeking climate justice because the causes of action are still in embryonic form and the costs involved in developing such actions have been seen as too high.

Seeking climate justice is not straightforward. Larger private law firm engagement with climate defence is often conflicted out because the short-term profit interests of their large corporate clients often dominate the thinking of both lawyer and client. Even those few private lawyers who do want to take action are intimidated by the need for considerable funding for disbursements and likely defendant arguments about the supposed need for security for costs. So far, no one in Australia has been able to locate a wealthy benefactor, foundation or not-for-profit prepared to meet these costs.

Some law schools are nevertheless in a position to fill this access to justice void and assist in the effort to combat climate change by designing and developing a climate defence or climate justice clinic. There *are* potential causes of action in the areas of nuisance, negligence and

public trust, as well as specific statutory and general regulatory arguments that can be developed in some jurisdictions.

This paper discusses and proposes a greenprint for such a clinic, not just to assist access to justice and climate defence, but to play a part in strengthening the political and social consciousness of the law students who pass through it. The discussion draws on the clinic design principles set out in *Australian Clinical Legal Education*⁵ and proposes a specific partnership model that leverages existing private lawyer goodwill and harnesses law school alumni beneficence.

What a law school clinic can do that a private law firm and barristers have not

Australia is not a large CO₂ emitter by volume, but it is among the largest on a per capita basis.⁶ In consequence, there is arguably a moral and pragmatic obligation on well-resourced Australian law schools with moral activist clinicians, to contribute to the concept of climate justice,⁷ just as many already do to address criminal law and numerous conventional, civil access to justice issues.

Law schools with well-developed clinical traditions tend to have access to a steady supply of motivated and skilled student researchers. Some of these are looking for opportunities to

⁵ Evans *et al*, *Australian Clinical Legal Education*, ANU Press, Canberra, 2017. Available at <https://press.anu.edu.au/publications/australian-clinical-legal-education>

⁶ Information provided by the Climate Council in 2015. See <https://www.climatecouncil.org.au/2015/05/20/new-report-reveals-that-australia-is-among-the-worst-emitters-in-the-world/>

⁷ There is a specific *ClientEarth* legal practice in the United Kingdom – see <https://www.clientearth.org/>, a firm which seeks to represent the earth as *the* client, utilising the concepts popularised in Cormac Cullinan’s *Wild Law: A manifesto for earth justice* (Green Books, London, 2003). There is also an *Australian Earth Laws Alliance*, at <https://www.earthlaws.org.au>.

pursue graduate research and many of these are capable of investigating, under supervision, likely causes of action. Law schools with sufficient staff depth can also provide the necessary academic and practitioner supervision for those students, linked to now commonplace multi-disciplinary sustainability resources of their University. Finally and most importantly, strong law schools are increasingly able to access high net worth clinical alumni and carefully recruit them to provide the relatively high levels of necessary funding for operating costs, and to meet potential security for costs' orders.

The key element in such recruitment is an alert attitude to possible sources of limited start-up funding and slow, careful engagement with potential long term donors to the ongoing operating costs of law school clinics. Often, these will be clinical alumni. Some will be known personally to clinic directors, others to dedicated alumni managers of the University. Not to put too fine a point on it, these people need to be *recruited* to a cause, and then sustained in their involvement in clinic priorities and direction, consistent with appropriate governance mechanisms.

Governance and control - identifying key partners

Governance of a climate defence clinic is an especially important task, something that cannot be fudged or rushed. The potential for political and financial missteps is real and accordingly, a strong, unified and specialised advisory board is justified, separate from any pre-existing and overarching clinical program advisory group that will lack a close knowledge of climate law and climate networks.

Ideally, this purpose-constructed climate defence advisory group will consist of five people with gender diversity: a managing partner of a significant mid-tier commercial law firm (which will be prepared to support climate litigation and clinical supervision pro bono, and which is unlikely to be conflicted out because of the commercial interests that are almost certain to be a problem with the largest firms), a major relevant NGO from the environmental law sector (which will provide relevant environmental network expertise and advice), a law school environmental law/ climate law academic and fourthly, a representative of the University's own sustainability network, institute or centre. The fifth member will be its nominal chair, and ideally, this person will be the overall director of the law school's clinical programs. Note that three of the five members of this body, which is advisory not determinative, are University employed, ensuring that effective control rests with the law school,⁸ in order to protect the educational objective of the clinic and ensure the same is pursued alongside the access to justice objective, and not relegated behind same.

A role for the donor(s), consistent with advice, but not control

Major alumni and other donors to the clinic are also likely to want a seat at the management table, consistent with the ownership they may feel that arises from their status as significant donors. It is essential to be clear with donors that donation does not equate to control, but does come with an expectation to be consulted. Accordingly, if any particular donor is

⁸ Note however that universities are not omniscient and can also misstep, particularly if they think their marketing is threatened. See for example the ANU law case in March 2018, where an ANU law student was removed from marketing publicity by the University because she wanted to include a statement about the plight of refugees. See Emily Baker, 'ANU removes law student from marketing booklet in aim for 'political neutrality'', *Sydney Morning Herald*, 19 March 2018, at <https://www.smh.com.au/education/anu-removes-law-student-from-marketing-booklet-in-aim-for-political-neutrality-20180316-h0xklf.html>.

insistent on a veto of clinic litigation decisions, their donation ought to be clarified and if necessary, respectfully declined with the above reasons given. This position is in any event, very likely to be consistent with general University attitudes to donors' conditions. But donors' trust must be respected and they must be regularly consulted and listened to. And for this reason, it is also important to regularly invite donors to be observers at advisory board meetings, and to make presentations on the issues that they think are important. It is best practice that each of the clinic's partners is consulted on and has provided informed agreement with the clinic's objectives.⁹ It is not recommended that a donor or donors be formulated into a separate donor advisory group for the clinic, as this can set up structurally-entrenched and competing advisory groups that will tie the hands of the clinic director.

Clinic Design

Clinic design - if this does not state the obvious - must occur before a clinic is in operation and begins with identifying and stating the desired course learning outcomes.¹⁰ Such identification is harder than it sounds, but can be begun by simply phrased, high level statements. In this clinic, learning outcomes might be stated as:

- Capacity in each student to understand the scale of climate deterioration and the key human contributions to same
- A willingness and capacity to critically analyse the existing law of climate preservation and anticipate areas where it might be extended

⁹ See Evans *et al*, *Australian Clinical Legal Education*, ANU Press, Canberra, 2017, Ch 4 Course Design for Clinical Teaching.

¹⁰ Evans *et al*, Note 7, pp 67-98.

- An ability to describe the different legal approaches to defending the climate and the factors and strategies to be taken into account in judging which approaches are best in what circumstances
- Adequate capacity to reflect on their experience in the clinic.

In addition to defining learning outcomes, there will be a range of best practices to take into account, as specified in *Australian n Clinical Legal Education*.¹¹ These typically include specifying necessary pre-reading and its assessment, in-course materials if any, clinic attendance times and other required activities. In addition, suitable pre-clinic observation (for example, with prior clinic students showing new students the ropes), is desirable. Classroom components are commonly seen as mandatory, to allow students to share and understand their clinic experience having regard to published documents and cases, while necessary reflection is often also a class room group activity, mediated through individual student journals. While clinics can be online and remotely delivered to suitable clients, the efficacy of this clinic is likely to depend on meaningful professional relationships that are best developed face to face over a reasonable period. Clinic length should therefore be at least a semester and ideally, a whole year, to allow consolidation of relationships, reflection and stronger learning outcomes.

Student selection into this clinic will be contested, not always for ideal reasons. The selection process should be negotiated with key partners and not just left to any default university procedures, even if the latter, should they exist, appear rigid. It is strongly suggested that:

¹¹ See generally, Evans *et al*, Note 7.

*The selection process is transparent and non-discriminatory. The prerequisites for selection are clearly articulated. The reasons for choosing particular methods of selection (which can include ballot, interview, stage of study or completion of a prior clinic) are articulated. There is no presumption that access to CLE courses and clinical experiences should be limited to later-year students.*¹²

Education and causes of action – strategic litigation against climate change

Education and compliance around the Task Force on Climate Related Financial Disclosure

There is powerful utility in a clinic design that engages law student-education and research strengths by building on the global *Task Force on Climate Related Financial Disclosures* (TCFD).¹³

TCFD is an initiative of the UK *Financial Stability Board*¹⁴ which has signed up many global corporations to a commitment to review their own climate preparedness. The incentive for corporations to cooperate with the TCFD protocols is financial: if their shareholders understand and can see that they are actively preparing for future climate impacts by disclosing their climate-related financial risk, they are likely to be persuaded to remain as shareholders rather than exit when their balance sheets are affected by recurring major climate shocks. Agriculture, fishing, superannuation and insurance are among the most directly affected activities, but the TCFD now includes nearly all major production sectors across the world. Properly supervised, some law students are capable of assisting such

¹² Best Practice 10 of *Best Practices in Australian Clinical Legal Education, Final Report, Clinic Design*, 2012, p 13 at <https://cald.asn.au/wp-content/uploads/2017/11/Best-Practices-Australian-Clinical-Legal-Education-Sept-2012.pdf>.

¹³ See <https://www.fsb-tcfid.org>

¹⁴ The Financial Stability Board is an international organisation headquartered in the UK, with a global responsibility to build resilience into financial organisations. Established in the aftermath of the 2008-09 global financial crisis, its mission has since broadened to include the wider and deeper threat posed to financial stability by climate change. See <http://www.fsb.org/what-we-do>

corporations in their preparations for such disclosure. For example, Monash and the major Asian firm *King Wood Mallesons* run a specialised climate-preparedness audit for the large corporate clients of that firm, with law students examining each client's business and developing the details for the audit.¹⁵

Superannuation litigation

This educative approach does not directly challenge emitters in a litigious way, but there are other related approaches to achieve a similar strategic impact. Superannuation is particularly fertile ground for climate litigation. One example concerns a young Australian landscape ecologist who in 2017 '...used the Market Forces website to ask his superannuation fund, REST, whether it was considering climate risks when making investment decisions.'¹⁶ When the fund repeatedly refused to answer his query, he commenced Federal Court of Australia action with the assistance of the major NGO in the sector, Environmental Justice Australia. This litigation highlights that corporations which have super fund shareholders - and that is virtually every major company - will be under increasingly negative public scrutiny if they are not adopting TCFD protocols for disclosure of their preparations for climate adversity.

Negligence and Failure to Act – Civil Law and specific constitutional protections

To date, the case launched by environmental rights group *Urgenda Foundation* in the

¹⁵ This concept was the brainchild of a Monash Professorial Fellow, Dr Bruce Dyer who, well before the TCFD emerged in 2016, persuaded his then firm Ashworths, to develop an environmental audit as a pro bono service to its own clients, in the interests of their own corporate social responsibility. This clinic continues now as an externship partnership with King & Wood Mallesons. See <https://www.monash.edu/law/home/cle/types-of-clinics>.

¹⁶ Julien Vincent, 'It's Time Super Funds Came Clean', *Business, The Age*, 2 August 2018, pp23-24.

Netherlands is the most significant example of successful climate action, essentially on the basis of negligence or a deliberate failure to act.¹⁷

In a letter to Urgenda, the Dutch government acknowledged that its actions are insufficient to prevent dangerous climate change. Urgenda concluded that The Netherlands is knowingly exposing its own citizens to danger. In legal terms, that is a wrongful act of the State. The Dutch Supreme Court has consistently upheld the principle that the government can be held legally accountable for not taking sufficient action to prevent foreseeable harm. Urgenda argues that this is also the case with climate change.¹⁸

The Dutch Government was ordered at first instance - and affirmed in the Hague Court of Appeals¹⁹ - to take affective action against climate change by lowering emissions, but may appeal to the Netherlands Supreme Court.

Where a particular legal system allows, similar fundamental approaches are possible. In the US State of Oregon, 21 teenagers have received US Supreme Court permission to proceed in a case which challenges the Federal government for an alleged failure to protect their constitutional rights. They allege that the government has failed to take meaningful action

¹⁷ Mark Loth, 'Too Big to Trial?: Lessons from the Urgenda case,' Tilburg Private Law Working Paper Series, No. 02/2018, at <https://ssrn.com/abstract=3130614>.

¹⁸ See Climate Case Explained, at <http://www.urgenda.nl/en/themas/climate-case/climate-case-explained>.

¹⁹ Arthur Neslen, 'Dutch appeals court upholds landmark climate change ruling', The Guardian, 10 October 2018, at <https://www.theguardian.com/environment/2018/oct/09/dutch-appeals-court-upholds-landmark-climate-change-ruling>. See also *Urgenda Foundation v The State of the Netherlands*, C/09/456689/HA ZA 13-1396 (24 June 2015), at <https://www.elaw.org/nl.urgenda.15>

against climate change and in so doing, has challenged their ‘...rights to life, liberty and property.’²⁰ A trial in this case is also pending.

Finding plaintiffs, finding regulatory failure

While *Urgenda* and the Oregon case do not represent obvious precedents for jurisdictions such as Australia - because the Netherlands is a civil law system with specific constitutional protections for the environment and the US appears to permit similar direct constitutional approaches - both are enabling actions in the sense that they have encouraged and stimulated similar efforts elsewhere. A sub-page of the foundation (‘Global Climate Litigation’) lists current developments in similar litigation in Ireland, New Zealand, Switzerland, Belgium and India.²¹

In countries without specific constitutional or regulatory protections, or obvious causes of action in negligence or nuisance, the challenge to create a convincing skein of argument continues. Fortunately, the current law in Australia²² accepts that ‘climate science is acceptable in evidentiary terms; that single construction or extraction projects can contribute to global warming; and that emissions are cumulative.’²³ So the challenge may be principally about finding the right factual situation and the right plaintiff.

²⁰ Malcolm Sutton, ‘Climate change litigation rising with the seas as victims revert to ‘Plan B’’, ABC Radio Adelaide, 10 April 2018, at <http://www.abc.net.au/news/2018-04-10/climate-change-litigation-rising-with-the-seas-plan-b/9627870>. The action is listed for late 2018 and is listed as *United States v. U.S. District Court for the District of Oregon*, 18A65.

²¹ See <http://www.urgenda.nl/en/themas/climate-case/global-climate-litigation>.

²² The state of play of global climate change law is increasingly accessible. See for example Daniel A. Farber and Marjan Peeters (eds), *Climate Change Law*, Edward Elgar, 2016.

²³ See Adrian Evans, ‘The Climate for Whistle Blowing’, Winter 2017, 27(2) *The Australian Corporate Lawyer* 34, citing Anita Foerster, Hari Osofsky and Jacqueline Peel, *Shaping the Next Generation of Australian Climate Litigation*, Report on a Melbourne Law School Workshop, 17 November, 2016 (unpublished).

For example, in the Australian context, a plaintiff such as a Great Barrier Reef tour operator might be able to successfully assert that the concerted failure of government (State and Federal) to sufficiently lower existing national emissions which contribute to destabilising the Reef – already the highest per capita on the planet - combined with their positive acts of endorsement of new major coal mine(s), broad scale land clearing and the methane leakages associated with unconventional gas extraction, are all inconsistent with general principles underlying existing environmental protection legislation. Other possible plaintiffs might be the national farmers' federation, especially in the major drought years which are becoming more frequent; fisheries organisations concerned with diminished inshore fish stocks due to increased current and temperature variability; and at local community levels, residents groups that experience property losses due to flash flooding from major, sudden climate events. It is not impossible also, that a major national insurer (supported by their international reinsurers) and cognisant of the worsening effects on their balance sheets of any of these groups and their burgeoning property losses, would fund a test case organised by a prepared and strongly-partnered climate defence clinic, to try out these and other causes of action.

It is of course, not easy to commence climate litigation anywhere and that reality must not be understated. And it may be suggested that a University clinic is least prepared for such major work; but Universities are one of the lightning conductors for major social change and they can have better antennae for conflicts of interest than private corporations. They are also adept at collaboration because of their research cultures, and their law schools, especially

those with strong clinical histories, are experienced in cooperating with significant not-for-profit interest groups. The ‘right’ law school can seize this opportunity.

The supervising clinician/ clinic director role

A small specialised clinic of this nature can be supported administratively through the wider clinical program, but the need to effectively recruit into the key role of supervising clinician cannot be underestimated.²⁴ This is a difficult position, given the governance and remuneration constraints on the role. However, the open legal recruitment market is now mature enough to contain a number of suitable environmental lawyers with the conventionally necessary characteristics: enough relevant experience, technical competence, enthusiasm, personal skills and judgment.

But the right appointee must fit other more exacting criteria as well: they must be an inherently capable teacher and be tolerant and accepting of university bureaucracy (especially around inflexible assessment rules and cautious academic hierarchies). Even more constraining is the question of salary and career advancement for this clinician. Law schools’ budgets are notoriously tight compared to private law firms and their general reluctance to employ a full time clinician for a small single-purpose clinic can be expected. Australian law schools are perhaps overdue to experience declining enrolments and declining revenues. It might almost be taken for granted that a law school dean will be reluctant to embark on a climate justice clinic if they must find the necessary supervisor salary solely from law school resources. Nevertheless, some of these deans will be willing to

²⁴ See Evans *et al*, Note7, Ch 9 Resourcing live client clinics, pp 203-207.

engage the 'right person' on a fractional appointment, say at 2-3 days per week, particularly if that expense is factored into the approach to major donors that ought to precede the establishment of the clinic.

Failing success in securing a direct law school appointment, it is also possible (with some safeguards) and perhaps desirable to ask the mid-tier firm which partners with the law school, to second one of its lawyers to the role of supervising clinician, ideally for a minimum period of two years. There are many examples of law firms successfully seconding lawyers to community legal services and clinical programs,²⁵ so the concept is hardly novel. The key safeguard would be the law firm's agreement to a strong and *published* conflict of interest protocol, developed in conjunction with the law school's legal ethicists, which would identify areas where the law firms' interests could diverge from those of potential clients or the law school, and refer decisions on those issues to an independent third party. A secondary provision would require that student assessment be decided by a law school academic, in consultation with the clinic director. Providing such safeguards are in place and such a person is available and willing to be seconded for that period to the role of clinic supervisor/director, then they can supervise and direct such clinics with confidence. Such a collaboration helps to tie in the firm to the law school, with numerous relationship benefits that can add to the sustainability of the clinic.

The last major issue with the supervising clinician is their reporting line. Whether they are a seconded lawyer or employed directly by the law school, they ought to be responsible to the

²⁵ Kingsford Legal Centre-UNSW for example, has a staff solicitor position seconded from Herbert Smith Freehills. See <http://www.klc.unsw.edu.au/about-us/klc-staff>.

overall clinical program director, not to the advisory board. Any other arrangement will blur the governance process and impede clinic progress.

Conclusion - the value proposition for university fund raisers and alumni

A concluding point is to recognise that climate litigation will be opposed not just by individual defendant corporations and various levels of government, but also by entrenched power groups within some industry sectors. Some of these groups may apply pressure through University councils. These cases will be quickly politicised. But the politicisation is now not so one sided as it would have been even five years ago. Community frustration with government inaction is intense. Law schools/ partner law firms and donors are not isolated and need not fear broad longer-term public opposition to their activism in this area, not least because younger people are more concerned than their parents and opponents' demographic is naturally withering. The 'right' judge or judges, capable of understanding and accepting the science, listening to the 'right' advocates and possessed of some courage, will inevitably fit together with the 'right' case and the 'right' plaintiff, for the era. This considerable conjugation of positive factors has occurred before,²⁶ and does so every time the law advances.

A climate defence clinic, partnering with appropriate private pro bono lawyers, not-for-profit legal expertise and significant alumni donors, can be alive to suitable plaintiffs and propose representation when approached.

²⁶ As for example (in the Australian context), in the Mabo litigation of the early 1990s, when the then utterly contentious concept of Native Title was developed by the High Court of Australia. See *Mabo and Others v Queensland* (1992) HCA 175 CLR 1.

Preparation, engagement and relationship management are the keys, and a lengthy lead time is likely while these players are brought into alignment. But of all these factors and players, the most pressing is the need to identify a suitable benefactor-funder. If climate change is among the most profound challenges faced by our species and its affects are fundamentally contributing to the breakdown of justice and the rule of law, then the innovative, socially responsible law school will get on board soon. They will find an alumni-founded or owned business that already sees climate-sensitive business practices as necessary and appropriate for their own sustainability, and persuade them to connect that sensitivity to the need to for climate justice. The value proposition for such alumni is their legacy, personal and financial.

DISABILITY HUMAN RIGHTS CLINICS AS A MODEL FOR TEACHING
PARTICIPATORY INTERNATIONAL HUMAN RIGHTS LAWYERING

Yvette Maker, University of Melbourne, Australia

Jana Offergeld, Evangelische Hochschule RWL (Protestant University of Applied
Sciences RWL), Germany

Anna Arstein-Kerslake, University of Melbourne, Australia

Introduction

The Disability Human Rights Clinic (DHRC) was established at Melbourne Law School, the University of Melbourne, in 2015. Its supervisors and students conduct legislative and policy reform projects as well as strategic litigation. The DHRC was created by Anna Arstein-Kerslake to address a significant lack of resources in community-based organisations to undertake in-depth legal analysis. It uses an innovative model of clinical legal education to harness the skills of law students to fill that gap and to expose a new generation of lawyers to the emerging field of disability human rights law.¹ In this article, we draw on our experiences running the DHRC to argue that the model it establishes can create significant scholarly output in the human rights field,

¹ Yvette Maker has worked as a Research Fellow with Anna Arstein-Kerslake since the inception of the clinic in 2015. She assists in leadership, supervision, and teaching. Jana Offergeld is a Research Fellow at Bochum University of Applied Sciences in Germany and she spent a semester in 2016 as a Visiting Research Fellow in the clinic. She assisted in supervision and teaching.

direct engagement with the community, and rich doctrinal and experiential learning for students.

The work of the DHRC is guided by the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD).² The CRPD obliges governments around the world to respect, protect and fulfil the civil, political, economic, social and cultural rights of persons with disabilities. The CRPD emerged as a response to persistent and serious violations of the human rights of persons with disabilities worldwide.³ It does not create any rights that were not already guaranteed under existing human rights instruments, including the Universal Declaration of Human Rights,⁴ the *International Covenant on Civil and Political Rights* (ICCPR),⁵ and the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR).⁶ However, the CRPD does enumerate them in a novel manner, specifically tailored to the barriers that persons with disabilities face to the realisation of their human rights.⁷ The creation and passage of the CRPD was a victory for the international disability rights movement, with persons with disabilities and their representative organisations playing a major role in the

² *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD').

³ Gerard Quinn, 'The United Nations Convention on the Rights of Persons with Disabilities: Toward a New International Politics of Disability' (2009) 15(1) *Texas Journal on Civil Liberties & Civil Rights* 33–52, 37–39; Paul Harpur, 'Embracing the New Disability Rights Paradigm: the Importance of the Convention on the Rights of Persons with Disabilities' (2012) 27(1) *Disability & Society* 1–14, 4.

⁴ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948 <<http://www.un.org/en/universal-declaration-human-rights/>>.

⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, except art 41, which entered into force 28 March 1979).

⁶ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁷ For a discussion, see Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1, 3–4.

initiation and drafting of the instrument.⁸ The role of persons with disabilities did not end when the CRPD entered into force in 2008; the CRPD obliges governments to involve them in all aspects of implementing the CRPD and monitoring the rights and circumstances of persons with disabilities.⁹

In this article, we argue that clinical legal education offers a valuable avenue to pursue the implementation of the CRPD at the local and national level, and particularly to support persons with disabilities and their representative organisations to advocate for their rights and participate in the CRPD implementation and monitoring process. At the same time, it can provide rich experiential learning to students and meet universities' goal of engaging more meaningfully with the community. As Evans and his colleagues note, while traditional clinical legal education in Australia 'places students in the role of lawyers representing clients with legal questions or problems', the meaning of clinical legal education has evolved in recent decades.¹⁰ It now encompasses a wide range of models that share the 'common element... [of] "real" experiences',¹¹ and the model developed in the DHRC joins this growing range of innovative approaches that combine 'student learning, community service, professional engagement, research and policy development'.¹²

⁸ Ibid.

⁹ CRPD arts 4(3), 31, 33(3).

¹⁰ Adrian Evans, Anna Cody, Anna Copeland, Jeff Giddings, Peter Joy, Mary Anne Noone and Simon Rice, *Australian Clinical Legal Education* (ANU Press, 2017) 41 <<https://press.anu.edu.au/node/2366/download>>.

¹¹ Ibid.

¹² Ibid, 36 and citing Jeff Giddings, *Promoting Justice Through Clinical Legal Education* (Justice Press, 2013) 39–73.

Addressing the history of marginalisation using a human rights framework

Disability research is a unique area because it deals with a group of people who are often marginalised, and research itself has played a role in that marginalisation by, for instance, treating persons with disabilities as objects of scientific study, supporting or justifying rights violations like segregation and invasive medical ‘treatment’, and failing to take into account the priorities and concerns of persons with disabilities in designing and conducting research.¹³ A clinic focused on research related to the rights of persons with disabilities must openly recognise this history of marginalisation and must structure itself in such a way that combats marginalisation in both its methodology and the content of its outputs. One of the key ways in which we employ emancipatory methods is the use of the CRPD as the framework for the curriculum and projects of the DHRC.

The CRPD is one of the most recent United Nations human rights treaties. It establishes that ‘disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others’.¹⁴ These barriers include a lack of accessible facilities and services, stigma and discrimination, and insufficient funding of services and supports. Such barriers produce and perpetuate

¹³ Mike Oliver, ‘Changing the Social Relations of Research Production?’ (1992) 7(2) *Disability, Handicap & Society* 101–114 ; Emma Stone and Mark Priestley, ‘Parasites, Pawns and Partners: Disability Research and the Role of Non-disabled Researchers’ (1996) 47(4) *British Journal of Sociology* 699–716, 700–701; Jan Walmsley and Kelley Johnson, *Inclusive Research with People with Learning Disabilities: Past, Present and Futures* (J. Kingsley Publishers, 2003).

¹⁴ CRPD Preamble para (e).

the marginalisation of persons with disabilities in many spheres of life and contribute to the high rates of human rights violations of persons with disabilities around the world. For example, the World Health Organization reports that persons with disabilities have poorer health outcomes, lower educational achievements, less economic participation and higher rates of poverty than persons without disabilities.¹⁵ Persons with disabilities are frequently subject to exclusion and segregation in many areas of life, such as education, employment and accommodation.¹⁶ The ability of persons with disabilities to live independently and to be included in the community is often questioned, especially for persons with cognitive disability.¹⁷ Another crucial issue is the ongoing legal practice in most parts of the world of restricting a person's legal capacity on the basis of disability.¹⁸ This denial of legal capacity is commonly coupled with the legitimation of 'substituted decision-making' by third parties, for

¹⁵ World Health Organisation, *Summary World Report on Disability* (Report, World Health Organisation, 2011) 10-12

<http://apps.who.int/iris/bitstream/10665/70670/1/WHO_NMH_VIP_11.01_eng.pdf>.

¹⁶ See for example Australian Government, *Shut Out: the Experience of People with Disabilities and their Families in Australia* (National Disability Strategy Consultation Report, Commonwealth of Australia, 2009) <<https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/policy-research/shut-out-the-experience-of-people-with-disabilities-and-their-families-in-australia>> ; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Periodic Report of Montenegro*, 18th sess, UN Doc CRPD/C/MNE/CO/1 (22 September 2017) paras 14, 36(c); Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Luxembourg*, 18th sess, UN Doc CRPD/C/LUX/CO/1 (10 October 2017) paras 42, 48; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Serbia*, 15th sess, UN Doc CRPD/C/SRB/CO/1 (21 April 2016) para 13; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of the European Union*, 14th sess, UN Doc CRPD/C/EU/CO/1 (2 October 2015) para 22.

¹⁷ Jenny Morris, 'Independent Living and Community Care: A Disempowering Framework' (2004) 19(5) *Disability & Society* 427-442, 431-2.

¹⁸ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition Before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) para 8. For a discussion, see Author 2017.

example, where a person can be involuntarily admitted and treated in a psychiatric facility on the basis of an assessment of their ‘best interests’, or where a legal guardian can be appointed to make financial, healthcare, lifestyle, or other decisions on the person’s behalf.¹⁹ Other fundamental civil and political rights, such as the right to vote or protection from arbitrary deprivation of liberty, are restricted or fully denied because of impairment in many countries.²⁰

The persistence of these barriers globally, coupled with decades of advocacy and activism by persons with disabilities, led to the creation of the CRPD to ‘promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity’.²¹ As noted above, the international disability community played a key role in advocating for a human rights treaty on disability, and a variety of national and international Disabled Persons’ Organisations (DPOs) contributed to the development and passage of the Convention. DPOs are civil society organisations controlled and led by persons with disabilities. They comprise a range of local, national and international non-government organisations with ‘the aim of collectively acting,

¹⁹ Ibid, paras 7, 27, 42.

²⁰ See for example the European Union Agency for Fundamental Rights’ (FRA) reports on the right to political participation and violence against children: FRA, *The Right to Political Participation of Persons with Mental Health Problems and Persons with Intellectual Disabilities* (Report, FRA, 2010) <http://fra.europa.eu/sites/default/files/fra-2010-report-vote-disability_en.pdf>; FRA, *Violence Against Children with Disabilities: Legislation, Policies and Programmes in the EU* (Report, FRA, 2015) <http://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-violence-against-children-with-disabilities_en.pdf>.

²¹ CRPD art 1.

expressing, promoting, pursuing and/or defending a field of common interest'.²² The drafting process was driven by active participation of DPOs and other civil society actors to a greater extent than other treaties.²³ The CRPD was adopted in 2006 and entered into force on 3 May 2008. As of March 2018, 176 States are party to it.²⁴

While the international disability rights movement has emphasised that persons with disabilities do not ask for special rights, the CRPD addresses specific challenges and human rights issues that are unique to the situation of persons with disabilities. They include, for example, equal recognition before the law and the prohibition of all forms of discrimination on the basis of disability;²⁵ taking appropriate measures to ensure equal access to the physical environment, transportation, information and communications technologies, and other systems and facilities;²⁶ ensuring against unlawful or arbitrary deprivation of liberty;²⁷ realizing the right to inclusive education;²⁸ and guaranteeing equal enjoyment of political rights, including the right to vote and be elected.²⁹

²² United Nations General Assembly, *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, 31st sess, UN Doc A/HRC/31/62 (12 January 2016) para 36 <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A_HRC_31_62_E.doc>.

²³ See Kayess and French, above n 7.

²⁴ Office of the High Commissioner for Human Rights, United Nations, *Status of Ratification Interactive Dashboard* (13 March 2018) <<http://indicators.ohchr.org/>>.

²⁵ CRPD arts 5, 12.

²⁶ CRPD art 9.

²⁷ CRPD art 14.

²⁸ CRPD art 24.

²⁹ CRPD art 29.

One of the guiding principles of the international disability rights movement, ‘nothing about us without us’, demands that all matters affecting persons with disabilities should involve persons with disabilities in positions of leadership and control.³⁰ The CRPD reflects this, explicitly obliging States to closely consult with, and actively involve, persons with disabilities and DPOs in the development and implementation of the CRPD (art 4), and in monitoring that implementation (art 33).³¹

This requirement to meaningfully include persons with disabilities applies to research that assesses the status quo in regard to the human rights situation of persons with disabilities, analyses relevant legal, political and social structures, and informs necessary policy and law reform. Historically however, as we noted above, research on disability has been conducted from a medical and deficit-oriented perspective, focusing on individual impairments and identifying approaches to ‘fix’ or ‘cure’ them. This is often referred to as a ‘medical model’ approach to disability.³² While medical research on impairment and human functioning is of course valuable for some purposes, the societal barriers facing persons with disabilities are complex and multifaceted, and cannot be redressed through medical research alone. In their role as objects of research, persons with disabilities have often been placed in a position of

³⁰ Kayess and French, above n 7, 12; Paul Harpur, ‘Embracing the New Disability Rights Paradigm: the Importance of the Convention on the Rights of Persons with Disabilities’ (2012) 27(1) *Disability & Society* 1–14.

³¹ For further information about legal mechanisms for involving and consulting DPOs, see FRA, *DPO Involvement: Indicators on Political Participation of Persons with Disabilities* (Background Information Report, FRA, 2014) <<http://fra.europa.eu/en/publications-and-resources/data-and-maps/comparative-data/political-participation/dpo-laws>>.

³² Theresia Degener, ‘Disability in a Human Rights Context’ (2016) 5(3) *Laws* 35 <<http://www.mdpi.com/2075-471X/5/3/35>>.

silence and dependency and their lived experience has not been considered to be valuable or relevant knowledge.³³ Persons with psychosocial and intellectual disabilities in particular are often questioned in terms of their ability to provide relevant and reliable information due to an assumed lack of mental capacity.³⁴ On this basis, academia has been a particular target of criticism by disability rights scholars and activists.³⁵

The call for disability research to be participatory and co-produced led to the formation of disability studies,³⁶ a research field characterised by the idea that persons with disabilities and their perspectives should have control over research, and providing them with decision-making powers regarding research questions, design and dissemination. In disability studies, researchers are held accountable by persons with disabilities and their representatives, who are involved in the research process wherever possible, as either academic researchers and/or non-academic partners.³⁷ This requires a questioning of traditional power hierarchies within academia and the opening of knowledge production to a marginalized social group.³⁸ Disability research emerges from a variety of disciplines but is always characterized by its aim to

³³ Jasna Russo and Peter Beresford, 'Between Exclusion and Colonisation: Seeking a Place for Mad People's Knowledge in Academia' (2015) 30(1) *Disability & Society* 153.

³⁴ See for instance Carol K Sigelman, Edward C Budd, Cynthia L Spanhel and Carol J Shoenrock, 'Asking Questions of Retarded Persons: A Comparison of Yes-no and Either-or Formats' (1981) 2(4) *Applied Research in Mental Retardation* 347.

³⁵ See above, n 13.

³⁶ Stone and Priestley, above n 13.

³⁷ Gerry Zarb, 'On the Road to Damascus: First Steps towards Changing the Relations of Disability Research Production' (1992) 7(2) *Disability, Handicap & Society* 125.

³⁸ Rannveig Traustadóttir, 'Research with Others: Reflections on Representation, Difference and Othering' (2001) 3(2) *Scandinavian Journal of Disability Research* 9.

empower and liberate participants and to foster social change on a broader scale. As the academic arm of the disabled peoples' movement, disability studies informed the drafting of the CRPD and provided a theoretical framework for its implementation.³⁹ Most importantly, the CRPD is premised on a 'human rights model' of disability, which is a further development of the social model of disability.⁴⁰ In comparison to the social model, the human rights model provides not only an explanation for the exclusion of persons with disabilities, but also, through the appeal to universal human rights, a framework for political and legal measures to remedy them. The model focuses not only on non-discrimination and civil rights, but also on the social, economic and cultural rights of persons with disabilities. Research that adopts a human rights-based model definition of disability, and that supports the work of persons with disabilities and their representative organisations to achieve social change in a collaborative way, can contribute to the monitoring and implementation of the CRPD at the national and international level. Student law clinics offer one means to pursue research that accords with the human rights model of disability and contributes to the implementation and monitoring of the CRPD. In clinical legal education programmes, research that pursues these goals can be conducted while also

³⁹ See Arlene S Kanter 'The Law: What's Disability Studies Got to Do with It or An Introduction to Disability Legal Studies' (2011) 42(2) *Columbia Human Rights Law Review* 40; Rannveig Traustadóttir, 'Disability Studies, the Social Model and Legal Developments' in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *The United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff Publishers, 2009) 1.

⁴⁰ Degener, above n 32.

offering students crucial experiential and theoretical learning. In the next section, we discuss this second contribution of disability human rights clinics.

Clinical legal education – cause-based lawyering, experiential lawyering, and engagement

Clinical legal education is increasingly recognised as a valuable – if not essential – complement to traditional legal education. Student clinics ensure that students develop valuable professional skills for their future careers as lawyers, including legal research and analysis, teamwork, client liaison, clear writing, and advocacy. Students are then equipped with knowledge and skills for lawyering in general, as well as ‘cause-based lawyering’ in the human rights field and beyond.⁴¹ Clinics also contribute to the ‘third mission’ of universities to engage with, transfer knowledge to, and contribute to the development of, the community.⁴² This responds to calls by public and private funding agencies for universities to leave the ‘ivory tower’ and allow non-academic organizations and individuals to access and actively participate in research activities.⁴³ Most notably, clinics can increase access to justice for people who have traditionally been denied this right, for instance, by sharing knowledge,

⁴¹ Kris Gledhill, ‘Establishing An International Human Rights Clinic in the New Zealand Context’ (2013) 19 *International Journal of Clinical Legal Education* 295 <<http://dx.doi.org/10.19164/ijcle.v19i0.31>>.

⁴² Michael Loi & Maria Chaira Di Guardo, ‘The Third Mission of Universities: An Investigation of the Espoused Values’ (2015) 42 *Science and Public Policy* 855.

⁴³ Henk A. J. Mulder and Caspar F. M. De Bok, ‘Science Shops as University–community Interfaces: An Interactive Approach in Science Communication’ in Cheng Donghong, Jenni Metcalfe and Bernard Schiele (eds) *At the Human Scale – International Practices in Science Communication* (Science Press, 2006) 2.

skills and resources with community organisations, by providing research support to community legal centres, or by contributing to reports or communications to law reform or other relevant bodies.

In the next section, we describe the Disability Human Rights Clinic at Melbourne Law School, and propose that it has six key features that are necessary for the design and execution of clinical programs that can achieve these multiple purposes.

Disability human rights clinics as a means to pursue the goals of the CRPD and clinical legal education

The Disability Human Rights Clinic at Melbourne Law School

While several other disability rights-focused law clinics are in existence,⁴⁴ the DHRC was the first project-based clinic that is focused on systemic change, and the first to incorporate disability studies and disability human rights curriculum. It is offered to students completing the Juris Doctor (JD) post-graduate law degree. The degree comprises both compulsory and elective subjects, and the DHRC has been offered as a semester-long elective or a three week intensive subject. It counts towards students' academic credit. Students enrolled in the DHRC undertake 12 days of clinical work (one day per week during semester or four days per week during the intensive). Each clinic day begins with a 90-minute seminar on international human rights law,

⁴⁴ For example, the Disability Legal Information Clinic at the National University of Ireland, Galway's Centre for Disability Law and Policy (see <<https://www.nuigalway.ie/centre-disability-law-policy/dlic/>>) and the Cerebra Pro Bono Research Programme at the University of Leeds (see <<http://www.law.leeds.ac.uk/about/extra/cerebra-pro-bono-research-programme>>).

disability rights law and disability studies. Students spend the rest of the clinic day working in small teams on a disability human rights-related clinical project, with the clinic director providing ongoing guidance through informal discussions and scheduled meetings with each team. Each group works on one major project for the duration of the course; on the first day of the clinic, students are invited to rank the projects that most interest them and are allocated to a group on that basis.

As a project-based clinic, students in the DHRC engage in research and/or advocacy focused on systemic change as opposed to individual client service. Clinical projects may include law or policy submissions, amicus briefs, research support for strategic litigation, or other projects that require legal analysis. Most projects have a 'client partner', which is an organisation that needs a specific project to be completed. These may be documents that are internal to the organisation, such as an inclusion or diversity policy review, or they may be public documents, such as a public report or submission. Through the DHRC website⁴⁵ and the professional contacts of the clinic director and fellows, project proposals on disability human rights issues are invited from DPOs, community legal services, state and federal government agencies, researchers in other faculties at the University of Melbourne, and other stakeholders. The students work closely with their client partner, seeking guidance when developing the project and conducting the research, and inviting feedback on drafts. At the end of semester, students deliver their research findings to the partner and

⁴⁵ See <<http://law.unimelb.edu.au/students/jd/enrichment/pili/subjects/disability-human-rights-clinic>>

(where appropriate) to the academic and wider community, through both written papers and oral presentations or seminars.

Based on our experiences in the DHRC, we propose that clinics must have six essential features in order to fulfil the tripartite mission of human rights implementation, engaging with the community, and providing rich experiential learning for students. We propose that these features can also offer useful guidance to human rights clinics concerned with other groups of rights-holders such as refugees and asylum seekers, women and older persons.

Six essential features of disability human rights clinics

1. Conduct projects that share the objectives of the CRPD

Disability human rights clinics should have an overarching objective of improving the human rights situation of persons with disabilities through legal analysis, research and/or investigation of the legal, political and social barriers to the realization of the rights enshrined in the CRPD. Using the CRPD as a framework for disability human rights clinics ensures that the research being conducted is underpinned by a set of principles and values that have been determined by the disability community itself. This places the clinic in the best position to co-produce research that meets the needs of that community.

The DHRC operates under the human rights-based model. It uses the CRPD as a framework for its curriculum as well as a basis for the legal analysis within each

clinical project. Within that framework, it accepts and adopts a social model of disability that recognises that social barriers and law reform can be altered to meet the needs of persons with disabilities. The DHRC rejects the concept that disability is a burden or that it is deficient in the individual. It also rejects the notion that disability is something that inherently needs to be ‘cured.’ Instead, in following with the CRPD and the social model, the DHRC celebrates diversity and strives to remove socially constructed barriers to full participation and equal rights for persons with disabilities. Projects may encompass ‘traditional’ legal research, such as the preparation of legal submissions, amicus briefs or information for public interest litigation, but also more advocacy-focused endeavours such as assisting non-profit organisations to draft shadow reports (which offer an alternative perspective to official State reporting) to the CRPD monitoring body, the Committee on the Rights of Persons with Disabilities, or the development of training materials for self-advocates and other stakeholders (like judges and disability service providers) on the legal implications of the CRPD. For example, projects completed by DHRC students have included research for strategic litigation being contemplated by the Australian Centre for Disability Law, a Specialist Community Legal Centre based in Sydney, and contributing to the annual report of Catalina Devandas Aguilar, the United Nations Special Rapporteur on the Rights of Persons with Disabilities, to the Human Rights Council and General Assembly.

Project-based clinics are particularly well-suited to human rights subjects⁴⁶ because human rights advocacy is often based on reporting, strategic litigation, and submissions to human rights bodies.⁴⁷ There are other benefits to project-based clinics. They allow the students to work on broader social issues⁴⁸ and to play a role in strategic litigation and law and policy reform efforts. There are also practical advantages of this structure. As long as the projects do not involve the provision of specific legal advice,⁴⁹ there is usually no need for student practice orders or for the supervisor to have a practicing certificate or admission to the local bar. In jurisdictions that do not have student practice orders, this is a significant benefit. This also allows international guests or partners to engage more heavily with clinic projects.

2. Partner with DPOs (and, where appropriate, other organisations whose activities have implications for the rights of persons with disabilities)

It is vital that disability human rights clinics focused on the rights or needs of marginalized communities engage with relevant non-government organizations (especially Disabled Persons' Organisations) and community groups. This ensures

⁴⁶ See Deena R Hurwitz, 'Lawyering for Justice and the Inevitability of International Human Rights Clinics' (2003) 28(2) *Yale Journal of International Law* 505

<<http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1221&context=yjil>>.

⁴⁷ For a discussion of human rights clinics, see Arturo J Carrillo, 'Bringing International Law Home: The Innovative Role of Human Rights Clinics in the Transnational Legal Process' (2003) 35 *Columbia Human Rights Law Review* 527

<https://www.law.gwu.edu/sites/www.law.gwu.edu/files/downloads/IHRC_article_AC.pdf>.

⁴⁸ For a discussion, see Katherine R Kruse, 'Biting Off What They Can Chew: Strategies for Involving Law Students in Problem-solving Beyond Individual Client Representation' (2002) 8 *Clinical Law Review* 405 <<https://ssrn.com/abstract=2172346>>.

⁴⁹ The definition of 'legal advice' varies based on jurisdiction and should be verified in any jurisdiction where a project-based clinic is running.

that they are up to date with the specific needs of the communities that they are working with. In order to meet the requirements of the CRPD in regard to the involvement of persons with disabilities in implementing and monitoring the Convention, clinics of this kind should also strive to respond directly to the needs of the specific community that they are working with. In practice, this means clinical programs should invite persons with disabilities and DPOs to propose clinical projects that will provide what they need to pursue disability human rights issues arising in relation to the CRPD.

Project-based clinics can fill a gap in the DPO community's resources.⁵⁰ These bodies are often under-funded and under-resourced with little capacity for writing and analysis, while project-based clinics have a student group that has designated time specifically for these tasks. Juris Doctor and other graduate students are usually particularly well suited to this type of work because they are post-graduate students with well-developed research and writing skills. Collaboration between project-based clinics and NGOs can often produce the best results because they combine the grassroots knowledge of the NGOs with the research and writing skills of the students and the resources of the university clinic.

While partnerships with persons with disabilities and their representative organisations should be prioritised, projects with or for other stakeholders may also

⁵⁰ For a discussion of the need for clinics to be responsive to community need, see Sameer Ashar, 'Law Clinics and Collective Mobilization' (2008) 14 *Clinical Law Review* 355.

be appropriate and consistent with the overarching objectives of disability human rights clinics. In particular, clinic students can offer training, advice and detailed analysis of the human rights implications of laws, policies and practices to government bodies, disability service providers and other organisations that may not otherwise adopt a human rights lens. Clinical projects of this nature can contribute to raising awareness about the rights of persons with disabilities (as guaranteed in article 8 of the CRPD) and increasing access to justice for persons with disabilities (article 13), among others. For example, students in the inaugural DHRC partnered with the Administrative Appeals Tribunal, an independent statutory body that decides appeals on certain administrative decisions made by the Australian government under Commonwealth laws. Its mandate includes reviewing decisions about individuals' access to the National Disability Insurance Scheme (NDIS), a new national scheme designed to give persons with disabilities access to individualised funding to purchase disability-related supports. The first object of the legislation establishing the NDIS is to 'in conjunction with other laws, give effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities'.⁵¹ In light of this, the DHRC students developed and presented a toolkit to assist Tribunal members to make decisions that are compliant with the CRPD.

In cases where person with disabilities and their representative organisations are not the primary project partners, it is especially crucial to ensure that the voices of the

⁵¹ *National Disability Insurance Scheme Act 2013* (Cth) s 3(1)(a).

disability community still guide the research. For example, research projects will only be selected if their goals are consistent with the CRPD and the statements of DPOs, the Committee on the Rights of Person with Disabilities or other United Nations mechanisms and agencies. In the DHRC, students are expected to make contact with relevant DPOs during the course of their projects, in order to seek their perspective and guidance on the issue and to invite their input. Ideally, students will also share their research outputs with interested DPOs, and produce versions of their materials that may be useful to that group. For example, one group of DHRC students who conducted comparative research on Australian and German guardianship laws for partners at the Bochum Centre for Disability Studies (BODYD) at the Protestant University of Applied Sciences RWL (Germany) also ran a workshop on Victorian guardianship laws and sought feedback on their research from the leadership group at VALiD, a Victorian organisation run by and for persons with intellectual disability and families.

The DHRC uses several methods to engage with DPOs and other potential partners. The DHRC website (hosted by Melbourne Law School) invites DPOs and persons with disabilities to propose research topics and collaborate with students and researchers to investigate those topics and produce research outputs. The clinic director and her colleagues also refer potential partners to the clinic when they are approached or otherwise hear about suitable projects. Information about human rights violations and issues of concern are also sought from other stakeholders, such as domestic

government bodies, non-DPO civil society organisations, disability service providers, and United Nations mandates and mechanisms (including members of the CRPD Committee and the Special Rapporteur on the Rights of Persons with Disabilities), although these voices are always considered to be secondary to those of persons with disabilities.

3. Participatory research methodology

Partnerships with DPOs in disability human rights clinics should not be restricted to commissioning clinical projects and taking receipt of research outputs. Rather, individuals and organisations should be involved as co-designers and co-producers of the research, in-keeping with the principles of participatory and emancipatory research developed in disability studies and reinforced in the CRPD. This means that research topics must be designed on the basis of concerns raised by, or direct research requests from, the disability community. It also requires students and researchers to discuss and agree on the design and conduct of the research project with these partners, hold regular meetings to discuss and refine the research process, and incorporate feedback from community partners before finalising their research reports or other project outcomes, including identifying accessible ways of disseminating the reports (discussed further below).

This ongoing engagement has several advantages. Research outcomes are not dictated by the initial research question but also by decisions made with the partners during the research process itself, for example regarding the operationalisation of research

questions and the selection of methods. This enables partners to understand and to actively take part in the necessary decisions-making processes.⁵² Intensive participation in the research process can be empowering for community partners who themselves gain new knowledge and skills, for example, by learning how international and national law work and how they can be useful for their own advocacy and action. At the same time, DPO involvement secures the student researchers' access to relevant stakeholder knowledge. The two-sided knowledge exchange ensures that research outcomes can be a tool for change – on one side, students are informed by needs or problems identified by the affected community, and on the other side, partnering organisations are supported by rigorous legal research and analysis.

Clinic students profit just as much from working closely with the community partners, gaining career-relevant contacts and developing their skills in project design and management, client liaison, legal and social research, advocacy, teamwork, responsiveness and communication. For example, students in the DHRC have formed working relationships that could lead to future work experience and employment, including peak national DPOs, community legal centres, United Nations mechanisms, and statutory authorities like the Victorian Office of the Public Advocate and Victoria Legal Aid. The project-based format enables students to gain lawyering skills that they

⁵² See Vivien Runnels & Caroline Andrew, 'Community-based Research Decision-making: Experiences and Factors Affecting Participation' (2013) 6 *Gateways: International Journal of Community Research and Engagement* 22.

may not have the opportunity to develop in their other studies. Working with other students, supervisors and community partners requires high-level teamwork and interviewing skills, and students are supported to develop these skills throughout the clinic teaching period.

4. *Produce accessible and useful outputs*

Law students and lawyers have long been criticised for failing to ensure that their written communications are clear and accessible to lay clients.⁵³ The issue of accessibility is of particular relevance for persons with disabilities, as they commonly face exclusion from accessing information due to communication barriers. This very much applies to academic publications, with journal articles, research reports and scientific conferences rarely being provided in accessible formats. Another crucial component of a disability human rights clinic is therefore to create outputs in shared ownership that are accessible and tailored to the needs of the community partners.

DHRC students are encouraged to identify the most useful and accessible formats for their research outputs early in the project planning process and in consultation with the partner organisation. For example, several groups of students have developed materials in ‘easy-to-read’ format, which they have utilised in workshops with persons with intellectual disability or their representative organisations.⁵⁴ The

⁵³ See for example Ros Macdonald and Deborah Clark-Dickson, *Clear and Precise Writing for Today’s Lawyer* (Queensland Law Society, 2000).

⁵⁴ Misako Nomura, Gyda Skat Nielsen and Bror Tronbacke, *Guidelines for Easy-to-Read Materials* (IFLA Professional Reports No 120, International Federation of Library Associations and Institutions, 2010) <<https://www.ifla.org/publications/guidelines-for-easy-to-read-materials>>.

DHRC's research outputs, such as written reports and videos of presentations, are published in multiple formats on the (accessible) Melbourne Law School website, including screen-reader accessible reports. The accessibility of presentations and seminars is also considered, with wheelchair accessible venues, sign-language interpretation, and other accessibility considerations factored into event planning. This is a work in progress, with future plans to develop more easy-to-read outputs and accessible events.

Where appropriate, disability human rights clinics can also provide advice and support to partner organisations to utilise the research outcomes to pursue social change by, for instance, linking them with legal services to pursue strategic litigation, or providing guidance on pursuing formal redress through a communication to the Committee on the Rights of Persons with Disabilities or other domestic or international bodies. This can also contribute to the realisation of the right to access to justice guaranteed in article 13 of the CRPD. Finally, to maximise the reach and impact of the research findings, partners are invited to share the research outputs with their members and networks. Permission is sought from the students and the partners prior to this dissemination.

5. Combine disability studies and human rights education

A detailed background in disability studies and human rights education is essential for students engaged in disability human rights clinics. The DHRC includes a teaching component – a 90-minute seminar or lecture at the beginning of every clinic day – to

equip students with a detailed knowledge of disability studies and disability human rights law and practice. Seminars address the key aspects of disability studies and teach students about the central ideas and shift of perspective that the emergence of this interdisciplinary research field brought to the scientific discussion of disability. This is particularly important for students in many universities that do not have disability studies or disability law programs.

Topics addressed in the seminars include the medical and social models of disability; discrimination (including intersectional discrimination); legal capacity; and accessibility. Other seminars deal with general human rights principles, theory and law, including the history and enforceability of international human rights, and the universal rights guaranteed in the ICCPR and the ICESCR. The application of these rights specifically to persons with disabilities in the CRPD, the implementation of disability human rights in domestic law in Australia and other parts of the world, and the mandates and activities of international human rights monitoring mechanisms, are also addressed. In the DHRC, we have very intentionally ensured that the substantive curriculum that we teach also includes knowledge of the history of marginalisation of persons with disabilities and the role that research has played. We also include an overview of new methods that have been proposed to shift research from marginalising to participatory and emancipatory.⁵⁵ Finally, we ask the students

⁵⁵ See for example Stone and Priestley, above n 36.

to explore how participatory and emancipatory methodologies can be employed in their work in the clinic and how the clinic as a whole uses those methodologies.

Lectures and seminars on disability studies and human rights (and associated readings and exercises) provide students with the background material that is essential to their ability to produce useful and legally sound research outputs for their partner organisations, and to develop essential legal knowledge for future lawyering and advocacy work in the national or international human rights fields. While students' learning is assessed primarily through a research report (or other output) produced for the partner, they are also required to complete a short exam at the end of the semester. This ensures that students have engaged with the full breadth of relevant materials, and not just the specific subject matter involved in their clinical project.

Importantly, the DHRC director and lecturers are aware of the sensitivity of some matters that arise during lectures and discussions, particularly because many of our students and lecturers are persons with disability themselves. Trigger warnings are provided for students regularly throughout the course of the clinic. Students meet individually with the director to ensure that there is adequate space for all students to express themselves, including when they are having a difficult time and experiencing anxiety or are particularly impacted by the sensitive issues such as violence and discrimination that arise in this area.

6. *Ensure that the clinic and educational experience is accessible to all*

In addition to making sure that the research outputs of disability human rights clinics are accessible, clinics (and all aspects of legal education) must also be accessible to students. This means ensuring that classrooms, learning materials and communications between lecturers, supervisors, students and partners are accessible. Frances Gibson has proposed that all clinical legal programs should follow a number of guidelines to ensure that clinics adhere to the requirements of the CRPD.⁵⁶ These include mandatory skills-based disability training for staff and students, contributing to policy-making and activities to increase the enrolment of students with disabilities in law programs, encouraging students with disabilities to enrol in clinics, teaching critical analysis of the law's approach to disability, and promoting employment of staff with disabilities.

The critical analysis of the law's approach to disability is the centrepiece of the DHRC. In addition, students are invited to note any accessibility requirements in their application to enrol in the clinic, and to attend a meeting with the clinic director prior to the commencement of the course if they so desire. Classes are conducted in an accessible room, and materials (such as the course outline and electronic versions of assigned reading materials) are provided in multiple formats as required. If requested, the director and fellows also provide support to students in their interactions with

⁵⁶ Frances Gibson, "'The Convention on the Rights of Persons with Disabilities': The Response of the Clinic' (2011) 15 *International Journal of Clinical Legal Education* 11 <<http://dx.doi.org/10.19164/ijcle.v15i0.53>>.

university services (such as the Student Equity and Disability Support service at the University of Melbourne) to make alternative exam arrangements and so on. Staff involved in the DHRC all have a background in disability rights law. They are involved in other disability rights-related research and activities within the University of Melbourne, including consultation on disability policy and student inclusion.

The multi-directional benefits of disability human rights clinics

The six principles outlined above emphasise the role of disability human rights clinics in both supporting the mission of community organisations (especially DPOs) and offering valuable experiential and traditional learning to students. Disability human rights clinics have obvious appeal for law schools and universities. They are relatively low cost – supervisors do not generally require a practising certificate for project-based clinical work, partner organisations mainly provide in-kind support rather than requiring funding, and the widespread availability of information and communication technology like video-conferencing reduces the need for travel to meet with partners or deliver research outputs.⁵⁷ Like other forms of legal clinics, they offer ‘work-integrated learning’, meaning they provide students with valuable, relevant work-experience that relates to their studies and their career aspirations, and results in new learning.⁵⁸

⁵⁷ See Gledhill, above n 41.

⁵⁸ Melinda Shirley, Iyla Davies, Tina Cockburn and Tracey Carver, ‘The Challenge of Providing Work-integrated Learning for Law Students – the QUT Experience’ (2006) 10 *Journal of Clinical Legal Education* 134, 135-6 <<http://dx.doi.org/10.19164/ijcle.v10i0.81>>.

By sharing knowledge, and the means of knowledge and research production, with the community specifically for the purpose of supporting human rights realisation, disability human rights clinics also contribute to universities' 'third mission' of engagement, as well as the so-called 'fourth mission' of establishing long-term university-community partnerships.⁵⁹ This can have wider flow-on effects for academia – civic engagement in research can help to rearrange traditional power structures in research and enable participation of stakeholders who traditionally have not been able to have a say, despite the fact that they are often significantly impacted by research activities and outcomes.

Conclusion

Disability human rights clinics can be a valuable addition to clinical legal programs in law schools worldwide. Where they have the six features identified in this paper, these clinics meet each of the three key 'motivations' for clinical legal education identified by Kris Gledhill.⁶⁰ First, they ensure that students develop valuable professional skills for their future careers as lawyers, including legal research and analysis, teamwork, client liaison, clear writing, and advocacy. Secondly, they can increase access to justice for people who have traditionally been denied this right, for instance, by sharing knowledge, skills and resources with community organisations, by providing

⁵⁹ On the third and fourth missions, see Jill Chopyak and Peter N Levesque, 'Community-based Research and Changes in the Research Landscape' (2002) 22(3) *Bulletin of Science, Technology and Society* 203; Gregory Trencher, Masaru Yarime, Kes B McCormick, Christopher N H Doll and Steven B Kraines, 'Beyond the Third Mission: Exploring the Emerging University Function of Co-creation for Sustainability' (2014) 41 *Science and Public Policy* 151.

⁶⁰ Gledhill, above n 41, 297.

research support to community legal centres, or by contributing to reports or communications to UN monitoring bodies. Finally, disability human rights clinics can contribute to social change by supporting the disability community in its pursuit of the realisation of the human rights of persons with disabilities at the local and international levels.

The model proposed here could also provide the basis for human rights clinics concerned with other groups of rights-holders, such as refugees and asylum seekers, women, and older persons. For example, the principles relating to participatory research and the accessibility of research outputs, and of the clinic itself, are relevant for all areas of research and advocacy. While the CRPD is the only human rights instrument to place such explicit emphasis on the participation of the affected persons in the implementation and monitoring of human rights, Deena Hurwitz explains that all human rights advocacy

is fundamentally participatory and equitable. That is, it requires active collaboration between lawyers, advocates, and those affected by the work (who may or may not be the clients).⁶¹

The DHRC model exposes student to this participatory methodology. Students who have completed the clinic have often commented that their perspectives of disability and human rights have shifted. They often see human rights as much more connected to their daily lives than they had previously realised, and often begin to see disability

⁶¹ Hurwitz, above n 46, 521.

as something to celebrate in appreciation of the joy of human diversity. Through the humble platform of clinical legal education, the DHRC model has had a significant impact on the students as well as the many and varied partners that have been our clients – the United Nations Committee on the Rights of Persons with Disabilities, the United Nations Special Rapporteur on Disability, the Australian Disability Discrimination Commissioner, and others.

STAKEHOLDER PERCEPTIONS OF CLINICAL LEGAL EDUCATION WITHIN
AN EMPLOYABILITY CONTEXT

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Abstract

The purpose of this paper is to examine how clinical legal education is perceived by current students, alumni, employers and clinic supervisors. The paper considers clinical legal education within the employability discourse in higher education and interrogates its place in the curriculum. With ever growing pressure on Higher Education providers to produce employable graduates in a challenging graduate marketplace this qualitative study seeks new insights into the role clinical legal education can play in preparing students for their transition from university into graduate careers.

There has been little empirical research in this area and so this article explores the literature around the employability discourse, with particular focus on the impact of clinical legal education on employability before reporting on the findings from the focus groups and reaching conclusions about the implications of the impact of clinical legal education on employability.

Introduction

Since 2008, higher education institutions (HEIs) in the UK have had to bear greater economic, political and environmental pressures. The introduction by HEIs of higher

¹ We are grateful to Rachel Dunn and Karla Prime of Northumbria University for their contribution to this article as research assistants.

tuition fees against a backdrop of low economic growth and the need to accommodate the shifting demands of student, employer and government expectations has created a highly competitive and challenging marketplace. A key element in securing ongoing success for HEIs is student employability and the recent introduction in the UK of the Teaching Excellence Framework² (TEF) has added a further dimension to this as it measures student satisfaction partly through employment outcomes metrics.³ With future funding linked to TEF rankings, HEIs and academic research will continue to focus on employability as a significant factor in the higher education agenda.

This article will highlight stakeholder perceptions drawn from a pilot empirical study of the role clinical legal education can play in an employability context and will interrogate a number of assumptions about the role of clinical legal education in preparing students for the transition into employment. There has been a huge increase in recent years in the number of law schools in the UK offering some form of clinical legal education⁴ yet there is little research on the interrelationship between clinical

² TEF is a system that assesses the quality of teaching in universities in England. It was introduced by the UK government in 2017 to provide a resource for students to judge teaching quality in universities and to increase the importance of teaching excellence (and bring it into line with research excellence) when rating institutions. Universities are classified gold, silver or bronze. These ratings are determined by six core metrics based on teaching, academic support and progression to employment: Department for Business, Innovation and Skills (2016) "Success as a knowledge economy: Teaching excellence, social mobility and student choice".

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523546/bis-16-265-success-a-s-a-knowledge-economy-web.pdf

³ Based on DLHE (Destinations of Leavers from Higher Education) data available at www.hesa.ac.uk.

⁴ At least 70% of all law schools were involved in pro bono and/or clinical legal education: <https://www.lawworks.org.uk/sites/default/files/LawWorks-student-pro-bono-report%202014.pdf>.

experience and legal employability.⁵ There is research in abundance around the employability discourse generally⁶ but little research within a legal context⁷ and even less around clinical legal education and employability⁸.

As the legal sector becomes increasingly disjointed, legal educators need to engage in discourse with employers to adapt to the changing legal landscape⁹. This is particularly important now as UK university law schools face their biggest challenge in decades of managing a period of transition with the replacement of qualifying law degrees, Graduate Diplomas in Law and Legal Practice Courses with the new Solicitors Qualifying Examination¹⁰. This brings with it a great deal of uncertainty for

⁵ J Russell, 'Enhancing employability for LLB law graduates - initiatives with ILEX and Clinic at London South Bank University' (2011) *The Law Teacher*, 45:3, 348-360.

⁶ Philip Brown, Anthony Hesketh and Sara Williams, 'Employability in a knowledge-driven economy' *Journal of Education and Work* (2003) 16:2, 107-126. Michael Tomlinson, 'Investing in the self: structure, agency and identity in graduates' employability' (2010) *Education, Knowledge & Economy* 4(2), 73-88, 74. Michael Tomlinson, 'Graduate Employability: A Review of Conceptual and Empirical Themes'

High Educ Policy (2012) 25: 407, 425.

⁷ One study explored factors that enhance employability with work experience being ranked as the most useful factor: P Childs, N Firth and H de Rijke, 'The Gap between Law Student Career Aspirations and Employment Opportunities' (2014) 48(1) *Law Teacher* 51-68, 58. Francis's research explored employability through the lens of legal work experience before arguing that it should not be seen 'as an uncontested good': Andrew Francis, 'Legal education, social mobility, and employability: possible selves, curriculum intervention, and the role of legal work experience' (2015) 42 *Journal of Law and Society* 173.

⁸ An Australian paper interrogates the connection between graduate employability skills and law clinics, Francina Cantatore 'The Impact of Pro Bono Law Clinics on Employability and Work Readiness in law Students' *International Journal of Clinical legal Education* (2018) 25:1, 147-172; and research in the UK that examines employers' awareness and understanding of clinical legal education, Linden Thomas, 'It Puts the Law They've Learnt in Theory into Practice: Exploring Employer Understandings of Clinical Legal Education' in Linden Thomas, Steven Vaughan, Bharat Malkani and Theresa Lynch (eds) *Reimagining Clinical Legal Education* (Hart Publishing 2018) 127-154.

⁹ E Dagilyte and P Coe, 'Professionalism in Higher Education: Important Not Only for Lawyers' (2014) 48(1) *Law teacher* 33-50, 34.

¹⁰ SRA, 'A new route to qualification: the Solicitors Qualifying Examination' (2017)

www.sra.org.uk/sra/consultations/solicitors-qualifying-examination.page, accessed 6 June 2018.

law schools as to future student interest in law as an academic discipline without the professional accreditation.¹¹ It is therefore more relevant than ever to ensure stakeholder voices are heard and this research project focusses on stakeholder perceptions of the impact of clinical legal education on employability, offering a unique insight into the role clinical education can play within an employability context.

What do we mean when we talk about employability?

Rajan *et al.* opine that employability ‘is one of the few words that have gone from cliché to jargon without the intermediate stage of meaning’.¹² The prominence of the employability agenda has resulted in a large body of literature around the definition of employability but no single agreed definition. If employability is simply about ‘getting a job’, it can be measured using DLHE (Destination of Leavers from Higher Education survey) statistics¹³, however imperfect and unsatisfactory that proves to be. Being employable is obviously a pre-requisite to being employed but not all

¹¹ M Davies, ‘Changes to the training of English and Welsh lawyers: implications for the future of university law schools’ (2018) *The Law Teacher* 52(1) 100-125, 101.

¹² Amin Rajan, Penny Van Eupen, Karen Chapple and David Lane (2000) ‘Employability: Bridging the Gap between Rhetoric and Reality, First Report: Employer’s Perspective’ Create Consultancy/Professional Development Foundation, London.

¹³ The DLHE is an annual survey of UK recent graduates, aimed at finding out what they have gone on to do approximately six months after graduating.

employable people can transition to employment.¹⁴ Brown and Hesketh¹⁵ introduced the concept of the *duality of employability*, that employability is both an absolute and a relative concept, the acquisition of skills being the *absolute* and *relative* in that it depends on the laws of supply and demand in the market. Getting a job can be relatively easy if jobs are in abundance but when there are fewer jobs available, employers can afford to be very selective in getting the right person irrespective of their apparent employability. HEIs do not control the graduate recruitment process or the economy and there are a huge number of variables that come into play during the recruitment process such as educational background, race, religion, gender, social background and disability that HEIs cannot influence.¹⁶

So, if employability is not just about employment then what is it? Academics, politicians and businesses have conceptualised employability as a set of skills that graduates must acquire, albeit without much consensus as to what that actually means. The skills debate has unfolded over many years from when the Dearing Report¹⁷ referred for the first time to skills outcomes as well as knowledge outcomes (albeit that it only referred to communication, numeracy, the use of information

¹⁴ Mantz Yorke, 'Employability in Higher Education: what it is - what it is not' (2004, re-issued 2006) York: The Higher Education Academy.

¹⁵ Philip Brown, Anthony Hesketh and Sara Williams 'Employability in a knowledge-driven economy' (2003) *Journal of Education and Work* 16:2, 107-126, 110.

¹⁶ These variables reflect one of Holmes' conceptualizations of employability as 'positional' where employability is understood through social positioning. Leonard Holmes, 'Competing perspectives on graduate employability: possession, position or process?' (2013) *Studies in Higher Education*, 38:4, 538-554.

¹⁷ R Dearing 'Higher Education in the Learning Society' (1997) Report of the National Committee of Inquiry into Higher Education, London: HMSO.

technology and learning how to learn). This inclusion resulted in increased engagement from the UK HEI sector with initiatives to 'embed' skills within the curriculum and resulted in a wide range of studies identifying skills that graduates should possess as well as frameworks to embed employability within the curriculum and help students develop their employability (Knight and Yorke, USEM model (2003)¹⁸; Dacre Pool & Sewell, CareerEDGE model (2007)¹⁹). Employers too have contributed to the debate with the Confederation of British Industry (CBI) (along with the National Union of Students) defining employability as:

'A set of attributes, skills and knowledge that all labour market participants should possess to ensure they have the capability of being effective in the workplace – to the benefit of themselves, their employer and the wider economy'.²⁰

Thus, the skills-based conceptualisation of employability has dominated academic discourse as HEIs strive to ensure their students' skill-set meet ever shifting employer expectations. Our study sits within this conceptualization and interrogates stakeholder perceptions of the skills students can develop from clinical legal education as part of the student journey.

¹⁸ P Knight and M Yorke, 'Assessment, learning and employability' (2003) Maidenhead, U.K: Open University Press.

¹⁹ Lorraine Dacre Pool and Peter Sewell, 'The key to employability: developing a practical model of graduate employability' (2007) *Education + Training*, Vol. 49 Issue: 4, 277-289.

²⁰ Confederation of British Industry (CBI) (1999) 'Making Employability Work: An Agenda for Action', London: CBI.

Employability and legal education

It is held as axiomatic that students want to secure graduate employment, while employers want to employ graduates who have the skills, knowledge and attributes that they are looking for. In 2016, 25,155 UK students applied to study law at undergraduate level in England and Wales; 17,855 were accepted.²¹ These figures are disconcerting when taken in the context of how many law graduates continue on to either a training contract (5,728) or pupillage (474).²² While not all students have that goal in mind, research has shown that 70.98% of students had the intention of entering the legal profession when they started their law degree.²³ With increasing competition for training contracts and pupillages, a law graduate needs to be 'future fit'²⁴ and able to distinguish themselves from the rest of the crowd. They need to develop the skills that will prepare them for what employers and clients require.

²¹ The Law Society, 'Becoming a solicitor: Entry trends' (The Law Society, 2016), <https://www.lawsociety.org.uk/Law-careers/Becoming-a-solicitor/Entry-trends/>, accessed 23rd March, 2018.

²² In the year ending 31 July 2016, 5,728 traineeships were registered with the SRA (The Law Society, 'Becoming a Solicitor: Entry trends', <http://www.lawsociety.org.uk/Law-careers/Becoming-a-solicitor/Entry-trends/>). In 2016/17 there were 1424 students enrolled on the BPTC, but there were only 474 First Six pupillages registered, <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/pupillage-statistics/> accessed 4th June 2018.

²³ Melissa Hardee, 'Career Expectations of Students on Qualifying Law Degrees in England and Wales' (2014) HEA https://www.heacademy.ac.uk/system/files/resources/hardee_interimreport_2014final.pdf, accessed 21 June 2018. Hardee's study compares the first year data of her study with the results of an earlier study conducted for the UK Centre for Legal Education (UKCLE), where 79.1% of students had the intention of entering the legal profession.

²⁴ Andrew Francis, 'Legal education, social mobility, and employability: possible selves, curriculum intervention, and the role of legal work experience' (2015) 42 *Journal of Law and Society* 173, 177.

In employability discourses, graduates are often described as knowledge workers bringing with them skills, knowledge and intellectual capital that will ‘springboard them into desirable occupational positions’.²⁵ If we consider employability in relative and absolute terms, the ‘absolute’ requires the graduate to differentiate themselves within the hierarchy of job seekers through the development of knowledge and skills and the ‘relative’ will depend on the demand for graduates at any given time.²⁶ Law schools cannot change the ‘relative’ dimension of employability but can contribute towards the ‘absolute’ dimension.

The law curriculum has to manoeuvre a path that synthesizes substantive legal knowledge with practice based and employability skills. This has always been a challenge with proponents of a liberal legal education²⁷ querying the need for skills and employability type activities being encompassed within the undergraduate curriculum. However, the pressure from government, employers and students to produce ‘job ready’ graduates propels all but the most elite universities towards embracing this agenda. The move towards centrally set and marked assessments in England and Wales (Solicitors Qualifying Exam (SQE))²⁸ as a gateway to the solicitors’

²⁵ Michael Tomlinson, ‘Investing in the self: structure, agency and identity in graduates’ employability’ (2010) *Education, Knowledge & Economy* 4(2), 73, 74.

²⁶ Philip Brown, Anthony Hesketh and Sara Williams, ‘Employability in a knowledge-driven economy’ (2003) *Journal of Education and Work*, 16:2, 107, 110.

²⁷ For a discussion of what is meant by a liberal legal education see, for example Jessica Guth & Chris Ashford ‘The Legal Education and Training Review: regulating socio-legal and liberal legal education?’ (2014) *The Law Teacher*, 48:1, 5-19, DOI: 1080/03069400.2013.875304; A Bradney, ‘Conversation, Choices and Chances: The Liberal Law School on the Twenty-First Century’ (Oxford Hart Publishing 2003).

²⁸ SRA, ‘A new route to qualification: the Solicitors Qualifying Examination’ (2017) www.sra.org.uk/sra/consultations/solicitors-qualifying-examination.page, accessed 6 June 2018.

route into the legal profession is unlikely to alter that situation as law departments in England and Wales make strategic decisions on where to position themselves as they navigate this radical new approach to legal training. Under the SRA's new scheme, qualifying law degrees, law conversion courses (CPE/GDL) and Legal Practice Courses will be replaced by the SQE and with no SRA accreditation requirements to meet, law departments will in theory have greater freedom to redesign the curriculum.²⁹ However, such choices will depend on whether and to what extent SQE preparation will form part of their offer. Whatever choices are made, employability will retain its relevance and in fact may become even more important in what will be a period of change and uncertainty for both students and Law departments as to the value of having a law degree that no longer attracts SRA accreditation.³⁰

In order to blend substantive legal knowledge with practice based skills, an increasing number of law schools in the UK have clinics that offer live client work to law students as part of their legal education.³¹ Apart from improving the student experience, it also provides students with a glimpse of the 'legal environment that awaits them upon

²⁹ Although, the qualifying law degree will remain relevant for entry to the bar, Bar Standards Board, 'BSB Policy Statement in Bar Training' (2017), [/www.barstandardsboard.org.uk/media/1825162/032317_fbt_-_policy_statement_version_for_publication.pdf](http://www.barstandardsboard.org.uk/media/1825162/032317_fbt_-_policy_statement_version_for_publication.pdf), accessed 6 June 2018'

³⁰ See Mark Davies, 'Changes to the training of English and Welsh lawyers: implications for the future of university law schools' (2018) *The Law Teacher*, 2018 Vol. 52, No.1, 100-125. DOI:10.1080/03069400.2017.1394145, for a fuller discussion of these points.

³¹ For more information please see LawWorks Law School Pro Bono and Clinic Report 2014, available via <https://www.lawworks.org.uk/solicitors-and-volunteers/resources/lawworks-law-school-pro-bono-and-clinics-report-2014> Accessed 01.04.16.

graduation.’³² It provides a learning environment and experience that cannot be duplicated in the classroom. While CLE is becoming increasingly popular there remains some contention, and a lack of evidence, as to whether CLE provides students with the necessary skills and competencies to enhance their employability. We make logical claims that students working with live clients will enhance their employability, giving them experience of the law in a practical setting prior to starting training contracts or equivalent. However, there is little data, particularly for the UK, to support this³³.

In order to determine which skills our graduates should be equipped with and whether CLE can contribute towards the development of those skills, we undertook a pilot study to interrogate stakeholder perceptions of CLE within an employability context. This paper, whilst only a small study in Newcastle, UK, has attempted to do this. Northumbria University is a post 1992 university and the Law School has a long tradition of delivering vocational, practice focussed courses. The Law School is well placed to carry out this research with its award winning, internationally renowned clinic, known as the Student Law Office (SLO), which is an integral part of our MLaw course³⁴ and which offers a full casework in-house model with the capacity to provide

³² James Marson, Adam Wilson and Mark Van Hoorebeek, 'Necessity of Clinical Legal Education in University Law Schools: A UK Perspective' (2005) 7 *International Journal of Clinical Legal Educ* 29, 30.

³³ There is an Australian paper that interrogates the connection between graduate employability skills and law clinics, Francina Cantatore, 'The Impact of Pro Bono Law Clinics on Employability and Work Readiness in Law Students' (2018) *International Journal of Clinical Legal Education* 25:1, 147-172.

³⁴ For more information visit <https://www.northumbria.ac.uk/study-at-northumbria/courses/m-law-exempting-ft-uufmay1/>.

not just advice, but representation. For the majority of students, participating in the law clinic is a compulsory, credit bearing part of their studies.³⁵ Students work on cases under the supervision of members of academic staff who are legally qualified, with experience as lawyers in practice.

Methodology

The purpose of this research is to get a fuller insight into perceptions of CLE by interrogating participants' experiences as employers, alumni, students and clinical teaching staff to gain a better understanding of what employability skills can and perhaps cannot be gained from clinic in its current form. This study follows a subjectivist approach to studying social phenomena and used qualitative analysis from the focus groups. The research was inductive and interpretive and drew out themes from the data collected;³⁶ we were theory building as opposed to theory testing. In our analysis, we were conscious of moving back and forth between a more naïve and inductive content analysis and deductive testing of our own preconceived ideas and by using a participatory and open ended data collection tool we were able to collect experiential insights into the participants' perceptions.

³⁵ For more information, visit <https://www.northumbria.ac.uk/about-us/academic-departments/northumbria-law-school/study/student-law-office/>.

³⁶ John Dewey, (1933) 'How We Think: a restatement of the relation of reflective thinking to the educative process.'

In this study, four focus groups were used to examine the views of employers from local law firms (9 participants); alumni (8 participants) who had participated in the law clinic at Northumbria University and who were in employment locally; current students (6 participants) participating in the law clinic; and clinical teaching staff (10 participants). The employer group comprised employers who have employed Northumbria University graduates in the past and who had an understanding of what is meant by CLE having recruited Northumbria graduates over many years³⁷. Each focus group lasted approximately one hour and were recorded and then transcribed. The CBI/NUS model of employability was used, which lists the following skills and attributes: positive attitude, self-management, team working, business awareness, problem solving, communication, numeric awareness and basic information technology skills.³⁸ This list was shown to each group who were asked to comment on this in the context of the clinical provision at Northumbria, the Student Law Office. This approach was chosen to give the participants some structure to explore the themes without constraining their ideas, and they were able to add to the model or remove or vary anything within it.

³⁷ We appreciate that CLE is not universally understood, Linden Thomas, 'It Puts the Law They've Learnt in Theory into Practice: Exploring Employer Understandings of Clinical Legal Education' in Linden Thomas, Steven Vaughan, Bharat Malkani and Theresa Lynch (eds) *Reimagining Clinical Legal Education* (Hart Publishing 2018) 127-154, 141.

³⁸ CBI/NUS Working Towards Your Future (2011).

We were cognisant of our ‘insider’ status as lecturers undertaking research using alumni, peers and students as participants and were reflexive³⁹ in our approach to analysing the data. While one of the researchers played a major role in the law clinic, the other did not and that separation along with our recognition of potential bias from the ‘insider’⁴⁰ positioning created a consciously reflexive⁴¹ environment that enabled us to consider the data through a critical lens.

Results

There was agreement across the groups that all the skills in the CBI/NUS model were relevant to current law practice albeit some required greater emphasis than others. A key theme was communication in all its different forms with the employers highlighting how critical it is to client relations but that some trainees/paralegals ‘hide’ behind emails rather than picking up the phone. Alumni felt very strongly that their SLO experience gave them an edge when they first started in their firm as they had already been exposed to clients during their year in the SLO, with one alumni commenting:

³⁹ AL Cunliffe, ‘Reflexive inquiry in organizational research: Questions and possibilities’ (2003) *Human Relations* 56(8): 983-1003.

⁴⁰ B Bourke, ‘Positionality: Reflecting on the research process’ (2014) *The Qualitative Report*, 19(33):1-9; Sonya Corbin Dwyer and Jennifer L Buckle, ‘The space between: On Being an Insider-Outsider in Qualitative Research’ (2009) *International Journal of Qualitative Methods*.

<https://doi.org/10.1177/160940690900800105>; Elizabeth McNess, Lore Arthur & Michael Crossley, ‘“Ethnographic dazzle” and the construction of the “Other”: revisiting dimensions of insider and outsider research for international and comparative education’ (2015) *Compare: A Journal of Comparative and International Education*, 45:2, 295-316, DOI: [10.1080/03057925.2013.854616](https://doi.org/10.1080/03057925.2013.854616).

⁴¹ *The Sage Handbook of Qualitative Business and Management Research Methods* (Sage Publications 2017) Chapter 23.

I was happy to pick up a phone in my first seat on my first day, just ring someone up because of the SLO, I know trainees in my year, when we started on our first day were panicking over making a phone call because they'd never done it before.

The student group certainly shared this view and felt that they had developed their communication and client care skills and that their fear of calling a client had diminished as their exposure to clients grew, with one students saying:

It seems ridiculous now, but, like, if you were on a training contract and you hadn't had the SLO, imagine if you got told to ring a client, you'd be scared but now I just go 'yeah cool',

and another adding;

...being in the SLO kind of gives you that groundwork [when dealing with clients] and what you need to be able to build on so that you can deal with clients on a day to day basis as part of a firm.

Employers emphasised the importance of communication in its broadest form, which is congruent with other findings,⁴² and that they needed graduates who could adapt and deal with different types of people across a spectrum of levels. This related not just to clients but also other professionals including those within the employer organisation. Linked to that, alumni recognised the importance of building networks and this was an area along with business awareness that they felt they were not exposed to during their clinical experience. For employers, unsurprisingly, they

⁴² For example, David Rigg, 'Embedding Employability in Assessment: searching for the balance between academic learning and skills development in law: a case study' (2013) *The Law Teacher*, 47:3, 404-420; W Archer and J Davison, 'Graduate employability, "What do employers think and want?"' (2008) The Council for Industry and Higher Education. <http://www.cihe-uk.com>.

wanted graduates to be ‘commercial’ and work quickly and efficiently with an awareness of the costs for both the firm and the client. This emphasis on commerciality is shown in Thomas’s research too where the majority of the participants in the study ‘specifically mentioned commercial awareness as a desirable quality in future recruits’.⁴³

The SLO works on a pro bono model and does not have a financial imperative, as one alumni said:

I think there is a little bit that could be done maybe just to say ‘look guys, in real life, you’re not just going to be sitting there, being spoon-fed’ ...it’s not just a learning exercise, at the end of the day it’s a business,
with another adding,

in the SLO you could quite happily sit there for hours and hours and hours on the task that, you know, you get into a firm and you can’t really sit there for hours and hours doing it, that’s not profitable.

The student group was not ignorant of commercial realities, one student highlighted this;

I think more should be made of business awareness because I think most of it stems from that: if you understand how the business works and what the aims are for the customer or the client then the way you work and how you relate yourself to that job – it all stems from that...

While they had an appreciation that spending too much time on a small issue was not cost effective, it was clear that, for the students’ focus group, in a clinic, which is

⁴³ Linden Thomas, ‘It Puts the Law They’ve Learnt in Theory into Practice: Exploring Employer Understandings of Clinical Legal Education’ in Linden Thomas, Steven Vaughan, Bharat Malkani and Theresa Lynch (eds) *Reimagining Clinical Legal Education* (Hart Publishing 2018) 127-154, 141.

assessed for academic credit, assessment is the 'currency'. Their motivation was to gain the best mark and that was their primary driver and if that meant spending a lot of time on a small issue then they would always choose to do so in an educational environment. As one student said:

I think you know that's the case [that you need to work efficiently in real life] but then because it doesn't affect us we just carry on doing it. ...If in the real world you can only spend 20 minutes, I would spend an hour if it meant I get a top mark!

Clinical supervisors were well aware of commercial drivers, but they also saw the law clinic experience as providing intensive feedback and mentoring⁴⁴ that would enable students to be resilient enough to maintain their independence and autonomy in their future careers. Both the student and the staff groups highlighted an important element, that the SLO exposes students to the 'messiness of law', to the reality away from carefully crafted 'academic' problems to appreciate that client problems routinely do not 'neatly fit into any kind of straightforward legal answer'.

Another theme arising from these focus group discussions included the differing views of employers and students as regards the value of the law clinic experience on their employability skills. The impact of the clinical experience was clear from the alumni group, who were overwhelmingly positive about their experience in the law

⁴⁴ This view expressed by supervisors on the importance of the educational experience is reflected in the 2014 LawWorks survey, where 94% of the law schools who responded to the survey rated 'educational value' as 'very important': 'The Law Works Law School Pro Bono Clinic Report 2014', <https://www.lawworks.org.uk/sites/default/files/LawWorks-student-pro-bono-report%202014.pdf>.

clinic and spoke with great affection of this and how they continue to reflect on what they have learned there, with an alumni commenting:

I was so grateful to have the SLO because then I had a bit more confidence...because even though I didn't have much supervision [in their job], I had, sort of, an idea of what I was doing because I had done it previously.

One employer did not feel they could differentiate between those who came to them having had experience in the SLO, and those who have not, although amongst the alumni, this clinic experience was clearly greatly valued, not just by them but by their employers. Whilst proponents of CLE and students alike may hope their experience in clinic enables them to stand out to employers, there is also a value for many students from post 92 universities simply to be perceived as on a par with their peers, bearing in mind that many of those peers are likely to have significantly higher social capital.

There was also discussion within the employer, alumni and staff groups around how to 'sell' clinical experiences to prospective employers and the balance to be achieved between those who undersell and those who oversell. The alumni did highlight the importance of contextualising the clinic experience when discussing their skills with prospective employers, for example, by showing employers that they had an awareness of the ways in which clinic was not the same as legal practice, in terms of volume, speed, and level of supervision and feedback.

However, perhaps the most impactful aspect of the focus groups was the way alumni spoke with both passion and enthusiasm of their time in clinic, and the value to them

when they started as legal professionals, particularly in terms of confidence. One alumni said:

I feel that that's helped me a lot when I've then transferred into a firm because now I'm not scared to be thrown in the deep end and I'm not scared to go and try new things or be in difficult situations or argue a difficult case because I think it's built the confidence that I've needed to be able to do that,

with another adding:

I think the SLO is such a good stepping stone for that because you are put in that position where you do need to ask questions and you might not know the answer or you might have a different idea to what somebody else has said and it's having the confidence to put that across.

This idea of the law clinic as a valuable stepping-stone was reflected in another student comment;

I think there is quite a lot of difference between working in a firm and the SLO but I think it's a useful difference because I think the SLO is never going to fully replicate life in a firm but it provides something that a firm can't because you really have got people who have that time to give you really really thorough supervision where you have got that extra time to consider things fully and so you do get a bit more in-depth training.

It can be seen from these themes and comments that employability skills can and are being developed in the SLO, but that currently there is limited exposure to aspects of commerciality that would further enhance the students' employability. While 'confidence' does not fit within the NUS/CBI model of employability as a separate entity, the 'positive attitude' that is at the centre of the model is only possible if

individuals are confident and both the student and alumni group saw the clinic as pivotal in building their confidence when transitioning into employment.

Interrogating the relationship between CLE and employability

Our study sits at an intersection between ‘clinic’ and ‘employability’ and as such we will review the discourse emerging from the literature.

CLE provides an alternative context of the ‘meaning, operation and consequences of legal rules and doctrines’⁴⁵ and enables law students to learn by engaging with their studies in a live client environment.⁴⁶ Its primary intent is to engage students in ‘active rather than passive learning’⁴⁷ by providing contexts for learning that differ from traditional pedagogical legal education.⁴⁸ Amsterdam has criticised the narrowness of traditional methods which:

‘failed to develop in students’ ways of thinking within and about the roles of lawyers- methods of critical analysis, planning, and decision-making which are not themselves practical skills but rather the conceptual foundations for practical skills and for much else, just as

⁴⁵ Jonny Hall and Kevin Kerrigan, ‘Clinic and the wider law curriculum’ (2011) 15 *International Journal of Clinical Legal Education* 25, 30.

⁴⁶ Georgina Ledvinka, ‘Reflection and assessment in clinical legal education: Do you see what I see?’ (2006) 9 *International Journal of Clinical Legal Education* 29.

⁴⁷ Lord Chancellor’s Advisory Committee on Legal Education and Conduct 1st Report, April 1996, paragraph 2.2, cited in, Jonny Hall and Kevin Kerrigan, ‘Clinic and the wider law curriculum’ (2011) 15 *International Journal of Clinical Legal Education* 25.

⁴⁸ Richard Grimes, ‘Reflections on Clinical Legal Education’ (1995) 29 *Law Tchr.* 169.

case reading and doctrinal analysis are foundations for practical skills and for much else.’⁴⁹

In Amsterdam’s opinion, CLE could address the failings in traditional methods and provide students with the skill-set needed for modern practice where it was no longer possible to ‘impart to students a self-contained body of instruction in the law.’⁵⁰

After the boom of CLE in the US in the 1960/70s⁵¹ academics and clinicians began a discourse around skills teaching and its place in legal education in conjunction with a discourse around the importance of different legal skills in preparing law students for practice.⁵² These types of studies are beginning to emerge in the UK. Marson et al highlight the importance of incorporating CLE into law school curriculums,⁵³ stating that this kind of learning experience ‘invigorates’⁵⁴ students and provides them with real life examples of skills that employers require. Other studies, presented as conceptual papers, have concluded that CLE is the best teaching method to provide

⁴⁹ AG Amsterdam, ‘Clinical Legal Education – A 21st Century Perspective’ (1984) 34 J. LEGAL EDUC. 612.

⁵⁰ *ibid* 612.

⁵¹ FS Bloch (ed), ‘The Global Clinical Movement: Educating Lawyers for Social Justice’ (Oxford University Press 2011).

⁵² R Schwartz, ‘The Relative Importance of Skills Used by Attorneys’ (1973) 3 Golden Gate Law Review 321; D Benthall-Nietzel, ‘An Empirical Investigation of the Relationship Between Lawyering Skills and Legal Education’ (1975) 63 Kentucky Law Journal 373; LL Baird, ‘A Survey of the Relevance of Legal Training to Law School Graduates’ (1978) 29 Journal of Legal Education 264 ; S Bright, ‘What, And How, Should We Be Teaching?’ (1991) 25 Law Tchr.11; E Peden & J Riley, ‘Law Graduates’ Skills - A Pilot Study into Employers’ Perspectives’, (2007) Sydney Law School Research Paper NO. 07/81. Accessed via <http://ssrn.com/abstract=1034823>.

⁵³ James Marson, et al., ‘The Necessity of Clinical Legal Education in University Law Schools: A UK Perspective’ (2005) 7 International Journal of Clinical Legal Education, 29.

⁵⁴ *ibid* 31.

our students with the skills, attributes and knowledge they will need for practice, but, with no data to support these conclusions, there is a credibility gap.⁵⁵

The lawyering skills research continues but with the economic downturn, the increase in clinical programmes has attracted a new line of research triggered by a paper by Professor Yackee from the US, which proved highly controversial and sparked a lively exchange of views.⁵⁶ Yackee undertook an empirical examination of the link between law school experiential learning opportunities (i.e. CLE) and employment outcomes and concluded that ‘there is not much evidence that law schools that provide greater opportunities for skills training have substantively better employment outcomes than those law schools that provide fewer opportunities’.⁵⁷ His project focused on the narrower concept of employability being about ‘getting a job’ and, perhaps with an eye to anticipated criticism, said that he was not attempting to show that CLE is ‘wasteful, misguided, or otherwise undesirable’,⁵⁸ although he is clearly not a CLE proponent! He opines that his study suggests that the investment into CLE may not pay off and can actually be harmful to employment outcomes⁵⁹ although it could be argued that this was not in fact demonstrated. His reasoning is that law schools with

⁵⁵ For example, Russell discusses how changes to the LLB curriculum at London Southbank University to include extra-curricular clinic, which it was claimed would enhance employability, amongst other benefits. However, this was a descriptive piece, with no specific data to support these conclusions: J Russell, ‘Enhancing employability for LLB law graduates - initiatives with ILEX and Clinic at London South Bank University’ (2011) *The Law Teacher*, 45:3, 348-360.

⁵⁶ JW Yackee, ‘Does Experiential Learning Improve JD Employment Outcomes?’ (2015) *Wis. L. Rev.* 601.

⁵⁷ *ibid* 604.

⁵⁸ *ibid* 604.

⁵⁹ *ibid* 614.

poorer employment outcomes invest more into CLE,⁶⁰ and that the prestige of a law school is what drives employment outcomes, with the lower prestige bringing with it lower employment outcomes.⁶¹ The results of Yackee's study are based on graduates from the top 100 U.S. law schools who have gone on to become attorneys, and does not include other legal jobs, such as clerkships and paralegal. The failure to include other legal jobs and opportunities, which arguably do count towards legal employment, provides a limited picture. Perhaps this can be explained by his concluding sentence that there is a lack of evidence that CLE is likely to improve graduates' 'overall prospects of obtaining a quality job as a lawyer'.⁶² Thus, Yackee has gone from 'any employment' with a law degree to what he refers to as 'quality' jobs. Yackee acknowledged that the empirical analysis of a link between law school clinics and employment outcomes was preliminary and that the 'statistical model is admittedly thin'.⁶³ Kuehn certainly agreed and addressed a number of methodological concerns about Yackee's approach in his 2015 paper.⁶⁴ Kuehn used Yackee's methodology, with some adjustments, to highlight how Yackee's study could not draw reliable conclusions of the effect of law clinics and CLE on employability.⁶⁵ He concluded that Yackee's 'method does not support any conclusion about if or to what

⁶⁰ *ibid* 614-615.

⁶¹ *ibid* 612-613.

⁶² *ibid* 622.

⁶³ *ibid* 609.

⁶⁴ RR Kuehn, 'Measuring Clinical Legal Education's Employment Outcomes' (2015) Legal Studies Research Paper Series, Paper No. 15-12-01.

⁶⁵ *ibid* 646.

degree law clinic availability or experiences affect employment outcomes'.⁶⁶ Kuehn recommends that this kind of research should be done on a school-by-school basis⁶⁷ but does agree, however, that there needs to be more research conducted in this area before any strong conclusions can be drawn.

Kuehn argues that other studies have shown CLE helps graduates to secure employment, specifically referencing Findley's response to Yackee. Findley, in his conceptual paper, considers whether, if Yackee's conclusion that CLE does not seem to improve employment outcomes is correct, then we should be asking *why* employers aren't influenced by CLE and what do employers want in terms of CLE and skills training,⁶⁸ working with them so they understand what CLE provides law graduates with, in terms of skills, attributes and knowledge. Critiquing Yackee's methodology, he states that the data cannot tell us various other relevant answers, such as whether CLE helps graduates get their first choice of job or with a better salary.⁶⁹ Regardless of whether CLE helps employment outcomes, Findley highlights that '...data about the hiring rates of graduates from various law schools should not dominate discussions about the value of clinical education'.⁷⁰ If law schools work more with employers to enable them to understand what CLE can provide and for educators to

⁶⁶ *ibid* 647.

⁶⁷ *ibid* 664.

⁶⁸ KA Findley, 'Assessing Experiential Legal Education: A Response to Professor Yackee' (2015) Univ. Of Wisconsin Legal Studies Research Paper No. 1348 627, 628. Accessed via <http://ssrn.com/abstract=2592684> last cited 04/04/16.

⁶⁹ *ibid* 640-641.

⁷⁰ *ibid* 643.

understand the needs of employers then statistics around graduate employment will not be a driving factor, but equipping students with what they need to start practice competently will be. While Yackee's research certainly caused a scholarly 'rumpus', it did also open an interesting debate around the importance/relevance of clinical experience to American employers.

Turning now to the UK perspective, Francis⁷¹ has argued that legal employability was a 'negotiated and situated process' and had to be taken beyond the skills and attributes conceptualisation and understood through the psychological concept of 'possible selves'.⁷² Francis's study drew on empirical research looking at legal work experience, which challenged the 'notion of the legal market as a neutral sphere within which individuals succeed by virtue of their own merit'. Francis interrogated the impact of legal work experience on employability, and the influences of social and cultural reproduction on access into the legal profession⁷³. This study consisted of surveys and focus groups with pre and post-1992 university students and a survey distributed to 50 law firms. While Francis's response rate was low (16%), he stated responses were consistent with other studies (e.g. a study by Kings College London, who conducted a survey with 20 named magic circle law firms⁷⁴). His sample consisted of multinational, magic circle or large corporate law firms bar one regional

⁷¹ Andrew Francis, 'Legal Education, Social Mobility, and Employability: Possible Selves, Curriculum Intervention, and the Role of Legal Work Experience' (2015) 42 *Journal of Law and Society* 173.

⁷² H Markus and P Nurius, 'Possible Selves' (1986) 41 *Am. Psychologist* 954.

⁷³ Francis drew on the work of Bourdieu, and two of his key concepts, habitus and cultural capital, as a way of understanding an individual's social position - P Bourdieu, 'The Logic of Practice' (1990) 59.

⁷⁴ King's College London Law Employability Research, in partnership with The Times 2013.

law firm. Again, the focus is not on graduate legal jobs generally, but the ‘quality jobs’ similar to those mentioned in Yackee’s study.

Francis concluded from his study that social mobility and employability were not influenced so much by relevant work experiences as by social background. For students who are from a more privileged background the future is ‘knowable’ and this allows them to see their ‘future selves’⁷⁵ as lawyers. Students from pre-92 institutions were more likely to apply, multiple times, for formal legal work experience and students with family/friends connections to the legal profession were twice as likely to have secured work experience at an early stage as those without connections.⁷⁶ For students from less advantaged backgrounds the future is not ‘knowable’ and thus those students can’t use this future idea of themselves as lawyers as motivation to apply at all or to apply time and time again for informal work experience, vacation schemes etc. Students from ‘particular backgrounds’ or who have ‘attended particular educational institutions’⁷⁷ need more support to understand what firms are looking for, and to be able to access opportunities. Francis’ findings highlight that employers are looking for trainees who stand out and this is usually demonstrated through extra-curricular activities. While this may seem a neutral requirement, many students at post-92 universities are juggling jobs on top of their studies, which is a barrier not only to accessing extra-curricular activities but also to

⁷⁵ Andrew Francis, ‘Legal Education, Social Mobility, and Employability: Possible Selves, Curriculum Intervention, and the Role of Legal Work Experience’ (2015) 42 *Journal of Law and Society* 173.

⁷⁶ *ibid* 187-188.

⁷⁷ *ibid* 201.

gaining unpaid legal work experience. One of the employer participants in Francis' paper commented that "a burning ambition to whitewater raft on the Amazon" could be a legitimate reason why an applicant had not undertaken work experience,⁷⁸ demonstrating the type of alternative experience that is valued. As the LETR report has highlighted, graduates from non-elite universities and less privileged backgrounds are disadvantaged from developing the preferred CV to demonstrate the 'spark' so often referred to by elite recruiters, with a participant commenting, 'I'm sorry I couldn't go to Cambodia'.⁷⁹ Interestingly, King provides a view from practice as a manager from within a Magic Circle firm, and looks at the choice students may have between clinic (at institutions where this is optional rather than credit bearing) and sporting or charitable extra-curricular activities, without mention of the struggle many students have to manage work and studies.⁸⁰ Clearly, students from less-privileged backgrounds are indeed at a disadvantage in this highly complex and opaque elite recruitment process.

Francis also concludes that for law firms who are considering the value of CLE it is 'unlikely to be viewed as carrying the same cultural capital as traditional forms of

⁷⁸ Andrew Francis, 'Legal Education, Social Mobility, and Employability: Possible Selves, Curriculum Intervention, and the Role of Legal Work Experience' (2015) 42 *Journal of Law and Society* 173.

⁷⁹ LETR, *The future of legal services education and training regulation in England and Wales*, p235.

⁸⁰ Tony King, 'Clinical Legal Education: A View from Practice' in Linden Thomas, Steven Vaughan, Bharat Malkani and Theresa Lynch (eds) *Reimagining Clinical Legal Education* (Hart Publishing 2018) 117-126.

legal work experience'.⁸¹ The value of what is learnt is dependent on what a student is exposed to whilst engaging with CLE and 'the preparedness of the profession to recognize any distinction that such initiatives may bring'.⁸² These points have been re-examined in Thomas's research⁸³ which investigated the level of awareness and understanding of clinical legal education by legal recruiters. Thomas's research was in two phases, firstly there was a desktop review of 50 graduate recruitment webpages and, secondly interviews were carried out with 18 professionals involved in the recruitment of trainee solicitors and barristers. The interviewees came from a cross section of the legal market. From this research, Thomas concluded that there was a 'general lack of understanding displayed by interviewees on the subject'⁸⁴. However, in contrast to Francis's opinion, once the interviews has progressed and the legal recruiters had a better understanding of what was meant by CLE, 'The majority of interviewees appeared to draw little or no distinction between experience generated through a clinical programme and experience with a law firm or chambers.'⁸⁵

Given this is a period of seismic change for the legal profession where the effects of globalization and new technologies will continue to disrupt the status quo and new

⁸¹ Andrew Francis, 'Legal Education, Social Mobility, and Employability: Possible Selves, Curriculum Intervention, and the Role of Legal Work Experience' (2015) 42 *Journal of Law and Society* 173, 196.

⁸² *ibid* 195.

⁸³ Linden Thomas, 'It Puts the Law They've Learnt in Theory into Practice': Exploring Employer Understandings of Clinical Legal Education' in Linden Thomas, Steven Vaughan, Bharat Malkani and Theresa Lynch (eds) *Reimagining Clinical Legal Education* (Hart Publishing 2018) 127-154.

⁸⁴ *ibid* 137.

⁸⁵ *ibid* 143.

types of lawyers and legal employers have already and will continue to emerge.⁸⁶ We must develop our curriculum in accordance with what skills and competencies we would like our students to graduate with, helping to develop their employability. Ensuring law programmes are relevant and innovative will be critical in attracting students and clinical legal education can play a key role in this as it has proven to not only be a successful pedagogical approach in the context of legal education but is also highly regarded by students and prospective students. It is more important than ever for Law schools to work more closely with law firms to inform them of the benefits of CLE, as is engaging in dialogue to better understand what they are looking for in graduates, and by going further than the large corporate firms in London.

Conclusion

So how valuable is the law clinic experience in developing the skills necessary to transition to employment? Francis's work on legal work experience argues that whilst experiential learning in the form of clinical work can be 'an effective way to develop knowledge and skills,' in terms of the transformation of the employability of students from all backgrounds, 'the value of what is learnt will depend on the work to which they are exposed, the ability of the student to identify what they are learning, and, ultimately, the preparedness of the profession to recognize any distinction that such

⁸⁶ See Richard Susskind, 'Tomorrow's Lawyers: An Introduction to Your Future' (OUP 2013) for some examples of possible future roles.

initiatives may bring.’⁸⁷ He reflects that ‘legal recruiters instinctively saw traditional forms of informal traditional work experience as signaling “commitment” rather than valuing it for skills and attributes which might equally be developed in credit-bearing modules.’⁸⁸ Francis cites the importance of ‘additionality’, that is, the additional factor which makes students stand out to employers, and that ‘there is limited value in compulsory credit bearing ‘cultural capital’.⁸⁹ This makes somewhat depressing reading, when taken alongside the almost evangelical fervor with which students and ex-students talk of their clinical experiences at Northumbria University as part of such a compulsory, credit bearing module. However, it is clear not all legal recruiters share that view⁹⁰ and for those students in post-92 universities such as Northumbria, who can struggle to access appropriate work experiences, an in-house law clinic may have the potential to bridge this gap at least in part - but only if students are able to ‘frame’ this experience appropriately when engaging with employers in the recruitment process.

The enthusiasm with which alumni spoke of their experience in the law clinic, and the great value it was to them on entering employment in legal practice was striking; clearly clinic was worthwhile, and provided them with employability skills including

⁸⁷Andrew Francis, ‘Legal Education, Social Mobility, and Employability: Possible Selves, Curriculum Intervention, and the Role of Legal Work Experience’ (2015) 42 *Journal of Law and Society* 173.

⁸⁸ *ibid* 196.

⁸⁹ *ibid* 201.

⁹⁰ Linden Thomas, ‘It Puts the Law They’ve Learnt in Theory into Practice’: Exploring Employer Understandings of Clinical Legal Education’ in Linden Thomas, Steven Vaughan, Bharat Malkani and Theresa Lynch (eds) *Reimagining Clinical Legal Education* (Hart Publishing 2018) 127-154.

a level of confidence which enabled them to use the experience as a 'real life bridge between academic study and practice'.⁹¹ The clinical experience appeared to have helped them to develop resilience in terms of dealing with new situations at the start of their legal careers. Whilst proponents of clinic may cite the skills development side of clinic, it is likely (according to Tomlinson) that success of graduates relies on the 'extent to which they can establish positive identities and modes of being that allow them to act in meaningful and productive ways'⁹² and that experiences in clinic help to affirm their emerging sense of workplace identity, and to withstand some of the challenging and 'potentially destabilising experiences'⁹³ they may have on entering graduate employment.

There was a multiplicity of views amongst employers about the value of clinic experience. Employers are managing a situation of over-supply where excellent academic qualifications are assumed. Increasingly these qualifications need to be accompanied by a range of 'soft' skills with considerable attention paid to interpersonal and communication skills.⁹⁴ The real task for employers is looking at areas of distinction and in this study, employers highlighted two such areas which were communication and commercial awareness. Communication was seen as not

⁹¹ Tony King, 'Clinical Legal Education: A View from Practice' in Linden Thomas, Steven Vaughan, Bharat Malkani and Theresa Lynch (eds) *Reimagining Clinical Legal Education* (Hart Publishing 2018) 117-126.

⁹² M Tomlinson, 'Graduate Employability: A Review of Conceptual and Empirical Themes' (2012) *Higher Education Policy*, 25(4), 407-431, 425. doi:10.1057/hep.2011.26

⁹³ *ibid* 423.

⁹⁴ Louise Morley, 'The X factor: employability, elitism and equity in graduate recruitment, Twenty-First Century Society' (2007) 2:2, 191-207, 205 DOI: [10.1080/17450140701325782](https://doi.org/10.1080/17450140701325782).

only an essential skill but as a broad concept, with the view of the employer group being that ‘communication covers everything. You want someone who can actually get along with people.’ As Brown et al highlight, this move towards the personality package⁹⁵ may create a system which relies more on habitus and socio-economic background than a meritocratic system. In relation to commercial awareness, the challenge for clinic is to provide more exposure to commercial realities.

Clinic experience can provide the skills to navigate the challenges of the world of work in a legal environment – if they can overcome the hurdle of securing employment. Clinic can help with that hurdle as it *should* provide students with a convincing narrative with examples of experience linked to the real world of legal work. But at the point of recruitment, it does not appear, from this and other studies, to provide an automatic advantage across the board and with ever increasing numbers of students undertaking some form of clinical experience, the ‘additionality’ it offered in the past may become ‘standard’. These results suggest that students should not place an over reliance on the clinic experience as some sort of passport to employment, but see it as a testing ground for them to explore their future work identities, and springboard into their engagement with employment.

⁹⁵ Philip Brown, Anthony Hesketh and Sara Williams 'Employability in a knowledge-driven economy' (2003) *Journal of Education and Work* 16:2, 107-126, 121.

This study covered a limited sample size of nine employers, but the responses echoed findings from other studies in relation to a mismatch between employer and student perceptions of work experience,⁹⁶ in this case, relating to experience in a law clinic.

By undertaking this pilot study, we have followed Findley's⁹⁷ advice by exploring stakeholder perceptions of clinical legal education, particularly those of employers, to ensure clinic equips students with the requisite skills to begin their legal careers. As a law school which has built a reputation for the high quality of teaching and learning in the law clinic, and that has received numerous accolades for engagement with the community, outstanding student experience, and working with the local profession, there is clearly still work to be done in ensuring that students' experience receives the recognition it deserves, and that students are fully aware of the recruitment environment, and utilise their clinical experience to its best effect.

⁹⁶ Andrew Francis, 'Legal Education, Social Mobility, and Employability: Possible Selves, Curriculum Intervention, and the Role of Legal Work Experience' (2015) 42 *Journal of Law and Society* 173.

⁹⁷ KA Findley, 'Assessing Experiential Legal Education: A Response to Professor Yackee' (2015) *Univ. Of Wisconsin Legal Studies Research Paper No. 1348* 627.

LAW & ENTREPRENEURSHIP IN GLOBAL CLINICAL EDUCATION

Janet Thompson Jackson and Susan R. Jones¹

INTRODUCTION

As clinical legal education (CLE) continues to evolve and prepare *practice-ready* lawyers, and governments worldwide focus on the multilayered impact of technology, automation and artificial intelligence, there is a pressing need to examine law and entrepreneurship through the lens of global clinical legal education. The range of issues include: corporate social responsibility, disruptive technologies, microbusiness, social entrepreneurship, social impact investing, the creative economy, sustainable local economies, cooperatives and shared work, and inclusive entrepreneurship.

Indeed, new legal entities like benefit corporations and low profit limited liability companies (L3Cs) have emerged to address contemporary legal needs and in the United States. the notion of an entrepreneurial mindset is prominent.² Many of today's law

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² Calvin Gladney, *Happy Better Lawyer*, <http://www.happierbetterlawyer.com/home/> (last visited Jan. 22, 2018); David E. Pozen, *We Are All Entrepreneurs Now*, 48 Wake Forest L. Rev. 283, 284 (2008).

students are Millennial generation, ages 18-34, while others are digital natives who have not known a world without technology.

Business law clinics (BLCs), also referred to as transactional clinics,³ representing for profit, nonprofit or nongovernmental (NGOs) organizations and social enterprises aim to support the growth of entrepreneurial ecosystems while promoting social and economic justice. BLCs teach law students substantive law, practical skills and professional values. Indeed, BLCs with a social and economic justice perspective can help law students, the next generation of leaders, to develop critical analytic skills and insights into how entrepreneurship supports and sometimes hurts human rights and civil society efforts.⁴

Part one of this article examines the evolution of global CLE in western countries like the United States, United Kingdom, Canada, Australia, and in Georgia and Croatia.

Part two discusses a more recent phenomenon in CLE, the emergence of BLCs, which expand the clinical experience beyond the courtroom to the boardroom, and the differences and similarities between litigation and transactional legal clinics. **Part three** examines the rise in BLCs globally, and contains case studies of the global experience in transactional CLE with perspectives from Georgia, Croatia, Australia, Canada and the

³ Alicia Alvarez and Paul R. Tremblay, *Introduction to Transactional Lawyering Practice*, 1, 1-12 (West 2013). Transactional lawyering takes place when parties come together for economics, social, or relational value creation. For purposes of this article we use the term “business law clinics” to include both for profit and nonprofit clinics.

⁴ See, e.g., Rebekah Schouten, *Dannon debuts Non-GMO Project verified yogurts*, FOOD BUSINESS NEWS (Sept. 18, 2017), www.foodbusinessnews.net/articles/news_home/New-Product-Launches/2017/09/Dannon_debuts_Non-GMO_Project.aspx?ID=%7B86C74298-1D3A-4FD5-B3F3-1E211A889C6F%7D&cck=1 (last visited Jan. 22, 2018); See, e.g., Lynn Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (May 7, 2012).

U.K. **Part four** considers the unique pedagogical and programmatic aspects of BLCs, such as redefining “practice-ready,” teaching Millennials, and collaboration as a lawyering skill. **Part five** reflects on the significance of BLCs now. In **Part six** the article concludes by looking to the future of BLCs in a global context. The article also includes an Appendix 1 with BLC Lawyering Competencies and Learning Outcomes and Appendix 2 with a Checklist for Starting or Re-Imagining a BLC.

PART I: THE GLOBAL CLINICAL LEGAL EDUCATION MOVEMENT

As early as the 1930s, Jerome Frank, a U.S. federal appellate judge, former chair of the Securities and Exchange Commission, and a leader in the legal realism movement, argued that law schools should incorporate actual practice into legal education. Although a few law schools heeded his advice, the U.S. clinical legal education movement took root in the 1960s when the Ford Foundation created the Council on Legal Education for Professional Responsibility, Inc. (CLEPR).⁵ Thus, the U.S. experience with CLE is unique because it received substantial funding which gave it firm footing.⁶

⁵ Robert L. Doyel, *The Clinical Lawyer School: Has Jerome Frank Prevailed*, 18 NEW ENG L. REV. 577, 577 (1982-1983) (During this time, legal education was also being reexamined amid concerns over lawyer competence.).

⁶ See Frank S. Bloch, *The Global Clinical Legal Education Movement: Educating Lawyers for Social Justice*, 1, 3 (2010) [hereinafter Bloch, *Global Clinical Movement*].

The modern CLE movement⁷ emerged primarily in western countries with the United Kingdom, Canada, Australia and the U.S. as the earliest adopters during the 1960s and 1970s, in response to societal, political and economic needs.⁸ In each of these countries, the rise of CLE was associated, at some level, with dissatisfaction with lawyer training as well as a concern for those less fortunate. In the U.K., the CLE movement was tied to the emergence of voluntary legal advice centers and was part of legal education reform including “ethical inquiry”⁹ and the “student-client experience.”¹⁰ In contrast, CLE in Canada was linked to a community-based access to justice movement which encouraged law school curricula to include poverty law issues. In Australia, even in the face of tough opposition, law students spurred a student volunteerism movement which facilitated the development of CLE. In the U.S., examples of CLE are found as early as 1893 in the form of a legal aid dispensary¹¹ and later in 1921 when critics denounced legal education for its lack of an experiential component, witnessed in other professions such as medicine and engineering.¹² Notwithstanding early interests in CLE, the U.S. CLE movement, like

⁷ *Id.* at 5 (U.S. Clinical Legal Education was funded by The Council on Legal Education and Professional Responsibility (CLEPR) and Ford Foundation in the 1960s and 1970s.).

⁸ Susan R. Jones and Jacqueline Lainez, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 WASH. U. J.L. & POL’Y 85, 85-86 (2014).

⁹ Bloch, *Global Clinical Movement* at 128.

¹⁰ *Id.* at 114.

¹¹ *Id.* at 5 (A Pennsylvania Legal Aid Dispensary was established in 1893).

¹² *Id.* at 5.

other western countries, was most influenced by social issues such as poverty and civil rights.¹³

While early litigation clinics represented clients with respect to criminal defense, welfare rights and public entitlements, domestic relations and landlord and tenant cases, today clinics represent immigrants and refugees, domestic violence and human trafficking survivors, and persons wrongfully convicted of crimes. In the case of criminal exoneration, technological advances in DNA evidence have enabled this new area of practice.¹⁴ Technological advances continue to impact CLE – from law practice incubators to virtual law practice and the rise of new legal clinics in social impact investing, technology, and entrepreneurship law and policy.¹⁵

CLE began to develop in Central and Eastern Europe in the mid-nineties as former Communist countries transitioned into democratic systems of governance.¹⁶ Eastern European countries have more quickly embraced CLE than most Western European countries.¹⁷ European scholars give several reasons for this, including that the fall of communism led to high incentives to change the structure of classical classroom lectures;

¹³ Bloch, *Global Clinical Legal Education*, at 128.

¹⁴ John M. Butler, *The Future of Forensic DNA Analysis*. *Philosophical Transactions of the Royal Society B: Biological Sciences*, 370 PHILOS. TRANS R SOC. LOND B BIOL SCI. 1, 1 (Jun. 22, 2015).

¹⁵ See, e.g., Berkley and Brooklyn, *Australia Social Impact HUB Clinic*, UNSW SYDNEY, <http://www.law.unsw.edu.au/current-students/law-action/clinics/social-impact-hub-clinic> (last visited Jan. 22, 2018).

¹⁶ Marguerite Angelari, *Raising the Bar for Legal Education in Western Europe*, (Nov. 18, 2013) available at <https://www.opensocietyfoundations.org/voices/raising-bar-legal-education-western-europe>, (last visited Jan. 22, 2018).

¹⁷ Aksamovic & Genty, *An Examination of the Challenges, Success and Setbacks for Clinical Legal Education in Eastern Europe*, 20 INT'L J. CLINICAL LEGAL EDUC. 427, 429-30. (2014).

that the transition created a market demand for legal reforms; that the transformation from non-market to market economies led to increased need for free legal aid; and that a new generation of law students wanted change.¹⁸ The development of CLE in Eastern European countries in 1990s was based on U.S. models (i.e., live-client, simulation, outside placement) and benefitted from some capacity-building efforts, but resulted in diverse CLE models in Eastern Europe because the design of clinical programs reflected the desire of the clinic founders who developed them.¹⁹ Also, clinical design related to needs in a particular country (e.g., labor and refugee law) and clinic creators lacked systematic approaches or strategies to move toward a uniform concept of CLE.²⁰

Initially, many Eastern European clinics failed due to loss of funding, insufficient numbers of teachers who could practice law and had knowledge of clinic pedagogy and methodology, and legislative restrictions.²¹ And, while some clinics in Eastern Europe still struggle to find firm footing and support due to a lack of respect from traditional law professors, undeveloped clinical pedagogy, unclear clinical design, and lack of curricular flexibility,²² many clinics in Eastern and Western Europe are thriving.

Today, legal clinics exist worldwide and their growth and development are tied not only to concerns about the relevance of legal education to the lives of real people, but also to

¹⁸ *Id.*

¹⁹ *Id.* at 430.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

societal change. BLCs are no exception as they first emerged from concerns about “community economic development,” broadly defined as strategies for creating healthy communities²³ in a worldwide focus on microbusiness, and more recently global interest in the wealth gap.

PART II: THE GLOBAL EMERGENCE OF BUSINESS LAW CLINICS

As with their litigation counterparts, some U.S.-based BLCs were created and supported with external economic funding. In the case of BLCs, this funding came from the U.S. Small Business Administration, state and local governments, and the Ewing Marion Kauffman Foundation.²⁴ BLCs grew in the U.S. between the late 1970s through the mid-1990s with more than 150 transactional clinics at 200 American Bar Association (ABA) approved law schools today.²⁵ This article analyzes the rapid growth of the BLC movement. In addition, it seeks to address the questions of why so many business clinics were created at American law schools and whether there are useful lessons from the U.S. experience that can inform the global clinical legal education movement and vice versa.

²³ See generally, Susan R. Jones and Roger A. Clay Jr., *Building Healthy Communities: A Guide to Community Economic Development for Advocates, Lawyers and Policymakers*, (Feb. 6, 2010).

²⁴ Jones and Lainez, *Enriching the Law School Curriculum* at 92; Ewing Marion Kauffman Foundation, <http://www.kauffman.org/> (last visited Jan. 22, 2018).

²⁵ Jones and Lainez at 87.

U.S. BLCs, which represent new and growing businesses and nonprofit organizations that are unable to afford market rate legal services, were created and grew for many reasons.²⁶

... [M]arket forces have necessitated changes in the way legal education is delivered, including the escalating importance of clinical legal education in teaching students to think and perform like lawyers. Recent downward shifts in the economy, academic reports extolling the benefits of experiential learning enlivening experiential remedies, funding for transactional clinics, and student demand for hand-on lawyering opportunities have all led to the expansion of transactional clinical curricula. Moreover, transactional clinics are important to teaching not only substantive law, lawyering skills, and values, but they also expose law students to entrepreneurs and social entrepreneurs, helping students to understand their specialized legal needs. This exposure is essential, given the emphasis on entrepreneurship and innovation in American society and the need to cultivate an entrepreneurial spirit in law students at a time when the legal market is shifting, due, in part to rapidly developing technologies.²⁷

²⁶ Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. J.L. & POL'Y 249, 250 n. 2 (2004), http://openscholarship.wustl.edu/law_journal_law_policy/vol14/iss1/9. (At least one of the first business law clinics was funded by the US Small Business Administration. Others were part of the community economic development movement driven historically by civil society groups as early as the 1800s).

²⁷ *Id.*

Entrepreneurship has always been the backbone of the American economy, but global technological and financial advances, such as crowd funding, supported by innovation and creativity, are disrupting traditional business forms.²⁸

The rise of BLCs has continued, not only in the U.S. and Canada, but also in Europe and Australia. The emergence and popularity of these clinics has been in response to many factors, including the generational pull of Millennial law students and Millennial entrepreneurs, student demand for non-litigation lawyering experiences, the limitations of the litigation model to impact systemic poverty, the rise of entrepreneurship globally, the rise and fall and rise again of global economies, and the impact of community lawyering.²⁹ Although generically called “business clinics,” they vary widely in practice area, design and sometimes, mission. Some BLCs very deliberately stayed within the social justice mission of traditional law clinics, but some have chosen to stray from that mission. As BLCs continue to take shape around the globe, transactional clinicians are creating new space in the clinical landscape.

PART III: BLCS – THE GLOBAL EXPERIENCE

BLCs have emerged slowly in the U.K, Canada, Australia, Croatia and Georgia, and this list may not be exhaustive.

²⁸ Jeff Thomas, Praveen Kosuri, and Bernice Grant, *Democratizing Entrepreneurship: Online Documents, Tools, and Startup Know-How*, 26 J. AFFORDABLE HOUSING & CMTY. DEV. L., 193, 217-18 (Dec. 29, 2017).

²⁹ Jones and Lainez at 121.

A. BLCs in the United Kingdom:

Associate Professor Elaine Campbell of Northumbria Law School in the U.K., presenter at the first meeting of the network of European (existing and aspiring) BLCs (hereinafter the “European BLC Network”), observes that she has often been the only business law clinician in attendance at conferences and meetings on CLE. She writes, “The development of clinics providing free legal advice to businesses in the United Kingdom has been woefully slow. There is also a dearth of information about the business law clinics that do exist, or have existed in the past. They have been hidden away, or, at the very least, backwards in coming forward. This makes it difficult to chart their existence.”

³⁰ The European BLC Network, sponsored by iLINC – Establishing a European Network of Law Incubators that bridge ICT Entrepreneurs and Start-ups with Law Students, a program of the Seventh Framework Programme of the European Union and funded by the European Commission – appears to be an effort to galvanize the BLC and business law pro bono legal services community. ³¹ Professor Campbell notes that the U.K. embraced clinical legal education in the 1970s, decades after the U.S., but today “a least 70% of law schools in the U.K. are now involved in pro bono and/or clinical activity.”³²

³⁰ Elaine Campbell, *A dangerous method? Defending the rise of business law clinics in the UK*, 49 THE LAW TEACHER 165, 168-69 (Feb. 23, 2015) available at <https://doi.org/1080/03069400.2015.1004254> [hereinafter Campbell, *A dangerous method?*].

³¹ iLINC, <http://www.ilinc.com/> (last visited Jun. 29, 2018) (It is noteworthy that in the US, there are a number of pro bono legal services programs providing business law services); see, Jared Nicholson, *Offering Transactional Legal Aid to Low-income Entrepreneurs*, 6 INDIANA J OF L & SOC EQUALITY, 1 (2018) available at <https://www.repository.law.indiana.edu/ijlse/vol6/iss1/1>.

³² Campbell, *A dangerous method?* at 2.

The BLC Professor Campbell runs at Northumbria University is a “student law office” and students work in “law firms” to assist businesses, charities and social enterprises of various types and without regard to income. Projects include trademark registration, drafting company registration documents and advising directors on fiduciary duties, and drafting website terms and conditions, and contract drafting. Law students also offer free workshops to the public and to entrepreneurial groups.³³

The clinical programs that provide *legal advice* as opposed to *legal representation* to businesses are varied. As of 2011, the clinic at York Law School began offering advice to small businesses.³⁴ Similarly, in 2011, the City University of London created Start-Ed Commercial Law Clinic (Start-Ed Clinic), a free walk in clinic, run by law students supervised by “local professionals”.³⁵ The Start-Ed Clinic represents small businesses and technology start-ups with business structure and incorporation, contracts, intellectual property, and preparing companies for investment.³⁶ The University of Portsmouth, Intellectual Property Advice and Support Service (iPass) advises its students and alumni on company formation and ideation, intellectual property and invention commercialization.³⁷ At the Legal Advice Centre at Queen Mary University of London

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* It is unclear whether these local professionals are lawyers.

³⁶ *The City Law School University of London*, <https://www.city.ac.uk/law> (last visited June 29, 2018).

³⁷ University of Portsmouth, IPASS (Intellectual Property Advice and Support Services) Intellectual Property Office, <http://www.port.ac.uk/media/contacts-and-departments/pbs/law/fastforward-2012-winners-ipass-final-IP-CLINIC-FOR-STUDENT-AND-GRADUATE.pdf> (last visited July 15, 2018).

(Queen Mary) law students offer free advice to “income eligible” for profit companies and nonprofit social enterprises on a broad range of businesses, commercial and intellectual property issues.³⁸ In 2013 Queen Mary’s Centre for Commercial Law Studies created “qLegal”, a program offering legal and regulatory advice to information and communication technology early stage start-ups.³⁹ Southampton Law School has a pro bono initiative run by final year LLB students “in conjunction with specialist lawyers” designed to facilitate the students’ “development of key skills, including client interviewing, team-work and case management.”⁴⁰

The University of South Wales in Pontypridd has a Legal and Financial Advice Clinic which advises small businesses and social enterprises. Business enterprises are not eligible for free legal advice through government programs, a goal of the clinic is to fill a gap in legal assistance for individuals who need help operating a business.⁴¹

It appears that The European Network of Law Incubators (iLINC), which helps businesses and is assisted by law students, has also been a champion of BLCs. The goal of iLINC is to build European capacity to provide legal advice to information, communications and technology start-ups and entrepreneurs. Its service delivery includes direct client representation, workshops and internet portals. iLINC’s partner

³⁸ Legal Advice Centre, *Queen Mary Legal Advice Centre*, <http://www.lac.qmul.ac.uk/> (last visited Jan. 22, 2018).

³⁹ *qLegal: The small print for BIG IDEAS*, <http://www.law.qmul.ac.uk/research/funded/qlegal/> (last visited Oct.10, 2018).

⁴⁰ *Southampton Law School*, <https://www.southampton.ac.uk/law/index.page> (last visited Jan 29, 2018).

⁴¹ *Legal Advice Clinic*, <https://www.southwales.ac.uk/about/faculties-and-schools/school-law-accounting-and-finance/legal-and-financial-advice/> (last visited Oct. 30 2018).

institutions include Queen Mary University of London, KuLeuVen, Universitat Hamburg and Universiteit Van Amsterdam where students are able to provide legal advice on a very broad range of legal issues under the supervision of qualified lawyers.⁴²

B. BLCs in Canada:

The University at Windsor (Windsor Law) in Windsor, Canada has an International IP Law Clinic that works in association with the University of Detroit Mercy.⁴³ This clinic represents clients from the EPICenter, which houses “programs and services ... to help students and recent graduates start and grow their businesses.”⁴⁴ The legal representation includes patent and trademark searches and legal opinions. This cross border BLC is believed to be the first of its kind in the U.S. or Canada.⁴⁵

Western University Business Law Clinic (WBLC) in London, Ontario, Canada aims to “alleviate the burden of legal complexities put on aspiring entrepreneurs by providing

⁴² Legal Advice Centre; *see, also, The Hans-Bredow-Institut*, <https://bib.hans-bredow-institut.de/en/forschung/ilinc-establishing-european-network-law-incubators-0> (last visited Jan. 22, 2018) (“The Hans-Bredow-Institut is collaborating with Queen Mary and Westfield College at the University of London, the University of Amsterdam and the Catholic University of Leuven to conduct the project, iLinc: Establishing a European Network of Law Incubators that Bridge ICT Entrepreneurs and Start-ups with Law Students,” as supported by the EU Commission.”).

⁴³ In Canada there is evidence of BLC creation in 2010. Email from Myra Tawfik, Professor of Law, University at Windsor explaining that the Center for Enterprise and Law, created in 2010 is not defunct but in 2013 it became “the EPICentre for entrepreneurial education and practice”. The Law, Technology and Entrepreneurship Clinic (LTEC) was “affiliated with the EPICentre” but in 2015 LTEC became the International IP Law Clinic.

⁴⁴ University of Windsor, *EPICenter*, <http://www.epicentrewindsor.ca> (last visited June 13, 2018). (The EpiCenter has three “Epic” components: 1) a membership program where students use the Business Model Canvas to test their ideas before joining other EPICentre programs 2) The RBC EPIC Founders Program teaches business founders about the Lean Startup model and the Business Model Canvas and 3) a membership incubation program for students, alumni and industry associates.).

⁴⁵ Law students get hands-on experience through joint international intellectual property law clinic, University of Windsor, <http://www.uwindsor.ca/law/2018-02-20/law-students-get-hands-experience-through-joint-international-intellectual-property-law> (last visited on Oct. 10, 2018).

small startup businesses with pro bono legal counsel...Traditional legal-aid-type clinics are becoming common in Canadian law schools, and provide a superb learning opportunity for students interested in areas such as family law, criminal law and litigation. In contrast, the WBLC's focus on assisting small-business clients in the wide realm of corporate law provides students with a particularly unique experience."⁴⁶

Clients must meet certain eligibility criteria in order to be represented by this clinic. They must be located in Southwestern Ontario or the surrounding area, unable to afford legal counsel, cannot have received prior legal help from a lawyer, have less than \$100,000 revenue, must have been in business for at least one year, must be approved by the WBLC Faculty Review Counsel, provide meaningful work to clinic students, and be committed to and enthusiastic about their business.⁴⁷ WBLC is student run and the students have faculty supervisors as well as outside mentor lawyers. Thirty-six law students work in teams of three. "Student volunteers are hired in their first year for a three-year commitment, so their experience within the clinic can evolve. Students in their first year perform mostly research; second years' get to fulfill a leadership role as file manager; and third years' use their previous experience to advise their colleagues in a supervisory and consultative capacity."⁴⁸ The legal matters have included new business incorporations, drafting shareholder agreements or employment contracts and working with

⁴⁶ *Id.*

⁴⁷ Western Business Law Clinic: Becoming a Client, https://law.uwo.ca/legal_clinics/western_business_law_clinic/becoming_a_client.html (last visited Oct. 10, 2018).

⁴⁸ *Id.*

trademarks. A tutoring company and a community tennis club are examples of clients at this clinic.

The Law & Business Clinic at Ryerson University in Ontario, Canada (Ryerson Law & Business Clinic) was founded by Dr. Pnina Alon-Shenker, an associate professor in the Department of Law and Business.⁴⁹ The clinic uses an outside counsel model,⁵⁰ and students are supervised “by a team of qualified lawyers from Bay St. law firms who work in tandem with Ryerson Law & Business students.”⁵¹ Selected “clients ... are some of Canada’s future business leaders.”⁵² Legal services include business organizations, partnership and joint venture agreements, non-disclosure, non-competition and employment agreements, intellectual property, contracts, tax and regulatory compliance.⁵³

Established in 2009, the Queens Business Law Clinic (QBLC) in Kingston, Ontario, Canada represents start-ups, entrepreneurs, businesses and non-for-profit organizations. Students are supervised by a program director and “two part-time lawyers who serve as review counsel.”⁵⁴ The students receive academic credit for their client work reviewing

⁴⁹ Law and Business Clinic: About Us, <https://www.ryerson.ca/tedrogersschool/lawbusinessclinic/about-us/> [hereinafter Ryerson Law and Business Clinic] (last visited Oct. 24, 2018).

⁵⁰ See Alicia Plerhoples and Amanda Spratley, *Engaging Outside Counsel in Transactional Law Clinics*, 20 *Clinical L. Rev.* 379 (Mar. 24, 2014).

⁵¹ Ryerson Law and Business Clinic.

⁵² Lawyers, <https://www.ryerson.ca/tedrogersschool/lawbusinessclinic/lawyers/> (last visited Oct. 30 2018).

⁵³ Law and Business Clinic: About Us, <https://www.ryerson.ca/tedrogersschool/lawbusinessclinic/about-us/> (last visited Oct. 24, 2018).

⁵⁴ Queen’s University Law Clinics: Business Law Clinic, <https://queenslawclinics.ca/business-law> [hereinafter Queen’s University Business Law Clinic] (last visited Oct. 24, 2018).

documents such as leases, privacy policies, trademark registrations and contracts.⁵⁵

Students also speak to local business groups about legal business issues.⁵⁶ Case work is supported by a two-semester credit course.⁵⁷

York University's Osgoode Hall Law School in Toronto boasts two BLCs, the IP Osgoode Innovation Clinic (OIC) and the Osgoode Venture Capital Clinical Project (OVC), an outside counsel clinic model. OIC, founded and directed by Professor Giuseppina D'Agostino in 2010, "is a needs-based, innovation-to-market legal clinic" operated in collaboration with Innovation York⁵⁸ and Norton Rose Fulbright Canada LLP. Osgoode Hall Law School student volunteers, known as clinical innovation fellows are supervised by lawyers from the aforementioned firm and exposed to business law issues and "actors in the innovation ecosystem."⁵⁹ The clinic offers "one-to-one legal information services to inventors, entrepreneurs, and start-up companies to assist with the innovation and commercialization processes."⁶⁰ In the OVC, students work with lawyers from Wildeboer Dellelce LLP as caseworkers, advising early stage business ventures.⁶¹

⁵⁵ Queen's University Law Clinics: Business Law Clinic: Services, <https://queenslawclinics.ca/business-law/services> (last visited Oct. 30, 2018).

⁵⁶ Business Law Clinic, <https://law.queensu.ca/programs/jd/student-experience/clinics/business-law-clinic> (last visited Oct. 30, 2018)

⁵⁷ Queen's University Business Law Clinic.

⁵⁸ York University, <http://www.yorku.ca/index.html> (last visited Jun. 29, 2018).

⁵⁹ Intellectual Property Law & Technology Program, *IP Osgoode Innovation Clinic*, <http://www.iposgoode.ca/ccr-ip-osgoode-innovation-clinic/> (last visited Jun. 29, 2018).

⁶⁰ *Id.*

⁶¹ The Hennick Centre for Business and Law, *Osgoode Venture Capital Clinic*, <https://hennickcentre.ca/fellowships/osgoode-venture-capital-clinic> (last visited Jun. 29, 2018).

In Montreal, Canada, McGill Law School has a longstanding Legal Information Clinic, “a student run, bilingual and free legal information service” committed to “meeting the needs of marginalized groups.”⁶² Started by law students in 1973⁶³ it offers advice-only services that have expanded to business matters, including nonprofit incorporations.⁶⁴

C. BLCs in Australia:

Curtin University in Perth, Western Australia provides advice to small businesses as does the University of Canberra Law School in Bruce, Canberra, Australian Capital Territory “in conjunction with the Legal Aid Act.”⁶⁵ Students from the University’s School of Law & Justice assist qualified legal practitioners from the Canberra profession in providing initial advice during the consultation.⁶⁶ In another example from Australia, the Start-up Law Clinic is a collaboration between the Bond University Faculty of Law, Bond’s Faculty of Business Transformer Program and Flow Legal, a legal consulting firm.⁶⁷ Under lawyer supervision, students in the Start-up Law Clinic volunteer for two hours a week to provide legal information (but not advice) to entrepreneurs in the Transformer

⁶² Legal Information Clinic: About Us, <http://licm.mcgill.ca/legal-information-clinic/> (last visited Oct. 10, 2018).

⁶³ Legal Information Clinic: About Us-History, <http://licm.mcgill.ca/legal-clinic-history/> (last visited Oct. 10, 2018).

⁶⁴ Legal Information Clinic: Our Services-Free Legal Information, <http://licm.mcgill.ca/legal-clinic-free-legal-information/> (last visited Oct. 10, 2018).

⁶⁵ Legal Advice Clinic for Small Businesses, <https://www.canberra.edu.au/about-uc/faculties/busgovlaw/about-us/school-of-law/legal-advice-clinic-for-small-business> (last visited Oct. 10, 2018).

⁶⁶ *Id.*

⁶⁷ Start-up Law Clinic, <https://bond.edu.au/intl/current-students/opportunities/bond-law-clinic/startup-law-clinic> (last visited Oct. 10, 2018).

Program.⁶⁸ The legal issues range from business structure to intellectual property and financing.⁶⁹

There are also experiential learning opportunities – a research and consulting model - aligned with BLCs. The University of New South Wales in Sydney, houses one such model, the Social Impact Hub, an experiential learning program and consulting service that works with “industry, social enterprises, not-for-profits and foundations to develop and conduct a variety of applied projects in different areas of social impact.”⁷⁰ Students working in the program do not enter into lawyer-client relationships but instead offer research assistance to projects in social entrepreneurship, social innovation and social finance, philanthropy, impact investing, business and human rights, corporate social responsibility, law and social movements, collective impact, and pro bono and volunteerism.⁷¹

D. BLCs in Croatia and Georgia:

A BLC in Croatia at the Josip Juraj Strossmayer University in Osijek is a collaboration between law and economics faculty to create a clinic that helps start-up entrepreneurs.⁷²

Law students work in teams to provide legal advice to entrepreneurs and start-up

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ ABOUT, SOCIAL IMPACT HUB, <https://www.socialimpacthub.org/about/> (last visited Oct. 10, 2018).

⁷¹ LAWSTUDENTS, SOCIAL IMPACT HUB, <http://www.socialimpacthub.org/law-students/> (last visited Oct. 10, 2018).

⁷² ABOUT US, LEGAL-ECONOMIC CLINIC, <https://www.pravos.unios.hr/katedra-trgovackog-prava/about-us> (last visited Oct. 10, 2018).

companies and help them with formation documents while economics students provide industry analyses.⁷³

Free University in Tbilisi, Georgia opened its National Center for Commercial Law Legal Clinic in 2012.⁷⁴ That clinic provides legal assistance on commercial matters to entities and individuals. Upper level students provide legal assistance under the supervision of lecturers of Free University or legal practitioners.⁷⁵

In summary, BLCs representing, advising and informing real clients and “BLC-like” experiential learning opportunities are growing worldwide. While the historic context for the development of these clinics may differ, they have a common goal to teach students about business law through an experiential lens.

As noted earlier in this article, the rise of BLCs mirrors global interest in entrepreneurship generally. Muhammad Yunus, Nobel Peace Prize Laureate, founder of the Grameen Bank in Bangladesh, and “one of the greatest entrepreneurs of our time”⁷⁶ according to Fortune Magazine, observes, “Every time I see a problem, my mind works in the direction of creating a business to solve it.”⁷⁷ Dr. Yunus’ observations about the importance of

⁷³ *Id.*

⁷⁴ *Mission*, NATIONAL CENTER FOR COMMERCIAL LAW, <http://nccl.ge/en/16> (last visited Jan. 22, 2018).

⁷⁵ *Id.*

⁷⁶ John A. Byrne. “The 12 Greatest Entrepreneurs of Our Time.” Fortune Magazine. Apr. 9 2012.

<http://archive.fortune.com/galleries/2012/news/companies/1203/gallery.greatest-entrepreneurs.fortune/13.html> (last visited Oct. 24, 2018).

⁷⁷ Logan Werlinger, *Muhammad Yunus Awarded George Washington University President’s Medal*, GW TODAY, (Oct. 31, 2016) available at <https://gwtoday.gwu.edu/muhammad-yunus-awarded-george-washington-university-president%E2%80%99s-medal> (last visited Jan. 22, 2018).

entrepreneurship today are instructive especially during these tumultuous times.⁷⁸ In 2016, before an audience of university students, he advocated for a “three zeros platform” for systemic change and transformation from a non-greed based civilization to a human-value based civilization: zero poverty; zero unemployment and zero net carbon emissions.⁷⁹ This platform is based on the premise that the economic structures that exist today are running in a wrong direction because they push all the wealth to the top.⁸⁰ Wealth concentration is increasing daily leaving insufficient resources at the middle and the bottom.⁸¹ Indeed, one percent of the world’s population has more than 99 percent of the world’s wealth and today only 62 people on the planet own more wealth than the bottom half of the entire population.⁸²

Demonstrating the speed of wealth concentration with the example noting that in 2010, of 388 people owned more than the bottom 50 percent of the world’s population,⁸³ Yunus argues that this terrifying pace of wealth concentration is unsustainable. Dr. Yunus goes on to add that the global wealth gap creates unhappiness in the bottom and the middle

⁷⁸ See, e.g., *About*, HALCYON HOUSE, <http://halcyonhouse.org/> (last visited Jan. 22, 2018); See, e.g., *Echoing Green: Funding Social Entrepreneurship & Innovation*, <http://www.echoinggreen.org/> (last visited Jan. 22, 2018) (A few social enterprise incubators such as Halcyon House and Echoing Green support social enterprises.).

⁷⁹ Logan Werlinger, *Muhammad Yunus Awarded George Washington University President’s Medal*, GW TODAY, (Oct. 31, 2016) available at <https://gwtoday.gwu.edu/muhammad-yunus-awarded-george-washington-university-president%E2%80%99s-medal> (last visited Jan. 22, 2018).

⁸⁰ *Id.*

⁸¹ Erik Simanis and Duncan Duke, *Profits at the Bottom of the Pyramid* (Oct. 2014), <https://hbr.org/2014/10/profits-at-the-bottom-of-the-pyramid>.

⁸² *Id.* at 11; see also Nick Bryer, *Richest 62 people as wealthy as half of world's population, says Oxfam*, THE GUARDIAN, <https://www.theguardian.com/business/2016/jan/18/richest-62-billionaires-wealthy-half-world-population-combined> (last visited Jan. 22, 2018).

⁸³ Werlinger, *infra* note 115.

of societies because they cannot share in the wealth Entrepreneurship though avenues such as social business can change wealth accumulation as entrepreneurs are wealth accumulators and not simply contributors to the one percent.⁸⁴ In the end, Dr. Yunus contends there are “three powers” that will enable a three zeros of poverty, unemployment and emissions. The first is social businesses defined as non-loss, non-dividend companies designed to address social problems.⁸⁵ The second is young people who see the new world from new perspectives abandoning the structures that created many of the societal problems, giving way to new structures and possibilities.⁸⁶ The third is technology, but not used as it is now, by “money makers or war makers,” but with a new social direction.⁸⁷ He asserts that these are the foundations for transformation from a non-greed based civilization to a human-value based civilization.⁸⁸ Building on the foundation provided by Professor Yunus’ work, it is noteworthy that some BLCs represent worker-owned cooperatives,⁸⁹ while others represent clients advocating for solidarity economies promoting just, equitable and sustainable economic structures.⁹⁰

⁸⁴ *Muhammad Yunus @ GW 10.26.16*, YOUTUBE(Oct. 27, 2016) (Dr. Yunus invited the students to consider whether they are thwarting their life’s purpose by working for the ninety-nine percent to make them wealthier.).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *See generally*, Carmen Huertas-Noble, Promoting Worker-Owned Cooperatives as a CED Empowerment Strategy: A Case Study of Colors and Lawyering in Support of Participatory Decision-Making and Meaningful Social Change, 17 *Clinical L. Rev.* 225 (2010).

⁹⁰ *U.S. Solidarity Economy Network*, <https://ussen.org/> (last visited Oct. 30, 2018).

PART IV: THE UNIQUE PROGRAMMATIC ASPECTS OF BLCS

A. *Redefining “Practice-Ready”: Social Justice*

In Western Europe, hailed as “the last holdout” in CLE by Professor Rick Wilson,⁹¹ the past decade has seen a boon in legal clinics, evidenced by the European Network for Clinical Legal Education (“ENCLE”), which launched in 2012.⁹² ENCLE has been very instrumental in supporting clinical legal educators and states as its main objectives to: “pursue and promote social justice and diversity as core values of the legal profession, improve the quality of legal education, foster awareness of fundamental rights and the mechanisms to enforce them, and promote an understanding of how domestic law and European law interact in practice.”⁹³

It is not surprising that ENCLE includes the promotion of social justice as one of its primary objectives. As European schools embraced CLE, a social justice focus addressed the legal needs of those at the margins of society.⁹⁴ And, as legal clinics around the world looked to long established clinics in the U.S. as guides for design, the traditional social justice emphasis was evident.

⁹¹ Rick Wilson, *Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education*, 10 GERMAN L.J. 823, 831 (2009).

⁹² *What is Encle?*, European Network for Clinical Legal Education (ENCLE), <http://encle.org/about-encle/what-is-encle>, (last visited Jan. 22, 2018) (ENCLE is a network of persons and institutions who are committed to the growth and quality of clinical legal education programs in Europe).

⁹³ *Id.*

⁹⁴ *Id.*

Recently, however, the social justice paradigm has been challenged by some business law clinicians in the U.S., who quite directly question whether their clinics should be obliged to carry out a social justice mission.⁹⁵ For others in the U.S., the mere suggestion of a legal clinic without a social justice mission is anathema. “The founders of the modern era of clinical legal education did not envision clinical education simply as a way to enrich legal education with practical experience and skills training... Clinics need not, and should not, abandon their social justice roots, even as they develop new and innovative approaches to clinical education.”⁹⁶ Yet, some reject the notion that CLE requires a social justice focus and, instead, argue that students are better served by a broader pedagogical view:

Clinical pedagogy is the multi-faceted jewel in the crown of clinical legal education. Preparation, performance, and reflection are key elements to any clinical experience regardless of subject-matter. The signature feature of clinical pedagogy is the students’ placement in the primary role of representative, where faculty members use those experiences as focal points for further inquiry. This pedagogy can be applied in any clinical experience and unlocks discussions about varied political, economic, and social issues. Clinical faculty should bring that experience to more

⁹⁵ See Lynnise E. Pantin, *The Economic Justice Imperative for Transactional Law Clinics*, 62 VILL. L. REV. 175, 175-211 (2017) (“...there is substantial debate about whether social justice should be a primary or secondary goal or even a goal at all in the design of such a clinic, further raising questions about the justice-oriented lawyering happening in a business law practice”); Praveen Kosuri, *Losing My Religion: The Place of Social Justice in Clinical Legal Education* at 331.

⁹⁶ Stephen Wizner, *Is Social Justice Still Relevant?*, 32 B.C.J.L. & SOC. JUST. 345, 347 (Apr. 2012), <http://lawdigitalcommons.bc.edu/jlsj/vol32/iss2/7>.

students regardless of whether it explicitly includes traditional notions of social justice.⁹⁷

Not surprisingly, opinions about the place of social justice in BLCs are not restricted to geographic boundaries. In the U.K., some scholars have argued that transactional law clinics should focus their resources on helping those on the margins of society find access to justice.⁹⁸ Others in the U.K., such as Professor Campbell, see a greater educational value in providing opportunities for students to learn practice and ethical lessons through transactions that generally do not occur when representing the poor.⁹⁹ While Campbell clearly sees the benefits of providing access to justice for the most disadvantaged in society, especially in the face of less government-funded support, she believes “that there are lessons that transactional law clinics can offer that clinics for underrepresented individuals do not.”¹⁰⁰ There are a number of practice and ethical issues that arise in transactional law clinics that do not in clinics for the poor.¹⁰¹ Even without a social justice mission, Campbell points out that her clinic’s representation of medium to high income businesses can still contribute to a rise in economic prosperity, which she says, is its own “social good.”¹⁰²

⁹⁷ Kosuri at 339.

⁹⁸ Elaine Campbell, *Recognizing the Social and Economic Value of Transactional Law Clinics: A View from the United Kingdom* at 581.

⁹⁹ *Id.* at 591.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

Much of the discussion around the place of social justice in BLCs seems to create an all or nothing paradigm. But Professor Lynnise Pantin points out that BLCs do not have to choose between having a social justice mission and producing practice-ready students. Pantin posits that “students can learn corporate skills in preparation for practice while accomplishing the social justice goals aligned with the missions of clinical education.”¹⁰³ Pantin acknowledges the need for practice-ready graduates, but labels the prioritization of practice-readiness over social justice as “misguided at best” and failing “our students at worst.”¹⁰⁴

Pantin argues that “practice-ready” in the BLC context should be revised.¹⁰⁵ Instead of an incidental social good that may arise in non-indigent transactional clinical practice, Pantin calls for a clear methodology for incorporating economic and social justice into the transactional clinical space.¹⁰⁶ Given the persistent social and economic injustices in the world, Pantin believes that when BLC students learn contract drafting techniques, they should also have an understanding of economic justice.¹⁰⁷ Practice-readiness, she concludes, should always include social justice for two reasons: “attorneys should do pro bono work in addition to their paid corporate work, and transactional attorneys are necessary to complete impactful transactional work after graduation from law school.”¹⁰⁸

¹⁰³ Pantin at 175-211, 179.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 181.

¹⁰⁶ *Id.* at 180.

¹⁰⁷ *Id.* at 181.

¹⁰⁸ *Id.*

Professor Alina Ball has also critiqued and criticized the practice-ready dominant narrative arguing for the integration of critical legal theory into BLCs. According to Professor Ball, critical legal theory and clinical legal theory are aligned in the view that the “law is made, not found”¹⁰⁹ and that it is “based on human experience, policy, and ethics rather than formal logic. Legal principles are not inherent in some universal, timeless logical system; they are social constructs, designed by people in specific historical and social contexts for specific purposes to achieve specific ends. Law and legal reasoning are a part of the way we create our form of life.”¹¹⁰

Properly designed BLCs are fascinating laboratories for examining the historical and social context of business law as evidenced by new business forms ranging from L3Cs to benefit corporations, capturing new “social contexts for specific purposes to achieve specific ends”¹¹¹ in the form of hybrid corporate entities. U.S. entrepreneurship most notably through the lens of the Horatio Alger, “rags-to-riches” story, challenged as myth, and the notion that everyone can pull themselves up by their own bootstraps continues into today’s culture of disruption, innovation and entrepreneurship.¹¹² Steve Jobs, founder of Apple Computers, dropped out of college to become a founder of that renown

¹⁰⁹ Alina S. Ball, *Disruptive Pedagogy: Incorporating Critical Theory in Business Law Clinics*, 22 CLIN. L. REV. 1, 28 (2015) (citing, n. 156) (citing Joseph W. Singer, *Legal Realism Now*, 76 CAL.L. REV. 465, 474 (1988)).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Bernard Sarachek, *American Entrepreneurs and the Horatio Alger Myth*, 38 J. OF ECON. HISTORY 439, 439, <http://www.jstor.org/stable/2119834> (last visited Jan. 21, 2018).

start-up,¹¹³ signaling to others the power of hard work and entrepreneurship. While BLCs work with a range of clients, most state bar rules authorizing law students' practice with clients during enrollment in legal clinics, require that students work with low income clients or individuals or groups unable to afford market rate legal services. Given the high cost of legal services, there is a significant range of eligible clients.¹¹⁴

In the U.S., Community Economic Development (CED) Clinics practicing business law have clear social and economic justice missions but newly emerging BLCs, lacking a clear CED and perhaps a social entrepreneurship focus, do not necessarily incorporate social and economic justice into their curricula. The debate about whether BLCs should have a social justice focus will likely continue for years. But, regardless of whether BLCs cling to traditional social justice roots or instead choose to represent non-indigent clients in matters that will not directly impact marginalized communities, all clinical programs should prepare students to practice law in the 21st Century and beyond. That requires expanding the meaning of "practice-ready" to a readiness to represent people from a variety of diverse backgrounds. It means exposing students to lessons of diversity and cultural consciousness so that they are prepared to represent clients who are not white, wealthy, and in positions of power.

¹¹³ Brandon Griggs, Steve Jobs: From college dropout to tech visionary, CNN, <http://www.cnn.com/2011/TECH/innovation/08/25/steve.jobs.profile/index.html>, Aug. 25, 2017

¹¹⁴ Legal Services Corporation, *America's Partner For Equal Justice*, (2008) available at https://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf (last visited Jan. 21, 2018).

B. Redefining “Practice-Ready”: Cultural Consciousness and Power

When the American Bar Association (“ABA”) increased its skills requirement for law schools in 2015, law clinics were well positioned to fill the skills gap. The development and utilization of legal skills in a live-client environment is the hallmark of clinical pedagogy.¹¹⁵ Clinics have been preparing law students to be practice ready for decades. But, what does practice-ready mean in the 21st Century, in a century that will see a “majority-minority”¹¹⁶ for the first time in U.S. history? Practice-ready must mean more than skills training and practical experience. Even for those who choose not to incorporate social or economic justice ideals into their clinical program, practice ready can, and should, mean preparing law students to interact with other lawyers, business people, and clients from diverse backgrounds.

It is easy to assume that social justice clinics always offer such experiences to students, but such presumptions should be challenged. Referring to clinics that serve the poor and legally disenfranchised, Professor Spencer Rand questioned, “What do students learn from a Social Security Insurance case if they don’t learn to consider the values and biases built into a welfare system that has been created by people with money to discriminate

¹¹⁵*Managing Director’s Guidance Memo Standards 303(a)(3), 303(b), and 304* (Mar., 2015), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_standards_303_304_experiential_course_requirement_authcheckdam.pdf (last visited Mar. 4, 2018) (note expanded definition of clinics, including non live-client and externships).

¹¹⁶ Sarah Carr, *Tomorrow’s Test: Americas Schools are Majority-Minority. Now What?*, http://www.slate.com/articles/life/tomorrows_test/2016/06/american_is_becoming_a_majority_minority_nation_it_s_already_happened_in.html (last visited Jan. 21, 2018).

between categories of people that have been deemed deserving of help? What do students learn from a landlord/tenant case if they don't recognize it as an often unsuccessful alliance by those without property to negotiate laws that were created by and are designed to benefit the propertied?"¹¹⁷ Or as noted in the business context, what do students learn about contract drafting if they don't understand economic injustices and power imbalances that too often accompany such contracts?¹¹⁸

In a profession where the majority of practicing lawyers are still white and male, and where law schools still struggle to matriculate culturally diverse students in significant numbers, the likelihood that the profession will be unprepared for an increasingly culturally diverse market is high. Studies show that, "Interest in entrepreneurship among people of color is quite strong, but access to the resources to do it successfully is often a challenge."¹¹⁹ From a client perspective, a diverse client base expects lawyers who are culturally proficient.¹²⁰

Cross-cultural competency is a term familiar to U.S. clinicians through The Five Habits scholarship of Professors Susan Bryant and Jean Koh Peters and in Bryant's seminal

¹¹⁷ Spencer Rand, *Teaching Law Students to Practice Social Justice: An Interdisciplinary Search for Help through Social Work's Empowerment Approach*, 13 CLINICAL L. REV. 459, 461 (2006).

¹¹⁸ See Pantin, *supra* note 28.

¹¹⁹ Center for Global Policy Solutions, *Entrepreneurship Report*, available at <http://globalpolicysolutions.org/press-release-entrepreneurship-report/> (last visited Jan. 22, 2018).

¹²⁰ Blanca Banuelos, *Embracing Diversity and Being Culturally Competent is No Longer Optional*, (March 22-24, 2012) available at https://www.americanbar.org/content/dam/aba/events/labor_law/2012/03/ethics_professional_responsibility_committee_midwinter_meeting/mw2012_cultural_compentancy.authcheckdam.pdf (last visited Jan. 22, 2018).

article on Building Cross-Cultural Competence in Lawyers.¹²¹ Bryant recognized the need for clinic students to analyze power imbalances in the lawyer-client relationship and how differences in race, national origin, gender, socio-economic status, and sexual identity shape that relationship.¹²² How can student attorneys help marginalized, low income and even middle income clients who are people of color if they are unaware of inclusive business practices¹²³ and programs designed to address systemic racial segregation? Bryant's work has had an enduring impact on CLE, and now, more than ever, cultural consciousness¹²⁴ should be more fully integrated into clinical teaching regardless of whether the clinic adopts a social justice focus. The term "cultural consciousness" is used here instead of "cultural competence" in response to the evolving recognition that educating students to interact with diverse communities requires more than competence (knowledge, skills, and attitudes)¹²⁵ and must involve a "critical consciousness," a term borrowed from medical education literature and refers to "a reflective awareness of the differences in power and privilege and the inequities that are imbedded in social relationships."¹²⁶ Even, or maybe especially, for those BLCs whose clientele reflects the corporate clients that its students will someday represent in private

¹²¹ Susan Bryant, *The Five Habits: Building Cross-Cultural Competency in Lawyers*, 8 CLINICAL L. REV. 33, 33-34 (2001).

¹²² *Id.*

¹²³ Insight, *About the Insight Center*, <https://insightccd.org/about-the-insight-center/> (last visited Jan. 22, 2018).

¹²⁴ See Arno K. Kumagai, MD, and Monica L. Lyson, MD, *Beyond Cultural Competence: Critical Consciousness, Social Justice, and Multicultural Education*, 84 ACAD. MED. 782, 782 (Jun., 2009).

¹²⁵ *Id.*

¹²⁶ *Id.* at 783.

firms, providing an understanding of cultural differences and power dynamics in transactional practice is critical to graduating practice ready lawyers. To illustrate, this is especially true as clinical programs respond to the educational motivations of Millennials, who are service-oriented,¹²⁷ but for whom the traditional clinic public service mission may seem outdated.¹²⁸ Clinical professors in the U.S. Canada, Europe, Australia, and around the globe have a unique opportunity to help students recognize such imbalances and how they as clinic students, and later as attorneys, can help to transform the relationship between the law and power.

C. Millennials

Given the connection between social and technology driven entrepreneurship and Millennials, it is useful to consider how this generation in particular may impact business law practice now and in the future. Assessments of Millennial generation law students, “born between 1981 and 1999, ranging in age from 14 to 31,¹²⁹ suggest that this unique generation will require law faculty to rethink how it teaches. Millennials also referred to as Generation Y, have been described as the greatest generation of optimistic entrepreneurs and a “hidden ‘powerhouse’ of potential” that is “leaving a lasting impression on the world and presenting unparalleled opportunity.”¹³⁰ Government

¹²⁷ Emily A. Benfer and Colleen F. Shanahan, *Educating the Invincible: Strategies for Teaching the Millennial Generation in Law School*, 20 CLINICAL L. REV. 1, 7 [hereinafter *Educating the Invincible*] (Nov. 8, 2013).

¹²⁸ See Karla Mari McKanders, *Clinical Legal Education at Generational Crossroads: Shades of Gray*, 17 U. TENN CLINICAL L. REV. 223, 223 (Oct. 27, 2010).

¹²⁹ Benfer, *supra* note 54, at 7.

¹³⁰ *Id.* at 1, 3-4.

regulations greatly impact business and the global consulting firm, Deloitte, reports that Millennials could not only “reenergize government” but “help to transform it into a high-performing twenty-first century organization with model workforce practices.”¹³¹ As explained below, collaboration and teamwork are essential lawyering skills and the Millennials are pegged as “confident, team oriented, conventional, achieving and ambitious.”¹³² Of particular interest to BLC clinicians concerned with social justice, Millennials want to better society and are “service and cause oriented.”¹³³

Bringing consumer perspectives to their education, Millennials are goal-oriented; enjoy a facilitative, non-hierarchical, non-teacher centric classroom and their learning styles are focused on multimedia, teaching that is entertaining and exciting, using simulations or live clients.¹³⁴

The learning outcomes set forth in the Appendix, ranging from interviewing and counseling to problem solving and self-reflection, are aligned with the Millennials’ need for structure and transparency, for example, understanding why an assignment is important. On the other hand, a reported challenge of working with Millennial law students is their tendency toward fast pace action and multi-tasking resulting in their frustration with reflection and critical thinking, essential lawyering skills.¹³⁵

¹³¹ Educating the Invincible at 3.

¹³² *Id.* at 8.

¹³³ *Id.*

¹³⁴ *Id.* at 10-11.

¹³⁵ Emily A. Benfer and Colleen F. Shanahan, *Educating the Invincible: Strategies for Teaching the Millennial Generation in Law School*, 20 CLINICAL L. REV. 1, 26 (Nov. 8, 2013).

D. Collaboration and Beyond

To fully prepare law students to engage effectively in global transactional markets, law schools world-wide would do well to focus more on collaborative learning.¹³⁶ The benefits of learning and working in teams have been evident for many years. In 1992, the ABA's MacCrate Report "found that "cooperation among co-workers" was an essential element of efficient law office management.¹³⁷ The MacCrate Report concluded that "effective collaboration with others" was a critical skill, "regardless of whether a lawyer is a solo practitioner, a partner or associate in a firm, or a lawyer in public service practice."¹³⁸ Yet, twenty-five years later, most law schools still do not give collaboration high priority as a practice skill outside of clinics, legal writing, and skills courses.

That is not to dismiss the significant teamwork many law professors incorporate into their podium or seminar classes. Many professors regularly utilize small groups or pairings in first year classes to introduce students to working and problem-solving together. These and other active learning strategies can be very effective in the learning

¹³⁶ *TU Law featured as a top experiential learning program in Europe*, <https://law.utulsa.edu/2018/02/02/tu-law-selected-best-study-abroad-program-europe/> (last visited Mar. 6, 2018); see also Smyth, Gemma, Hale, Samantha Gold, and Neil, *Clinical and Experiential Learning in Canadian Law Schools: Current Perspectives*, CANADIAN BAR REV., 95, 175, <https://scholar.uwindsor.ca/lawpub/49> (currently "Osgoode Hall has developed a three-pronged approach to its experiential 'practicum' requirements: exposure to relevant law and context, substantial experiential engagement, and reflective practice"); see also *experiential learning - Offshore study*, THE UNIVERSITY OF SYDNEY LAW SCHOOL, <https://canvas.sydney.edu.au/courses/4533/pages/experiential-learning-offshore-study> (last visited Mar. 6, 2018) (Currently The University of Sydney Law School offers an offshore program to supplement study in Australia toward Master of Laws degree (LLM) or may also count as electives towards an LLB or JD degree. The units are taught on an "intensive basis – usually over four or five successive days – with some interim assessment components" completed at a later time, though this is not a part of the regular curriculum).

¹³⁷ Michael I. Meyerson, *Law School Culture and the Lost Art of Collaboration: Why Don't Law Professors Play Well with Others?* 93 NEB. L.REV. 547, 557 (2014).

¹³⁸ *Id.*

process, but they are not usually designed with the purpose of developing competencies in professional teamwork (although that may be a valuable by-product). Though exceptions exist, few podium professors devote a significant amount of class time to collaborative learning as a core competency measure.¹³⁹ Such resistance exists even though non-clinical professors agree that developing effective collaborative skills is an important learning objective.¹⁴⁰ Still, “many believe that teaching and assessing students’ collaborative interpersonal skills is impractical.”¹⁴¹

This dearth of collaborative learning spaces in law schools has a number of causes. A primary cause is familiar to anyone who has been exposed to the traditional culture of law school from movies and books – rival students competing for grades. Some of the blame for this competition goes to law school grading policies that reinforce the competitive culture. “Most law schools require their faculty “to apply some standardized mean or curve in awarding [their] grades. Mandatory grade curves send the (accurate) message that success is only to be determined by besting your classmates, not by the absolute measure of your understanding.”¹⁴² But, arguably, professors share the blame for the competitive culture. “[L]aw students learn more than just law from their professors. They also learn what it means to be a lawyer. In terms of their psychological

¹³⁹ See Sophie M. Sparrow, *Can They Work Well on a Team? Assessing Students’ Collaborative Skills*, 38 WM. MITCHELL L. REV. 1162, 1165 (2012).

¹⁴⁰ Sparrow at 1663-64.

¹⁴¹ *Id.* at 1164.

¹⁴² Myerson at 556.

and intellectual development, [p]robably the greatest role models for students are faculty members themselves. To the extent that law professors avoid collaboration, so will their students.”¹⁴³

The consequences of the legal academia’s disregard of collaborative learning are many, and increasingly harmful in a global society. “Among the many critiques of legal education are criticisms that law students do not graduate with effective emotional intelligence skills - in particular, they have not learned to work well with others.”¹⁴⁴ And, working well with others is crucial, both in domestic and international lawyering. As a recent study concluded, ““most legal work in 2013— at least the high-value work that attorneys and law firms coveted— required multiple attorneys to work together. Collaboration was, in fact, extremely valuable to firms: it allowed them to take on increasingly sophisticated client work, which in turn let them charge higher prices.”¹⁴⁵ Increased globalization also has led to American lawyers working more with lawyers in other countries: “Counsel must frequently collaborate across geographic and cultural boundaries with far-off partners to ensure that work is aligned with the client’s global strategy and accounts for country-specific issues.”¹⁴⁶

¹⁴³ Myerson at 555; *see also*, Janet Weinstein, Linda Morton, Howard Taras and Vivian Reznik, *Teaching Teamwork to Law Students*, 63 J. LEGAL EDUC. 36, 36 (Aug. 2013) (“law professors unfamiliar with teamwork theory and practice are unlikely to use teams to engage students in learning.”).

¹⁴⁴ Sparrow at 1662.

¹⁴⁵ Debra Cassens Weiss, *BigLaw firm reveals nuts and bolts of its pay system in Harvard case study on collaboration*, ABA JOURNAL (Oct. 15, 2013) available at http://www.abajournal.com/news/article/biglaw_firm_reveals_nuts_and_bolts_of_its_pay_system_in_harvard_case_study/news/article/do_you_volunteer_on_a_regular_basis/?utm_campaign=sidebar (last visited Jan. 22, 2018).

¹⁴⁶ Myerson at 561.

If we recognize that “group work is routinely understood as one of the most effective learning methods based on the principles that learning is “inherently social” and “an active process”¹⁴⁷ and clearly see the need to prepare law students for a collaborative practice, how do we achieve that in a law clinic setting?

Law clinics, particularly BLCs, have always been an exception to the individualistic approach of law school learning.¹⁴⁸ BLC student attorneys commonly work in pairs or small groups. In this collaborative model the students are responsible for both their own learning and contribute to and support the learning of their co-counsels. When the model works, the whole is greater than the sum of its parts. But, while student pairing often meets the goal of work allocation and having another set of eyes and ears in a client meeting, too often the pairing is not designed to meet the goal of developing collaborative interpersonal skills. Meeting that goal takes intention, even for clinical programs where interpersonal skills are emphasized.

The benefits from collaborative work and teaching teamwork as a skill are many. Students learn critical life skills including “communication, planning and coordination, leadership and cooperation, as well as conflict resolution, problem solving, and creative thinking.”¹⁴⁹ These skills are helpful for any area of legal practice, but especially in business practice, where client businesses often count the ability to work in a team as one

¹⁴⁷ A. Rachel Camp, *Creating Space for Silence in Law School Collaborations*, 65 J. LEGAL EDUC. 897, 898 (2016).

¹⁴⁸ Camp at 897 (“In many clinical programs, collaboration—through team pairings and group work—has long been the norm...” though, litigation clinics commonly use an individual approach).

¹⁴⁹ *Teaching Teamwork to Law Students* at 38.

of the top five characteristics necessary to secure a position.¹⁵⁰ Such business clients “expect firms to work effectively across departments, offices, and even jurisdictions.”¹⁵¹ One of the reasons driving the value of collaboration among business clients is the changing nature of the legal work being done. Due to increased globalization and business consolidation, legal work has become “increasingly complex, multi-disciplinary and international.”¹⁵² In addition, law firms have begun to “outsource” some legal work to less expensive foreign lawyers.¹⁵³ This so-called “legal process outsourcing” requires “good communications skills, along with the ability to motivate workers from different organizations, negotiate and administer service contracts, assemble effective teams, and plan for and respond to contingencies. In other words, American lawyers need to learn how to collaborate with their international colleagues, just as they must learn to collaborate here at home.”¹⁵⁴ Failure to incorporate this critical skill into clinical pedagogy may result in the realization of British Professor Richard Susskind’s prediction that law schools will continue to produce 20th century lawyers in the 21st century.¹⁵⁵ Susskind urges collaboration not only among lawyers, but also among law firms, saying that 21st century clients expect as much.¹⁵⁶

¹⁵⁰ *Id.* at 40.

¹⁵¹ *Id.*

¹⁵² Myerson at 560-61.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Richard Susskind, *Tomorrow’s Lawyer*, OXFORD UNIV. PRESS (2d ed. May 25, 2017).

¹⁵⁶ *Id.*

At the same time, law school curricula and clinicians must not swing the pendulum to the other extreme in focusing on collaborative learning as the end goal. Doing so tends to “isolate and ignore individuals who do their best work when given space to contemplate and consider ideas alone, and instead reward[s] those who are the loudest and most comfortable within the collaborative space.”¹⁵⁷ In her book, *Quiet: The Power of Introverts in a World That Can't Stop Talking*, Susan Cain, an attorney, voices a similar concern. Cain argues that our institutions are designed for extroverts and that there is a bias against introverts.¹⁵⁸ Cain notes that collective thinking strategies favor dominant extroverts, but cautions that forced and inflexible teamwork can actually stifle creativity and lead to destructive behavior.¹⁵⁹ Cain cites to the financial crisis as an example of groupthink dominated by extrovert leaders.¹⁶⁰

Considering the many benefits of collaborative learning and the expectation of collaborative lawyering, law clinics, and BLCs in particular, should include collaboration as a learning objective. Clinical professors should teach the skill of collaboration while honoring differing personalities in the room by clearly communicating that students who use “deliberation, contemplation and quiet reflection”¹⁶¹ are valued as much as the students who quickly and comfortably participate in the classroom. Collaborations fail

¹⁵⁷ Camp at 899.

¹⁵⁸ Susan Cain, *Quiet: The Power of Introverts in a World That Can't Stop Talking*, 1-19 (May 2, 2017).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Camp at 899.

often because of a lack of understanding about how people work best to achieve the end goals and not because there is something inherently wrong with the collaboration in and of itself.¹⁶²

Given the fast-paced nature of business and the associated need for rapid innovation, collaboration is critical in business environments. Accordingly, we have highlighted the importance of this skill in BLCs. As the BLC Learning Outcomes in the Appendix makes clear, the lawyering competencies learned in BLCs are the same as those in litigation clinics, namely: case theory and development; fact-gathering; client centered interviewing and counseling; problem-solving and judgment; negotiation, persuasion and advocacy; professionalism, cross cultural competence, social justice and systemic critique; self-evaluation, reflection and learning from experience.

PART V: THE SIGNIFICANCE OF BLCS NOW

“Global development is entering a phase where entrepreneurship will increasingly play a more important role. There are at least three reasons for this, each particular to certain types of countries. Firstly, in the West, the managed economy of the 1970s-2000s, characterized by reliance on big business and mass production, has given way to a so-called entrepreneurial economy. Here knowledge-driven goods and services are now

¹⁶² *Id.*

more flexibly provided by smaller firms, and the emergence of a creative class requires a less interfering but more facilitating state.”¹⁶³

The United Nations University World Institute for Development Economics Research (UNU-WIDER) has focused on the role of entrepreneurship in economic development.

That research concludes that entrepreneurship will “contribute to growth and employment creation in advanced, emerging and least developed countries alike.”¹⁶⁴

Indeed, global problems, ranging from poverty and terrorism to climate change and migration, need entrepreneurial solutions.”¹⁶⁵

This trend in global entrepreneurship is pronounced in Western countries. According to the U.S.-based Ewing Marion Kauffman Foundation, entrepreneurship is affected by the changing nature of work.¹⁶⁶ Many Americans are working as freelancers or microbusiness owners, leading economists and policymakers to label this form of work in new ways.¹⁶⁷ “Platform economy,” referring to a range of work relationships, the “sharing economy,” the “gig economy,” and the “on-demand economy,” are the most prevalent.”¹⁶⁸ The platform economy, a menu of “alternative work arrangements,” is a noun describing “the collection of transactions occurring on online structures, which act

¹⁶³ Wim Naude, *Entrepreneurs and economic development*, UNITED NATIONS UNIV. (Mar. 23, 2011), available at <https://unu.edu/publications/articles/are-entrepreneurial-societies-also-happier.html>.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Ewing Marion Kauffman Foundation, *Entrepreneurship Policy Digest, What the Changing Nature of Work Means for Entrepreneurship* (Aug. 9, 2016), [hereinafter Kauffman, *Changing Nature of Work*] (last visited Jan. 22, 2018).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

as intermediaries between workers, customers and businesses.”¹⁶⁹ Significantly, all industries and wage and skill levels are found in the platform economy and it “may look like a traditional job (such as delivering food) or more like a micro-business (such as producing and selling craft goods on an online platform).”¹⁷⁰ Some researchers believe that the platform economy is rapidly growing and may have resulted in “all net employment growth from 2005 to 2015.”¹⁷¹ Notably, “16 percent to 34 percent”¹⁷² of workers earn their living through these alternative work arrangements. Platform economy work may be less risky than entrepreneurship and persons less risk adverse may be drawn to it.

On the other hand, entrepreneurship is a wealth generator and “is an important option for securing economic independence.”¹⁷³ Law students and lawyers must understand these new economy law and policy issues. This is especially true for minorities such as African Americans in the US.¹⁷⁴ To illustrate, in the U.S., a report by the Center for Global Policy Solutions found that “expanding entrepreneurship among people of color is an essential strategy for moving the country toward full employment for all.”¹⁷⁵ Unfortunately, due to historical and present racial discrimination, “America is currently

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *id.*

¹⁷³ *Id.*

¹⁷⁴ See Algernon Austin, *The Color of Entrepreneurship: Why the Racial Gap among Firms Costs the U.S. Billions*, GLOBAL CENTER FOR POLICY SOLUTIONS (April 20, 2016) available at <http://globalpolicysolutions.org/report/color-entrepreneurship-racial-gap-among-firms-costs-u-s-billions/> (last visited Jan. 22, 2018).

¹⁷⁵ *Id.*

forgoing an estimated 1.1 million businesses owned by people of color."¹⁷⁶ Indeed, "[t]hese missing businesses could produce an estimated 9 million more jobs and boost" the American "national income by \$300 million."¹⁷⁷ The Future of Work Initiative of the Joint Center for Political and Economic Studies, a U.S. based think tank, aims to ensure that workers of color have new economy job skills.¹⁷⁸ Entrepreneurial perspectives and mindsets complement this vision.

To be sure, the platform economy has significant law and policy "implications for economic independence and entrepreneurial capacity."¹⁷⁹ Examples of these law and policy implications include how platform economy workers will retain benefits, traditionally associated with paid labor, in these alternative work arrangements, how assets will be accumulated for the future, the type of education and job training needed to prepare workers for this new economy and whether wage insurance is a viable policy approach to help the middle class.¹⁸⁰

Gary Swart, former president and CEO of Odesk, which merged with Elance to become Upwork, now the largest freelancing work website in the country and a general/venture Partner at Polaris, notes that there are 500 entrepreneurship programs at U.S. universities

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Joint Center, *About*, JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES (Mar. 9, 2015), <http://jointcenter.org/about/about> (last visited Mar. 4, 2018).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

up from 250 just 10 years ago.¹⁸¹ “It’s a testament to what’s going on in the world. Clearly entrepreneurship is not just about starting businesses, it’s a mindset which is attracted to opportunity, innovation and value creation. This is what, students/Millennials, persons 18-30 years old, care about and making a difference in the world, making impact.”¹⁸²

Swart notes that two-thirds of employees want to quit their jobs because they aren’t happy with the work.¹⁸³ They want to make more of a difference and are attracted to innovation and opportunity and value creation but these opportunities may not exist at large companies.¹⁸⁴ Innovative, forward thinking companies must consider how they will retain talent. Author, Thomas W. Malone, noting the rapid speed of workforce change observed that his father had one job in his career, and that he’ll have 7 jobs, and his kids will have 7 jobs at one time.¹⁸⁵ Another prediction is that learners of today will have 10 jobs by the time they are 40 -- that’s a new job every 2 years.¹⁸⁶

PART VI: CONCLUSION: THE FUTURE OF BLCS IN GLOBAL CONTEXT

BLCs are growing slowly outside of the U.S. and this growth warrants further study, analysis and comparative inquiry. Accordingly, this article, a first of its kind, explores

¹⁸¹ Gary Swart, *Keynote Address: 2016 New Venture Competition Finals*, YOUTUBE (June 27, 2016), <https://www.youtube.com/watch?v=pEJL2qswBGk>.

¹⁸² NFTE, *Entrepreneurship: The Best Preparation for the Innovation Economy*, available at <https://nfte.com/why-entrepreneurship/> (last visited Jan. 22, 2018).

¹⁸³ Gary Swart, *Keynote Address: 2016 New Venture Competition Finals*, YOUTUBE (June 27, 2016), <https://www.youtube.com/watch?v=pEJL2qswBGk>.

¹⁸⁴ *Id.*

¹⁸⁵ Thomas W. Malone, *The Future of Work: How the New Order of Business Will Shape Your Organization, Your Management Style, and Your Life*, Harv. Bus. Rev. (Apr. 2, 2004).

¹⁸⁶ See also Gary Swart, *Keynote Address: 2016 New Venture Competition Finals*, YOUTUBE (June 27, 2016), <https://www.youtube.com/watch?v=pEJL2qswBGk>.

BLCs within the context of the global clinical movement. Entrepreneurship holds a special place in legal education today because technology, automation and artificial intelligence are disrupting traditional economies and changing forms of work giving rise to new corporate legal forms such as benefit corporations -- blending social purpose and profit -- and new work patterns, evidenced by the platform economy. Some of these economic disruptions stem from entrepreneurial innovation.

In light of the foregoing, this article analyzes the emergence of BLCs in eastern and Western Europe, Canada, the U.S. and Australia and posits a broad definition of practice-ready, inclusive of social justice, honoring cultural consciousness and power alongside collaboration, teamwork and business risk analysis.

Recognizing that not all BLCs are able to embrace this broad definition and that environmental needs will prevail, at minimum, BLCs should envision entrepreneurship as a social benefit. The article concludes that BLCs are important now because of the Millennial generation, the rise of the new economy and of social enterprises.

Appendix 1

GEORGE WASHINGTON UNIVERSITY LAW SCHOOL SMALL BUSINESS & COMMUNITY ECONOMIC DEVELOPMENT

LAWYERING COMPETENCIES AND LEARNING OUTCOMES

The overall teaching goal of SBCED Clinic is to provide law students with direct practical experience with various aspects of the lawyering process, particularly as it relates to small business law and community economic development. Specific lawyering competencies to be discussed and evaluated throughout the semester include: (1) case theory and development; (2) fact-gathering and development; (3) client-centered interviewing and counseling; (4) problem-solving and judgment; (5) negotiation, persuasion, and advocacy; (6) professionalism; (7) collaboration; (8) cross-cultural competence; (9) social justice awareness and systemic critique; and (10) leadership, self-evaluation, reflection, and learning from experience.

SBCED Clinic Core Lawyering Competencies and Learning Outcomes

- 1. Case Theory and Development**
 - A. Understand how legal problems arise and are experienced by clients;
 - B. Understand how to research and identify relevant legal doctrine; and
 - C. Understand how to identify the historical context of ongoing development of law through critical lawyering and legal analysis.

- 2. Fact-Gathering and Development**
 - A. Understand how to discern legally relevant facts and identify gaps in knowledge;
 - B. Understand the relationship between fact and theory, and understand how to leverage frameworks such as negotiation, the practical dimensions of cases, and other modes of planning/analysis to balance competing options; and
 - C. Exercise judgment, problem solving, and critical thinking in the factual analysis process.

- 3. Client-Centered Interviewing and Counseling**
 - A. Identify and apply legal doctrine and theory to specific facts of client issues;

- B. Develop awareness and familiarity with interviewing and counseling techniques; and
- C. Understand the ethical requirements of client confidentiality and the importance of that requirement for the client.

4. Problem-Solving and Judgment

- A. Identify both legal and non-legal strategies for addressing legal problems;
- B. Devise innovative methods and strategic plans that creatively use law to empower clients to accomplish their goals; and
- C. Utilize problem-solving skills to identify strengths and weaknesses of various options.

5. Negotiation, Persuasion, and Advocacy

- A. Understand appropriate uses of precedent documents and learn how to draft relevant legal documents for the client;
- B. Develop an ability to convey legal conclusions and recommendations through purposeful writing;
- C. Understand how to anticipate potential problems, conduct legal research and communicate findings to clients, colleagues, and supervising attorneys; and
- D. Understand how to effectively deliver oral presentations and oral recommendations to clients, colleagues and supervisors.

6. Professionalism

- A. Understand the ethical obligations and responsibilities of the lawyer;
- B. Understand the importance of professionalism in the following instances:
 - i. class attendance and participation;
 - ii. case management and file organization;
 - iii. time management;
 - iv. interactions with clinic colleagues and supervisors;
 - v. communication with potential and existing clients;
- C. Communication with stakeholders in the legal system, (e.g., attorneys, government agencies, etc.); and
- D. Understand how to balance professional responsibilities with self-development, and personal health and well-being.

7. Collaboration

- A. Develop collaborative and interpersonal working skills;
- B. Develop interdisciplinary working skills with other lawyers, accountants, business advisors, and financial institutions;
- C. Develop perspectives on and identify methods to contribute positively toward existing legal institutions through strategic professional relationships; and
- D. Engage in strategic and contextual thinking to determine options available to clients.

8. Cross-Cultural Competence

- A. Exercise empathy in contextualization of client issues, and develop cross-cultural competence in representation of clients;
- B. Learn how to transfer skills and insights to new contexts; and
- C. Understand the importance of context and culture in identifying goals and options.

9. Social Justice Awareness and Systemic Critique

- A. Understand the role of the lawyer as a legal professional and social justice advocate;
- B. Understand the role of the lawyer in advancing social justice and poverty alleviation; and
- C. Understand the role of legal advocacy to influence political and social justice.

10. Leadership, Self-Evaluation, Reflection, and Learning From Experience

- A. Exercise self-awareness to zealously represent clients with compassion and empathy;
- B. Develop reflective lawyering skills, including identifying the lessons and meanings of lawyering experiences; and
- C. Develop best methods to create learning habits and understand the value of one's learning process.
- D. Understand the role of lawyers as leaders.

Washburn Small Business and Nonprofit Transactional Clinic:

Lawyering Competencies and Learning Outcomes

1. Attorney-Client Relationship

- A. Fosters confidence, builds trust and maintains active communication with clients
- B. Facilitates active participation by clients in their projects
- C. Consistently gives clients meaningful explanations of the law in terms they can understand
- D. Uses client goals as a guide for all client work
- E. Practices compassion and empathy

2. Project Development and Planning

- A. Conducts comprehensible and reliable research to identify all possible options and to discard inappropriate options
- B. Demonstrates effective legal analysis
- C. Effectively works through legal, social, and economic issues with the client in order to clarify existing goals and to set future goals
- D. Clearly articulates plans and strategies in writing so that others could follow the plan

3. Practice Management

- A. Manages time effectively and meets deadlines
- B. Consistently follows Clinic office procedures
- C. Maintains files so that others may reconstruct what has occurred, track research, and determine what has been advised
- D. Allocates time, effort and other resources to consistently meets obligations to clients and the Clinic
- E. Prepares for supervision meetings and timely submits supervision agendas
- F. Initiates contact with Clinic supervisor and seeks additional supervision when needed

4. Oral and Written Advocacy

- A. Expresses thoughts with precision, clarity, economy, and organization

- B. Communicates, verbally and in writing, with clients in a style and format that is appropriate for each client
- C. Timely prepares and thoroughly proofreads work before submitting it
- D. Responds to Clinic supervisor's written and verbal comments
- E. Writes professional email communications to Clinic supervisor and others

5. Collaboration and Professionalism

- A. Engages in true collaboration with Clinic partner, not simply division of tasks
- B. Meets with Clinic partner at least twice a week to discuss client matters
- C. Addresses collaboration-related concerns appropriately
- D. Thoroughly prepares for meetings with clients, Clinic partner, and supervisor
- E. Demonstrates respectful interaction with Clinic staff
- F. Secures approval from Clinic supervisor before acting
- G. Identifies and address ethical, ideological, or personal considerations bearing on a project or the attorney-client relationship
- H. Demonstrates value and respect for all people and integrates cross-cultural consciousness in Clinic work

6. Self-Evaluation

- A. Effectively critiques own performance, including strengths and areas in need of improvement
- B. Accepts constructive feedback and applies it appropriately
- C. Examines own insights, biases, and reactions concerning issues that arise in the course of client representation and project work
- D. Regularly assesses self-care, such as adequate sleep, proper nutrition, exercise, mental health needs, and use of alcohol and recreational drugs.

Appendix 2

Checklist for Starting or Re-Imagining a BLC

- ✓ What is the need in your community for business legal services?
- ✓ Have you done a needs assessment or a listening project to determine the need?
- ✓ What are the results of that process?
- ✓ Do you have support from the local or national bar or other legal groups?
- ✓ Is a BLC consistent with your national, regional, or local government's economic development agenda?
- ✓ Are there other actors or stakeholders supporting a BLC in your community?
- ✓ What are sources of funding a BLC?
- ✓ Who will be the clients/beneficiaries of a BLC?
- ✓ Who will be the community partners of a BLC?
- ✓ How will you measure the effectiveness of the BLC for clients?
- ✓ How will you measure the effectiveness of a BLC for students?
- ✓ How will you measure the effectiveness of a BLC for stakeholders?
- ✓ Will your BLC focus on particular sectors, e.g., technology, immigrant or women-owned businesses or social enterprises?
- ✓ What types of direct legal representation does your BLC provide?
 - Examples include business formation, business regulation, contracts, intellectual property, and employment.

IMMIGRATION UNIVERSITY CLINICS AND REGULATION:

A WORKING CASE STUDY

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Jeremy Dunn (Office of the Immigration Services Commissioner, UK)

Abstract:

This paper seeks to introduce readers to the regulation of immigration advice, and how this can work in practice in clinical legal education. The case study of Queen Mary Legal Advice Centre demonstrates that although the statute does not ideally seem to fit with the regulation of university law clinics, it is possible to be compliant. Far from being a negative aspect, regulation in these unique legal advice settings can actually provide a rich ethical learning environment and produce well rounded future lawyers.

The Office of Immigration Services Commissioner

The Office of the Immigration Services Commissioner (OISC)¹ is the statutory regulator of immigration advice and services in the United Kingdom. The OISC was established by Part 5 of the 1999 Immigration and Asylum Act² in response to growing concerns that vulnerable migrants, in particular asylum seekers, were falling prey to

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¹ <https://www.gov.uk/government/organisations/office-of-the-immigration-services-commissioner> (as of 17/08/18).

² <https://www.legislation.gov.uk/ukpga/1999/33/section/83> (as of 17/08/18).

unqualified and unregulated immigration advice providers. Large numbers of refugees and other migrants, who were seeking advice and assistance in navigating the increasingly complex immigration rules and asylum procedures in the UK, were easy targets for unscrupulous advisers. With little understanding of how long various immigration decisions would take or the work involved, clients paid large sums of money for assistance with some discovering at a later point that no work had been undertaken on the required application. Migrants would unknowingly become overstayers with many facing re-entry bans. Even within the charitable sector, well-meaning but incompetent advice was provided which could be just as devastating to the client's long term prospects of leave to enter or remain in the country.

The OISC has been in operation for the last 17 years and currently regulates approximately 3000 advisers operating in 1500 registered organisations. Any person providing immigration advice and services in the UK who is not already regulated by a Designated Qualifying Regulator (DQM)³ and thus a 'qualified person' under the Act, must be regulated by the OISC in order to provide immigration advice and services. That is those that relate to an application to the UK authorities for any type of leave to enter or remain (including asylum and immigration bail work), applications for British nationality and citizenship and admission to or residence in the UK under EU law. It is important to note that it is the entity that the OISC registers

³ Designated Qualifying Regulators include the General Council of the Bar, Law Society of England and Wales, Chartered Institute of Legal Executives, Faculty of Advocates, Law Society of Scotland, General Council of the Bar of Northern Ireland, Law Society of Northern Ireland.

and through the entity, the immigration advisers that provide the advice and services. To provide immigration advice and services while not regulated is a criminal offence⁴ and the OISC investigates and prosecutes those who operate when not authorised to do so.

The Statute

Whether individuals working within certain bodies are in fact regulated by a DQM can be complex. Solicitors working in law firms and barristers in chambers are likely to be fully regulated by their respective regulatory bodies, further; they are normally permitted to supervise non-legally qualified staff to also provide immigration advice and services acting on behalf of the regulated organisation. Outside of law firms and chambers the situation becomes less clear. Solicitors working in practices which are authorised to operate by a DQM set up under the Alternative Business Structure can also supervise non-legally qualified staff and these individuals do not need to be regulated by the OISC. However, practicing solicitors working in Law Centres and certain charitable organisations that have been permitted to employ solicitors to provide advice and services to the public are not (in England and Wales) permitted to supervise others. This means that while practicing solicitors in these settings may be regulated by the Solicitors Regulatory Authority, or barristers regulated by the Bar

⁴ <https://www.legislation.gov.uk/ukpga/1999/33/section/91> (as of 17/08/2018).

Standards Board, non-legally qualified staff providing immigration advice and services must be regulated by the OISC. This therefore applies to students working in clinical legal education (whether under the supervision of employed and qualified clinicians or volunteer barristers or solicitors).

Where do University Law Clinics Fit in the Statute?

What does this mean for Law Clinics operating in the UK who provide immigration advice and services to the public? Those operating in England and Wales will need to consider carefully how they deliver their advice and services.

Where they are provided completely through a practicing solicitor, with all advice and any representations made to the UK immigration authorities' being made in their name, then it is likely they will not need to be regulated by the OISC even if students assist in the research or gathering of information that supports a particular application. However, if advice and services are provided in the name of the Law Clinic then the Law Clinic (or any other similar type of organisation) as an entity, and any non - solicitor staff will need to apply to the OISC for regulation. Law clinics operating in Northern Ireland and Scotland should confirm with their respective regulators if they regulate students who provide immigration advice and services in the name of the Law Clinic.

A Working Pilot: The Queen Mary Legal Advice Centre

The Queen Mary Legal Advice Centre (QMLAC)⁵ is a free community legal advice centre based in the heart of East London - an area particularly marred with a reputation for untrustworthy immigration legal advice. QMLAC engages undergraduate students in the provision of legal services across a range of clinics including those which cover immigration advice; a general immigration clinic, Pink Law (where the immigration issues relate to membership of the LGBT+ community) and The EU AIRE Hub (legal queries relating to the free movement of people within the European Union). The clinics are advice only, rather than representation. Clients attend for appointments and provide the detailed facts of the case to the student who is supervised by a barrister or solicitor (both at the appointment and when compiling the advice). The supervised legal advice is then sent to the client, in writing, within 14 days of their appointment. The advice will typically undergo legal checks from the volunteer barrister or solicitor, and professional checks (such as proof reading) from Centre staff. In the academic year 2017-18 there were thirty five clients across these three clinics who received immigration legal advice. Fifteen students advised in these areas.

There is no doubt that the regulatory position of university law clinics has been a confused picture for some time. It was summer 2017 when the QMLAC approached OISC to try and resolve the issue of compliance. Far from the reprimanding that the

⁵ <http://www.lac.qmul.ac.uk/> (as of 17/08/18).

QMLAC expected, the OISC praised the clinic and took a flexible approach to regulation to allow the Centre to continue operating in this area. This type of hybrid organisation (not a law centre or a firm) was new to OISC, and quite early on in the discussions it became apparent that a flexible approach was most suitable.

Step 1: Register the Clinic:

The QMLAC completed the relevant form⁶ to get the organisation registered as an OISC approved body to provide immigration legal advice. The form is primarily designed for independent advice offices meaning some of the information requested was more difficult for the Law Clinic to provide (for example accounts). However discussions with the OISC around such issues meant that the forms were simple to complete and QMLAC became registered a few months later.

Further, as part of the registration it was necessary to list the barristers and solicitors who volunteer at the QMLAC. Although a comprehensive list was given, the OISC were pragmatic in realising that sometimes other people from the same Law Firm may step in at short notice to cover for a busy colleague. The QMLAC demonstrated that there were good procedures in place for when this happened to both record the new volunteer details and train them in the QMLAC procedures.

Registration had the added benefit that the QMLAC was able to advertise that they were OISC registered (and display the logo on their website).

⁶<https://www.gov.uk/government/publications/oisc-application-for-regulation-of-a-new-legal-entity> (as of 17/08/18).

Step 2: Authorising the Advisers:

The turnover of students involved in clinics (whether immigration or otherwise) is always high. Further, the academic year is very short, meaning that the moment students start in September / October they need to be in a position to hit the ground running in order to complete a sufficient number of cases and have a meaningful educational experience.

Applications for new advisers are two fold; firstly students need to complete an OISC ‘New adviser application and competence statement’⁷. This relatively straightforward form can be completed within 20 minutes or so with guidance from a member of staff.

Again, OISC took a pragmatic position when the forms asks for applicants to list all jobs and work experience and helped incorporate the QMLAC standard training and the student’s degree courses into the form. This helped to keep the process streamline.

QMLAC had a specific workshop for students to attend to complete this form with a member of staff who had previously liaised with OISC. The staff member was able to help students with stock phrases relating to training and their degree which could be inputted.

Secondly applicants need to have a suitable Data Barring Service (DBS) check. As part of Queen Mary University, all the QMLAC DBS checks needed to go through a central team. In this case it was the central Widening Participation Team. DBS forms are

⁷ <https://www.gov.uk/government/publications/new-adviser-application-and-competence-statement> (as of 17/08/2018).

lengthy and can be complex (especially for foreign students). Submitting these forms and sending them in with copies of appropriate documents was a very lengthy and drawn out task. The OISC registration was delayed pending the return of the DBS certificate. There were further complications in the certificates sometimes being sent by the DBS service to old addresses that students were in when they did finally come through.

This all produced the undesirable consequence that students were nearly finishing their 6 months at the QMLAC when their authorisation was complete. This authorisation of advisers was taking up a lot of staff time and causing logistical difficulties. To try and address this issue in the academic year 2018-19 there has been an earlier selection of students so forms can be completed and submitted before the summer break. It was also agreed that the OISC forms could be submitted before the DBS checks have been returned.

QMLAC students are registered as Level 1 advisers⁸ with permission by the OISC to provide Immigration Advice and Services up to Level 2 under supervision. If QMLAC wanted to offer advocacy in immigration matters (Level 3 work), the students would need to gain authorisation at Level 2 which would require additional application procedures for QMLAC in additional assessment of the students competence.

⁸ <https://www.gov.uk/government/publications/competence-oisc-guidance-2012> (as of 17/08/2018).

Advisers seeking authorisation with the OISC normally undertake a written competence assessment. At Level 2 and 3 this involves a written exam paper taken under exam conditions at an OISC test centre. Any adviser authorised by the OISC may apply through the registered organisation to take assessments at higher levels. There is no cost to the individual or organisation to make such an application. Law Clinics might therefore consider whether they wish to make such applications for students where they feel the student has gained sufficient knowledge and experience and is interested in gaining a higher level of authorisation.

It is worth noting that QMLAC students are only authorised at QMLAC to give legal advice. The authorisation granted to any OISC adviser is not transferable to another organisation, thus a Queen Mary student would not be entitled to provide immigration advice and services at another clinic or to provide immigration advice or services outside of QMLAC. Again underpinning that it is the Centre which is registered then the adviser through the Centre.

Step 3: Auditing:

The QMLAC has been visited twice by the OISC. Firstly a visit was made prior to registration. The OISC considered the premises, handbooks, procedures and client file format to check that it was to a certain standard. After a year of registration, the OISC completed an audit of the Centre. As is standard, a list of immigration cases was submitted in advance of the visit. The visit itself took half a day. Cases were randomly selected, viewed in electronic format by the OISC and a follow up letter

outlining the visit was issued. The preparation for, and timing of doing the audit is not arduous (providing of course that everything is in order).

Reflection and the Future

There is no doubt that the regulation of law clinics is complex⁹ and has not been fully resolved. This niche area within that wider gap can feel like an added layer of intricacy asking already stretched clinicians deal with more bureaucracy. There is no doubt that the gaining authorisation for each Student Adviser within the QMLAC is more work for clinicians. Both the OISC and QMLAC have tried to approach this seemingly adverse situation with a fresh layer of flexibility and enthusiasm. As such some benefits have arisen.

- It provides a real and current clinical example of regulation to the students. This means from an early stage in their education students do not view regulation as a negative to be feared but as a protection mechanism for vulnerable clients and the profession.
- Regulation has been a rich learning ground for developing a deeper understanding of professional ethics. Students at the QMLAC undertake reflection sessions at 'Breakfast Club' where the SRA Principles¹⁰ and the Bar Core Duties¹¹ are regularly discussed. Linking these to clinical work (especially

⁹ Linden Thomas (2017) Law clinics in England and Wales: a regulatory black hole, *The Law Teacher*, 51:4,469-485, DOI: [10.1080/03069400.2017.1322858](https://doi.org/10.1080/03069400.2017.1322858)

¹⁰ Part 1 of the SRA Handbook. Published on 1st October 2017.

¹¹ BSB Handbook, version 3.2, updated February 2018, Part 2, B.

those relating to regulators) can sometimes be difficult. This relationship between the OISC and the QMLAC provides a simple backdrop to introduce the importance of regulation and link it to a student's duty to their client and their duty to provide a good standard of care.

- Students see beyond their clinical setting and are introduced to the wider legal world. Through discussions as to the reasons behind regulation they see that the idyllic world of being a barrister or solicitor is not always correct. This sense of realism adds a layer of maturity to student thinking which they take forward to employment interviews.

Of course there are further changes to be made, and in an ideal world the statute would be amended to allow more flexibility to students in a clinical setting. Essentially a recognition that students in clinics are *very* heavily supervised and that students more often than not feel a deeply committed sense of responsibility to their clients. Exactly how this flexibility would be inputted is yet to be seen, but removing the need for a DBS check and / or simplifying the adviser authorisation process would be an important step.

If this article has the intended outcome of attracting more clinical legal education initiatives to provide immigration legal advice, this will create more student advisers needing to be authorised. As more clinics start to register with the OISC it will in all likelihood be necessary for the OISC to consider further where efficiencies in the application process might be made, especially when the advisers are usually only

needing to be registered for a short period of time such as six months. This may of course lead to changes in the individual adviser authorisation process. However, for the moment the statute remains solid and an in-depth two stage registration process continues, with consideration of the fitness of the clinic itself (how it operates and is managed) and the fitness and competence of the student advisers.

Previous Poor Legal Advice

It is perhaps unsurprising that free law centres and university clinics who offer immigration advice will be some of the front line services to hear of unscrupulous immigration legal advice which clients have previously paid for. The OISC is committed to protecting vulnerable people and stopping poor advice. Should your Law Clinic be aware of clients who have received poor quality immigration advice and services from any person in the UK, the OISC can take such complaints and investigate. If the complaint relates to a person regulated by another DQR the OISC will refer this matter on. Where it relates to an OISC registered adviser the OISC will look to investigate the matter themselves. Clients may be reluctant to make complaints, particularly if their own immigration status is precarious. As an independent body the OSIC will never share information with the Home Office related to a client. Their interest is in the adviser only. Law Clinics can support a client to make a complaint or can make one on their behalf. A complaint that includes details of the specific client is always best as it means the OISC can look into the individuals

matter fully, however complaints can also be made which do not name the client but raise an issues of concern around a particular adviser¹².

The opportunities for teaching ethics which arise from working closely with a regulator are both obvious and subtle. The obvious professional ethics principles to discuss with students include; upholding the rule of law and the proper administration of justice¹³, Delivering a competent standard of work¹⁴, and acting with integrity¹⁵ etc. but there is a pool of rich learning in situations where clients come to clinics having received bad previous legal advice. Is there a duty for the Clinic to inform the client that they could make a complaint to the OISC or elsewhere? Is there actually a duty on an OISC regulated clinic to make an anonymous complaint themselves? How does a clinic uphold confidentiality in these circumstances? Is making a complaint against the wishes of a client acting in their best interests?

We are all well aware of the rich and diverse range of ethical issues that clinical legal education already produced. Mixing in a regulator which students have to actively

¹² <https://www.gov.uk/find-an-immigration-adviser/complain-about-an-adviser> (as of 17/08/2018)

¹³ The Solicitors Regulation Authority Principle 1 (<https://www.sra.org.uk/solicitors/handbook/handbookprinciples/part2/content.page> as of 17/08/18), and The Bar Standards Board Core Duty 1 (<http://handbook.barstandardsboard.org.uk/handbook/part-2/> as of 17/08/2019).

¹⁴ The Solicitors Regulation Authority Principle 5 (<https://www.sra.org.uk/solicitors/handbook/handbookprinciples/part2/content.page> as of 17/08/18) and The Bar Standards Board Core Duty 7 (<http://handbook.barstandardsboard.org.uk/handbook/part-2/> as of 17/08/18).

¹⁵ The Solicitors Regulation Authority Principle 2 (<https://www.sra.org.uk/solicitors/handbook/handbookprinciples/part2/content.page> as of 17/08/18) as of 17/08/19), and The Bar Standards Board Core Duty 3 (<http://handbook.barstandardsboard.org.uk/handbook/part-2/> as of 17/08/18).

join (rather than the SRA / BSB which may feel like a lifetime away) can be another tool to pass over the student responsibility to ensure deeper learning.

Conclusion

Clinics work hard to ensure that some of the most vulnerable in society are respected and not taken advantage of, while teaching students good practice. Both these principles underpin the work of the OISC who concurrently want to support the provision of good quality, (usually free) legal advice that clinics provide to this vulnerable group in society.

While there is undoubtedly some bureaucracy involved in the OISC registration process it is clear that the OISC do not wish to create barriers to innovative programmes such as those designed by Law Clinics. The OISC recognise that such programmes not only provide a much needed service to local communities but lay the ground work for competent and ethical immigration advisers of the future.

Should you be concerned that your Law Clinic may need to be regulated by the OISC please contact the Voluntary Sector Support Group at the OISC (VSS@oisc.GOV.UK). You can e-mail the group with details of how the Law Clinic operates and we will confirm for you if you do need to be regulated. It is worth noting that how services are delivered affects whether the clinic will need to be registered with the Commissioner.

The Voluntary Sector Support Group at the OISC also has a dedicated section on their website which provides advice about regulation specifically for the voluntary and community sectors which may be helpful to consult. This can be found at <https://www.gov.uk/government/publications/guidance-for-the-community-and-voluntary-sector>

EMPIRICAL LEGAL RESEARCH IN ACTION: REFLECTIONS ON METHODS AND THEIR APPLICATIONS, edited by Willem H. van Boom, Pieter Desmet, and Peter Mascini (Edward Elgar), 2018, 271pp, £85.50 (hardback), ISBN: 978-1-78536-274-3

In this volume, the editors have curated fascinating insights into the topic of empirical legal studies (ELS). The book is divided into eight chapters delivered by empirical legal scholars from Europe and the United States. The book is recommended for any researchers new to, or about to enter, the field of empirical legal studies and adds value to the increasing literature on the methodological aspects of empirical legal research. It is published by Edward Elgar and available online for £85.50.

The book begins with a clear explanation of its major themes. For the editors, empirical legal research complements doctrinal research due to the differing methodological premises. “Empirical” is to be understood broadly: the key defining characteristic of empirical legal research is that the collection and use of observation is *systematic*. They do not discriminate between qualitative or quantitative approaches, and this is well reflected in the chapters selected for the book.

They go on to briefly discuss a range of empirical methods, such as experiments, surveys, and case studies, which will be valuable to newcomers to the field, and which are discussed and critiqued in the chapters which follow. The book does not claim to be a handbook explaining in detail these different methods – other introductory books

exist for that. But the book will be useful for introducing new methods and offering a more basic understanding of their benefits and limitations.

Chapter 2, by Hilke Grootelaar and Kees van den Bos, focuses in the use of experiments and surveys in administrative law. They discuss the different types of experiments which could be utilised to study administrative law: laboratory experiments, artefactual field experiments, framed field experiments, and natural field experiments. They provide many ideas of experimental designs and explain how surveys can be used to enhance experimental research. The idea of entering a lab and conducting experiments might appear somewhat alien to legal scholars. However, they provide a well worked example of an experiment, testing trust in administrative law courts by varying (in a lab) whether the experiment's subjects experience fair or unfair procedures, which is fully referenced, easy to follow, and could be adapted to other research questions.

Chapter 3, by Christoph Engel, and Chapter 4, by Christopher Reinders Folmer, continue the theme of experimental ELS. Chapter 3, by some way the longest chapter in the book, provides a comprehensive literature review of survey-based ELS from law, economics, and criminology. Chapter 4 covers a similar brief, but for private law. There is a little repetition across these two chapters, although some of the points, such as the limitations of experimental and survey research, may be worth repeating. The sheer amount of literature covered by these two chapters, in particular Chapter 3,

makes them an ideal starting-point for prospective ELS researchers using these methods.

Chapter 5, by Melissa Rorie, Sally S. Simpson, and Breanna Boppre, completes the theme of experimental or quasi-experimental ELS which occupies the first half of the book. They explore their use of factorial surveys to address the impact of environmental law on the decisions people make. Factorial surveys combine traditional surveys with the random assignment of case vignettes which allows the drawing of inferences as to how different facts affect respondents' judgements. Their clear explanation of the method, its benefits, and its pitfalls, means that it is a method which could easily be adapted to other areas of law.

Chapters 6 and 7, by Julien Etienne, and Irene van Oorschot and Peter Mascini, focus on the case study method of ELS. Chapter 7 in particular offers a colourful, reflective, and engaging account of this kind of work on criminal courts.

The volume concludes with Chapter 8 by Jan Crijns, Ivo Giesen, and Wim Voermans. The authors consider what value empirical evidence can add to scholarship in the areas of private law, criminal law, and administrative law. Ultimately, they conclude that the main use of ELS in law is to add data (or insights) to existing scholarship about the actual working of the law – and that this must be a good thing – allowing for better informed decisions from legal institutions.

The authors note that some areas of law – such as criminal law due to its links with criminology – are quite advanced in terms of ELS history, whilst in other areas –

private law and especially property law and the like – ELS is virtually non-existent. Scholars in these areas who believe – and most should believe – that most areas of legal scholarship could be improved by an element of empirical study (if done well)

The editors of this book have created an insightful and lively discussion of ELS methods and theory. The authors of the chapters lead the reader through the research process, from initial idea, to developing research questions, and analysing empirical findings. The authors exhibit a good level of openness and honesty in how they conduct their research – good empirical research does not just happen, it takes a lot of work. The result is that the works are engaging in their style, and persuasive in the benefits of ELS and their particular methods. For a relatively short book, it is bursting with content and authority on empirical legal research, which is highly valuable for a scholar interested in conducting empirical research but not sure where to turn. The price of the book will undoubtedly place it beyond the reach of some. This is a shame because the book makes a valuable contribution to the literature in this area.

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