

**Painful Injustices:
Clinical Legal Education and the Pedagogy of Suffering**

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By Sarah M. Buhler

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Abstract

In this thesis, I argue that clinical law teaching requires a theoretical analysis and pedagogical framework to address law students' encounters with social suffering in clinical law contexts. A critical "pedagogy of suffering", I argue, would take at its starting point an acknowledgement of the importance of the law student-client encounter as a deeply important "pedagogical site" - a place where certain views about lawyering, law, and justice are played out, and therefore a place that ought to be the subject of close attention by clinical law scholars and teachers. I argue that a critical pedagogy of suffering would focus specifically on the presence of human suffering in many of these encounters. Such a pedagogy would seek to distill the ways in which larger social and systemic forces produce and distribute social suffering, and how the dominant legal gaze and dominant legal practice are too often incapable of assessing or responding to these forces. It would also work to challenge notions that emotions and suffering are apolitical and unrelated to progressive legal practice, and to build a conception that engaged, critical "witnessing" of social suffering by lawyers and law students might lead to passionate and thoughtful lawyering for social justice in clinical law settings.

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Dedication

To my parents, Jake and Louise.

To my children, Simon, Benjamin and Rachel.

And to my husband, Charlie.

Thank you, thank you.

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Chapter 1: Introduction

In an essay frequently cited by poverty law and clinical law writers,¹ Stephen Wexler writes: “poor people are always bumping into sharp legal things.”² Wexler proceeds to develop a depiction of law as an intrusive and abrasive force in the lives of poor clients, a source of wounding and suffering.³ In another article about clinical poverty law practice, Shelley Gavigan compares community legal clinics to wartime field hospitals caring for clients devastated by poverty and injustice.⁴ Reworking the emergency room metaphor, Paul Tremblay writes about the importance of “triage” in clinical case selection,⁵ and Jane Spinak chronicles the intense suffering of a client struggling with poverty and the apprehension of her children by child protection officials.⁶ Writing about a clinical law program located in Vancouver’s downtown eastside neighbourhood, Renee Taylor writes that “the [clients] I see are totally crushed...What I see are people whose spirit has been

¹ S Wexler, “Practicing Law for Poor People” (1970) 79 Yale LJ 1049. This article has been cited 241 times, according to heinonline: <http://home.heinonline.org>.

² *Ibid* at 1050.

³ *Ibid* at 1051.

⁴ SAM Gavigan, “Poverty Law, Theory, and Practice: the Place of Class and Gender in Access to Justice” in E Comack et al, eds. *Locating Law: Race/ Class/ Gender Connections* (Halifax: Fernwood, 1999) 208 at 208. Gavigan writes of her time as a supervising lawyer at Parkdale Community Legal Services in Toronto, noting that “[d]uring that year I often felt like a person with a bit part in the film and later, television series *M*A*S*H*. With each crackle of the intercom, I imagined that our receptionist...would next say: “The choppers are here. They are bringing in the wounded.”

⁵ PR Tremblay, “Acting a Very Moral Type of God: Triage Among Poor Clients” (1998-1999) 67 Fordham L Rev 2475.

⁶ J Spinak, “Reflections on a Case (of Motherhood)” (1995) 95 Colum L Rev 1990 at 1992. Spinak writes about hearing her client’s story that “[h]er anguish as a mother overwhelmed me: her terror became mine....My shoulders and chest ached...as I listened to her loss”.

broken.”⁷ Depictions of clients as wounded, hurt, and suffering due to the ravages of poverty, circumstance, and routine and debilitating interactions with the machinery of the state abound in the poverty law and clinical law literature.

Images of suffering clients and stories about traumatic events experienced by clients also routinely appear within the discourse of the clinical law classroom. Indeed, the topic of the suffering and distress of clients emerges regularly during case rounds⁸ and class discussions in the clinical law classes that I teach at the University of Saskatchewan College of Law.⁹ Students enrolled in the College’s clinical law program take on cases at Community Legal Services for Saskatoon Inner City (CLASSIC), a community legal clinic

⁷ D Culhane and R Taylor, “Theory and Practice: Clinical Law and Aboriginal People” in DE Chunn and D Lacombe, eds, *Law as a Gendering Practice* (Toronto: Oxford University Press, 2000) 120 at 120.

⁸ The “oral tradition” is an important part of clinical legal education. The pedagogical technique of “case rounds”, where clinical students and teachers use client cases as the basis for classroom discussion and learning, has been identified by Bryant and Milstein as a “signature pedagogy” of clinical legal education: S Bryant and E Milstein “Rounds: A Signature Pedagogy for Clinical Education?” (2007-2008) 14 Clin L Rev 195. Certainly, stories and narratives about clients and client cases have been important to clinical law scholarship. See discussion in B Miller “Telling Stories about Cases and Clients: the Ethics of Narrative” (2000-2001) *Geo J Legal Ethics* 1 at 11.

⁹ CLASSIC was founded by a group of University of Saskatchewan College of Law students, including Kyle Vermette, Victoria Coffin and Jody Busch, with the support and collaboration of the University of Saskatchewan College of Law and numerous community organizations. CLASSIC opened its doors to clients in January 2007. I use the term “reinstated” in relation to the clinical law program because the College of Law had previously had a clinical law program in the late 1970s and early 1980s. CLASSIC is a not-for-profit community legal clinic that focuses on assisting low-income clients with legal matters, focusing on areas of law where clients would not otherwise have access to assistance through the Saskatchewan’s Legal Aid Commission. CLASSIC takes on cases in many areas of law, including residential tenancies, Employment Insurance, workers’ compensation, social assistance appeals, refugee and immigration law and criminal law. It also assists clients with wills and estate and guardianship matters, and issues relating to the Indian Residential School settlement. Approximately 40% of CLASSIC’s clientele are First Nations or Metis. Although the majority of CLASSIC’s work involves individual client representation, CLASSIC works closely with community agencies on broader projects including community legal education, and other initiatives. The College of Law offers two clinical law classes. The first is a full-year, 6-credit course, which involves carriage of client files and other work at CLASSIC, as well as participation in a weekly seminar. Students who have previously taken, or are currently enrolled in the 6-credit class can also register in the 3-credit “Advanced clinical law class”, which involves further case work and a major community project.

whose mandate is to serve the needs of Saskatoon’s low-income community.¹⁰ In the seminar component of the course, students often describe encounters with clients who face multiple and significant hardships in their lives. CLASSIC’s clients include residential school survivors seeking assistance with reassessment of Common Experience payments,¹¹ single parents who have been evicted by landlords and who find themselves homeless, and parents who have had their children apprehended by child welfare officials. Many of CLASSIC’s clients struggle with chronic disabilities and health conditions, including HIV-AIDS, diabetes, and addictions. Others struggle with mental health diagnoses or fetal alcohol spectrum disorder. Some are imprisoned, and many are socially isolated. The stories that clients at CLASSIC tell to students about their lives and troubles are often traumatic ones, and clients often express deep stress and suffering to students during the course of their relationship with them at the clinic. In short, human suffering, in its multitudinous forms and permutations, enters into the day-to-day reality of legal clinics such as CLASSIC, and the question of how lawyers should respond to and understand this suffering enters into clinical legal education by virtue of this reality.¹²

Students display a range of approaches and questions about the expressions and stories of client suffering that they encounter in the clinical law context. Very often, in my

¹⁰ CLASSIC’s mandate is as follows: “The purpose of CLASSIC is to provide legal assistance to low-income, historically disadvantaged Saskatchewan residents (with particular attention to the needs of Aboriginal peoples) through a legal clinic that meets the needs of the community. This provides students with clinical experience, new insights into the social reality of law, and also fosters an ethic of social justice and cultural understanding.” See <http://www.classiclawn.ca>.

¹¹ The Indian Residential School court settlement agreement arose from litigation regarding the systemic abuses inflicted upon Aboriginal students in residential schools. See http://www.residentialschoolsettlement.ca/english_index.html for more details about the settlement.

¹² As I will discuss in more detail below, I am not suggesting that all clients suffer, nor that suffering defines clients in any way, but rather that the subject of suffering must be critically interrogated within clinical law pedagogy and practice.

experience, students respond by entering into a critical self-analysis, admonishing themselves to focus on separating “legal issues” from “non-legal issues” in their interactions with clients, to better establish and maintain “boundaries” between themselves and their clients, and to focus on the law rather than “emotions”. Various clinical law writers have also identified this phenomenon. For example, Linda Mills writes that law students often argue that by becoming too involved emotionally in their clients’ problems they will not have the distance to advise their clients objectively.¹³ Similarly, Julie MacFarlane notes that clinical law students tend to suppress concerns about their clients’ emotions or anxieties and focus instead on litigation strategies.¹⁴ And Fran Quigley describes what she calls the “disorientation” experienced by law students who are confronted “with their clients’ very real suffering and frustration,” noting that many students are ill-equipped to assimilate or respond to these realities.¹⁵

Yet many students do not simply or easily adopt dispassionate professional boundaries in the face of their clients’ traumatic narratives and emotional expressions of suffering. Indeed, many respond with compassion and empathy, while attempting to reconcile and balance notions of professional boundaries and ideas of the proper realm of legal practice. For many students, their own emotional responses to their clients’ stories and expressions of suffering are challenging to understand and integrate into larger visions of legal professional identity. Thus, the student’ encounter with the suffering of clients in

¹³ LG Mills “Affective Lawyering: the Emotional Dimensions of the Lawyer-Client Relationship” in DP Stolle, DB Wexler and BJ Winick, eds, *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Durham: Carolina Academic Press, 2000) 419 at 420.

¹⁴ J MacFarlane, “Bringing the Clinic into the 21st Century” (2009) 27 Windsor YB Access Justice at 48.

¹⁵ F Quigley, “Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics” (1995-1996) 2 Clin L Rev 35 at 53.

the clinical law context triggers, but also destabilizes, idealized notions of professional identity and ideas about lawyers' proper response to human suffering.

In this thesis, I examine and problematize the notion of students' encounter with clients who are, or who are perceived to be, suffering. I argue that the encounter can function for law students as a location for producing notions of professional identity and understandings of justice, and is therefore a rich pedagogical site and one that deserves critical attention. I argue that without critical and theoretical reflection, the encounter can function to produce and reinforce dominant understandings of suffering as a non-legal, private emotional or psychological attribute of the client, a matter to be referred to other professionals, ignored, or otherwise managed by the lawyer. This type of "reading" of suffering, I argue, can serve to reinforce acontextual, uncritical legal practice and uneven power relationships between lawyer and client. Furthermore, I argue that in poverty law clinical contexts this reification of notions of professional identity and role is often problematically compounded with the reproduction of dominant images of poor clients as victims, or as helpless, or as responsible for their suffering, and which fetishizes, appropriates, or otherwise problematically approaches the reality of suffering.

Yet the encounter of law students with suffering and the stories of suffering of their clients can also profoundly challenge and destabilize dominant conceptions of professional identity and legal practice, and potentially open up alternate understandings. This thesis proposes that although the clinical law literature has directly and indirectly presented various critiques of dominant models of legal practice in response to suffering, there remains a need for a critical "pedagogy of suffering" in clinical contexts. By drawing on the

eclectic and emerging body of literature on “social suffering”, as well as the critical feminist and post-colonial theoretical literature on emotions, suffering and “embodied encounters”, I highlight the importance of paying attention to the encounter with human suffering in clinical legal education, and propose a framework for a critical “pedagogy of suffering” for clinical legal education. In particular, I argue that it is important for clinical educators to embrace a contextual theory of suffering, and to encourage a critical approach to the encounter of suffering in clinical law environments. Such an approach would seek to locate the suffering of clients within wider social, economic and political contexts and to engage students in practices of “critical witnessing and listening”, and encourage them to develop a “critical emotional praxis” in their encounters with suffering. This pedagogical framework would seek to both challenge and transform dominant understandings of suffering and of the role of lawyers in response to suffering.

I do not in this thesis attempt to define, catalogue or categorize the actual experiences of suffering of clients in poverty law clinics. Nor, given the deeply subjective and culturally contingent nature of human suffering, do I adopt a single or rigid definition of “suffering.” Indeed, as Iain Wilkinson explains, human suffering by its very nature resists definition and categorization.¹⁶ Thus, when I refer to client suffering in clinical law contexts, I am discussing a multitude of experiences and expressions, and adopt the views of social suffering theorists Arthur and Joan Kleinman, who write that: “[t]here is no single way to suffer; there is no timeless or spaceless universal shape to suffering.”¹⁷ However, I

¹⁶ I Wilkinson, *Suffering: A Sociological Introduction* (Cambridge: Polity Press, 2005) at 17.

¹⁷ A Kleinman and J Kleinman, “The Appeal of Experience, the Dismay of Images: Cultural Appropriations of Suffering in Our Times” (1996) 127 *Daedalus* 2 at 2.

would agree with Ian Wilkinson's broad observation that despite the inherent difficulty in categorizing or defining suffering, generally suffering can be identified as "taking place in experiences of bereavement and loss, social isolation and personal estrangement," and can comprise feelings of "depression, anxiety, guilt, humiliation, boredom and distress....[and] may all at once be physical, psychological, social, economic, political and cultural."¹⁸ Thus, when I refer to the encounter with suffering in clinical contexts, I am referring to students' encounters with their clients' traumatic stories, as well as their encounters with the emotional manifestations of suffering - including expressions of grief, pain and distress.

Perhaps more importantly, I seek to identify and explore the ways in which the concept of suffering has been constructed in dominant legal discourses and pedagogies, as well as in broader cultural discourses, and how these understandings of suffering can shape the understandings that law students bring to their interactions with clients in clinical law contexts. Suffering, I argue, has most often been theorized as a private, psychological and individualized experience, one that has little to do with law or legal practice. That is, our understandings and experiences of suffering are in many ways shaped and influenced by ideology and culture. By drawing attention to this, I hope to highlight the importance of critically exploring the concept of the suffering of clients in clinical law pedagogy and of examining the ways in which lawyers and law students understand and respond to client suffering.

I am not intending to suggest that all clients who seek legal services at poverty law clinics experience suffering, nor that those who do express suffering are merely

¹⁸ *Supra* note 16 at 16-17.

disempowered victims who must be “rescued”. Indeed, my analysis is deeply critical of the ways in which dominant perceptions and assumptions about suffering entrench these types of assumptions about, and responses to, suffering, and reproduce hegemonic (and problematic) notions of lawyers as benevolent agents of justice in poverty law contexts. However, given the current economic and political context, wherein poverty, marginalization and other forms of systemic violence are widespread, some clients in clinical law contexts will continue to tell stories of suffering to law students, and to express profound distress and pain to them. Because of this, a critical “pedagogy of suffering” - one that seeks to understand suffering in its historical and social context, and to question whether our encounter with suffering can teach us about larger questions of lawyering for social justice - is an important aspect of clinical law teaching and practice.

Outline of chapters

The thesis is divided into three substantive chapters in addition to this introductory chapter and the conclusion. In chapter two, I explore dominant understandings of the appropriate or “proper” professional response of lawyers to suffering, and describe how these understandings are promoted through both overt pedagogies and tacit “disciplines.”¹⁹ I show that in the process of defining suffering as a topic that falls outside the domain of law and legal practice, dominant legal pedagogies and discourses produce very particular “legal” understandings of the nature of suffering itself. I go on to

¹⁹ PG Kissam, *The Discipline of Law Schools: the Making of Modern Lawyers* (Durham: Carolina Academic Press, 2003) at 4.

problematize the notion of a separation of law and suffering by arguing that law is in fact deeply implicated in suffering, dealing daily with the pathos and pain of human life. In other words, it is my argument that the subject of human suffering is indeed one that ought to be of serious concern to legal educators.

In chapter three, I consider the clinical legal education context and the ways in which clinical law writers have approached the subject of suffering. The purpose of this chapter, other than to provide some contextual background about clinical legal education and scholarship, is to argue that there remains a dearth of critical and theoretical explorations of the encounter of law students and lawyers with suffering in the clinical law context. In particular, I discuss the focus of clinical law writers on client-centred counseling, therapeutic jurisprudence approaches, feminist “ethic of care” approaches, and “critical lawyering”.²⁰ I argue that while these various lawyering theories and models provide valuable challenges and insights, each approach does not go far enough to address the depth and complexity of suffering in clinical client-law student encounters, and the ways in which the encounter with suffering might be a window into a critical reassessment of dominant notions of professional role and identity.

In chapter four, I turn my attention to an exploration of why it is important for clinical educators to be attentive to the reality of suffering, and how a critical “pedagogy of suffering” might take shape within clinical legal education contexts. First, I draw on post-colonial and critical pedagogical theories to explore the idea of the student-suffering client

²⁰ I have chosen to use the term “critical lawyering” to refer to a broad area of critical scholarship in the poverty law/ clinical law/ “theoretics of practice” literature that is referred to by its proponents by various names. See discussion below in chapter three.

encounter as a “pedagogical site” that plays a role in the production of professional identities and understandings about law and legal practice. Then, drawing on postcolonial theories as well as the literature on social suffering, I turn to an exploration of the critiques and questions that might be foundational for a critical pedagogy of suffering in clinical contexts. In particular, I critique the notion of suffering as a private, emotional, depoliticized attribute and argue that a more contextual and politicized understanding of suffering is required in clinical legal education contexts. Ultimately, I propose that clinical law educators seek to challenge their students to strive to understand the suffering of their clients through a contextual and politicized lens, and to develop practices of critical witnessing and listening, and “critical emotional praxis” in relation to social suffering. This in turn, I argue, entails an ethic of commitment to broader social justice goals, as well as a willingness to enter into a profound critique of dominant rescue fantasies that clinical law students and lawyers may harbour regarding their work on behalf of their clients. I explore how such approaches within clinical law teaching can work to critique dominant assumptions about suffering and appropriate responses to suffering, and to identify and draw upon emotions and affect as resources for passionate and engaged practice for social justice. In the end, it is my hope that this thesis makes a contribution to clinical legal education and scholarship in its particular focus on the dynamics of social suffering in clinical law contexts and on its proposal that the encounter with suffering in clinical contexts be a focus of critical pedagogical inquiry into larger questions of professional identity, legal practice, and understandings of justice.

Chapter 2: Thinking like a lawyer about suffering: constructing lawyers, clients, and suffering in law and legal education

Introduction

In this chapter, I argue that dominant discourse, practices and pedagogies within traditional legal education work together to produce in law students particular understandings about human suffering and the proper orientation of lawyers toward suffering. These practices seek to instill in law students an understanding of law as being disconnected from suffering, and of lawyers as possessing boundaries that are (or ought to be) closed to suffering. In other words, dominant legal discourse and pedagogies firmly relegate suffering to the “non-legal” sphere, a territory beyond the proper realm of concern for lawyers. These messages, I argue, lead many law students and lawyers to assume that law has little real concern about suffering, and that problems of suffering ought to be left to social workers, therapists and others, or at best relegated to the domain of “non-legal” issues to be managed by the lawyer through appropriate techniques.

Yet, paradoxically, suffering is not viewed as something that is “unknowable” to lawyers. Rather, it is viewed through a particularly legal lens, which permits it to be identified, separated from legal issues, and, on occasion, brought into legal analysis in discrete and unproblematic ways. Suffering tends to be constructed in legal discourse as a purely private matter that, insofar as it is “relevant” to a law (for example in the assessment of damages) can be quantified, broken into component parts, and read through a legal or doctrinal lens. These particular “legal” understandings of suffering are, I argue, part of the

emerging and yet unarticulated views that law students struggle to invoke in clinical law contexts and in their encounters with clients. This is significant because it encourages clinical law students to approach the encounter with clients with the understanding that their professional selves should be closed or unavailable to suffering, but without any adequate critical or theoretical foundation for confronting suffering in clinical or practice contexts.

However, I conclude the chapter by drawing on the work of Robert Cover and others in order to problematize these dominant understandings of law's relationship with suffering, arguing that law deals daily and routinely with suffering and human tragedy, and indeed plays a significant role in the production and distribution of suffering. I thus conclude that the subject of human suffering is one that ought to be of serious concern to legal educators.

Marking law's boundaries: separating law from suffering in legal discourse and pedagogy

In this section, I analyze the ways in which dominant legal discourse and various practices within legal education instill the notion that suffering and law are separate and unconnected. This idea of a disconnection between law and suffering is produced and reinforced through the emphasis in legal discourse and education on the marking of the "boundaries" of law. Indeed, one of the defining refrains of dominant legal discourse is that there is a clear separation between "legal" and "non-legal" spheres. Thus, legal problems

are framed in the routine statements and discourse of law schools²¹ as being separate and separable from social contexts, and law itself is portrayed as neutral, rational, and unrelated to politics or emotion. Embodied or affective human experiences, including suffering, are envisioned as falling outside law's boundaries, and therefore as being of scant interest or relevance to law and legal practice.

The dominant approach in law schools on what Margaret Thornton terms "technocentrism" reinforces this idea of clear boundaries separating legal issues from human experiences arising from complex social, economic and political circumstances, including suffering. Thornton writes that technocentrism is characterized by "rules rationality" where technical legal rules, with their veneer of objectivity and neutrality, function to "mask the partiality of law."²² In dominant law school curricula, certain subjects that lend themselves well to technocentric and rules-based analysis, such as contract law, commercial law and property law are typically characterized as falling clearly within the realm of "real" or "hard law". Meanwhile, subjects that tend to revolve around the intimate aspects of human lives such as family law, human rights law and so on, are subordinated or thought of as "soft-law" such that teachers of these subjects sometimes "set out to harden them by teaching them as propositional and rules-based" in order to legitimate them within law school curricula.²³ In other words, subjects that may involve the lived, embodied experience of human suffering tend to be viewed with suspicion – as

²¹ This "discourse of law schools" can be thought of as consisting of all the myriad statements made in law school classrooms, final examinations and doctrinal scholarship, as well as the "tacit 'rules of formation' that generate order, coherence and truth statements in these forums." Kissam, *supra* note 19 at 117.

²² M Thornton, "Technocentrism in the Law School: Why the Gender and Colour of Law Remain the Same" (1998) 36:2 Osgoode Hall LJ 369 at 370.

²³ *Ibid* at 374.

“soft” and questionably related to core legal practice and doctrine unless they are somehow “hardened” through a technocentric lens. By reinforcing messages about what subjects fall within the sphere of law, and what subjects fall outside of this sphere, then, dominant technocentric legal discourse in law schools functions to delineate a separation between legal and social, political or emotional worlds.

Lessons about the boundaries of law are also transmitted to law students through their immersion in the case method, which remains the signature pedagogy of the core doctrinal curriculum of most Canadian and American law schools. Originally introduced as a pedagogical method for training students to understand law as a “scientific method” by Dean Langdell of Harvard Law School in the 1870s, the case method entails the detailed study of appellate court decisions.²⁴ Judicial decisions routinely portray the “facts” of the case as given and uncontroversial, and demonstrate a method whereby abstract and doctrinal legal concepts are “applied” to the facts in order to reveal the correct legal result. The case method requires students to train their attention away from social context or “irrelevant” particularities of individual cases, searching instead for abstract doctrinal categories.

In her detailed linguistic study of the discourse of law school classrooms, Elizabeth Mertz shows how first year law students struggling to master the method of legal reasoning

²⁴ Christopher Langdell famously wrote that: “[l]aw, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law...[T]he shortest and best, if not the only ay of mastering the doctrine effectually is by studying the cases in which it is embodied.” CC Langdell, *A Selection of Cases on the Law of Contracts*. (New Jersey: The Lawbook Exchange, Ltd, 1999) Originally published Boston: Little, Brown & Co, 1871, at vi.

exemplified by the case method often seek to bring social, economic, political and other contextual factors into their discussion of legal cases. Mertz shows how law school professors routinely admonish students to disregard these “irrelevant” factors in their examination of legal problems, and to train their focus instead upon abstract doctrinal categories and technical legal rules.²⁵ In this way, law students learn that fundamental to the legal method is an intellectual process of separating technical or doctrinal legal issues from issues that are identified as falling outside of the legal realm. Interestingly, however, Mertz notes that contextual factors are not entirely absent from the discourse of law school classrooms. Rather, she shows that emotion and social factors are on occasion evoked in classroom discussion and analysis as “wildcards” to explain inconsistent legal results.²⁶ In this way, dominant law school discourse reifies the message that the consideration of social factors or emotions has the potential to ruin the “correct” legal answer.

The privileging of rational and technical modes of reasoning in dominant law school pedagogies both implicitly and explicitly devalues and even “disallows” modes of discourse based on emotion or experience. As Lynne Henderson writes, “the ideological structures of legal discourse and cognition block affective and phenomenological argument.”²⁷

Similarly, Martha Minow and Elizabeth Spelman note that

[L]egal reasoning uses formal logic to proceed from premises, given at the start and to generate applications to new situations without reaching outside the given premises and without bypassing the demands of logical consistency. In law, for at least a century, *the devotion to such a model of reason treats any attention to*

²⁵ E Mertz, *The Language of Law School: Learning to “Think Like a Lawyer”* (Oxford: University Press, 2007) at 116.

²⁶ Mertz, *ibid.* See also R Granfield, *Making Elite Lawyers: Visions of Law at Harvard and Beyond* (New York: Routledge, 1992) at 77.

²⁷ LN Henderson, “Legality and Empathy” (1987) 85 Mich L Rev 1574 at 1575.

*intuition, to experience...[to] passions, as corruption. Emotion and passion signify evil, danger, and threat of disorder.*²⁸

Related to the acontextual method of legal reasoning privileged through the case method is the impulse towards the fragmentation of problems in legal thinking. Indeed, Philip Kissam identifies this impulse as one of the key “disciplines” of legal education, stating that the discipline favours a “mental practice and instinct of breaking things down and dividing them into many small discrete and useful parts.”²⁹ This analytical method is significant because it tends to tacitly devalue other intellectual methods, such as the synthesis of materials and arguments or the construction of creative or novel legal arguments, and in this way reinforces notions of law as acontextual and amoral.³⁰ It also, as I will argue below, serves to promote the concept that complex and deeply contextual human experiences such as suffering might be broken down and analyzed in a legal frame.

Thus, law students come to the understanding through the pedagogies and discourses of law school that there is a separation between the “legal world”, which is characterized by technical rules and legal issues, and the “non-legal” or social world.³¹ By rhetorically marking law’s boundaries, dominant technocentric and rational law school

²⁸ ML Minow and EV Spelman, “Passion for Justice” (1988) 10 *Cardozo L Rev* 37 at 38 (emphasis added). Similarly, Linda Mills writes that “[l]awyers... need to narrow their arguments, parse out details in order to present to an emotionless judge who uses reason and precedent to make a decision.” Mills, *supra* note 13 at 427. See also TM Maroney, “Law and Emotion: A Proposed Taxonomy of an Emerging Field” (2006) 30 *Law Hum Behav* 119 at 120: “[a] core presumption underlying modern legality is that reason and emotion are different beasts entirely: they belong to separate spheres of human existence; the sphere of law admits only of reason; and vigilant policing is required to keep emotion from creeping in where it does not belong.”

²⁹ *Supra* note 19 at 6. See also A Sarat, “Law’s Two Lives” (1993) 5 *Yale J L and Hum* 201.

³⁰ Kissam, *supra* note 19 at 6 and 7.

³¹ See also A Sarat, *Divorce Lawyers and their Clients: Power and Meaning in the Legal Process* (New York: Oxford University Press, 1995) at 6; Granfield, *supra* note 26 at 53 and 85, and J Mosher “Legal Education: Nemesis or Ally of Social Movements?” (1997) 35 *Osgoode Hall L.J.* 613 at 625.

discourse constitutes an idea of law's territory, or what lawyers can claim to know and to deal with.³² That is, it constructs a notion of a particular and identifiable "space" of law³³ within which lawyers can operate, and encourages a practice of legal thinking that entails separating legal from non-legal issues, honing in on the legal problems, breaking them down into component parts, and applying technical or neutral legal rules. It also involves the renunciation of modes of thought considered intuitive, emotional, theoretical, political or critical.³⁴ The legal mind, and the legal gaze, thus avert themselves from social context, political considerations, and the embodied realities of human life, including the reality of suffering.

Although dominant legal discourse tends to insist on presenting the law and legal practice as apolitical such that most law students can "continue throughout their legal education under the misapprehension that law is intentionally neutral",³⁵ legal epistemology and discourse are in fact, very particular and culturally specific forms of knowing, thinking, reading and talking. As Elizabeth Mertz points out, dominant legal discourse asks "some kinds of questions while neglecting others and make sharp demands for proof in some places where elsewhere it accepts unproven assumptions".³⁶ In fact, by asserting that law inhabits a neutral sphere separate from political or social context, the legal method tends to privilege politically and socially conservative values. As Philip Kissam writes, legal education tends to promote the "adoption of intellectually, socially and

³² Sarat, *ibid* at 6.

³³ *Ibid*.

³⁴ See discussion about this also in Thornton, *supra* note 22 at 374.

³⁵ N Bahkt, K Brooks et al, "Counting Outsiders: A Critical Exploration of Outsider Course Enrollment in Canadian Legal Education" (2007) 45 Osgoode Hall LJ 667 at 684.

³⁶ *Supra* note 25 at 98-99.

politically conservative attitudes and behavior that tend to avoid and discourage open-ended, risk-taking deliberations about ethical, moral and political issues.”³⁷ This conflation of legal thought with socially and politically conservative values encourages and underscores the understanding of suffering as a private matter – an affliction of individuals or a matter of individual emotion, and unrelated to larger social, political, or justice-related questions.

Of course, significant currents of resistance to dominant disciplines and pedagogies exist within law schools. For example, many critical courses, including courses that focus on feminist and critical race theory, attempt to offer a critical perspective on dominant assumptions about the role of law, and the role of lawyers, in society. A recent article calls these courses examples of “outsider pedagogy”.³⁸ These “outsider” courses attempt to carve out, within the space of the law school, alternative spaces for critical reflection on law and legal practice. In other words, such courses offer the possibility of creating environments in law school “in which otherwise silent voices have not only space, but credibility and power.”³⁹ Law schools have also introduced courses that explicitly critique and offer alternatives to traditional models of lawyering and professional identity,

³⁷ Kissam 11, See also WL Moore, *Reproducing Racism: White Space, Elite Law Schools, and Racial Inequality* (Lanham: Rowman & Littlefield Publishers) at 17 and J Mosher, *supra* note 31 at 625. See also Thornton, *supra* 22. Thornton writes that “the successful acculturation of the law student into accepting automatically legal form facilitates the process of rendering substantive justice incidental ...There is, therefore, a political dimension to learning to think like a lawyer: the process is dedicated not only to improving the quality, precision, and clarity of thinking, but to the rationalization of particular outcomes. (at 378).

³⁸ Bahkt et al, *supra* note 35 at 672. “Outsider pedagogy” is described by the authors as approaches to teaching law that focus on the critical perspectives of members of groups who have historically been marginalized in society, or who have been “outside the realm of fashioning, teaching, and adjudicating the law.”

³⁹ *Ibid* at 674.

including alternate dispute resolution courses.⁴⁰ Currently, broad-based curriculum reforms have been adopted, or are being proposed, in many American and Canadian law schools.⁴¹ Some law professors attempt to integrate deeply critical views of law and legal practice in their substantive law and other courses. It is arguable that by focusing on the experiences of oppressed groups within the legal system, so called outsider courses illuminate the ways in which law has magnified and distributed suffering of certain groups in disproportionate ways. However, despite these pedagogical counter-currents within law schools, Janet Mosher asserts that

changes in the curriculum have been at the periphery, with little impact upon the core of legal education....Perhaps more importantly, these changes have not caused most legal educators to think critically about the vision of lawyering which they impart to students.⁴²

Similarly, Philip Kissam describes the ways that critical and alternative approaches and perspectives tend to be “infiltrated” and marginalized within law schools, such that the dominant and hegemonic messages about law remain relatively undisturbed.⁴³ Thus, it would seem that dominant pedagogies continually reinforce and buttress the perceived boundaries between law and human suffering.

⁴⁰ See, for example, J MacFarlane, “What Does the Changing Culture of Legal Practice Mean for Legal Education?” (2001) 20 Windsor YB Access Just 191.

⁴¹ In particular, the influential Carnegie Report in the United States, and the Federation of Law Societies of Canada Taskforce Report on the Canadian Common Law Degree, have garnered significant attention. See: Task Force on the Canadian Common Law Degree, “Final Report” (Federation of Law Societies of Canada, October 2009), online: <http://www.flsc/en/whatsnew/whatsnew.sop//CCLD> and WM Sullivan, A Colby, JW Wegner, *Educating Lawyers: Preparation for the Profession of Law* (San Francisco: Jossey-Bass, 2007).

⁴² Mosher, *supra* 31 at 630.

⁴³ Kissam, *supra* note 19 at 137.

The construction of lawyers in legal education: boundaries closed to suffering

As described above, the process of learning how to “think like a lawyer” is more than an intellectual exercise. Rather, dominant pedagogies and practices in law schools transmit distinct ideological messages to law students about law and the proper terrain of legal thought. Indeed, as law students learn the particular modes of legal thinking described above, including how to distinguish legal from non-legal issues and clearly ascertain the boundaries of the legal world, they themselves are undergoing a process of professional identity formation. In this section, I explore the ways in which the process of legal education transforms the identities of law students and examine in particular the ways in which this process produces notions of professional boundaries that are, or ought to be⁴⁴, impermeable to suffering.

It is uncontroversial to point out that law school is “a powerful transformative experience”⁴⁵ that profoundly affects the identities and ideologies of law students.⁴⁶ The idea of legal education as a portal into a new professional identity is encapsulated in a famous quote by Karl Llewellyn, who wrote:

[T]he first year of law school] aims, in the old phrase, to get you to “think like a lawyer”. The hardest part of the first year is to lop off your common sense, to

⁴⁴ As I will argue in more detail below, law students are not automatons who blindly accept dominant visions of professional identity, and many struggle profoundly with the messages about professional identity that they encounter in law schools. Thus, I use the phrase “ought to be” to underscore the reality that there is an idealized image of professionalism, but that in reality legal practice is disputed, contested and complex.

⁴⁵ A Stone, “Women, Law School and Student Commitment to the Public Interest” in J Cooper and LG Trubek, eds, *Educating for Justice: Social Values and Legal Education* (Aldershot: Ashgate Dartmouth, 1997) 56 at 63.

⁴⁶ See for example K Economides “Cynical Legal Studies” in *Educating for Justice: Social Values and Legal Education* (Aldershot: Ashgate Dartmouth, 1997) 26 at 29; and J Webb, “Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education” in A Bradney and F Cownie, eds, *Transformative Visions of Legal Education* (Oxford: Blackwell Publishers, 1998) 134 at 138.

knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice – to knock these out of you along with woozy thinking, along with ideas all fuzzed along the edges. You are to acquire the ability to think precisely, to analyze coldly, to see, and see only, and manipulate the machinery of law. It is not easy thus to turn human beings into lawyers.⁴⁷

Llewellyn's quote highlights the extent to which legal education has often been understood as an indoctrination into not only a new way of "thinking about law", but also as an immersion into a new identity. Indeed, Elizabeth Mertz has concluded that legal education leads many students to embrace "entirely new views of reality and authority, new landmarks and new ways of speaking, altered conceptions of themselves and others (and their relations to the world around them)."⁴⁸

As writers such as Philip Kissam and Robert Granfield have pointed out, the power of legal education to transform and produce professional identities in law students occurs through a complex web of practices, pedagogies, and discourses within law schools. Philip Kissam describes what he calls the "discipline of law schools", which he defines as a "subterranean and habitual system of routine practices and tacit lessons, a latent disciplinary system"⁴⁹. According to Kissam, practices such as the use of the case method, the final examinatorial regime, and even tacit messages sent through the very architecture of law schools function to reinforce key messages to students about their role as lawyers, including the importance of deference to authority, the privileging of litigation, the view of legal practice as an amoral use of technique, and a view of law as apolitical.⁵⁰ Similarly,

⁴⁷ K Llewellyn, *The Bramble Bush: On Our Law and Its Study* (New York: Pceana, 1960) at 116.

⁴⁸ Mertz, *supra* note 25 at 98.

⁴⁹ Kissam, *supra* note 19 at 4.

⁵⁰ *Ibid* at 9.

Robert Granfield describes the multitude of practices in legal education that function to promote allegiance to status quo ideologies and a tendency to view legal practice as apolitical and amoral.⁵¹

Various writers have used the metaphor of “boundary construction” to describe the process of professional identity production that occurs in law schools. The notion of boundaries suggests a clear delineation between professional and non-professional ways of understanding the world, and evokes an image of a space of law within which lawyers can claim authority and privileged knowledge. In this way, the boundary construction process that takes place within legal education

transforms students from outsiders, who are seen as possessing elementary perceptions of justice, to professionals who recognize the true complexity of social relations and social policy questions that await them in the future.⁵²

David Sibley’s theory of the role of boundaries in the formation of the identity of social groups provides a helpful framework here. Sibley notes that social groups often define themselves in opposition to others, and in this way make distinctions between “ordered and disordered, ‘us’ and ‘them’”.⁵³ Through learning the distinct modes of thought and practice associated with legal professionalism, law students thus align themselves with a professional identity and move from being “outsiders” to “insiders”. Sibley writes that part of the process of professional identity formation and boundary construction entails claiming and defining the “compartmentalized knowledge” that is

⁵¹ Granfield, *supra* note 26 at 77 and 200. Granfield notes that legal pedagogies tend to constitute knowledge that reflects dominant ideologies, assumptions and values.

⁵² *Ibid* at 74 .

⁵³ D Sibley, *Geographies of Exclusion: Society and Difference in the West* (London: Routledge, 1995) at 8.

exclusively available to that group. In this way, he writes, the group “secures monopolies and insulates the purveyors of knowledge from the threat of challenging ideas.” He goes on to note that the resulting “[c]ompartimentalized knowledge, kept within secure boundaries, gives power and authority to those who peddle it.”⁵⁴ Drawing on the work of Julia Kristeva, Sibley writes that by claiming these forms of compartmentalized knowledge and defining themselves against outsiders, individuals and groups undergo a process of “purification”, reinforcing the notion of the unique identity of their group.⁵⁵

As I have argued above, the rational and technocentric approach favoured in dominant legal pedagogy and method clearly carves out a “territory of law”, and defines this territory against non-legal knowledge and concerns, including affect, emotion, politics, and social context. Thus, consistent with Sibley’s theory of boundaries, lawyers are constructed as expert knowers, or purveyors of “techne”⁵⁶ who can occupy and move within this territory. Returning to Sibley’s notion of the “insider” professional peddling exclusive knowledge from within secure boundaries, the lawyer is the “knower or all-knowing technocrat, who possesses privileged knowledge and who exercises power as a result of that knowledge.”⁵⁷ In other words, the image of lawyers invoked by technocentric discourse and promoted by the boundary-construction process within legal education is of technically competent, morally neutral practitioners, with access to authoritative

⁵⁴ *Ibid* at 122. See also the study by Carol Schick about the identities of white education students at the University of Saskatchewan in relation to racialized groups: C Schick, “Keeping the Ivory Tower White: Discourses of Racial Domination” in SH Razack, ed, *Race, Space, and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002) 99.

⁵⁵ *Supra* note 53 at 37.

⁵⁶ This is Thornton’s term, referring to technical legal knowledge privileged in technocentric discourse. See Thornton, *supra* note 22 at 372.

⁵⁷ *Ibid*.

knowledge within the legal sphere.⁵⁸ Affect, emotion, and suffering fall outside of these boundaries. Thus, lawyers learn to suppress attention to emotion, and to close themselves to “personal matters” in their clients’ lives, identifying these matters as unrelated to the legal sphere. Indeed, in their study of the professional identities of divorce lawyers, Maher, McEwen and Maiman noted that the majority of lawyers constructed professional boundaries, which functioned to discourage clients from discussing emotional issues. These lawyers also insisted upon the separation of the “legal” from the “nonlegal” aspects of cases, and stated that the expertise of a lawyer “did not extend to personal matters.” Interestingly, these lawyers tended to describe personal or emotional aspects of their clients’ cases as matters to simply be “tolerated”.⁵⁹

Various pedagogies and disciplinary practices in legal education function to reinforce the ideologies of boundaries described above. A key practice is the hegemonic disciplining of emotion in law schools and the cultivation of a distinctive professional emotional style that Philip Kissam calls “coolness”. Kissam notes that a variety of practices within law schools, including the “relentless rationality” of casebooks, classroom discourse and most legal scholarship privilege an attitude of coolness and toughness in law students and professors.⁶⁰ Reiterating this point, Duncan Kennedy writes that demonstrations by

⁵⁸ See also A Sarat and S Scheingold, “Cause Reproduction and the Reproduction of Professional Authority” in A Sarat and S Scheingold, eds, *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York: Oxford University Press, 1998) 3 at 3.

⁵⁹ L Mather, CA McEwen and RJ Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford: Oxford University Press, 2001) at 68-69.

⁶⁰ Kissam, *supra* note 19 at 97. Kissam writes that dominant law school pedagogies tacitly promote a “*rhetoric* of authority, complexity, confidence and closure and the *related attitude* of a lawyer’s “toughness”. Emphasis in original.

students of passion or outrage at injustice are often suppressed in law school classrooms.⁶¹ This argument is echoed by the recent and influential Carnegie Report on legal education in the United States, which studied pedagogical practices within American and Canadian law schools and noted that “...students are told to set aside their desire for justice. They are warned not to let their moral concerns or compassion for people in the cases they discuss to cloud their legal analyses.”⁶² Similarly, Robert Granfield’s ethnographic study of Harvard law students described the ways in which law students pressure each other not to cross professional boundaries by bringing naïve and “non-legal” political or emotional analysis into their discussion of legal issues.⁶³ In this way, students are pushed to suspend emotion and morality and instead take on pragmatic or “metapragmatic” ways of conceptualizing legal texts, authority, and translations of people’s stories.⁶⁴ Thus, one of the key marks of professionalism is an image of the lawyer as emotionally detached, committed to “disinterested client service”⁶⁵ and operating confidently within the closed boundaries of the professional realm.

I wish to briefly consider two interrelated consequences of the suppression of emotion, affect and morality in legal discourse and education. First, the construction of a professional identity that is closed to affect and emotion requires law students to suppress

⁶¹ D Kennedy, “Legal Education and the Reproduction of Hierarchy” (1982) 32 J of Leg Educ 591 at 594.

⁶² *Supra* note 41 at 187.

⁶³ Granfield, *supra* note 26 at 80 and 92.

⁶⁴ Mertz, *supra* note 25. Mertz noted how first year law students in her study would, at the beginning of their law school training attempt to discuss a person in a case by describing his character or appearance, or by asking questions about social context, or by asking about moral or fairness issues (at 99). Law professors, she wrote, routinely refocused attention upon legal categories. Similarly, Julie MacFarlane identifies as a problem the notion that techno-rationalism insists on the separation of thinking and feeling: MacFarlane, *supra* note 14 at 42.

⁶⁵ SA Scheingold and A Sarat, *Something to Believe In: Politics, Professionalism, and Cause Lawyering* (Stanford: Stanford Law and Politics, 2004) at 59. See also Mills, *supra* note 13 at 426.

or “bracket” key elements of their own prior knowledge, personalities, and identities.⁶⁶ That is, law students are routinely discouraged from thinking about how their own life experiences might affect interactions with clients and understanding of the law.⁶⁷ This is reflected in what Margaret Thornton calls the “submersion or denial of self” in dominant legal discourse. Thus, students are for, example, required to take on depersonalized, objective voices in their legal writing.⁶⁸ Therefore, as they learn the techniques and discourses of law and how to think and observe through a legal frame, law students are “undergoing a quiet process in which their very selves are decentered”.⁶⁹ Similarly, Hess writes that “[f]or some students, ‘learning to think like a lawyer’ means abandoning their ideals, ethical values, and *sense of self*.”⁷⁰

Second, the image of the cool, tough, emotionally detached lawyer is one of a curiously disembodied character. Phillip Kissam writes about the practices within law schools that promote this notion of lawyers as disembodied and “invisible”, arguing that the impersonal discourse and the suppression of personal experience and knowledge within law school classrooms tends to promote a sense of the “invisibility of law students as persons.”⁷¹ In a similar vein, Noonan uses the metaphor of “masks of the law” to describe the ways in which lawyers and judges take on the rational, detached personas demanded

⁶⁶ Mertz, *supra* note 25 at 121 and 135.

⁶⁷ Mills, *supra* note 13 at 432. See also Thornton, who writes that technocratic legal knowledge “disqualifies the lifeworld knowledge students bring with them to law schools”: Thornton, *supra* note 22 at 382.

⁶⁸ Thornton writes that “the distance between the legal knower – the creator of knowledge – and the knowledge itself is collapsed, so that the knoweldge appears to be objective.” Common techniques include an emphasis on depersonalized legal writing, and an emphasis on depersonalized judicial discourse. See Thornton, *supra* note 22 at 378.

⁶⁹ Mertz, *supra* note 25 at 135.

⁷⁰ GF Hess, “Heads and Hearts: the Teaching and Learning Environment in Law School” (2002) 52 J Legal Educ 75 at 79 (emphasis added).

⁷¹ Kissam, *supra* note 19 at 94.

by dominant legal reasoning, writing that legal rules form masks that hide “the emotion of the human face...suppressing humanity.”⁷² Finally, Hilary Sommerlad writes about dominant conceptions of legal professionals as possessing “disciplined bodies”, writing that “...the legal profession, coherent with law’s discursive construction as value-free” entails “the production of the ‘disembodied’, ‘bleached out’ professional.”⁷³

Other writers have pointed out that this idea of the “disembodied” idealized lawyer is connected to a distinctly gendered idealized notion of the lawyer as male. For example, Margaret Thornton argues that lawyers tend to be associated with “imagined masculine” traits, including rationality, objectivity and toughness.⁷⁴ In this way, the lawyer, as an “agent of legality”, is expected to be a “neutral conduit of legal knowledge”. Thornton writes:

[t]o obtrude one’s bodily persona detracts from the neutrality, the objectivity, and the universality of law. The male body is invisible in a business suit....As this body is normative within the public sphere, it has come to represent neutrality and disembodiment.⁷⁵

These dominant images of rational, neutral lawyers who do not detract from the universality of law further reinforce the notion that law and legality have little room for

⁷² JT Noonan, *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* (New York: Farrar, Straus and Giroux, 1976) at 20.

⁷³ H Sommerlad, “Researching and Theorizing the Processes of Professional Identity Formation” (2007) 34 *J of Law and Soc* 190 at 194.

⁷⁴ See M Thornton, “Towards Embodied Justice: Wrestling with Legal Ethics in the Age of the “New Corporation” (1999) 23 *Melbourne U L Rev* 749 at 766. See also Lisa Webley’s study, which showed that law students associated lawyers working in litigation and corporate practice with the male gender, while lawyers engaged in family law mediation and alternative dispute resolution were associated with the “fictive feminine”: L Webley, “Solicitors as Imagined Masculine, Family Mediators as Fictive Feminine and the Hybridization of Divorce Solicitors” in F Bartlett, R Mortenson and K Tranter, eds *Alternative Perspectives on Lawyers and Legal Ethics: Reimagining the Profession* (London: Routledge, 2011) 132.

⁷⁵ M Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford: Oxford University Press, 1996) at 216. Emphasis in original.

emotion, experience, and the vicissitudes of human suffering, and underscore the belief that lawyers, in their professional role, are, or ought to be, unavailable to emotion and embodied experiences.⁷⁶ Hilary Sommerlad's recent study of law students' conceptions of lawyers shows that these dominant images of lawyers retain a powerful influence on students' conceptions of professionalism and professional identity. In Sommerlad's study, a diverse group of male and female law students, including students from a variety of racial backgrounds, were each asked to draw a picture of a lawyer, and to describe a lawyer in five words. Sommerlad found that the students produced images that were striking in their difference from the students themselves: the figures depicted were almost universally elitist, powerful, male, and white.⁷⁷

Of course, law students are not a homogenous group, and individual students are affected in different ways by the experience of law school. Students come to law school not as blank canvasses waiting to be inscribed with a professional identity, but with various motivations, backgrounds, and life experiences. However, studies have shown that in the face of dominant messages about law and the role of lawyers, many students experience strong pressure to conform to dominant expectations of professional voice, affect and identity and respond by actively shaping their identities and ideologies to conform to

⁷⁶ See discussion in Thornton, *ibid* at 138. See also R Collier, "(Un)Sexy Bodies: the Making of Professional Legal Masculinities" in C McGlynn, ed *Legal Feminisms: Theory and Practice* (Aldershot: Ashgate Dartmouth, 1998) 21 at 28. See also C Eppert, "Review of Michalinos Zembylas: *The Politics of Trauma in Education* (2009) 28 *Stu Philos Educ* 473, who discusses the ways in which expressions of emotions tend to be "hegemonically disciplined" in dominant professional discourses.

⁷⁷ See Sommerlad, *supra* note 73 at 201-202. Sommerlad writes: the "students produced images which were striking in their distance from most of the students themselves. The figures depicted were almost universally elitist, powerful, and wealthy; moreover none were black and almost all were male and described by the students as corporate lawyers".

status quo expectations.⁷⁸ This process is often a difficult one, involving struggle and shifting notions of identity and values.⁷⁹ As Granfield found in his study of Harvard law students, this process is not accepted easily by law students, who struggle to take on the identity that they come to believe is required of legal professionals.⁸⁰ This struggle is exemplified by the statements of law students cited by Koenig, who wrote that students complained that it is “[h]ard to be a human being and a lawyer”.⁸¹ Similarly, Carrie Yang Costello’s recent study of law students involved an observation of what she calls the struggles of “identity consonance and dissonance” of law students struggling to take on idealized notions of professional identity.⁸²

⁷⁸ Other students, who may resist dominant messages and the habitus of legal professionalism at a deeper level, often experience a feeling of being “outsiders” in the environment of the law school and the legal profession. For example, Patricia Williams recalls the experience of feeling “invisible” as an African American law student at Harvard Law School, writing that “[t]he school created a dense atmosphere that muted my voice to inaudibility.” P Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991) at 55. Similarly, writing about her experience as a Mohawk law student at Osgoode Hall Law School, Patricia Monture-Angus described what she called the “something missing feeling” that permeated her law school experience. PA Monture, “Now that the Door is Open: First Nations and the Law School Experience” (1990) 15 Queen’s LJ 179 at 185. Such students may employ particular strategies in order to manage these experiences. For example, Mari Matsuda writes that some racialized law students find ways to shift back and forth between the dominant “consciousness required for survival in elite educational institutions and their own consciousness”, for example, as women of colour. MJ Matsuda, “When the First Quail Calls: Multiple Consciousness as Jurisprudential Method” in J Conaghan, ed *Feminist Legal Studies: Critical Concepts in Law, Vol III* (London: Routledge, 2009) 160 at 161. See also the discussion in ME Montoya, “Voicing Differences” (1997-1998) 4 Clin L Rev 162.

⁷⁹ See discussion in R Granfield and P Veliz, “Good Lawyering and Lawyering for the Good: Lawyers’ Reflections on Mandatory Pro Bono in Law School” in R Granfield and L Mather, eds *Private Lawyers and the Public Interest: the Evolving Role of Pro Bono in the Legal Profession* (New York: Oxford University Press, 2009) 53 at 53 and 54. They cite research showing that over the course of law school students learn to define justice procedurally, and to make little or no connection between justice and issues such as gender, race, poverty, equality or social class.

⁸⁰ Granfield, *supra* note 26 at 73.

⁸¹ R Granfield and T Koenig, “It’s Hard to be a Human Being and a Lawyer: Young Attorneys and the Confrontation with Ethical Ambiguity in the Legal Profession” (2002-2003) U Va L Rev 495 at 496.

⁸² CY Costello, *Professional Identity Crisis: Race, Class, Gender, and Success at Professional Schools* (Nashville: Vanderbilt University Press, 2005) 25 and 33. (However, as Costello notes at 33, the empirical literature suggests that most commonly, “when the values of incoming professional students conflict with common values of the profession, the individuals are likely to change much more than are the institutions”).

In many ways, the above description of the various pressures and forces within legal education upon the identities and values of law students reflects and affirms the theories of sociologist Pierre Bourdieu. Bourdieu posited that the legal profession exerts a significant influence on its members through deep structures of behaviour, discourse, tradition, and daily practices of its members. These structures and practices together form what Bourdieu terms the “habitus”, which has been described as

the habitual, patterned and thus pre-reflexive way of understanding and enacting the social field. Hence identity and professional development entail habituation to a discursive and symbolic field, the production of disciplined bodies, within which must be objectified those ‘durable dispositions that recognize and comply with the specific demands of a given institutional area of activity.’⁸³

Bourdieu’s notion of the habitus is that of a force that exerts powerful pressures on members of the group, but that can also be resisted and transformed to some extent. That is, he understood the habitus as “an open system of dispositions that is constantly subjected to experiences, and therefore constantly affected by them in a way that either reinforces or modifies its structures. It is durable but not eternal.”⁸⁴ Bourdieu’s theory thus embraces the possibility that individual lawyers might contest or dispute aspects of the habitus in their day to day practices, but also makes it clear that dominant pressures and habits of the profession play a powerful and often constraining role on the identities and practices of lawyers. In other words, although lawyers may ascribe to dominant notions about professional identity, boundaries, and practice, and while these notions

⁸³ Sommerlad, *supra* note 73 at 194.

⁸⁴ P Bourdieu and LJD Wacqaunt, *An Invitation to Reflexive Sociology* (Chicago: University of Chicago Press, 1992) at 133.

undoubtedly are core features of professional identity, lawyers may not enact this habitus in all individual clients and cases, and may indeed, resist it in various ways.⁸⁵

Thus, it is my argument that law students absorb and integrate dominant notions about the importance of constructing professional boundaries against suffering, and may take on the habitus of cool and tough professionalism that is privileged in dominant legal pedagogies and discourses. This is not, however, an easy process, and may entail a sense of identity displacement. This process of identity formation is also associated with notions of the legal professional as a rational, cool and tough individual who operates within the realm of law, which is in turn, as described above, understood as separate from the “embodied” world of emotion, passion and suffering. Although individual lawyers and law students may resist the dominant notions about the lawyer’s role, most, I would argue, do experience a sense of pressure to conform to dominant ideals about boundaries that are, or ought to be, closed to suffering. However, as I will argue below, critical pedagogical practices that address the actual encounter of students with suffering in clinical contexts can challenge these dominant understandings.

⁸⁵ See also J MacFarlane, “A Feminist Perspective on Experience-Based Learning and Curriculum Change” (1994) 26 *Ottawa L Rev* 357 at 366. Robert Nelson and David Trubek argue that in practice, legal professionalism “consists of multiple visions of what constitutes proper behavior by lawyers.” RL Nelson and DM Trubek, “Arenas of Professionalism: the Professional Ideologies of Lawyers in Context” in RL Nelson, DM Trubek and R Solomon, eds, *Lawyers’ Ideals/ Lawyers’ Practices: Transformations in the American Legal Profession* (Ithaca: Cornell University Press, 1976) 177 at 179.

Reading suffering clients through the “legal gaze”

I have argued that dominant pedagogies and discourses in legal education send a message to law students that law and suffering generally occupy distinct spheres, and that lawyers ideally ought to construct and guard boundaries against human suffering. Specifically, I have attempted to describe the ways in which dominant legal discourse and pedagogical practices construct the idea of a separation between legal and non-legal worlds, where the legal world is characterized by clear legal problems that are solvable by lawyers who apply technocentric, pragmatic and rational reasoning, and who avert their attention from “non-legal” contextual factors. Lawyers are constructed in this dominant discourse as possessing defined professional boundaries: emotion, affect, and embodied realities, including the experience of suffering, are seen as falling outside the realm of proper legal professional expertise and knowledge.

What messages, then, are sent to law students about how they should understand the suffering of their clients when they encounter it? I argue in this section that although dominant legal discourse and law school pedagogies transmit the message that law and suffering inhabit separate worlds, they do not entirely ignore the suffering of individual clients. Rather, it is constructed in particular ways through the “legal gaze”.⁸⁶ I argue that although clients as the subjects of law are largely ignored throughout the teaching of the core law school curriculum, when they do emerge they are viewed through a particular lens which functions to both constitute the client in distinct ways and also produce and

⁸⁶ I am drawing on the theory of Michel Foucault, who described the “medical gaze” in M Foucault, *The Birth of the Clinic* (London: Routledge Classics, 2003). I explore the concept of the legal gaze in more detail below.

reinforce idealized notions of professional identity of the law student. The legal gaze, I argue, tends to view clients in terms of doctrinal categories and remove them from their social and embodied contexts. In this way, it reflects the understanding promoted elsewhere in legal discourse that clients' legal matters can be separated from other aspects of their lives, including their experience of suffering. Suffering itself, I argue, is presented as being a private, emotional attribute of clients, capable of being broken down and described in technical terms.

Perhaps the most notable feature about clients in law school discourse is their *absence*. As Ann Shalleck notes, various features of dominant legal discourse function to remove clients almost entirely from consideration in legal analysis. Thus, the case method, which as described above tends to present "facts" as given and static, can give students the impression that clients are unproblematic figures, easily severable through the "stylized dialogue" of law schools from the social world from which their legal problem emerged.⁸⁷ Shalleck notes that when clients do emerge in classroom discussions, they do as uncomplicated "cardboard" cutouts, usually functioning to "permit familiar classroom dialogue to proceed."⁸⁸ Thus, they are mentioned in the statement of facts in the case method, and in the routine recitations of legal argumentation, functioning to fill unproblematic voids in the rhetorical recitation of the facts of cases on law school examinations or in classroom discussion.

⁸⁷ A Shalleck, "Constructions of the Client within Legal Education" (1992-1993) 45 *Stan L rev* 1731 at 1733-1734.

⁸⁸ *Ibid* at 1731 and 1732.

However, when clients are considered in law school classrooms, they are viewed through a particular lens as a result of the acontextual method of legal reasoning described earlier. In particular, as described by Elizabeth Mertz, clients tend to be defined in terms of doctrinal frames and requirements, and therefore considered “as actors in a legal drama, as characters in legal stories.”⁸⁹ Mertz shows how students are pushed to distance themselves from the human dimensions of the problems of clients, instead employing various linguistic techniques to carefully “place people in legally crafted categories”.⁹⁰

In other words, law students learn through traditional legal discourse and pedagogies that there is a particularly “legal” way to view clients and the legal problems of clients. Foucault’s theoretical work on the construction of a professional “medical gaze” is helpful in understanding how the “legal gaze” might function to view the suffering of clients. In works including *Birth of the Clinic*, Foucault outlined a theory of the ways in which professional medical discourses worked to produce very particular understandings of the human body and disease. Foucault posited that physicians viewed the problems and suffering of their patients through what he termed a “medical gaze”, which he described as an active force that functioned to “discover” and “produce” particular medical information and knowledge. Foucault described the medical gaze as “an operation that makes visible....that totalizes by comparing...that recalls normal functioning”, that “scrutinizes the

⁸⁹ *Supra* note 25 at 100 and 114.

⁹⁰ *Ibid* at 115. See also C Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart Publishing, 2000). At 237, Douzinas describes the legal subject as merely a “caricature of the real person, a cartoon-like figure which, as all caricature, exaggerates certain features and characteristics and totally misses others”.

body and discovers...a visible invisible.”⁹¹ According to Foucault, the patient is objectified through the medical gaze as a site of disease, as an object to be understood through medical frames of reference: “[d]isease is thus objectified and treated as a dimension of human biology rather than socially produced misery or human suffering.”⁹² In other words, the medical gaze is a culturally and ideologically specific way of *seeing* and *understanding* the patient – the object of the gaze. In particular, it isolates the patient from his or her social context, and observes him or her as reducible to biological or physical bodily functions and parts.

Significantly, the legal gaze and legal discourse, in constructing the idea of what Anna Grear calls the client as a “homologous abstract individual”,⁹³ strips clients of their particularities, complexities and materiality. Thus, just as the medical gaze functions to reconstitute and objectify patients who are suffering from illness or pain, the legal gaze removes clients from their embodied and social contexts, and views their legal issues as separate and unrelated to suffering or other experiences. In this way, the legal gaze works to fundamentally “disembody” and also decontextualize clients.⁹⁴ Muneer Ahmad writes about the ways in which the physical space of the law office tends to reify this acontextualized understanding of clients. As Ahmad writes, the legal clinic or law office

⁹¹ Foucault, *supra* note 86 at 114.

⁹² BJ Good and M DelVecchio Good “Learning Medicine: the Construction of Medical Knowledge at Harvard Medical School” in S Lindenbaum and M Lock, eds *Knowledge, Power, and Practice: the Anthropology of Medicine and Everyday Life* (Berkeley: University of California Press, 1993) 81 at 82.

⁹³ A Grear, “Challenging Corporate ‘Humanity’: Legal Disembodiment, Embodiment and Human Rights” (2007) 7 *Human Rights L Rev* 511 at 522.

⁹⁴ *Ibid* at 522.

interview room, helps to reproduce a view of the client as disconnected from a larger political identity or community.⁹⁵

Indeed, the same technocentric and rational legal understandings that promote an idea of lawyers as unavailable to emotion, affect, or embodied and contextual realities work to suppress the centrality of the human embodiment of clients.⁹⁶ Alan Hyde calls the tendency of legal discourse to remove itself from the reality of human embodiment and construct abstract subjects or clients the “discourse of absence”.⁹⁷ Interestingly, Hyde examines how legal discourse actively draws on “bodily” imagery to construct legal concepts, and in so doing, “effaces physical bodies”.⁹⁸ For example, Hyde describes the way that legal discourse constructs the concept of “rights”. He shows that rights are constructed in legal discourse as having a distinct area that may, for example, be intruded upon by the state, and other times as having “mass” that can be “balanced” or “weighed” in the course of legal analysis. Hyde writes that “[r]ights are thus discursively constructed as projections of the human body...: they have space, boundaries, borders, weight, and hearts

⁹⁵ See MI Ahmad, “Interpreting Communities: Lawyering Across Language Difference” (2006-2007) 54 UCLA L Rev 999. Thus, just as the dominant medical model and medical pedagogy produces a notion of patients as “monadic bodies” who “stand, alone before the physician”, disconnected from larger social or economic contexts, the typical client is symbolically disconnected from his or her context and community by her presence in the lawyer’s office, and before the “legal gaze”.

⁹⁶ See discussion in Grear, *supra* note 93 at 522. See also Alan Hyde, who writes that “the legal discourse of privacy constructs the body of an isolated private individual, cut off from other human relations and metaphorically opposed to something called society or the public.” A Hyde, *Bodies of Law* (Princeton, New Jersey: Princeton University Press, 1997) at 163.

⁹⁷ Hyde, *ibid* at 266.

⁹⁸ *Ibid* at 84.

– all the features of physical bodies, and – most importantly – thereby may efface physical bodies.”⁹⁹

Thus, legal discourse and the legal gaze construct clients as parties – litigants, appellants, defendants, and applicants – stripped of their individual motivations, social context, emotion, and material existence and placed within a distinct geography of legal discourse. As Vanessa Munro observes, dominant modes of legal analysis function to remove people from their everyday environments, “stripping them of the characteristics and relationships that influence their choices, and placing them in a sterile legal world...”¹⁰⁰ Dominant liberal jurisprudential theories reinforce this methodology. For example, John Rawls’ model of the “veil of ignorance” requires an intellectual exercise where the judge or lawyer is required to imagine factors such as gender, social context, culture, community, and other factors as severable from individuals in order to construct a model of justice.¹⁰¹

However, as much as legal discourse and dominant law school pedagogies tend to ignore or remove acknowledgement of the pain, physical bodies, or complicated social realities of the subjects of law, the reality of suffering does not entirely escape law’s attention. Rather, law tends to approach suffering in particular ways. In this way,

⁹⁹ *Ibid.* Similarly, Hyde examines legal discourse about abortion and notes that it constructs the “state” as embodied, and in so doing, strips women of their embodiment. Thus, the state is envisioned as having the ability to “touch the bodily integrity of women”. Through these discursive maneuvers, Hyde writes, “[w]omen lose their bodies, which become rights or zones. At the same time, law acquires a metaphorical body” (at 84). Similarly, Hyde shows how legal discourse dehumanizes prisoners by referring to them as “fetishized collections of body cavities....nameless, identitiless, faceless.” (at 163). Hyde shows that the active and complex patterns of discursive disembodiment in legal discourse reify and privilege abstract legal categories (such as “rights”, the “state” and so on), and simultaneously permit judges and lawyers to perpetuate the abstraction and distance from the bodies and suffering of human beings with legal problems. (See page 266).

¹⁰⁰ V Munro, *Law and Politics at the Perimeter: Re-evaluating Key Debates in Feminist Theory* (Oxford: Hart Publishing, 2007) at 45.

¹⁰¹ IM Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990) at 101.

suffering does not pose any serious challenge to law, but rather appears manageable and uncomplicated through the legal lens. As Austin Sarat writes, “[t]he brute physicality of pain and death neither overwhelms law nor compels attention.”¹⁰² As described above, legal discourse accomplishes this by tending to portray human suffering as, for the most part, “irrelevant” or “non-legal”. However, on occasion, for example, in the matter of assessing damages, suffering is brought back into the legal view. Tort law, for example, tends to construct suffering as an attribute that can be quantified, analyzed, and broken down unproblematically through doctrinal or legal frames. In this way, the “legal domain transforms pain into a condition that can be quantified as the basis for compensation claims.”¹⁰³ A vivid example of this process is provided in Bruce Feldhusen’s analysis of the ways in which some judicial opinions have approached the suffering of former residential school students. Feldhusen’s piece demonstrates how legal categories and terminology are used to categorize and chart suffering, reducing it to individualized experiences of litigants.¹⁰⁴ Similarly, Jody Lynee Madeira analyses the ways in which legal decision-makers routinely assume the ability to assess the “authenticity” of suffering of victims, to “sit in judgment upon such injuries, to weigh their existence, extent, and incurrence; and to determine what response they merit – in essence, to recognize another as an authentic

¹⁰² A Sarat, “Introduction: On Pain and Death as Facts of Legal Life” in A Sarat, ed *Pain, Death, and the Law* (Ann Arbor: The University of Michigan Press, 2001) 1 at 14.

¹⁰³ S Ahmed, *The Cultural Politics of Emotion* (New York: Routledge, 2004) at 32. Similarly, Elizabeth Mertz shows legal discourse manages emotion by filtering it through doctrinal categories. See Mertz, *supra* note 25 at 132.

¹⁰⁴ B Feldhusen, “Civil Liability for Sexual Assault in Aboriginal Residential Schools: the Baker Did It” (2007) 22 *Can JL & Soc* 61.

sufferer whose injury merits compensation.”¹⁰⁵ Suffering is thus portrayed as a personal and private experience of a litigant, a matter that can be assessed, separated from non-relevant experiences, removed from social context and managed, judged and “solved” from a legal perspective.

It should be noted that depictions in law and legal discourse of suffering as a matter of private emotions and as an experience that can be unproblematically quantified and described is reflective, to a great degree, of the approaches to suffering taken in many other disciplines. Thus, Arthur Kleinman writes about “the proliferation of rational-technical professional argots that express and constitute suffering in physiological, public health, clinical, psychological, and policy terms”, noting that these modes of analysis about suffering reflect a “systematic, routinized, quantified talk about biomedical and psychiatric and legal and policy issues” related to suffering. Kleinman notes that the result of these dominant professional and technical discourses about suffering, both “expert and popular”, has been that the “idea of suffering has been attenuated, sometimes trivialized, and at times expunged altogether”.¹⁰⁶

Despite the force of the legal gaze and the habitus of professional ideologies regarding the proper orientation of lawyers towards suffering, it is important to reiterate here that not all lawyers or law students uncritically or unequivocally accept these dominant messages or practices. Indeed, the daily interactions of lawyers and clients (and

¹⁰⁵ JL Medeira, “Recognizing Odysseus’ Scar: Reconceptualizing Pain and Its Empathic Role in Civil Adjudication” (2006-2007) 34 Fla St U L Rev 41 at 43.

¹⁰⁶ A Kleinman, PE Brodwin, et al “Pain as Human Experience: An Introduction” in M DelVecchio Good, PE Brodwin et al, eds *Pain as Human Experience: an Anthropological Perspective* (Berkeley: University of California Press, 1992) 1 at 13-14.

clinical law students and clients) undoubtedly reveal a much more nuanced and complex picture of the ways in which lawyers actually respond to suffering. Thus, I would argue that individual lawyers and law students do exercise agency in their interactions with clients and are not utterly beholden to the legal gaze. Indeed, my understanding of the possibility of a critical pedagogy of suffering depends on the possibility of transformative encounters between lawyers and clients, where alternate understandings can be generated. Nevertheless, it is my argument that dominant understandings and readings of suffering described in this chapter play a powerful role and that clinical law students carry these ideas and perspectives with them into their clinical law experiences. Certainly, clinical law educators who wish to pay attention to the issue of suffering must be aware of these dominant approaches to and understandings of suffering in legal discourse and pedagogies.

Conclusion: “A field of suffering and death”: the importance of suffering in law and legal education

I have argued that dominant legal discourses and pedagogies send the message to law students that law and suffering generally occupy distinct and separate worlds, and that lawyers ought to cultivate boundaries that are impermeable to human suffering, which is viewed as “non-legal”. I have showed that the “legal gaze” thus constructs the suffering of clients as separable from their legal problems, a private or emotional attribute unrelated to law. Thus, law students might easily be left with the understanding that law and legal practice do not concern themselves with the problem of suffering, except in very discrete and manageable instances, for example when quantifying damages. In this brief section, I

problematize these assumptions by arguing that law is in fact implicated deeply in problems of human suffering. Indeed, as Jeanne Gaakeer writes,

[s]uffering in the broadest sense of that word remains law's core business...suffering, albeit in different forms for different people, is inextricably bound to law in its modern institutional guise... The initial impetus to law in action is always someone's feeling, be it rightly or wrongly, that he or she suffers by what another person did or failed to do.¹⁰⁷

In an influential essay entitled “Violence and the Word”, legal theorist Robert Cover urged lawyers to be attentive to the ways in which the legal system, and particularly the act of judicial decision-making, actually produce and sanction suffering and pain in very stark material ways. Cover wrote that “[l]egal interpretation takes place in a field of pain and death...A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.”¹⁰⁸ Cover described the ways in which the “Word” or the written or spoken decision of judges, is filtered down through the hierarchical structure of the legal system (to police, jailers, and so on) and transforms into material, physical and often painful consequences for the subjects of law.¹⁰⁹ Thus, Cover draws attention to the specific ways in which legal interpretation and legal discourse actually produces, routinizes and distributes suffering.¹¹⁰ Similarly, Richard Devlin shows how law often functions to normalize, sanitize, and domesticate violence, playing a role in

¹⁰⁷ J Gaakeer, “The Legal Hermeneutics of Suffering” (2009) 3 Law and Human 123 at 128, emphasis added.

¹⁰⁸ R Cover, “Violence and the Word” (1986) 95 Yale LJ 1601 at 1601. Cover’s reference to the death penalty is obviously American in focus, but his arguments and ideas are applicable to the Canadian context.

¹⁰⁹ Cover describes the legal system as a “pyramid of violence”, that acts to “restrain, hurt, render helpless, even kill the prisoner.” (*Ibid* at 1609.)

¹¹⁰ *Ibid* at 1619.

maintaining unequal and hegemonic power structures.¹¹¹ While Cover emphasizes the role of law and legal interpretation in criminal law and penal contexts, his observations are widely applicable in other areas of law as well. For example, as Gaakeer notes, losing a civil lawsuit often implies continued or renewed suffering for the loser.¹¹²

Similarly, Austin Sarat draws attention to the fact that “[b]odies are everywhere in law,”¹¹³ noting that aspects of human suffering, including police brutality, abortion, euthanasia, and so on are key focal points in law; and indeed that a closer look reveals that suffering is everywhere in law, despite dominant techno-rational legal discourses. As Martha Nussbaum points out, our need for law itself is founded upon our “vulnerab[ility] to harm and damage”.¹¹⁴ And, on a systemic level, law reifies the social structures that unevenly distribute suffering along the lines of income, race, gender, ability and so on. Thus, law and suffering are more closely linked and implicated in one another than dominant legal discourses and dominant professional understandings of suffering might reveal. Louis E. Wolcher writes that

[t]he agents of law and justice – even those who serve the very best legal systems – always in fact are wading hip deep through a veritable tidal wave of human suffering as they go about performing law’s tasks, whether or not they realize it.¹¹⁵

¹¹¹ RF Devlin, “Nomos +Thanatos (Part A). The Killing Fields: Modern Law and Legal Theory” (1989) 12 Dal LJ 298 at 332 and 339. And, as Robin West points out, often the harms suffered by certain groups, i.e. women, are not registered by law. R West, *Caring for Justice* (New York: New York University Press, 1997) at 96-97.

¹¹² *Supra* note 107 at 131.

¹¹³ A Sarat, “Introduction: On Pain and Death as Facts of Legal Life” in A Sarat, ed, *Pain, Death, and the Law* (Ann Arbor: the University of Michigan Press, 2001) 1 at 5.

¹¹⁴ MC Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton: Princeton University Press, 2004) at 6.

¹¹⁵ LE Wolcher, *Law’s Task: the Tragic Circle of Law, Justice and Human Suffering* (Aldershot: Ashgate, 2008) at xxi.

As I will argue in the next two chapters, the intersection of law and suffering in poverty and clinical law contexts is particularly apparent. The subject of human suffering, then, ought to be of serious concern to legal educators in general and clinical legal educators in particular.

Chapter 3: Approaches to suffering in clinical law scholarship

Introduction

In this chapter, I argue that clinical legal education and scholarship has challenged dominant understandings about the ways in which lawyers ought to understand and respond to human suffering. I examine four different models or theories of lawyering within the clinical literature that directly or indirectly address the lawyer-suffering client relationship. In particular, I consider client-centred lawyering, therapeutic jurisprudence, feminist “ethic of care” approaches, and, finally, the “theoretics of practice” or “critical lawyering” literature. I argue that while each model provides a valuable antidote to dominant understandings about the encounter between lawyers and the suffering and stories of suffering of their clients, there remains a need for a critical pedagogy of suffering in clinical legal education. I turn first, however, to a discussion of the history and context of clinical legal education and scholarship in Canada and the United States.

Clinical legal education and scholarship – context and controversies

The modern concept of clinical legal education emerged in the United States and Canada during the radical social and political movements of the 1960s and 1970s.¹¹⁶ Early

¹¹⁶ Note that the present-day clinical law movement, which began in the 1960s and 1970s in both American and Canadian law schools was predated by the so-called “first wave” of clinical legal education which occurred in the 1950s in the United States. The first wave of clinical legal education involved the establishment of several law school clinics by proponents of legal realism who rejected the Langdellian view

clinical legal educators were inspired by the Critical Legal Studies jurisprudential movement and critical race and feminist theoretical approaches, and were motivated by their political commitments to the ideal of engaging in the struggle for social justice in low income and marginalized communities.¹¹⁷ The model of clinical legal education adopted by these law schools, which remains the foundation of clinical law programs to this day, was to provide law students with real-life legal experience representing primarily indigent clients.¹¹⁸ By the end of the 1970s, most American law schools had established clinical legal education programs. Similarly, the clinical legal education movement took hold in Canada in the 1960s and 1970s.¹¹⁹ In an early article, William Pincus, one of the founders of the clinical law movement in the United States, identified the pursuit of social justice as

of law as a science, and believed that an understanding of law required the student to, in the words of George Grossman, “look beyond the words of the opinion to the social and psychological forces which were at play upon the judge as an individual, and upon the institutional and professional system at the time of the opinion.” Quoted in JC Dubin, “Clinical Design for Social Justice Imperatives” (1997-1998) 51 SMWL Rev 1462 at 1463. See also J Frank, “Why Not a Clinical Lawyer-School?” (1933) 81 U Penn L Rev 907 and K Llewellyn, “On What is Wrong with So-called Legal Education” (1935) 35 Colum L Rev 651. It is apparent that in 1960s and 70s in the United States, a major endowment from the Ford Foundation enabled the establishment of clinical programs in a myriad number of law schools, and as a result, by the end of the 1970s, most American law schools had clinics. J MacFarlane, *supra* note 14 at 36.

¹¹⁷ MacFarlane, *ibid.* See also Dubin, *ibid* at 1465. See also NW Tarr, “Current Issues in Clinical Legal Education” (1993-1994) 37 Howard LJ 31 at 31-32. Tarr writes that “a major stimulus for many programs that developed during the 1960s and early 1970s was the desire to serve the needs of the unrepresented, to sensitize law students to their ethical and moral responsibilities to society, to train students in poverty law practice, and to give law schools a role in their communities.”

¹¹⁸ As Phyllis Goldfarb points out, clinical education, as originally conceived, involved direct client service in a setting where students represented indigent clients. P Goldfarb, “A Theory-Practice Spiral: the Ethics of Feminism and Clinical Legal Education” (1990-1991) 75 Minn L Rev 1599 at 1646.

¹¹⁹ For histories and descriptions of Canadian clinical law programs within the context of Canadian legal education, see: R Voyvodic and M Medcalf, “Advancing Social Justice through an Interdisciplinary Approach to Clinical Legal Education: the Case of Legal Assistance of Windsor” (2004) 14 Wash UJL & Pol’y 101; H Savage, “The Dalhousie Legal Aid Service” (1975) 2 Dal LJ 505; “Preface to the Symposium” (1977) 3 Queen’s LJ 211; see C Nation, “A Role for Law Students in the Administration of Justice in Quebec” (1976) 22 McGill LJ 468; D Clark, “Legal Education in Saskatchewan: the Last Ten Years” (1983) 7 Dal LJ 375, A Demers, “And Social Justice for All: A History of the University of Windsor, Faculty of Law” (2009) 27 Windsor Rev Leg & Soc 31; P Slayton, “Law at Western: 1968-1982” (1983) 7 Dal LJ 411; F Iacobucci, “Recent Developments in Legal Education at the University of Toronto” (1983) 7 Dal LJ 400; SAM Gavigan, “Twenty-Five Years of Dynamic Tension: the Parkdale Community Legal Services Experience” (1997) 35 Osgoode Hall LJ 443.

being one of the primary educational goals of clinical legal education, writing that clinical legal education must teach students to “recognize what is wrong with the society around [them] – particularly what is wrong with the machinery of justice in which [they are] participating and for which [they have] a special responsibility.”¹²⁰ The early Canadian clinical literature expresses similar political and social justice themes. For example, Harry Arthurs wrote that “[b]y working with the poor and the powerless, providing legal advice, personal counseling and community organizing assistance, law students are helping to define a new clientele of conscience whose claims on the legal profession have been too seldom recognized in the past.”¹²¹

Despite the overtly political tone of much of the early clinical law literature, it is also apparent that the fundamental purpose of clinical legal education and its place within legal education as a whole has been contested from the beginning. Thus, many early advocates of clinical legal education conceptualized it primarily in terms of skills training.¹²² And many others described the purpose of clinical legal education as being a mixture or a balancing between education in social justice and development of conventional legal and professional skills.¹²³

¹²⁰ S Wizner, “Beyond Skills Training” (2000-2001) 7 Clin L Rev 327 at 331.

¹²¹ H Arthurs, “Study of the Legal Profession in the Law School” (1970) Osgoode Hall LJ 183 at 189.

¹²² See discussion and sources in N Gold, “Legal Education, Law and Justice: the Clinical Experience” (1979-1980) 44 Sask L Rev 97 at 102.

¹²³ See, for example, Arthurs, *supra* note 121 at 189. And see CJ Hathaway, “Clinical Legal Education” (1987) 25 Osgoode Hall LJ 239 at 239. Hathaway writes: “...it is argued here that clinical education in law schools can and should be a means of providing students with an enhanced understanding of mainstream conceptual learning goals.”

While most American and a significant and growing number of Canadian law schools offer clinical programs today¹²⁴, it is clear that clinical legal education remains contested terrain within law schools. Thus, while many clinicians are steadfastly committed to the notion that clinical law inherently “contains an enduring social justice rationale,”¹²⁵ and is inextricably tied to a political commitment to the goals of social justice for marginalized groups,¹²⁶ others take the view that clinical legal education is primarily a vehicle for professional skills transfer, with the goal of preparing future lawyers for conventional forms of legal practice. Indeed, it appears that with the ongoing corporatization of law schools and post-secondary education, law schools have increasingly sought to emphasize clinical legal education as a vehicle for apolitical and neutral “skills transfer”, or “depoliticized craft training,”¹²⁷ thus deemphasizing the social justice or critical elements of clinical legal education. Indeed, Philip Kissam observes that the basic instinct of law schools has been to resist and “tame” clinics by focusing on skills and by marginalizing them within the curriculum. He writes that “[t]hus limited and tamed, clinics help legitimate the law school as a provider of excellent education, and they provide

¹²⁴ Regarding American clinical programs, see JM Brodie, “Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics” (2008-2009) 15 Clin L Rev 333. Brodie points out that American clinical law programs are very diverse, and include service clinics (civil and criminal) and specialized clinics that cover law reform, mediation and ADR and more (at 336). In the Canadian context, note the recent Canadian Conference on Clinical Legal Education, held at Western Law School in October 2010. See <http://www.uwo.ca/conferences/CanadianLegalEd/Cacle.html> for information about Canadian clinical law programs.

¹²⁵ SM Ashar, “Law Clinics and Collective Mobilization” (2007-2008) 14 Clin L Rev 355 at 360.

¹²⁶ For example, Nina Tarr writes that “[c]linical education is not simply a pedagogical method, it is a philosophy about the role of lawyers in our society”: Tarr, *supra* note 117 at 33. See also J Cooper and LG Trubek “Social Values from Law School to Practice: an Introductory Essay” in J Cooper and LG Trubek, eds *Educating for Justice: Social Values and Legal Education* (Aldershot: Ashgate Dartmouth, 1997) 1 at 5 and RD Dinerstein, “Clinical Texts and Contexts” (1991-1992) 39 UCLA L Rev 697.

¹²⁷ Kennedy, *supra* note 61.

transitional bridges to practice for some students.”¹²⁸ Similarly, Sameer Ashar writes that the notion of professional “skills transfer” has emerged as the dominant rationale for clinical legal education in law school and legal education discourse.¹²⁹ According to Ashar, “[t]he external pressure of the market to train lawyers for designated functions – unyielding in the current political moment – is both a direct and indirect cause of the dilution (and sometimes, elimination) of the social justice mission of law school clinics.”¹³⁰

It seems clear that clinical legal education presents a fundamental methodological difference from mainstream pedagogical approaches in law schools.¹³¹ As Kissam notes, clinical legal education

immerses students in a world of practical rationality, contextualized judgments, tacit knowledge and student-centred learning that is fundamentally dissimilar from the world of the case method and final examination.¹³²

However, it is equally clear that there is no uniform or homogeneous understanding among clinicians or legal educators more generally regarding the purpose and goals of clinical legal education. It is unsurprising, then, that an eclectic body of scholarship has emerged by clinical scholars, and clinical writers have drawn on and developed widely varying theoretical perspectives. Many clinical writers draw on the theories of various contemporary jurisprudential movements, including critical legal theory, critical race theory, feminist jurisprudence, law and literature, and narrative jurisprudence.¹³³ These clinical scholars tend to ground their scholarly explorations in actual clinical experiences,

¹²⁸ Kissam, *supra* note 19 at 148.

¹²⁹ Ashar, *supra* note 125 at 372.

¹³⁰ *Ibid* at 366.

¹³¹ See MacFarlane, *supra* note 14 at 43; Shalleck, *supra* note 87 at 1739.

¹³² *Supra* note 19 at 147.

¹³³ See discussion of P Goldfarb, “A Clinic Runs Through It” (1994-1995) 1 Clin L Rev 65 at 65.

often, for example, using stories about clients and lawyers as the source of critical and theoretical analysis. In other words, scholars tend to emphasize the critical examination of clinical experience “as a source of understanding, and advocate for the “continual reconstruction of knowledge in the light of new experience.”¹³⁴ Other clinical writers draw on psychological theory and practice, and still others appear to root their work in legal realist traditions or other jurisprudential theories.¹³⁵

Despite the broad range of theoretical approaches and subject matter discussed in the clinical law scholarship¹³⁶, the fact that much clinical legal education revolves around direct-service legal representation to low income individuals and communities has meant that a frequent theme in the literature is the theorizing and critique of legal practice, as well as a specific focus on clients and the lawyer-client relationship. This focus of clinical law scholarship has led to what Anthony Alfieri describes as the development of specific “clinical knowledge”¹³⁷ about the lawyer-client relationship and the centrality of the experience of clients in their interactions with the legal system. Indeed, as Susan Carle writes, “[t]he clinical law movement can be characterized by its (re)turn to an emphasis on the client’s proper role in shaping and defining her experience with the law,”¹³⁸ and Ann Shalleck asserts that the clinical approach is based on a “deeply contextualized

¹³⁴ Goldfarb, *supra* note 118 at 1648.

¹³⁵ See, for example,

¹³⁶ Any issue of the Clinical Law Review, for example, is filled with a variety of articles on clinical pedagogy and practice, and writings from various theoretical perspectives.

¹³⁷ A Alfieri, “The Politics of Clinical Knowledge” (1990) 35 NY Law Sch L Rev 14.

¹³⁸ SD Carle, “Clinical Approaches” in SD Carle, ed *Lawyers’ Ethics and the Pursuit of Social Justice* (New York: New York University Press, 2005) 145 at 145. See also Biny Miller’s reflections on the place of clients in clinical law scholarship: B Miller, “Telling Stories about Cases and Clients: the Ethics of Narrative” (2000-2001) 14 Geo L Legal Ethics 1.

understanding of who clients are and why they are significant.”¹³⁹ Similarly, Phyllis Goldfarb notes that much of clinical scholarship and theory is grounded in the “multiple ways that diverse people experience law in their daily lives.”¹⁴⁰

Given this emphasis on issues pertaining to the lawyer-client relationship, specifically within clinical contexts where clients are often marginalized and socially subordinated, it is perhaps unsurprising that various clinical law writers have either directly, or indirectly, addressed the topic of the encounter of lawyers and law students with the suffering of clients in clinical law contexts. In the remainder of this chapter, I consider four approaches or theories of the lawyer-client relationship that have been embraced and developed by clinical law writers and educators and that touch on this topic. In particular, I explore the ways in which the encounter with suffering has been conceived of in the “client-centred lawyering” literature, the “therapeutic jurisprudence” movement, feminist “ethic of care” approaches, and the more overtly political critical lawyering/theoretic of practice literature. I argue that while each body of scholarship either directly or indirectly challenges dominant conceptions of the lawyer-client relationship and the proper response of lawyers to the suffering of clients, none undertakes a critical theoretical approach towards the topic of suffering itself, thus leaving intact various dominant assumptions about suffering. I argue that there remains a need for a critical pedagogy of suffering in clinical legal education, which forms the subject of discussion and analysis in the next chapter.

¹³⁹ Shalleck, *supra* note 87 at 1740.

¹⁴⁰ Goldfarb, *supra* note 133 at 65.

Client-centred lawyering

The model known as “client-centred lawyering” has been highly influential in clinical pedagogy and scholarship. Indeed, several clinical writers have identified the client-centred model as a defining feature of clinical legal practice and pedagogy. For example, Robert Dinerstein has written that “client-centredness” is a core feature of clinical law¹⁴¹, and Katherine Kruse identifies the client-centred model as the most influential doctrine in clinical legal education.¹⁴² Similarly, Sameer Ashar identifies client-centred lawyering as the dominant model of lawyering in clinical legal education.¹⁴³ The model’s best-known articulators are David Binder, Paul Bergman and Susan Price, whose book *Lawyers as Counselors: A Client-Centred Approach*, develops the client-centred model and has profoundly influenced many clinical educators, and perhaps can be thought of as a canonical text within clinical legal education. In this section, I outline the client-centred approach as articulated by Binder, Bergman and Price, focusing particularly on the ways in which the model addresses the topic of lawyers’ responses to client suffering. I argue that the model, although reflected, developed, and embraced within a large body of clinical scholarship, tends to replicate rather than challenge dominant notions of the proper response of lawyers to suffering. In particular, I argue that the client-centred model tends to reproduce the notion of the division of legal and non-legal spheres and the

¹⁴¹ Dinerstein, *supra* note 126 at 728.

¹⁴² KK Kruse, “Fortress in the Sand: the Plural Values of Client-Centred Representation” (2005-2006) 12 Clin L Rev 369 at 370-371. Kruse 370-1. See also DA Binder, P Bergman, SD Price, Paul R Tremblay, *Lawyers as Counselors: a Client-Centred Approach*, 2nd ed (St. Paul: Thomson West, 2004) at 3.

¹⁴³ Ashar, *supra* note 125 at 368.

acontextualized depiction of suffering as a private emotional matter to be appropriately managed and dealt with by lawyers through a series of professional techniques.

The client-centred model insists on the primacy of client decision-making and stresses that lawyers must strive to give centrality to the experience and self-determination of clients. A client-centred approach, then, requires the lawyer to listen and to give clients “time and space for self-definition.”¹⁴⁴ According to its proponents, the client-centred model was developed in response to dominant models of lawyering where lawyers “portray themselves as professionals who control the choices that clients make by convincing clients as to what is in their best interests...” and which “regards clients as unsuited to the tasks of legal problem-solving”.¹⁴⁵ In this sense, the model levels a critique against notions of impersonal professional expertise often promulgated in dominant legal discourse and pedagogies. In addition, the model is significant in its emphasis on the importance of the perspectives of clients given the tendency of dominant legal discourse and pedagogies to disregard clients.

In their text, Binder, Bergman and Price develop a detailed model for client-centred lawyering. They espouse a notion of lawyering as problem-solving¹⁴⁶, describing client problems as multi-dimensional and complex. In their words,

[t]he client-centred conception has its source in a perspective that legal problems typically raise both legal and non-legal concerns for clients, that collaboration between attorneys and clients is likely to enhance the effectiveness of problem-solving, and that clients ordinarily are in the best position to make important decisions.¹⁴⁷

¹⁴⁴ Shalleck, *supra* note 87 at 1742.

¹⁴⁵ Binder, Bergman and Price, *supra* note 142 at 4.

¹⁴⁶ *Ibid* at 3.

¹⁴⁷ *Ibid*.

In its attention to the multifaceted nature of client problems, the client-centred model of lawyering places a high value on the ability of lawyers to attend to the emotions of clients. Thus, Binder, Price and Bergman write that

[L]egal problems do not exist in emotionless vacuums. Clients' emotional reactions to problems and their possible solutions are often as significant as the facts that generate the problems. Thus, clients often want and need to talk about their feelings.¹⁴⁸

The authors focus specifically upon the importance of lawyers' responses to "negative feelings" of clients, which, they say, can manifest when clients recall traumatic events. They write that "client trauma" in the context of the lawyer-client relationship

occurs when you ask clients to recall experiences that evoke unpleasant feelings. *Many events (especially those that clients relate to lawyers) cause people to experience negative feelings such as fear, anger, humiliation, and sadness. When you ask clients to recall such events, they may re-experience the negative feelings.*¹⁴⁹

Binder, Price and Bergman go on to present in their text several examples of so-called "client trauma", including a hypothetical situation of a client whose child has been severely injured¹⁵⁰, a client whose spouse has died due to medical malpractice, and a client whose children were sexually molested.¹⁵¹ The authors also refer to the phenomenon of lawyers encountering clients who are "hostile, angry, and explosive", noting that in some cases the "inner pressures" of clients may escalate during their conversations with lawyers, causing them to "explode into fits of anger, hurt, or hostility."¹⁵² They caution that "[w]ith some

¹⁴⁸ *Ibid* at 11.

¹⁴⁹ *Ibid* at 24 (emphasis added).

¹⁵⁰ *Ibid*.

¹⁵¹ *Ibid* at 248.

¹⁵² *Ibid* at 260.

clients, fits take the form of tears; with others, they take the form of complaints, threats or accusations.”¹⁵³

Binder, Price and Bergman go on to suggest that lawyers should be able to anticipate client “reluctance” to discuss traumatic issues, or the potential of clients to explode into “fits” of emotion, and offer a series of specific client-centred techniques that lawyers can employ to manage and overcome these potential problems. For example, they suggest that lawyers can attempt to “overcome” client inhibition to share information through “empathic understanding of clients’ anxiety or discomfort.”¹⁵⁴ They suggest that lawyers can display empathy by offering a “[g]eneric statement of reward and desire to help”¹⁵⁵ and through employing techniques of “active listening with compassion”.¹⁵⁶ Furthermore, they suggest that lawyers employ specific techniques such as postponing discussion of the traumatic topic “until a future time when greater rapport or some other factor will overcome the client’s reluctance”, providing emotional clients with a “cooling off period”¹⁵⁷ or simply ignoring the problem and “pressing on with the topic” using “motivational statements” along the way.¹⁵⁸ However, they warn that in some instances, lawyers’ ability to “overcome” the issues raised by client trauma may be stretched to its limit, and lawyers should refrain in such cases from playing “amateur psychologist”¹⁵⁹ but instead consider referring the client to a therapist or another appropriate professional.¹⁶⁰

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid* at 249.

¹⁵⁵ *Ibid* at 251.

¹⁵⁶ *Ibid* at 261.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid* at 249.

¹⁵⁹ *Ibid* at 11.

¹⁶⁰ *Ibid* at 24-25.

The authors thus put forward the position that the emotions, feelings and suffering of clients should be acknowledged and taken into consideration by lawyers. Indeed, they write that lawyers have a role in assisting clients articulate and clarify their feelings so that clients are better able to “understand their own emotions”.¹⁶¹ Throughout, however, it is clear that the authors view client trauma and emotions as “non-legal” issues¹⁶² which function as hurdles or obstacles to lawyers, who must seek to “overcome” them in order to effectively address the true legal problems presented by the client’s situation.

Thus, client trauma or suffering is viewed in the client-centred model as a personal emotional problem of the client, evoked by unfortunate or tragic circumstances and that tends to function as a communication barrier or inhibitor. That is, trauma elicits emotional reactions by the client that can impede the lawyer’s ability to properly gather legally relevant information from the client, or to effectively problem-solve. By viewing client suffering as a problem to be overcome, the model tends to pathologize suffering clients.¹⁶³ Indeed, Binder, Bergman and Price explicitly refer to clients who are emotional or exhibiting signs of trauma as “atypical”, “difficult” and “problem” clients.¹⁶⁴ In this way, the model envisions suffering as a “problem” of individual clients, one that can make clients difficult to manage for lawyers.

Furthermore, the model presents a particular vision of the lawyer that I would argue parallels the dominant image described above in chapter two. That is, the client-centred approach tends to envision a lawyer who is able, through the use of appropriate

¹⁶¹ *Ibid* at 49.

¹⁶² *Ibid* at 9.

¹⁶³ P Margulies, “Reframing Empathy in Clinical Legal Education” (1999) 5 *Clin L Rev* 605 at 610.

¹⁶⁴ *Supra* note 142 at 247.

techniques, to dispassionately view and assess the suffering of his or her client and “overcome” the problems to legal practice that this suffering entails. Thus, the model delivers what Peter Margulies calls a “value-neutral version of empathy” where lawyers are to be neutral and non-judgmental in their response to clients.¹⁶⁵ In this way, the client-centred model tends to reproduce the dominant notion of a clear separation between legal and non-legal spheres and a clear image of lawyers as competent professionals who can manage non-legal issues in order to hone in on the legal issues.¹⁶⁶ Empathy is articulated in the model as a value-neutral tool of a lawyer, who employs it to defuse problematic barriers to communication and in order to move the client’s issue clearly into the legal realm.

While the client-centred model is important in its attention to the individual circumstances and perspectives of clients, its failure to acknowledge political, racial or socio-economic contexts of clients leads it to replicate dominant acontextual approaches legal practice. In essence, client-centred lawyering as articulated by Binder, Price and Bergman, puts forward a conception of a series of techniques that can be applied by any lawyer to any suffering or “emotional” client, failing to account for the differences among lawyers, and among clients, and within the various communities in which lawyers and clients exist.¹⁶⁷ As Ann Shalleck writes, “in terms of the [client-centred] method, the lawyer treats all cases the same whether the client is a poor, single mother or a

¹⁶⁵ *Supra* note 163 at 608.

¹⁶⁶ Shalleck, *supra* note 87 at 1745 makes this point also.

¹⁶⁷ Shalleck notes that the model does not tend to account for differences among clients, and Michelle Jacobs notes that the model tends to treat clients as interchangeable: Shalleck, *ibid* at 1743 and M Jacobs, “People from the Footnotes” (1997) 27 *Golden Gate L Rev* 345 at 347.

pharmaceutical executive. There is no sense that these situations pose different issues for the lawyer.”¹⁶⁸ Indeed, as several critics have pointed out, the model has the effect of “fetishizing the lawyer-client dyad”¹⁶⁹, where the lawyer and client are viewed simply as a “community of two” separate from political and social contexts.¹⁷⁰

Indeed, the client-centred lawyering view of client emotions and suffering, with its tendency to view clients and client problems without regard to their social, political and cultural contexts can inadvertently make completely false assumptions about the shape and reality of clients’ lives. Lawyers who are trained to view suffering as an emotional problem of the client to be managed by appropriate techniques in order to move into the legal sphere are less likely to see the need to inquire into larger contextual questions which might in the end lead them to a broader and more expansive understanding of lawyering in the face of systemic injustice. As Sameer Ashar writes, the complete removal of the lawyer-client relationship from the socio-political sphere and the “chiseling of clients away from their political and racial solidarities”¹⁷¹ inherent in the client-centred model is problematic for these reasons. Certainly, the model, with its assumption that lawyers can assess and address client suffering, tends to view clients as arriving at the lawyer-client relationship in a “state of defeat.”¹⁷² In other words, clinicians and lawyers who ascribe to the client-centred model risk replicating dominant notions of legal practice and professional identity

¹⁶⁸ *Supra* note 87 at 1747.

¹⁶⁹ M Ahmad, “Interpreting Communities: Lawyering Across Language Difference” (2006-2007) 54 UCLA L Rev 999 at 1076. See also M Diamond, who writes about the potential dangers of the “cul-de-sac of the lawyer-client relationship”: “Community Lawyering: Revisiting the Old Neighbourhood” (2000) 32 Colum Hum Rts L Rev 67.

¹⁷⁰ See WH Simon, “Homo Psychologicus: Notes on a New Legal Formalism” (1979-1980) 32 Stan L Rev 487.

¹⁷¹ Ashar, *supra* note 125 at 359.

¹⁷² Jacobs, *supra* note 167 at 352-3.

in the face of suffering. That is, the client-centred model arguably reproduces ideals of the lawyer as a competent and cool “expert”, who is able to assess, read, and manage client suffering as a private emotional experience, and then cross over into the legal realm and solve the client’s legal problems.

Therapeutic jurisprudence

“Therapeutic jurisprudence” is a movement within legal scholarship and practice that has, like client-centred lawyering, been embraced by clinical teachers and writers. Like the client-centred model, therapeutic jurisprudence constructs a model of legal practice that emphasizes the centrality and the importance of individual clients’ perspectives.¹⁷³ However, it diverges from the client-centred model in its very specific grounding in psychological and social science theories, and its central emphasis on the ways that law, the legal system and actors within the legal system (including lawyers and judges)¹⁷⁴ can, through their interactions with clients, have either “therapeutic” or “anti-therapeutic” effects upon clients. According to its proponents, therapeutic jurisprudence seeks to identify the role of law as a therapeutic agent. These writers suggest that both the positive and negative consequences of the law should be studied empirically, and through

¹⁷³ Therapeutic jurisprudence certainly overlaps in significant ways with client-centred approaches. See BJ Winick, “Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys can Identify and Deal with a Psycholegal Soft Spot” in DP Stolle, DB Wexler et al, *Practicing Therapeutic Jurisprudence: Law as Helping Profession* (Durham: Carolina Academic Press, 2000) 327 at 345.

¹⁷⁴ DB Wexler and BJ Winick, *Essays in Therapeutic Jurisprudence* (Durham: Carolina Academic Press, 1991) ix.

multidisciplinary lenses.¹⁷⁵ Although therapeutic jurisprudence originally focused upon the interaction of clients with law and legal processes in mental health law contexts, the movement has broadened to include a more general consideration of the ways in which clients are psychologically impacted through their interactions with law and the legal system.¹⁷⁶

Although therapeutic jurisprudence has not necessarily become a “canonical” model or theoretical approach within clinical legal education contexts, it appeals to a significant number of clinical writers and arguably has become an influential approach within clinical contexts.¹⁷⁷ Indeed, Sameer Ashar notes that a therapeutic approach has “become the central thrust of instruction and the metric of success in conventional clinical cases.”¹⁷⁸ And Keri Gould and Michael Perlin argue that therapeutic jurisprudence is a “natural fit” for clinical legal education.¹⁷⁹ Therapeutic jurisprudence scholars writing about its application to clinical legal education argue that it is a particularly useful approach for

¹⁷⁵ DP Stolle, DB Wexler et al, “Integrating Preventative Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering” in DP Stolle, DB Wexler and BK Winick, eds., *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Durham: Carolina Academic Press, 2000) 5 at 7.

¹⁷⁶ DB Wexler, “Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies” in DP Stolle, DB Wexler et al, *Practicing Therapeutic Jurisprudence: Law as Helping Profession* (Durham: Carolina Academic Press, 2000) 45 at 45.

¹⁷⁷ See, for example, Symposium, “Therapeutic Jurisprudence and Clinical Legal Education and Skills Training” (2005) *St Thomas L Rev* 403 and BJ Winick and DB Wexler, “The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic” (2006-2007) *13 Clinical L Rev* 605. See also CS Salisbury, “From Violence and Victimization to Voice and Validation: Incorporating Therapeutic Jurisprudence in a Children’s Law Clinic” (2005) *17 St Thomas L Rev* 623 and KK Gould and ML Perlin, “Johnny’s in the Basement Mixing Up his Medicine: Therapeutic Jurisprudence and Clinical Teaching” (2000) *24 Seattle UL rev* 339 and SL Brooks, “Using Therapeutic Jurisprudence to Build Effective Relationships with Students, Clients and Communities” (2006-2007) *13 Clin L Rev* 213.

¹⁷⁸ Ashar, *supra* note 125 at 380.

¹⁷⁹ *Supra* note 177 at 341.

students who are interviewing and counseling clients who are confronting stressful situations or suffering from various psychosocial problems.¹⁸⁰

Proponents of therapeutic jurisprudence tend to view the law (and the various processes and systems associated with it) as a social force that can, and does, impact the psychological or emotional well-being of people who interact with it in both negative and positive ways. The goal of therapeutic jurisprudence scholarship, according to these writers, is to assist in the reformation of law and legal processes to minimize their “anti-therapeutic consequences” and maximize “therapeutic consequences” for people who interact with the legal system.¹⁸¹ Thus, the therapeutic jurisprudence model seeks to equip lawyers with techniques for applying “existing law in such a way as to enhance wellbeing of the individual client.”¹⁸² In this way, proponents of therapeutic jurisprudence encourage lawyers to broaden their conception of their professional role in relation to their clients. For example, Winick and Wexler urge lawyers to embrace a conception of themselves as “therapeutic agents”, which requires “an interdisciplinary, psychologically-oriented perspective and enhanced interpersonal skills”.¹⁸³ Thus, therapeutically-oriented lawyers must hone their ability to identify so-called “psycholegal soft spots”¹⁸⁴, which may include legal rules, legal processes, and so on, which might lead to anti-therapeutic consequences for clients. Anti-therapeutic consequences can include “strongly negative emotional

¹⁸⁰ Winick and Wexler, *supra* note 177 at 612.

¹⁸¹ *Supra* note 175 at 6.

¹⁸² *Supra* note 176 at 46.

¹⁸³ Winick and Wexler, *supra* note 177 at 607.

¹⁸⁴ Wexler, *supra* note 182 at 47.

reactions,”¹⁸⁵ or feelings of “anger, stress....anxiety, fear, or depression”.¹⁸⁶ These client feelings, argue Winick and Wexler, can interfere with and interrupt lawyer-client dialogue and prevent effective lawyering.¹⁸⁷

In its primary emphasis on the psychological well-being of clients, the therapeutic jurisprudence literature tends to place a special emphasis upon the importance of lawyers attending to the emotions of clients,¹⁸⁸ being sensitive to “client voice”,¹⁸⁹ and creating safe and “non-threatening” environments for clients.¹⁹⁰ In particular, proponents of therapeutic jurisprudence caution lawyers to pay attention to the possible “anti-therapeutic consequences” of legal advice that they give to clients. For example, according to Dennis Stolle, lawyers must strive to avoid giving clients legal advice that might “discourage the client from seeking needed treatment or contribute to the client’s level of depression or anxiety.... unless these negative consequences are outweighed by some legal priority.”¹⁹¹ Thus, according to Stolle, a lawyer practicing therapeutic jurisprudence and with HIV positive client would “enhance an HIV-positive client’s autonomy by protecting his or her individual liberties and enhance the client’s psychological well-being by making emotional concerns one priority in legal planning.”¹⁹² Other writers, such as David Wexler, emphasize that the therapeutic attention to client emotions leads lawyers to embrace a

¹⁸⁵ Winick and Wexler, *supra* note 177 at 610.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid* at 611.

¹⁸⁸ See, for example, DP Stolle, “Advance Directives, AIDS, and Mental Health: Preventative Law for the HIV – positive Client” in DP Stolle, DB Wexler et al, *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Durham: Carolina Academic Press, 2000) 83 at 87.

¹⁸⁹ See O Hankivsky, *Social Policy and the Ethic of Care* (Vancouver: UBC Press, 2004) at 71.

¹⁹⁰ *Ibid* at 71.

¹⁹¹ Stolle, *supra* note 188 at 88.

¹⁹² *Ibid* at 84.

“preventative law” approach wherein they endeavour to assist their clients to avoid the development of legal conflicts in the first place.¹⁹³

Therapeutic jurisprudence writers thus stress the importance of empathetic and sensitive affective responses by lawyers towards their clients. According to Bruce Winick, empathy requires a lawyer to be able to “cross over” into the client’s world, and “respond in ways calculated to ease the other person’s pain.”¹⁹⁴ Winick goes on to explain that

“[t]o be effective at expressing empathy, attorneys must learn to project themselves into the feelings and situations of their clients, expressing the warmth and understanding that create a comfortable space within which clients can express their own emotions. *Empathy involves an openness to suffering that is most pronounced in people who themselves have experienced suffering...*”¹⁹⁵

In other words, Winick promotes a notion that lawyers should be able to draw on their own experiences of suffering or pain to better empathize with their clients.

Similarly, Linda Mills, who identifies her focus on what she terms “affective lawyering” as a form of therapeutic jurisprudence¹⁹⁶, writes that clients “demand an emotional response, either explicitly or implicitly, and that lawyers must have the skills to address the anger, frustration, despair, or even indifference that legal interactions evoke.”¹⁹⁷ Mills writes that lawyers must understand that “every interaction contains an emotional subtext” and argues that lawyers and clients, who tend to operate in “two

¹⁹³ Wexler, *supra* note 182 at 47.

¹⁹⁴ Winick, *supra* note 173 at 338. See also Lynne Henderson, who writes that empathy can lead to a “distress response”: L Henderson, *supra* note 27 at 436.

¹⁹⁵ Winick, *supra* note 173 at 338. Emphasis added.

¹⁹⁶ Mills, *supra* note 13 at 423.

¹⁹⁷ *Ibid* at 422.

worlds”, can meet in “a space in between” despite their differences.¹⁹⁸ Thus, Mills urges lawyers to try to identify with their clients’ suffering by sharing their own experiences of suffering, noting that lawyers and clients can discover “common ground in shared experiences of oppression”¹⁹⁹ and experiences of “shared suffering”.²⁰⁰

Mills’ approach to “affective lawyering”, as well as Winick’s discussion of the ways in which lawyers can draw on their own experiences of suffering in order to better empathize with clients pose challenges to the idealized dominant notions of lawyers as neutral, rational and dispassionate described in chapter two. These therapeutic jurisprudence approaches arguably challenge the notion of clear and impermeable professional boundaries with their emphasis on “shared suffering” as a resource for effective lawyering. However, the assumption that lawyers can unproblematically access or experience client suffering, as articulated by Mills and Winick, functions to obscure an analysis of power relations or systemic factors that produce and perpetuate suffering, and to thus reaffirm acontextual and individualistic approaches to lawyering promulgated in dominant visions of legal practice.²⁰¹ The conception of lawyers as “therapeutic agents” also tends towards a paternalistic approach in its positioning of lawyers as the source of client healing through the process of the client’s involvement with the legal system.²⁰² Indeed, the notion that

¹⁹⁸ *Ibid* at 434 and 437.

¹⁹⁹ *Ibid* at 435.

²⁰⁰ *Ibid* at 436.

²⁰¹ Simon, *supra* note 170 at 495. Simon writes: “[f]rom this perspective, it becomes difficult to distinguish the powerful from the powerless. In every case, both the exercise of power and submission to it are portrayed as a matter of personal accommodation and adjustment.”

²⁰² See Salisbury, who discusses the voicelessness of victims of abuse: *supra* note 177 at 242; and Wexler, who writes that criminal law lawyers practicing therapeutic jurisprudence approaches can engage clients in thinking through their behaviour that has led them to criminality: DB Wexler, “Relapse Prevention Planning

lawyers can assess and prevent client suffering erases any conception of client agency and resistance.

It is important to stress that in its emphasis that legal processes and legal actors can function as sources of potential stress and trauma for clients, the therapeutic jurisprudence scholarship explicitly deals with the question of client suffering. Indeed, by focusing on legal and judicial processes as potential sources of this suffering, therapeutic jurisprudence scholarship levels a unique critique against dominant conceptions of legal practice and legal systems as neutral and unrelated to human suffering. However, therapeutic jurisprudence replicates many of the problematic approaches to suffering evidenced within the client-centred model discussed above. Indeed, its emphasis on “law-related psychological well-being”²⁰³, the therapeutic jurisprudence literature tends to confirm a view of suffering as acontextual and individual. Furthermore, in its explicit theoretical reliance on behavioural psychology and psychological literature, therapeutic jurisprudence literature tends to obscure any analysis of power, class, socio-economic factors, or other systemic factors that inform and shape the client’s legal problem.²⁰⁴ Thus, it tends to reduce what may be profoundly contextual and social factors giving rise to suffering to individual emotional and psychological experiences of clients. As William Simon wrote in an early critique of what he termed the “psychological vision of law”, in this kind of approach

Principles for Criminal Law Practice” in DP Stolle, DB Wexler et al, *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Durham: Carolina Academic Press, 2000) 237 at 242.

²⁰³ Wexler, *supra* note 182 at 47.

²⁰⁴ William calls this discourse about law and lawyering that is inspired by psychology the “psychological vision”: Simon, *supra* note 170 at 488.

[t]he social world, the world in which people act, appears only dimly and randomly. It has neither history nor structure. It is of interest principally insofar as it is reflected through or impinges upon feelings.²⁰⁵

In other words, the therapeutic approach functions to alienate clients from their contextual, community, racial and political identifications and thereby “reduces potential political solidarity between law students and their clients to mutual therapeutic validation.”²⁰⁶

A further critique of therapeutic jurisprudence, which indeed applies also to client-centred models of lawyering, is that these models tend to simply accept the existence of law and the legal system, as well as dominant notions of legal practice as “givens”, and encourage lawyers to seek ways to assist clients to navigate these systems in ways that will be less stressful and harmful psychologically . In other words, the potential of alternate approaches to social and systemic injustices, including law reform efforts or political action, are ignored as lawyers are exhorted to focus on therapeutic approaches within the conventional legal system.

²⁰⁵ *Ibid* at 508. See also E Cruz, “Through the Clinical Lens: a Pragmatic Look at Infusing Therapeutic Jurisprudence into Clinical Pedagogy” (2007-2008) 30 T Jefferson L Rev 463.

²⁰⁶ Ashar, *supra* note 125 at 375.

Feminist theories of lawyering: the ethic of care

Feminist theory has had a significant impact upon clinical law scholarship and pedagogy.²⁰⁷ Feminist clinical law teachers have drawn on various aspects of feminist jurisprudence and scholarship to inform and shape theories of feminist lawyering in clinical contexts. In this section, I focus particularly on feminist theories of lawyering in clinical contexts based on notions of the “ethic of care”. By examining the approaches of clinicians who embrace the “ethic of care” as a model for lawyering, I do not intend to suggest that feminist clinical legal educators are united in an acceptance of the ethic of care as a feminist model. Indeed, the meaning and substance of “feminist lawyering” in clinical law contexts has remained a contested topic of debate among feminist writers and clinicians, and certainly not all feminist clinicians focus on the ethic of care as a basis for their work.²⁰⁸ Indeed, Naomi Cahn emphatically writes that “[f]eminist litigation does not necessarily require what Carol Gilligan has labeled an ethic of care.”²⁰⁹ However, because the ethic of care has significantly engaged and challenged feminist clinical lawyers and theorists, particularly those who write about the lawyer-client relationship, it is important to examine it here.

The notion of an “ethic of care” was originally developed by feminist psychologist Carol Gilligan in her influential critique of Lawrence Kohlberg’s theory of moral development. Kohlberg posited that the highest level of moral reasoning was exemplified

²⁰⁷ See, for example: L Morton, “Creating a Classroom Component for Field Placement Programs: Enhancing Clinical Goals with Feminist Pedagogy” (1993) 45 Me L Rev 19; A Shalleck, “The Feminist Transformation of Lawyering: a Response to Naomi Cahn” (1991-1992) 43 Hastings LJ 1072; NR Cahn, “Defining Feminist Litigation” (1991) 14 Harv Women’s LJ 1.

²⁰⁸ For example, clinician Naomi Kahn, writes that feminist litigation and lawyering involves taking a “feminist position” on issues, thus taking a political perspective on legal issues. See Cahn, *ibid* at 1-2.

²⁰⁹ Cahn, *ibid* at 3, fn 13. Indeed, Cahn defines lawyering based upon an ethic of care as more in line with a “feminine” style of lawyering rather than a “feminist” style of lawyering: at 4.

by abstract and rational reasoning based on principles of individual rights – the so-called “ethic of justice.” Gilligan argued that Kohlberg’s model of moral reasoning privileged a distinctly male form of reasoning, asserting that women were more likely to employ forms of moral reasoning based on principles of connection and empathy.²¹⁰ Thus, Gilligan argued that caring and an emphasis on relationship with others provides a distinct epistemological and moral perspective, which can be contrasted with the abstract modes of reasoning usually associated with male-dominated society. In particular, Gilligan noted that reasoning founded on an ethic of care tended to be more sensitive to context, more nuanced, and more attentive to particularities.²¹¹

The conception of an ethic of care as a distinctively feminine or female style of moral reasoning has been subject to considerable challenge and debate. Indeed, many feminist writers have argued that the idea that men and women reason differently, or that women are more likely to engage in caring relationships with others, promotes problematic essentialist notions about women, ignoring diversity and indeed even entrenching unequal gender roles.²¹² However, many feminist writers, including the clinical writers focused upon in this section, have moved beyond the “sameness/ difference” gender debate and have taken Gilligan’s work as a basis for a critique of dominant approaches to justice and legal practice and a model to inspire an approach to lawyering based on empathy and

²¹⁰ See discussion about this issue in J Nedelsky, “Embodied Diversity and the Challenges to Law” in N Naffine, ed *Gender and Justice*, 2nd ed (Aldershot: Dartmouth Publishing Company, 2002) 407 at 415.

²¹¹ See discussion in S Ellmann, “The Ethic of Care as an Ethic for Lawyers” (1993) 81 *Georgetown Law J* 2665 at 2688.

²¹² See Ann Shalleck, *supra* note 207 at 1072 for more on this debate. See also the discussion in E Gachenga, “Stein’s Ethic of Care: an Alternate Perspective to Reflections on Women Lawyering” in F Bartlett, R Mortenson and K Tranter, eds *Alternative Perspectives on Lawyers and Legal Ethics: Reimagining the Profession* (London: Routledge, 2011) 151 at 152.

connection. In other words, these writers have seen the value of moving beyond the gender differences debate towards a “theory of care” in the conception of lawyering.²¹³

Clinicians who have embraced the ethic of care emphasize the importance of “connection” in the lawyer-client relationship, arguing that a genuine relationship based on caring provides the best foundation for effective legal representation of the client by the lawyer.²¹⁴ That is, the ethic of care provides for the lawyer particular insights into the client’s specific situation and problems that in turn shape the approaches to lawyering.²¹⁵ In this way, the clinical law literature based on the ethic of care stresses that effective lawyering consists of both emotional and intellectual aspects.²¹⁶

A fundamental feature of lawyering based on an ethic of care, according to these writers, is an emphasis on the lawyer’s ability to empathize with his or her client. Thus, lawyers must seek to “enter her client’s world”²¹⁷ or “feel another’s experience as if it were one’s own.”²¹⁸ This emphasis on empathy encourages lawyers to undertake a conscientious effort to acquire “situated knowledge” about their clients’ lives and contexts, and thus may prevent lawyers from falling prey to “unexamined assumptions that their

²¹³ See J Tronto, “Beyond Gender Difference to a Theory of Care” in S Moller Okin and J Mansbridge, eds, *Feminism, Vol 2* (Aldershot: Edwards Elgar Publishing Company, 1994) 318.

²¹⁴ Indeed, Ellmann writes that in some cases, a lawyer who practices based on the ethic of care might become “truly, rather than metaphorically, friends” with his or her client: Ellmann, *supra* note 211 at 2695. See also Goldfarb, *supra* note 133 at 69.

²¹⁵ See Ellmann, *supra* note 211 at 2681.

²¹⁶ See, for example, T Glennon, “Lawyers and Caring: Building an Ethic of Care into Professional Responsibility” (1991-1992) 43 *Hastings LJ* 1175 at 1179. Similarly, Ellmann writes that the ethic of care requires lawyer to seek a depth of understanding that engages her heart as well as her head”, Ellmann, *supra* note 211 at 2700.

²¹⁷ Ellmann, *ibid.*

²¹⁸ *Ibid* at 2681.

understanding of the world coincides with their clients.”²¹⁹ Indeed, Jane Spinak suggests that an ethic of care enables lawyers to overcome differences that are likely to exist between lawyer and client in poverty law contexts by enabling the lawyer to draw upon her own experiences of suffering or vulnerability in order to better understand the circumstances of her client. Thus, Spinak writes that her own experience of motherhood and “the vulnerability of living” enabled her to have insights into the deep pain and suffering of a client whose children had been apprehended by child welfare authorities.²²⁰

The definition of care and connection is inevitably linked in the ethic of care clinical literature with notions of emotion and personal relationship. Thus, according to Ellman, the ethic of care “encourages the lawyer to develop a personal tie, an emotional connection, to her client.”²²¹ Similarly, Theresa Glennon underscores the importance of personal relationships between lawyers and clients when she writes that she encourages her clinical law students to understand that their “professional lives are connected to the lives of those who live in poverty and that, by working for and with people living in poverty, students can create relationships with clients...that are rewarding and sustaining.”²²²

The elevation of the personal relationship between lawyer and client, and the particular emphasis on the role of emotion, care and “sympathetic engagement and personal attachment”²²³ to clients stands in contrast to the dominant ideal of a detached professional lawyer-client relationship. However, the model, like the client-centred model

²¹⁹ Goldfarb, *supra* note 118 at 1678.

²²⁰ Spinak, *supra* note 6 at 2053.

²²¹ *Supra* note 211 at 2694.

²²² Glennon, *supra* note 216 at 1175.

²²³ Goldfarb, *supra* note 133 at 69.

of lawyering, and to some degree lawyering based on therapeutic jurisprudence, tends towards the fetishizing of the lawyer-client relationship at the expense of a focus on broader contextual and systemic forces.

The ethic of care also tends towards a sentimentalization of the role of emotions in the lawyer-client relationship and even on occasion the justification of paternalistic intervention by a lawyer. This paternalistic approach is certainly apparent in Stephen Ellman's description of the ethic of care as a foundation for lawyering in clinical contexts. Ellman writes that

Lawyers and clients are thrown together by the client need that generates the relationship.*The lawyer who decides to represent a client may be unable to avoid such client need: by moral disposition the caring lawyer will not be inclined to avoid it; for she will acknowledge a responsibility to meet needs that she has helped to generate, and her contact with her client will make her especially aware of his particular set of needs.*²²⁴

In this way, Ellman emphasizes the “need” of clients for their lawyers for both “emotional sustenance” and legal representation, and notes that lawyers who embrace an ethic of care will acknowledge and take on the responsibility for meeting both of these needs.

Thus, the clinical law “ethic of care” literature tends to challenge dominant notions of lawyering based on detachment and clear professional boundaries, and indeed to claim that an emotional and affective relationship between lawyer and client constitutes an important foundation for more responsive legal practice. However, despite the exhortation upon lawyers to attempt to see the world through the eyes of clients and therefore to take into account the particularities and contextual details of a client's life, it

²²⁴ Ellmann, *supra* note 211 at 2686. Emphasis added.

does not tend to challenge constructions of suffering as a private emotional attribute, nor to subject the encounter with client suffering to any degree of theoretical or contextual analysis. Indeed, the suggestion by clinical law writers such as Ellman that the ethic of care can justifiably lead lawyers to paternalistic interventions on behalf of vulnerable clients confirms conceptions of lawyers as having the ability to truly “see”, assess and understand the suffering of their clients. Finally, the notion, implicit in much of the clinical law ethic of care literature, that establishing a deep and caring relationship between lawyer and client ought to be a primary and overarching goal of the lawyer, can lead the lawyer to neglect the broader critique and strategies necessary for effective lawyering for social justice.²²⁵ It also tends to constitute the lawyer as a benevolent, caring subject, capable of rescuing her client through her care. As I will argue in the next chapter, there is a danger that such benevolent feelings can reproduce and perpetuate dominant power relations between lawyers and clients, and distract from the analysis of larger questions relevant to lawyering in poverty and clinical law settings.

The “critical lawyering” literature

I have considered the ways in which models of lawyering and theorizations of the lawyer-client relationship based on client-centred practice, therapeutic jurisprudence, and the ethic of care have both challenged dominant conceptions of lawyers’ encounters with

²²⁵ Diamond, *supra* note 169 at 67. Michael Diamond’s critique of “progressive lawyers” is applicable here: “[p]rogressive lawyers spend so much time and energy focusing on the nature of their relationship with clients, that clients purposes in obtaining the representation may be neglected, trapped in the relational maze.”

the suffering and traumatic stories of clients, and also reaffirmed certain conceptions of suffering and the ability of lawyers to assess and respond to suffering. In this final section of this chapter, I turn to the body of clinical law literature which perhaps most vigorously critiques dominant conceptions of legal practice, and which has most clearly articulated alternate conceptions of lawyering for subordinated individuals and communities. This critical movement within clinical law and poverty law scholarship encompasses a diverse group of writers, who refer to their approaches to lawyering in different ways, but whose work nevertheless raises a range of similar themes. Thus, Gerald Lopez writes about “rebellious lawyering”²²⁶, Anthony Alfieri writes about the “theoretics of practice” and “reconstructive poverty law practice”²²⁷, Ascanio Piomelli refers to “democratic lawyering”²²⁸, Corey Shdaimah refers to “progressive lawyering”,²²⁹ Buchanan and Trubek describe “critical lawyering”²³⁰ Juliet Brodie, Karen Tokarz and others write about “community lawyering,”²³¹ and Austin Sarat refers to “cause lawyering.”²³² These various writers are united in their project of articulating a sustained critique of dominant legal practice that seeks to systematically address issues of power and subordination, and to

²²⁶ GP Lopez, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (Boulder: Westview Press, 1992).

²²⁷ See AV Alfieri, “Reconstructive Poverty Law Practice: Learning the Lessons of Client Narrative” (1990-1991) 100 Yale LJ 2107.

²²⁸ A Piomelli, “The Challenges of Democratic Lawyering” (2008-2009) 77 Fordham L Rev 1383.

²²⁹ C Shdaimah, *Negotiating Justice: Progressive Lawyering, Low-income Clients, and the Quest for Social Change* (New York: New York University Press, 2009).

²³⁰ R Buchanan and LG Trubek, “Resistance and Possibilities: A Critical and Practical Look at Public Interest Lawyering” (1992) 19 NYU Rev L and Soc Change 687.

²³¹ K Tokarz, NL Cook, “Conversations on Community Lawyering: the Newest (Oldest) Wave in Clinical Legal Education” (2008) 28 Wash UJL & Pol’y 359. See also Brodie, *supra* note 124 and Diamond, *supra* note 169.

²³² S Scheingold and A Bloom, “Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional” (1998) 5 Int J of the Legal Prof 209 at 216.

politicize legal practice in poverty law contexts. Ann Shalleck notes that this body of literature

recaptures the drive for a contextualized understanding of clients that has animated the creation and development of live-client clinics. It also renews the search for a self-critical understanding of the meaning of legal work with clients, and it develops forms of practice that reflect such an understanding.²³³

Referring to this body of work as “critical lawyering” literature, I will sketch some of its main themes and show how it provides a crucial critical perspective on dominant conceptions of legal practice. However, I will also argue that this body of work does not fully address or theorize about the encounter of suffering in clinical law contexts. This opens up the door for the next chapter, in which I argue that there remains a need for a critical and contextual pedagogy of suffering in clinical legal education focused on social justice goals.

The critical lawyering literature shares several themes. First, the literature is united in its profound critique of dominant conceptions of lawyering, or what Gerald Lopez refers to as the model of “regnant lawyering.”²³⁴ Regnant lawyering, according to Lopez and others, is characterized by a conception of lawyers as preeminent problem-solvers who are best positioned to assess and initiate the solutions to their client’s problems.²³⁵ It is also, as described above in chapter two, characterized by an insistence on an acontextual focus on narrow legal issues and a tendency to ignore larger oppressive political and systemic forces. Regnant lawyering approaches, say these writers, can have particularly devastating

²³³ Shalleck, *supra* note 87 at 1748.

²³⁴ Lopez, *supra* note 226 at 24.

²³⁵ *Ibid.*

consequences in low-income communities, where lawyers systematically ignore the larger political and social context of their work, focusing on narrow “legal problems” and thus potentially obscuring or derailing broader strategies for social justice. Progressive and critical or “rebellious” lawyers should realize that they are not “saviors, protectors, or instructors of befuddled victims, nor... preeminent engines or engineers of social change.”²³⁶ Rather, lawyers should seek out and join community struggles and “joint, multidimensional efforts to advocate for justice.”²³⁷

Thus, the notion of lawyering as a neutral, apolitical or amoral task is subverted in the critical lawyering literature. With this comes a critique of acontextual individual litigation strategies and a focus on the importance of collaborative and community-based strategies with the goal of the fundamental transformation of social conditions rather than individual litigation victories.²³⁸ In this way, the critical lawyering writers articulate a distinctively political vision of lawyering in poverty law contexts, emphasizing the importance of a contextual focus on the communities and circumstances of low-income clients, and recognizing the social forces that give rise to legal problems, and considering and engaging in political and other avenues for addressing these issues.²³⁹

While much critical lawyering literature focuses upon the role of lawyers in joining and supporting larger political and community-based struggles, the literature also focuses carefully on the individual lawyer-client relationship, acknowledging that much poverty

²³⁶ Piomelli, *supra* note 228 at 1385.

²³⁷ *Ibid.*

²³⁸ *Ibid.* See also MB Abbott, “Seeking Shelter under a Deconstructed Roof: Homelessness and Critical Lawyering” (1996-1997) 64 *Tenn L Rev* 269 at 287.

²³⁹ See Abbott, *ibid.*

law practice retains an anchoring in individual provision of legal services to clients. The literature tends to focus critically upon power imbalances within the lawyer-client relationship and stress the importance of client empowerment and client narrative and voice, exhorting lawyers to be cautious and critical of the tendency of the legal system to disempower and silence subordinated clients. Thus, the focus is upon challenging and subverting hierarchy from the law and from the lawyer-client relationship,²⁴⁰ and investing in the empowerment of clients.²⁴¹ For example, in his detailed theoretical work on “reconstructive poverty law practice”, Anthony Alfieri critiques the tendency of lawyers to “displace client narratives”²⁴² by silencing the voices of clients and applying false assumptions about client dependency and powerlessness to their interpretation of client stories.²⁴³ Similarly, Shin Imai points out the myriad problems associated with the “epistemological imperialism” endemic in much traditional legal practice, which involves “invading, subjugating and transforming other peoples’ realities into forms and concepts that [make] sense in the world of law.”²⁴⁴ Arguing that these practices constitute acts of “interpretive violence” by lawyers²⁴⁵, Alfieri argues that lawyers should embrace techniques of listening to their clients’ stories in order to hear stories of client “self-empowerment”²⁴⁶ and to construct the “alternate vision” of the client as a “self-

²⁴⁰ Scheingold and Bloom, *supra* note 232 at 216.

²⁴¹ See Abbott, *supra* note 238 at 287, and Piomelli, *supra* note 228 at 1393.

²⁴² Alfieri, *supra* note 227 at 2111.

²⁴³ *Ibid* at 2118.

²⁴⁴ S Imai, “A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering” (2002-2003) 9 Clin L Rev 195 at 197.

²⁴⁵ Alfieri, *supra* note 227 at 2128. See also AV Alfieri, “Faith in Community: Representing ‘Colored Town’” (2007) 95 Cal L Rev 1829: “[lawyers tend to] ‘reenact the cultural and socio-economic marginalization of poor clients and communities in their advocacy.’”

²⁴⁶ Alfieri, *supra* note 227 at 2118.

empowering subject”.²⁴⁷ Overall, this body of literature emphasizes that clients are “able to speak out and to act collectively on their own behalf”, and are “not just sources of information on the problems they face, but active partners in working collectively to solve those problems.”²⁴⁸

Writers such as Lopez, Alfieri, and Lucie White note that lawyers must seek to understand the contexts and particular and concrete details of subordinated clients’ lives, in clients’ own terms, in order to work collaboratively and effectively for social justice and the resolution of legal problems.²⁴⁹ Critical lawyering scholarship is thus grounded in the conception that legal problems of poor people arise out of complex and politically constructed systemic forces: that poor clients have “problems [that] are the product of poverty, and are common to all poor people.”²⁵⁰ In other words, these writers recognize that critical poverty law lawyers must seek to see the individual problems of clients in the “context of community.”²⁵¹ This type of contextualized learning about clients’ lives, say writers such as White, entails a “situated theoretical perspective” and an acceptance of the

²⁴⁷ *Ibid* at 2120.

²⁴⁸ Piomelli, *supra* note 228 at 1385. See also Mosher, *supra* note 31 at 624: “In sum, dominant and uncritical lawyering practices actively work against the creation of counter-hegemonic discourses about needs, and about justice, and [undermines]... confidence in the ability of the oppressed to name, and to take action to change, the unjust order which shapes their everyday realities.”

²⁴⁹ As Lopez writes, “lawyers must know how to work with (not just on behalf of) women, low-income people, people of color, gays and lesbians, the disabled, and the elderly by educating themselves about the details and political and contextual aspects of clients’ lives.” *Supra* note 249 at 11. Note also Piomelli, *supra* note 228 at 1399, who writes that progressive critical lawyers should reject “atomized individualism” and emphasize the interdependence of people.

²⁵⁰ Wexler *supra* note 1 at 1053.

²⁵¹ C Zuni Cruz, “[On the] Road Back In: Community Lawyering in Indigenous Communities” (1999) 5 *Clin L Rev* 557 at 572.

process of “the slow learning that comes from multiple, partial perspectives, from uncertain readings by advocates of their own day to day work.”²⁵²

In its emphasis on empowerment of clients, on the importance of collaboration and critical work with communities and its acknowledgement that the legal problems of poor clients arise out of particular social and political contexts, the critical lawyering literature profoundly challenges dominant notions of lawyers as professionals who operate within distinct “legal spheres”, and indeed challenges the notion of a clear demarcation between legal and non-legal spheres itself. The literature challenges the notion of professional expertise of lawyers in its emphasis on the centrality of client experience and the importance of the details and context of client lives. As Ann Shalleck notes, this body of literature and scholarship affirms that

the relationship between lawyer and client is not built across separate spheres – legal and nonlegal – but within a single sphere of overlapping practices. When... rebellious lawyers embrace a practice of working with and not for their clients, they are accepting the clients’ knowledge and experience as an integral part of legal thought and action.²⁵³

However, it is interesting to note that despite its attention to power dynamics within the lawyer-client relationship, the critical lawyering literature does not pay particular or sustained attention to the reality of social suffering in poor communities. This may be because these writers are suspicious that a focus on suffering may be interpreted or understood as a focus on stereotypes of clients as disempowered and voiceless. Certainly, as described in this section, the work of Alfieri and others admonishes lawyers to be suspicious of assumptions of stereotypes of clients as weak and

²⁵² L White, “Paradox, Piece-Work, and Patience” (1991-1192) 43 Hastings LJ 853 at 854.

²⁵³ Shalleck, *supra* note 87 at 1749-1750.

disempowered. However, there is a danger that a lawyering practice that focuses only upon empowerment may obscure attention to the real and systemic violence that continually plays out in subordinated communities. As Lucie White does note in one of her pieces, an admonition that lawyers only listen for “stories of dignity and power from our clients...renders us less attentive when a client attempts to name for us the violence that threatens her life.”²⁵⁴ Similarly, Binny Miller writes that the critical lawyering literature tends to construct idealized visions of clients, and cautions that it is at the same time important to be aware that “not all client stories are empowering, nor are all clients empowered.”²⁵⁵

The failure of the critical lawyering literature to focus attention on the embodied social suffering of some subordinated clients may also be due to the emphasis in this literature upon the importance of lawyering on behalf of communities, and the notion that in the face of a perceived tension between individualized client representation and systematic and larger community campaigns, progressive lawyers ought to focus on the latter in order to achieve the greatest impact. As Shdaimah has pointed out, “[i]ndividual or incremental work is viewed as a means of alleviating immediate suffering and is sensitive to individual clients. But it has also been criticized [by progressive lawyers] as insufficient and possibly dangerous.”²⁵⁶ In other words, the critical lawyering literature can fail to pay considerable attention to dynamics and emotions inherent in lawyer-client

²⁵⁴ White, *supra* note 252 at 858.

²⁵⁵ B Miller, “Give Them Back Their Lives: Recognizing Client Narrative in Case Theory” (1994-1995) 93 Mich L Rev 485 at 525.

²⁵⁶ Shdaimah, *supra* note 229 at 58.

relationships and legal practice.²⁵⁷ As I will argue in the next chapter, it is my contention that this notion of a dichotomy or tension between individual lawyer-client encounters and relationships and broader systemic, community-based work is perhaps a false one: in the context of clinical legal education, the encounter between individual law students with the suffering of their clients can in fact function as a critical pedagogical site for the analysis and critique of dominant conceptions of lawyering and the understanding that broader systemic injustices are often distilled into and expressed as experiences of individual suffering. In this way, a critical pedagogy of suffering can serve to underscore for clinical law theory a model for holding together the tensions between individual client work and systemic and critical struggles for social justice.

²⁵⁷ See Shdaimah, *ibid* at 160.

Chapter 4: Toward a pedagogy of suffering in clinical legal education

Introduction

I have argued that dominant legal discourse and pedagogies tend to largely treat human suffering as a “non-legal” problem that ought to remain on the outside of the boundaries of law, but that can be viewed dispassionately by a legal gaze in some circumstances. The corresponding message to law students, I have argued, is that suffering is an individual, emotional or psychological problem of clients against which lawyers ought to construct appropriate professional boundaries in order to focus on the legal issue at hand. Alternatively, approaches to legal practice that challenge this dominant model, such as client-centred practice, therapeutic jurisprudence, and “ethic of care” lawyering, tend to fall short of significantly challenging or subverting visions of legal practice in the face of client suffering, and especially notions of suffering as a private experience of individuals that is fundamentally disconnected from the “legal sphere”. And I have argued that the eclectic body of critical lawyering clinical law literature, while fundamentally challenging many dominant conceptions of legal practice for subordinated clients and communities and offering robust and contextual descriptions of progressive legal practice, has also tended not to analyse the implications of the encounter of law students with the suffering of clients in clinical law settings, or to specifically ground any discussion of the encounter with suffering in any critical or theoretical context.

In this chapter, I argue that a critical “pedagogy of suffering”, which I define as a pedagogical approach that seeks to encourage clinical law students to reflect critically upon their encounters with the suffering of their clients and to contextualize these encounters within critical theories of suffering, could be brought to bear within clinical legal education contexts. It is my argument that such a critical pedagogy of suffering could work to challenge notions that emotions and suffering are apolitical and unrelated to progressive legal practice, and to build a conception that engaged, critical “witnessing” of social suffering by lawyers and law students can lead to passionate and thoughtful lawyering for social justice in clinical law settings.

The law student-client encounter as a pedagogical site

My argument in this chapter is built on the idea that the encounter between law students and clients in the clinical law context can function as a “pedagogical site” for the production of professional identities of law students, as well as their understandings of law, legal practice, and justice. This argument makes a claim for the importance of clinical education in that it suggests that profound understandings of the lawyer-client relationship, professional responsibility, and the role of lawyers in confronting and addressing injustice can be formed through the actual face-to-face encounter of lawyers and clients. As I will argue, when law students encounter the stories and experiences of suffering expressed by clients, there is a risk that dominant notions of legal practice in the

face of suffering will be reproduced. However, there is also an opportunity for critical pedagogical inquiry and approaches that may lead to alternate and critical understandings.

In this section, I explore the idea that the encounter between law students and clients in clinical law contexts is a site for the production of professional identity of the students and also an experience that can lead to understandings about justice and the role of lawyers in the face of social injustice. This understanding challenges the notion that clinical legal education is an avenue for law students to simply “practice” or implement legal skills or play out already-formed notions of professional identity and responsibility. In other words, this approach rejects the idea that law students enter into clinical contexts with clearly fixed ideas about the lawyer-client relationship, despite the fact that they carry with them the notions and ideals of practice contained within the habitus of professional identity and practice. Rather, I am arguing that students enter into clinical law encounters in a process of struggling to form a professional identity and make sense of the dominant messages and ideologies that they have encountered in their legal education, and that critical pedagogical approaches can challenge students to understand the encounter in alternate ways.

Where students encounter clients who relay narratives of suffering, or who express suffering, it is my argument that students often tend to approach the encounter struggling to accommodate dominant ideas of professional boundaries described in chapter two with other dominant ideas about suffering – for example, that suffering is an individual emotional attribute or response to harm, that it is private and psychological in nature and can be managed or approached through empathy, sympathy, care, or psychological

assistance. Thus, the possibility is opened up that clinical law encounters can function to destabilize certain ideas about lawyering, professional identity, and suffering itself, and open up new insights.

In advancing this argument, I draw on the work of post-colonial theorists Mary Louise Pratt and Sara Ahmed, on the subject of how “encounters” or “contact” between dominant and subordinated groups work to shape identities. Mary Louise Pratt’s image of a “contact zone” is of a site where subjects previously separated by geographic, cultural or other divisions come to intersect and meet one another.²⁵⁸ Pratt writes that these contact zones are “social spaces where disparate cultures meet, clash, grapple with each other, often in highly asymmetrical relations of domination and subordination.”²⁵⁹ She theorizes that social identities and subjectivities are mutually constituted through these experiences of “contact”, writing that a

“contact” perspective emphasizes how subjects get constituted in and by their relations to each other. It treats the relations among colonizers and colonized, or travelers and “travelees”, not in terms of separateness, but in terms of co-presence, interaction, interlocking understandings and practices.²⁶⁰

Similarly, Sara Ahmed’s theoretical work about what she terms “strange encounters” and “embodied encounters” explores the ways in which identities and subjectivities are formed through face to face “encounters with others that surprise, that shift the boundaries of the familiar, or what we assume that we know.”²⁶¹ She writes that

[i]dentity itself is constituted in the ‘more than one’ of the encounter: the designation of an ‘I’ or ‘we’ requires an encounter with others. These others cannot

²⁵⁸ ML Pratt, *Imperial Eyes: Travel Writing and Transculturation*, 2nd ed (London: Routledge, 2008) at 7.

²⁵⁹ *Ibid.*

²⁶⁰ Pratt, *supra* note 258 at 8.

²⁶¹ S Ahmed, *Strange Encounters: Embodied Others in Post-Coloniality* (London: Routledge, 2000) at 7.

be simply relegated to the outside: given that the subject comes into existence as an entity only through encounters with others, then the subject's existence cannot be separated from the others who are encountered.²⁶²

Pratt and Ahmed's work can be taken as a reminder about the ways that unequal power relations can be forged through these moments of contact or encounter between members of differently-located groups. However, the notion of the encounter as a site of identity production is also a challenge to the notion that lawyers or law students approach their meetings with clients, especially clients from traditionally subordinated groups, with fixed professional identities and a clear-eyed "legal gaze".²⁶³ Rather, the frame of the encounter can open up the possibility that new conceptions of professional identity and practice can emerge from these face-to-face meetings between lawyer or law student and client.

The frame of post-colonial theory is helpful in analyzing the law-student-client encounter in clinical law contexts because this encounter is so often one marked by class, race, and other "difference". That is, although law students are far from being a homogenous group, and although there is increasing diversity among law students²⁶⁴, it is fair to say that a significant number of students entering into clinical law settings identify with socio-economic privilege, racial privilege, and other markers of privilege. Indeed, as

²⁶² *Ibid.*

²⁶³ See also D Jeffrey, "Encountering Strangers: Teaching Difference in the Social Work Classroom" in C Schick and J McNinch, eds, *"I Thought Pocahontas was a Movie": Perspectives on Race/ Culture Binaries in Education and Service Professions* (Regina: CPRC Press, 2009) 65 at 65 and 67. Jeffrey applies Sara Ahmed's theory of strange encounters to the social work context, noting that imputing "difference" to the client has the effect of cementing the idea of the social worker as normative and "professionally astute", and the frame of the encounter destabilizes these assumptions about the social worker.

²⁶⁴ Cairns Way and Gilbert note that "[t]here is an ongoing lack of diversity in Canadian law schools and the legal profession at large." R Cairns Way and D Gilbert, "Resisting the Hidden Curriculum: Teaching for Social Justice" (2008) *Can Leg Ed Ann Rev* 1 at 20, fn 38.

described in more detail above in chapter two, various writers have shown how law school functions to reproduce social class.²⁶⁵ Certainly, many law students, regardless of background, are in the process of struggling to align themselves with dominant ideals of professional identity promulgated in the overt and tacit curriculum of law schools, and various authors have shown just how effective the traditional first year law school curriculum is in its “homogenizing” influence on the modes of thinking and sense of identities of law students.²⁶⁶

Meanwhile, the clients of law school legal clinics such as the clinic associated with the University of Saskatchewan College of Law, are overwhelmingly marginalized socio-economically, racially, and politically. In other words, encounters between law students and clients in clinical law settings are often experienced by students as an encounter with “difference.” Indeed, as Abbe Smith writes about clinical legal education settings: “[t]he first thing clinical law students encounter is difference.”²⁶⁷ Similarly, Carol Schick and James McNinch, writing about professional service provider-client relationships more generally, write that “more often than not, the relationships between practitioners and their clients continue to reflect differences in social, political and economic power.”²⁶⁸ And Barbara Bezdek, writing about the experiences of her clinical law students, remarked that “[v]ery often the students who return from crumbling rowhouses in disintegrating

²⁶⁵ See, also, for example, DJ Schleef, *Managing Elites: Professional Socialization in Business and Law Schools* (Lanham: Rowman & Littlefield Publishers Inc, 2006) at 20.

²⁶⁶ See Cairns Way and Gilbert, *supra* note 264 at 21. See also discussion above in chapter two.

²⁶⁷ A Smith, “Rosie O’Neill Goes to Law School: the Clinical Education of the Sensitive New Age Public Defender” (1993) 28 Harv CR-CL Rev 1 at 17.

²⁶⁸ C Schick and J McNinch, “Introduction” in C Schick and J McNinch, eds *“I Thought Pochahontas was a Movie”: Perspectives on Race/ Culture Binaries in Education and Service Professions* (Regina: CPRC Press, 2009) i at xii.

neighborhoods... are shaken beyond their expectations. The students find it difficult to believe the degree of deprivation and unrequited perseverance which mark their clients' lives."²⁶⁹

Thus, I would argue that Pratt and Ahmed's work is important for clinical legal education in that it suggests that the professional identities of law students, as well as their understandings of their clients, can be challenged and reconstituted in and through actual encounters with their clients. Their work suggests that law students are not fully formed professional subjects but rather come to their clinical law encounters struggling to invoke and perform the understandings and ideologies about lawyering that they have learned in law school. The encounter can serve to cement, but also to destabilize these understandings. Certainly, this notion allows for the agency of individual law students and teachers, and the possibility that law students can be transformed by their clinical law experiences, and in turn may transform dominant ideologies of legal identity and practice. The observation of Byron Good, writing in the context of medical education, can be applied to the legal education context as well: "[t]hrough the structure of medicine influences [medical students], it does not simply reproduce itself through them. Their actions can also transform it."²⁷⁰ Similarly, the actions and experiences of law students can also potentially transform the structure of legal practice.

²⁶⁹ BL Bezdek, "Legal Theory and Practice Development at the University of Maryland: One Teacher's Experience in Programmatic Context" (1992) 42 Wash U J Urb and Contemp L 127 at 135.

²⁷⁰ BJ Good, *Medicine, Rationality, and Experience: An Anthropological Perspective* (Cambridge: Cambridge University Press, 1994) at (). See also Sarat, who writes that the process of lawyer-client interaction is one characterized by a process "in which lawyer and client seek to produce for each other a satisfying rendition of their distinctive worlds." Sarat, *supra* note 31 at 17. As discussed above in chapter 2, it is important to acknowledge the complexities and diversity within actual lived legal professionalism.

In focusing on the transformative possibility of the law student-client encounter in clinical contexts for law students, I am conscious that the encounter between law students and their clinical law clients can have profound effects on the client as well. Indeed, as I described above in chapter three, this topic forms the subject of a significant body of critical lawyering literature, whose proponents, including Anthony Alfieri, Lucie White and Gerald Lopez, have focused upon the ways in which interactions between lawyers and subordinated clients can replicate and reproduce dominant power relations and further subordinate already marginalized clients in poverty law contexts. I am also mindful of the reality that clients, unlike many law students or lawyers, do not tend to derive their primary identities from the lawyer-client relationship. Indeed, as Muneer Ahmad writes,

[i]t is important to remember that, while “lawyer” is a professional role that often informs the lifelong identity of those who inhabit it, “client” is not. Rather, the client role is ephemeral...becoming a client, particularly a poor client, is typically incidental – if not accidental – and unfortunate.²⁷¹

Ahmad stresses that clients, and particularly poor clients in clinical law contexts, do not derive their identity from the lawyer-client relationship, and indeed, while “[a] lawyer without a client is bereft of professional identity, a client without a lawyer is the same person she has always been.”²⁷² Ahmad encourages poverty law lawyers to be mindful of this reality, and to be critical of the tendency to “fetichize” the lawyer-client dyad at the expense of a critical and contextual understanding of the community in which the client exists and in which individual legal problems arise.²⁷³ As I will argue below, a pedagogical

²⁷¹ Ahmad, *supra* note 169 at 1077.

²⁷² *Ibid.*

²⁷³ *Ibid* at 1076.

approach that attempts to critically address the ways in which the suffering of clients is addressed and understood in clinical contexts remains vigilant about the risks of this kind of fetishizing.

In the sections that follow, I turn my attention to the eclectic and multidisciplinary literature on social suffering in order to help articulate a pedagogy of suffering for clinical legal education contexts, one which views suffering as a signifier of larger political and systemic injustice, and one which encourages critical and attentive “witnessing” and response to suffering by law students as an act pointing towards broader and critical understandings of legal practice.

The remainder of this chapter is divided into two main sections. I first examine in more detail what I term the “risks of the encounter” of law students with the expressions and narratives of suffering of their clients in clinical law contexts. I argue that there is a risk that the face-to-face encounter of law students with suffering of subordinated clients will reinforce dominant notions of professional identity, paternalistic practice and conceptions of suffering. In the final section, I go on to describe some of the foundations, theoretical approaches and practices that might give rise to a critical and potentially transformative “pedagogy of suffering” in clinical legal education contexts.

“Risks” of the encounter with suffering in clinical law contexts

Without critical and contextual reflection upon suffering and social suffering, as well as a critical analysis of the role of lawyers in relation to suffering that they encounter, law

students will likely reproduce dominant notions and understandings of suffering as a private and acontextual emotional attribute of clients, and of law and legal practice as unrelated to suffering. In this section, I draw upon the broader multidisciplinary scholarship of social suffering theorists to illuminate and contextualize the ways in which these dominant understandings of suffering can undermine progressive and alternative visions of clinical legal practice and pedagogy. In particular, I focus on the “risks” associated with interpreting suffering as an acontextualized private experience of clients, and the dangers of an uncritical focus on compassion as an appropriate response to the suffering of clients.

Suffering as acontextual spectacle and private experience

As I argued above in chapter two, dominant legal discourse and pedagogical practices tend to convey a notion of clients’ suffering as private, acontextual and apolitical. It is important to note that acontextualized readings of suffering as private and unconnected to larger political or social forces are perpetuated not simply by dominant models of legal practice and professional identity, but also by the broader dominant culture, including the dominant media. Scholars of social suffering, such as Arthur Kleinman, have noted the tendency of dominant media to promote the commoditization of suffering and to reduce images of suffering to media “spectacle”, to be unproblematically “consumed” by viewers. Kleinman notes that the effect of such spectacle tends to be a numbing one for viewers. Indeed, Kleinman notes that for the viewers of the “mediatization” of suffering, this rendering of suffering as spectacle creates a kind of

inauthentic social experience – viewers witness suffering from a distance “where nothing is acutely at stake for the observer.”²⁷⁴ However, related to this is the observation that media portrayals of suffering clearly accord more weight or attention to some groups and individuals over others. Thus, there is a watering down of the importance of the suffering of subordinated or racialized groups, and a privileging of the suffering of privileged or dominant groups. In this way, as Sara Ahmed writes, the valuing of some forms of suffering over others becomes a “crucial mechanism for the distribution of power”.²⁷⁵

Ann Kaplan’s study of the way that suffering is portrayed in dominant media images provides a helpful framework for understanding how suffering tends to be viewed as individual and acontextualized in our dominant culture. In her analysis of mainstream media portrayals of the Iraq War, Kaplan notes that media stories overwhelmingly focused on individual stories of suffering, without any analysis of the context in which this suffering took place. Thus, dominant media portrayals of the war tended to take the form of a series of fragmented images of individuals experiencing various facets of the war, seeking to evoke emotional or empathetic reactions in viewers. However, as Kaplan notes, the effect of these disparate images was to give the viewer a sense that he or she was simply “[p]eeking in on the action...[without any] context through which to organize empathic

²⁷⁴ A Kleinman, “The Violences of Everyday Life: the Multiple Forms and Dynamics of Social Violence” in V Das, A Kleinman, M Ramphela and P Reynolds, eds, *Violence and Subjectivity* (Berkeley: University of California Press, 2000) 226 at 232.

²⁷⁵ Ahmed, *supra* note 103 at 32.

feelings for the [victims].”²⁷⁶ This focus tended, she argues, to lead to a sense of everything being “murky”, or hardly real.²⁷⁷ She writes:

One is encouraged to identify with specific people, to enter into their experiences rather than to think about what we are looking at, or to engage on any larger intellectual or analytical level.²⁷⁸

Thus, the political and social context is missing and the trauma of individuals evokes a confused and “empty empathy” in the viewer.²⁷⁹ Similarly, Michalinos Zembylas argues that dominant media portrayal of suffering as spectacle tends to portray suffering as “universally accessible”, yet strangely renders viewers unable and unwilling to engage with the implications of suffering.²⁸⁰

As argued above in chapter two, dominant legal discourse about suffering overwhelmingly portrays suffering as a private attribute or emotional state of individuals. Again, this view of suffering is reflected and reproduced in dominant approaches to suffering in our broader cultural context. As Zembylas points out, suffering and trauma tend to be portrayed in both expert literature and popular discourse as manifestations of individual problems, falling within the realm of the “private” and the “personal”.²⁸¹ The emphasis on suffering as a private and psychological experience of individuals is reinforced in this dominant discourse through the application of scientific, technocratic or “expert” language to describe and assess suffering, which represents and reduces human suffering

²⁷⁶ AE Kaplan, *Trauma Culture : the Politics of Terror and Loss in Media and Literature* (New Jersey: Rutgers University Press, 2005) at 95.

²⁷⁷ *Ibid* at 97.

²⁷⁸ *Ibid* at 99.

²⁷⁹ *Ibid* at 94.

²⁸⁰ M Zembylas, *The Politics of Trauma in Education* (New York: Palgrave MacMillan, 2008) at 29.

²⁸¹ *Ibid* at 38.

in terms of “official diagnosis”²⁸² or the “medicalization of social distress”.²⁸³ Scholars of social suffering caution that this technocratic language about suffering leads to the marginalizing of those who experience violence and oppression.²⁸⁴ Similarly, twentieth century political philosopher Hannah Arendt, whose work has been influential for many scholars of social suffering, wrote extensively about the ways in which human suffering becomes routinized through mundane and technical language. Arendt argued that language and ordinary technocratic discourse can obscure the painful reality of suffering, and influence the responses of people to human suffering.²⁸⁵

It follows that pedagogical approaches or models of lawyering that encourage law students to “view” the suffering of clinical law clients as individuals isolated from broader political or systemic contexts can promote and reproduce notions of suffering as a messy and confusing individual emotional problem of clients, unrelated to the larger and more important questions of legal representation and justice. To echo Ann Kaplan, without a critical theoretical understanding of suffering, law students are likely to experience the encounter with suffering as a somewhat confusing array of emotions, a sense of “peeking in” on one individual’s experiences without any framework for organizing or contextualizing the suffering into a larger political or legal analysis. This may encourage

²⁸² V Das, “Sufferings, Theodicies, Disciplinary Practices, Appropriations” (1997) 49 *Int Soc Science J* 563 at 568-570.

²⁸³ N Adelson, “Reimagining Aboriginality: An Indigenous People’s Response to Social Suffering” in V Das, A Kleinman, et al, eds, *Remaking a World: Violence, Social Suffering, and Recovery* (Berkeley: University of California Press, 2001) 76 at 80.

²⁸⁴ See discussion in Wilkinson, *supra* note 16 at 47.

²⁸⁵ H Arendt, *On Revolution* (New York: Pelican Books, 1977). See also the discussion in Wilkinson, *supra* note 16 at 99 about this.

law students to shore up professional boundaries, and either numb themselves to, or disregard the suffering of their clients.

Sentimentalizing suffering and the danger of compassion

While a reduction of suffering to technical discourse, “official diagnosis” or spectacle serves to create a sense of distance and disconnection in viewers of suffering, an overly sentimentalized or emotional response to suffering can be equally problematic in clinical law contexts. Approaches to suffering based on the ethic of care model, therapeutic jurisprudence, or even client-centred lawyering, where lawyers are urged to focus on the emotions of clients as a separate matter from their legal problems, may tend to perpetuate this kind of sentimental approach to suffering. As Sara Ahmed cautions, turning indifference into sympathy is “not necessary to repair the costs of injustice. Indeed, this conversion can repeat the forms of violence it seeks to redress, as it can sustain the distinction between the subject and object of feeling”.²⁸⁶ That is to say, compassionate or empathetic emotional responses to suffering can serve to sustain the very power relations that create the conditions for suffering in the first place, and can also obscure the role of the empathizer in these ongoing conditions of injustice.²⁸⁷

Thus, popular discourses of compassion may lead members of dominant groups to a benevolent sense of themselves as “rescuers”, and caring and empathetic responses can

²⁸⁶ Ahmed, *supra* note 103 at 193.

²⁸⁷ EV Spelman, *Fruits of Sorrow: Framing Our Attention to Suffering* (Boston: Beacon Press, 1997) at 7. See also L Berlant, “Introduction: Compassion (and Withholding)” in Berlant, L, ed, *Compassion: the Culture and Politics of an Emotion* (New York: Routledge, 2004) 1 at 13. Berlant writes that “we like our positive emotions to feel well intentioned and we like our good intentions to constitute the meaning of our acts.”

create or perpetuate relationships where the “charitable” person has the power to overcome the pain of the victim of suffering. Michalinos Zembylas notes that this approach can lead to “melodramatic attempts to close the wound”²⁸⁸ by well-meaning and privileged observers. In poverty law contexts, this frame for viewing and responding to suffering may lead to what Peter Margulies calls the “rescue mission” by poverty lawyers, who seek to save or rescue the “desperate person subject to legal sanctions.”²⁸⁹ Like the privatized and acontextual view of suffering made in dominant media and technocratic visions of suffering described in the previous section, this view of suffering tends to disregard social context and instead assume that an individualized and caring approach can alleviate suffering. That is, it portrays a vision of suffering that can be alleviated by “empathetic understanding and generosity” of privileged and generous observers.²⁹⁰

Sara Ahmed writes that the view of suffering of others as tragic and solvable through compassionate and benevolent responses tends to “over-represent” the pain of others by “fixing the other as the one who ‘has’ pain, and who can overcome that pain only when the Western subject feels moved enough to give.”²⁹¹ In other words, it tends to view those who suffer as being *defined* by their suffering, becoming what Kapur calls “hegemonic victim subjects.”²⁹² In particular, this approach also tends to reinforce the notion of suffering as private and removed from the larger political or public sphere. As Zembylas writes, “the experience of being moved by sentimental scenes of suffering...may

²⁸⁸ Zembylas, *supra* note 280 at 4.

²⁸⁹ Margulies, *supra* note 163 at 620 and 621.

²⁹⁰ Zembylas, *supra* note 280 at 21.

²⁹¹ Ahmed, *supra* note 103 at 22.

²⁹² R Kapur, “The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International Post-Colonial Feminist Legal Politics” (2002) 15 Harv Hum Rts J 1 at 2.

work instead to return us to a private world far removed from the public sphere.”²⁹³ In clinical and poverty law contexts, this view of clients as victims is particularly problematic as it can perpetuate regnant lawyering and silencing of clients. This view can also encourage lawyers to pay little or no attention to the contextual and complex circumstances of the lives of clients, or to listen for the stories of resistance and agency in their stories.²⁹⁴ As Dara Culhane writes in her article about social suffering in Vancouver’s downtown eastside neighbourhood,

[i]n conditions of ongoing relations of radical inequality, focusing on the destructive impacts of historically and socially produced experiences and conditions runs the risk of paying insufficient attention to the complexities, the wisdom, and the capacity of people to survive disadvantage.²⁹⁵

Related to sentimentalized, charitable responses to suffering is what some writers refer to as the “appropriation” of suffering by non-sufferers. Sara Ahmed warns that this approach “transforms and perhaps even neutralizes their pain into our sadness.”²⁹⁶ In this way, those who are suffering can be portrayed as “carriers of experiences from which others can benefit.”²⁹⁷ This approach simultaneously reproduces the notion of subordinated groups as voiceless and produces the notion that dominant groups, observers of suffering, can speak for and understand the nature of their experiences. Spelman thus points out what she calls the “danger of empathy”²⁹⁸ which can obscure the social and

²⁹³ M Zembylas, “Trauma, Justice and the Politics of Emotion: the Violence of Sentimentality in Education” (2008) 29 *Discourse: Studies in Cul Pol of Educ* 1 at 7.

²⁹⁴ See discussion of Alfieri about this: *supra* note 227.

²⁹⁵ D Culhane, “Narratives of Hope and Despair in Downtown Eastside Vancouver” in LJ Kimayer and GG Valaskakis, eds *Healing Traditions: the Mental Health of Aboriginal Peoples in Canada* (Vancouver: UBC Press, 2009) 160 at 166.

²⁹⁶ Ahmed, *supra* note 103 at 21.

²⁹⁷ Spelman, *supra* note 287 at 1.

²⁹⁸ *Ibid* at 130, referring to the work of Karl Morrison.

economic differences between the person who is suffering and the person observing the suffering.²⁹⁹ This same theme is echoed by feminist theorist bell hooks, who writes that dominant observers of suffering may appropriate stories of suffering in order to maintain their status as the “colonizer[s], the speaking subject[s].”³⁰⁰ In other words, dominant notions of empathy and compassion require over-identification with and silencing of the object of empathy, situating the empathizer as the authoritative observer, judge, and articulator of suffering.

The analysis in this section underscores my argument in chapter three that models of lawyering that emphasize client-centredness, therapeutic lawyering, or an ethic of care in the face of suffering can function to reinforce the notion of suffering as a private emotional experience, and to reify the notion of the lawyer as rescuer, saviour or intervener in a client’s life. While engaged empathy and compassionate responses to suffering are unquestionably important, an uncritical embracing of these approaches to suffering of clients by lawyers risks focusing on narrow and acontextual therapeutic and emotional responses to suffering, and, even more problematically, perpetuate rescue fantasies and notions of clients as voiceless victims. What is missing, I would argue, is a critical theory of suffering and a pedagogy that teaches clinical law students a practice of

²⁹⁹ See J Bennett, *Empathic Vision: Affect, Trauma, and Contemporary Art* (Stanford: Stanford University Press, 2005) at 21.

³⁰⁰ Bell hooks writes of the tendency of dominant groups to appropriate the suffering and voice of subordinated groups: “Only tell me about your pain. I want to know your story. And then I will tell it back to you in such a way that it has become mine, my own. Re-writing you, I write myself anew. I am still author, authority. I am still the colonizer, the speaking subject, and you are now at the center of my talk.” B hooks, *Yearning: Race, Gender, and Cultural Politics* (Toronto: Between the Lines, 1990) at 152.

critical and contextual “witnessing” to suffering, and to use this practice as a frame for thinking about justice and lawyering for social justice.

Toward a critical pedagogy of suffering

I have identified and problematized some of the dominant approaches and assumptions about suffering that permeate dominant consciousness and which many law students carry with them into clinical law settings. When confronted in the clinical law interview room with a client who expresses or articulates an experience of suffering, law students draw on nascent notions about the ways in which lawyers ought to view and think about suffering, described in chapter two, as well as the dominant cultural tropes about suffering described in the previous section. In other words, I would argue that law students’ encounter with narratives and expressions of suffering of clients may evoke complex but generally unexamined ideas for the students, ideas that are tied up with notions of professional identity and conflicting ideas about the proper response of lawyers to suffering. That is, students may understand a need to create and maintain professional boundaries against client suffering, but then feel conflicted by the emotional response that is evoked by hearing the stories and witnessing the pain of their clients. Again, without critical reflection and an adequate theoretical frame for thinking about suffering in poverty law contexts, it is most likely that dominant visions of suffering and dominant responses to suffering will be evoked. Thus, students may vacillate between feeling that they are “peeking in” on suffering without any proper context or understanding of it, or responding

emotionally, again without a clear or contextual frame for understanding or critiquing their response.

In this final section of this chapter, I propose that clinical legal educators seek to develop and articulate a “pedagogy of suffering” to address the encounter of their students with the suffering of clients in clinical contexts. In particular, I propose that clinical legal educators seek in their classrooms and clinics to open up discussions about the ways in which suffering and the responses to suffering are political and directly related to questions of justice, rather than separate or detached from these questions. I argue that this pedagogy needs to balance engaged critical and theoretical analysis of suffering with a profound and politicized “critical emotional praxis”³⁰¹ which invites students to bear critical witness to their encounter with suffering, to engage in a praxis of critical listening, and to engage in questions about how lawyers working in poverty law contexts can shape their practice in response to suffering. This approach requires a deep and perhaps uncomfortable questioning about the utility and ability of well-meaning lawyers to ever bring about social justice in their work in impoverished communities.

I should note that the phrase “pedagogy of suffering” has been used independently by at least two authors, Arthur Frank and Rebecca Martusewicz. Frank, a medical anthropologist, seeks to illuminate the narratives of patients in his work, with the goal of highlighting the ways in which traditional medical pedagogy, which he writes is characterized by an “ethics of separation and distance”³⁰² fails to take into account the lived

³⁰¹ Zembylas, *supra* note 280 at 1.

³⁰² AW Frank, *The Wounded Storyteller: Body, Illness, and Ethics* (Chicago: University of Chicago Press, 1995) at 147.

experiences of pain and suffering of patients. For Frank, then, the pedagogy of suffering functions as an “antidote to administrative systems that cannot take suffering into account because they are abstracted from the needs of bodies.”³⁰³ Frank writes that “when the body’s vulnerability and pain are in the foreground, a new social ethic is required.”³⁰⁴ Meanwhile, Rebecca Martusewicz is a pedagogical theorist who writes that “[i]n all my teaching, what matters most to me is that students begin to grapple with the complex and difficult problem of suffering.”³⁰⁵ For Martusewicz, a pedagogy of suffering seeks to teach students to see that individual suffering is intimately connected with structural injustices. In other words, both Frank and Martusewicz view suffering as an expression of structural and systemic injustices, and both encourage educators to focus pedagogical attention upon the phenomenon of human suffering.

Like Frank and Martusewicz, I argue that a pedagogy of suffering requires an analysis of the ways in which suffering is an embodied expression of larger systemic forces. In clinical legal education contexts where students encounter expressions and stories of suffering face to face, I argue that clinical law teachers can help students understand these connections, through developing practices of “critical witnessing” and “critical listening”, and honing the skills of a “critical emotional praxis”, in order to engage emotional and affective responses to suffering, and to seek to link these responses with larger questions about the role of lawyers in the face of social suffering and social injustice.

³⁰³ *Ibid* at 146.

³⁰⁴ *Ibid* at 146.

³⁰⁵ RA Martusewicz, *Seeking Passage: Post-Structuralism, Pedagogy, Ethics* (New York: Columbia University Press, 2001) at 102.

Attention to suffering: critical witnessing and critical listening

As I have argued above, there is a risk that the encounter of clinical law students with the suffering of their clients may serve to reproduce dominant ideas about the boundaries of lawyers and the appropriate spheres of legal practice, but that it may at the same time evoke complex emotional responses which students may experience as private, difficult to interpret, and requiring individual caring or empathetic responses. In this section, I propose that a pedagogy of suffering in clinical contexts could encourage students to develop a praxis of paying close attention to suffering and narratives of suffering that they encounter in their clinical work. I propose that such attention to suffering must draw on practices of “critical witnessing” and “critical listening”. The concepts of witnessing and listening I propose here are inspired by the works of Ann Kaplan, Kelly Oliver, Dori Laub and others. These practices, I argue, would seek to instill in students a contextual and critical frame for understanding suffering, and also to engage students in critical self-interrogation and analysis of their own responses to suffering. The hope would be that these practices of critical witnessing and listening could potentially lead to new understandings of the proper responses of lawyers to social suffering encountered in clinical legal education contexts.

In her work on the subject of trauma and the politics of trauma, Ann Kaplan develops the notion of “witnessing” in the context of the pervasive spectacles of violence and suffering that permeate dominant media, especially the saturation of images of war and violence. As I described earlier, Kaplan argues that viewing media spectacles of

violence and suffering can lead the viewer to empty empathetic responses, but without any awareness or understanding of the political or social context of the suffering. In contrast to the dominant practice of passive and uncritical viewing of these spectacles of suffering, Kaplan calls instead for a practice of “witnessing”, which she says entails a passionate and ethical response to images of suffering. Kaplan writes that “[w]itnessing’ is the term I use for prompting an ethical response that will perhaps transform the way someone views the world, or thinks about justice.”³⁰⁶ For Kaplan, a frame of witnessing does not only “intensify... the desire to help an individual in front of one...[but also] leads to a broader understanding of the meaning of what has been done to victims, of the politics of trauma being possible.”³⁰⁷

Kaplan cautions that critical witnessing may require in some cases a refusal of direct identification with the specificity of suffering of the individual. That is, Kaplan writes, there may be a requirement for a “deliberate distancing from the subject to enable the interviewer to take in and respond to the traumatic *situation*.”³⁰⁸ Thus, Kaplan suggests that an overwhelming emotional or caring response to individual suffering can depoliticize and distract from the interviewer’s ability to pay attention to the larger situation and context. This positioning of distance, writes Kaplan, “thus opens the text out to larger social and political meanings.”³⁰⁹ Kaplan does not, however, dismiss the role of caring and empathy. Rather, she suggests that the emotional response must be held in balance with a critical response to suffering, and in fact suggests that the empathetic response be

³⁰⁶ Kaplan, *supra* note 275 at 123.

³⁰⁷ *Ibid* at 123. Emphasis in original

³⁰⁸ *Ibid* at 125.

³⁰⁹ *Ibid*.

understood as a resource for political analysis. She writes: “[w]itnessing’ involves not just empathy and motivation to help, but understanding the structure of injustice – that an injustice has taken place – rather than focusing on a specific case.”³¹⁰

Feminist theorist Kelly Oliver’s work on witnessing echoes the themes elucidated by Kaplan. Oliver urges “witnessers” of suffering and trauma to learn how to, as she puts it, “bear witness to what cannot be seen”.³¹¹ By this, Oliver, like Kaplan, is referring to the importance of developing a frame of analysis that places individual suffering and trauma into a larger political context. Thus, the notion of witnessing developed by Oliver is one that requires a process of learning how “[a]ttention to social context addresses the ways in which an individual is constituted by and within his or her circumstances.”³¹²

Kelly Oliver’s conception of witnessing also requires the witnesser to learn how to become a critical witness *to herself* and to be acutely aware of her responses to what she is witnessing.³¹³ Oliver writes that “in order to bear witness, we as witnessers must reconceive of ourselves.”³¹⁴ This ability to “bear witness to oneself”, Oliver argues, requires an awareness that our own sense of self and subjectivity is created by virtue of our “dialogic relationships with others.”³¹⁵ Such a self-critical practice of witness, she writes, can function to militate against the “objectifying gaze” (typified by the medical or “legal

³¹⁰ *Ibid* at 22.

³¹¹ K Oliver, *Women as Weapons of War: Iraq, Sex and the Media* (New York: Columbia University Press, 2007) at 103.

³¹² *Ibid*.

³¹³ Oliver draws on work of psychiatrist Dori Laub. Laub writes that the listener, “has to be at the same time a witness to the trauma witness and a witness to himself.” D Laub, “Bearing Witness or the Vicissitudes of Listening” in S Felman and D Laub, eds, *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History* (New York: Routledge, 1992) 57 at 58.

³¹⁴ K Oliver, *Witnessing: Beyond Recognition* (Minneapolis: University of Minnesota Press, 2001) at 18.

³¹⁵ *Ibid* at 18.

gaze” described above)³¹⁶ that can otherwise accompany the witnessing of suffering.³¹⁷

Thus, for Oliver, it is important to engage in an ongoing practice of “witnessing to the process of witnessing itself”...”, which involves “witnessing as perpetual questioning.”³¹⁸

Thus, for Oliver, witnessing is an ongoing process of critical analysis that contextualizes and makes sense of what and how we see. This practice of witnessing requires “vigilant attention” to what we see, and a commitment to moving beyond what we see to what is

beyond recognition: the subjectivity and agency, along with the social and political context or subject positions, of the “objects” of our gaze, and our own desires and fears, both conscious and unconscious, that motivate our actions in relation to others.³¹⁹

Clinical legal educators can draw on Ann Kaplan and Kelly Oliver’s work as a frame for talking about how students might approach the encounter with suffering in clinical law environments. First, the notion of critical witnessing can be used as a reminder to students that in many cases, it is helpful for them to step back from their close encounter with their clients to think carefully and critically about the larger context in which their clients’ suffering has arisen, and to try to “see” the bigger picture that is, in Oliver’s phrase, “beyond

³¹⁶ See BA Davenport, “Witnessing and the Medical Gaze: How Medical Students Learn to See at a Free Clinic for the Homeless” in ED Whitaker, ed, *Health and Healing in Comparative Perspective* (Upper Saddle River, NJ: Pearson Education Inc, 2006) 119 at 124. Davenport writes that for the medical students in her study, who worked at a clinic for homeless individuals, witnessing “sometimes [was] applied as a salve for the helplessness that volunteers felt in the face of the overwhelming social problems the clinic’s patients forced them to confront...But it was more than that – it was an ideological attempt to alter the balance of power between patients and practitioners in favor of patients....In the micro-practices of teaching and learning in the actual clinical encounters, the actors’ actions alternated: now gazing, now witnessing, now gazing again.”

³¹⁷ Oliver, *supra* note 314 at 9.

³¹⁸ Oliver, *supra* note 311 at 105. Similarly, Dori Laub writes that listeners to the narratives told by those who have suffered traumatic events must recognize that they themselves are “battleground for forces raging...to which [they] must pay attention”: Laub, *supra* note 313 at 58.

³¹⁹ Oliver, *supra* note 311 at 106.

recognition". The rich literature on social suffering, which I will refer to in more detail below, is a helpful resource for this analysis. As I will argue, this contextual analysis of suffering can illuminate the ways in which suffering is an embodied expression of larger systemic injustice. This contextual analysis, I will argue, can be used by lawyers and clients as a resource for understanding and strategizing about the legal problem at hand.

Second, clinical legal educators can draw on Kelly Oliver's notion of "witnessing to oneself" to urge students to engage in a critical self-interrogation of their responses and assumptions about their clients and of the ways in which the encounter with suffering impacts upon and shapes their sense of professional identity. In particular, this practice of "witnessing to oneself" would encourage clinical students to critically question and analyze their responses to suffering and understand these responses as politically relevant, and relevant to their professional practice and identity. A critical analysis of suffering in which students engage in the kind of "witnessing to themselves" described by Oliver would require them to inquire into the ways that the social production and distribution of suffering means that some people are "much better insured against suffering" than others.³²⁰ This type of analysis, I would argue, could lead to discussions about the relative privilege of law students and lawyers in comparison to their clients, and related questions of the accessibility of the legal system to clients, and whether or not access to the legal system really ever provides "justice" to most clinical law clients.³²¹ As Gada Mahrouse writes about her experience working with students involved in social justice initiatives in

³²⁰ Spelman, *supra* note 287 at 8. See also Veena Das's discussion of the Marxist view of suffering. Marx, Das writes, viewed suffering as having a "pedagogic purpose", and noted how it helped to "create docile bodies for capital". Das, *supra* note 282 at 564.

³²¹ N Cook, "Looking for Justice on a Two-Way Street" (2006) 20 Wash UJL & Pol'y 169 at 170.

the global south, it is vital to “caution [them] to be vigilant about what injustices their participation may inadvertently reinforce.”³²² She goes on to write that

[i]ndeed, instead of showing students all that can be achieved through social justice efforts, I contend that it is better to show them how real change fails to take place as a result of certain initiatives. This is not to discourage them, but to help them see with some candour just how hollow many claims to social justice can be.³²³

However, I would argue that the analysis of suffering described above should not be undertaken without the client’s participation. That is, students should be encouraged to develop practices of “critical listening” to the traumatic narratives of their clients. This practice requires patience and humility, and is one that is not generally honed or valued by busy lawyers. As Lucie White has written, “[t]he lawyer might feel it is a waste of resources to immerse herself in the endless, chaotic stories of suffering that individuals might want to tell.”³²⁴ The practice of listening in the face of suffering is often a painstaking one, where students must be encouraged to recognize that, as Elaine Scarry has famously written, that suffering is at one level fundamentally unshareable, and can be experienced as the “unmaking of the world” for those who are suffering.³²⁵ The recognition that suffering is in many respects, not able to be “represented” fully through language is a reminder to students that they cannot and should not leap to conclusions, or make quick judgments, about their clients’ experiences or identities.³²⁶ Students might be encouraged, instead, to

³²² G Mahrouse, “Questioning Efforts that Seek to ‘Do Good’: Insights from Transnational Solidarity Activism and Socially Responsible Tourism” in S Razack, M Smith, S Thobani, eds, *States of Race: Critical Race Feminism for the 21st Century* (Toronto: Between the Lines, 2010) 169 at 183.

³²³ *Ibid.*

³²⁴ LE White, “Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak” (1987-1988) 16 NYU Rev L & Soc Change 535 at 545.

³²⁵ Good, *supra* note 270 at 118.

³²⁶ M Zembylas, “Bearing Witness to the Ethics and Politics of Suffering: J.M. Coetzee’s *Disgrace*, Inconsolable Mourning, and the Task of Educators” (2009) 28 Stu Philos Educ 223 at 230.

practice listening in ways where they, as Dori Laub writes, simply learn to “hear the silence”.³²⁷

In this way, a praxis of critical listening in clinical law contexts recognizes that law students should seek to listen to their clients’ narratives of suffering, and that this stance of listening might involve listening beyond the words and into the silence of their clients’ stories and experiences. This practice requires overcoming the impatience to get to the “facts” or the “legal issue” that is so often characterized by legal practice and recognizing that the act of telling a traumatic story may in some cases be, as Scarry points out, a process of “reconstituting the world.”³²⁸ While the practical time-constraints of clinical work can mitigate against this kind of patient and attentive practice, I would argue that the act of inquiring deeply into the client’s narrative of suffering, and also his or her perspective on the meaning and context of this narrative, can provide for the client an opportunity “reconstitute the world”. A recognition of the unshareability and unknowability of the client’s experience also challenges the ideal of the lawyer as all-knowing technocratic problem-solver. In the end, a pedagogy that encourages students to experience the encounter with their clients and the narratives of their clients as one over which they cannot have full understanding or control, but one which they ought to approach with a

³²⁷ Laub, *supra* note 313 at 58. Laub notes that the listener must learn to “*listen to and hear the silence*, speaking mutely both in silence and in speech, both from behind and from within the speech. He or she must recognize, acknowledge, and address that silence, even if this simply means respect – and knowing how to wait. The listener to trauma needs to know all this...”

³²⁸ E Scarry, *The Body in Pain: the Making and Unmaking of the World* (New York: Oxford University Press, 1985) at 118. See also DB Morris, *Illness and Culture in the Postmodern Age* (Berkeley: University of California Press, 1998) at 196.

stance of critical listening and witnessing, can be a powerful challenge to the dominant “legal gaze”.

Beyond empathy: critical emotional praxis

I have argued that a critical pedagogy of suffering would encourage students to approach their encounter with their clients’ expressions and stories of suffering with a stance of critical witnessing and listening. It would also, I will argue in this section, seek to foster a “critical emotional praxis”³²⁹ - a praxis that encourages students to understand their emotional responses to stories and expressions of suffering as directly relevant to, questions of justice and legal practice in poverty law contexts. As critical pedagogical theorist Michalinos Zembylas writes, a critical emotional praxis entails understanding emotions as “practices”, emphasizing the “connection between inner feelings and their external manifestation through action.”³³⁰ This view, he writes, holds that “emotions are...performances that produce action within the context of particular social and political arrangements.”³³¹ That is to say, a pedagogy that encourages critical emotional praxis in law students would encourage students to see emotions and affect as politically and indeed legally relevant, and as a resource for further reflection and action.

In his writings on what he call the “politics of trauma” in education, Zembylas writes about the ways in which representations of traumatic events in educational contexts may

³²⁹ This term is used by Michalinos Zembylas, who writes that critical emotional praxis requires constant interrogation of “ethical and political imaginaries that are promoted through engaging with trauma representations” Zembylas, *supra* note 280 at 233.

³³⁰ Zembylas, *supra* note 293 at 3.

³³¹ *Ibid.*

affect students. Similarly to Ann Kaplan and Kelly Oliver, Zembylas is critical of the tendency of students to respond to traumatic images or narratives with either numbness or alternately, with sentimental or emotional responses. In both cases, as argued above, suffering is viewed as a private matter, unrelated to larger questions of social justice. For Zembylas, it is important for educators to create pedagogical spaces where students and teachers can critically examine their emotional and affective responses to such traumatic images and events, where “those affective investments can be challenged.”³³² He writes that critical educators must seek to challenge the “strong grip” of both sentimental or desensitized responses to suffering, and instead seek to develop pedagogies that “acknowledge the discomfort caused by trauma narratives and transforms such feelings into energy for praxis and transformation.”³³³ He argues that emotion ought to be politicized in educational contexts as a means of addressing questions of otherness, difference, and power.³³⁴

A pedagogy of critical emotional praxis in clinical law contexts would thus seek to politicize the emotional or affective responses of students to the suffering of their clients and to examine how these responses might be relevant to other inquiries related to clinical law and practice. This entails a deliberate and sustained attention to these emotional and affective responses in clinical law classrooms. In particular, clinical law teachers can encourage students to describe and analyze their often conflicting emotional responses to the traumatic or difficult stories that some clients share with them. Students can be

³³² *Ibid* at 15.

³³³ *Ibid* at 32.

³³⁴ *Ibid* at 16.

encouraged to interrogate what their responses might say about their professional identities and conceptions of their role in the face of suffering, as well as what responses would be most conducive to social justice practice in poverty law contexts.

Thus, students who might feel that they are emotionally exhausted or are feeling “burned out” because of their empathetic responses to their clients can be urged to critically examine the ways in which empathy, although important, can also function to focus attention on individual emotions, and to magnify the individual lawyer-client relationship at the expense of other focuses, for example, upon larger systemic forces that produce suffering. They can also be encouraged to reflect on how their focus on their own emotional burn-out or pain as a result of the encounter may obscure and neutralize the power differences between themselves and their clients. Similarly, students who feel numb or conflicted about their responses to the narratives of suffering of their clients can be encouraged to examine how the suppression of emotional responses can maintain dominant ideas about the irrationality of emotional responses in legal practice, and how these ideas similarly reproduce dominant notions of the proper sphere of legal practice and professional identity. Indeed, as Zembylas and others point out, if emotions are indeed political, then their suppression is an ideological move.³³⁵

A clinical law pedagogy that embraces and encourages critical emotional praxis subverts the dominant norms of coolness, rationality and neutrality in legal education, and certainly disrupts dominant notions of emotions as being separate and irrelevant to legal practice. By bringing a discussion of emotional responses into the classroom, and by

³³⁵ Zembylas, *supra* note 280 at 120. See also Spelman, who writes that our emotional lives are often highly politicized”: Spelman, *supra* note 287 at 88.

subjecting emotional responses to critical analysis rather than simply treating emotions as apolitical and unrelated to other subjects of discussion, this pedagogy challenges notions that lawyers must possess dispassionate boundaries in the face of emotions and suffering. However, as described above, it also does not encourage students to fall into a swamp of sentimental emotional responses to the suffering of clients, rather encouraging critical and careful analysis of these kinds of responses.

A pedagogy of critical emotional praxis thus encourages students to understand their emotional responses to their clients as potential resources for analysis and indeed, fuel for passionate responses to suffering, but always subject to critical and careful analysis and search for underlying assumptions. By critically interrogating emotional responses, then, clinical law teachers can encourage students to politicize their emotions and use them as tools or modes of analysis.³³⁶ Thus, a critical emotional praxis in clinical law classrooms sees emotional or affective responses to suffering as resources for analysis that may lead to critiques of dominant models of the lawyer-client relationship and legal practice. This will be explored in further detail in the next section. A critical emotional praxis in clinical legal education also subverts dominant notions of lawyering as unrelated to emotional responses to clients, understanding that lawyering in poverty law contexts is a deeply personal and emotional undertaking, but that this emotional response can and should be a resource for political action. As Zembylas writes, the “call of...pain...is a call for action, and a demand for collective politics.”³³⁷

³³⁶ Zembylas, *supra* note 280 at 131.

³³⁷ Ahmed, *supra* note 103 at 39.

Painful injustices: suffering as contextual and political

I have argued that a critical pedagogy of suffering in clinical law contexts involves a recognition that the encounter of law students with the suffering of their clients can function as a pedagogical site. That is, it can help shape the understandings that students form about their role as lawyers in poverty law contexts and in relation to their clients. I argued that there is a risk that the encounter will reproduce dominant notions and fantasies about lawyers as rescuers and clients as victims, as well as dominant notions about suffering as a private and apolitical attribute of clients. I argued that clinical legal educators can seek to instill in students practices of critical witnessing and listening, which requires students to examine and challenge dominant understandings about the suffering of clients, and to also develop a critical emotional praxis in relation to their own emotional responses to suffering. Throughout, I have argued that what is required is a political and contextual understanding of suffering itself, which can engage students with the moral, ethical and political context for understanding suffering and trauma. That is, such an approach urges students to approach suffering with “not just empathy and motivation to help, but the responsibility to recognize others through an awareness of injustice in the world.”³³⁸

A critical pedagogy of suffering in clinical law contexts, then, must seek to encourage students to identify dominant assumptions about suffering and responses to suffering, and to draw on contextual and critical theories of suffering. As I will argue in this section, the foundation for this pedagogy of suffering would be an illumination of the links between the

³³⁸ Oliver, *supra* note 314 at 166.

lived and embodied expressions of suffering of clients and wider social forces, noting, with Sara Ahmed that “the fact of suffering...has *something to do* with what is ‘wrong’ about systemic forms of violence, as relations of force and harm.”³³⁹

The emerging body of literature on social suffering provides a rich and nuanced theoretical framework for this analysis. Scholars of social suffering seek in their work to chronicle the “*lived experience* of pain, misery, violence and terror.....[the] occasions when human dignity is violated and people come to some kind of grief and harm...”³⁴⁰ and to show how these embodied experiences are directly and causally linked to structural violence, inequity and injustice. As medical anthropologist and physician Paul Farmer writes, a key question for the social suffering literature is “[b]y what mechanisms, precisely, do social forces ranging from poverty to racism become *embodied* as individual experience?”³⁴¹ In other words, this body of literature seeks to show that the experience of suffering of individuals is often actively produced by larger systemic forces, and to trace the ways in which individual experiences of suffering exist “in a dialectical space between individuality and sociality.”³⁴² Thus, the encounter with suffering in clinical law contexts can be framed and understood as an encounter with the systemic forces that have produced this suffering – as an encounter with what Serres calls the point where “the global touches the local, the universe the singular”.³⁴³

³³⁹ Ahmed, *supra* note 103 at 193.

³⁴⁰ Wilkinson, *supra* note 16 at 84-5.

³⁴¹ P Farmer, *Pathologies of Power: Health, Human Rights, and the New War on the Poor* (Berkeley: University of California Press, 2005) at 30.

³⁴² Zembylas, *supra* note 280 at 25.

³⁴³ M Serres, *The Troubadour of Knowledge*, trans E MacArthur and W Paulson (Ann Arbor: University of Michigan Press, 1997) at 70.

The encounter of law students with the suffering of clients in their clinical work can be understood as a point of analysis of how the client's individual experience of suffering might be produced by a wider web of political and social forces. This type of analysis requires law students to metaphorically step out of the individual client interview room³⁴⁴ and into a study of the wider history and context in which the individual client's suffering has arisen. A commitment to this kind of historical and contextual analysis recognizes, in Sara Ahmed's words, that harm and suffering are not simply historical and acontextual experiences, but rather that "harm has a history...[p]ain is not simply an effect of a history of harm; it is the *bodily life of that history*."³⁴⁵ In other words, this analysis requires students to critique and identify conditions that make social suffering possible and also acceptable in dominant consciousness.³⁴⁶

Such an analysis of suffering requires a historical and political analysis. For example, in the case of suffering expressed by residential school survivors, an analysis of colonial history in Canada is required in order to contextualize the individual suffering of a survivor. As Naomi Adelson writes, this type of analysis leads to an ability to locate suffering as the "embodied expression of damaging and often long-term and systemic asymmetrical social and political relations".³⁴⁷ In other words, the suffering of "many

³⁴⁴ Ahmad uses the metaphor of the interview room for the lawyer-client relationship, writing that "[b]reaching the client interview room and liberating the lawyer-client relationship from it frees us to imagine new configurations of lawyers, clients, and communities. Such a crowd could never fit in the traditional interview room." Ahmad, *supra* note 169 at 1078.

³⁴⁵ Ahmed, *supra* note 103 at 34.

³⁴⁶ Hannah Arendt's response to this problem was to seek to think about and write about suffering in a way that "solves no problems and assuages no suffering": Arendt, *supra* note 284 at 29.

³⁴⁷ N Adelson, "Toward a Recuperation of Souls and Bodies: Community Healing and the Complex interplay of Faith and History" in LJ Kimayer, GG Valaskakis, eds, *Healing Traditions: the Mental Health of Aboriginal Peoples in Canada* (Vancouver: UBC Press, 2009) 272 at 273.

Aboriginal persons is rooted in, but not limited to, the destructive legacy of colonization.”³⁴⁸ Another way of framing this understanding of residential school experience is provided by Sara Ahmed, who writes that the damage to the bodies of residential school survivors in Australia was simultaneously damage to the metaphorical “skin” of the Aboriginal community. She writes that thus, colonial “violence was not simply inflicted upon the body of the individual who was taken away, but also on the body of the indigenous community, which was ‘torn apart’.”³⁴⁹

In other cases, the history and context of suffering and harm experienced and expressed by an individual client might be more subtle, related to what Veena Das and Arthur Kleinman call the “slow erosion of community through the soft knife of policies that severely disrupt the life worlds of people.”³⁵⁰ However, an inquiry that is adequately “historically deep” and “geographically broad”³⁵¹ may reveal the shape and source of the “soft knife” that has formed the suffering experienced by the client. In many cases, an analysis of current political and economic forces, including the current climate of neo-liberal globalization and economic crisis and concomitant weakening or dismantling of public institutions and the welfare state provides insight into how individual clients come to their individual, embodied experiences of suffering.³⁵² Students can be encouraged to analyze how current legal systems and law function to maintain and reproduce these

³⁴⁸ *Ibid.*

³⁴⁹ Ahmed, *supra* note 103 at 32.

³⁵⁰ V Das and A Kleinman, “Introduction” in V Das, A Kleinman, et al, eds, *Remaking a World: Violence, Social Suffering, and Recovery* (Berkeley: University of California Press, 1997) 1 at 1

³⁵¹ Farmer, *supra* note 341 at 158.

³⁵² See Ashar, *supra* note 125 at 360, who also urges clinical teachers to take current political context into consideration in their teaching.

conditions, and therefore how law can be implicated in the production and distribution of suffering, and also in maintaining a sense that the current reality, where the lives of many poor people are considered “superfluous”, is acceptable, or inevitable.³⁵³

In this way, the suffering of a client can be linked to his or her legal problem and also to the larger social and political forces that shaped and produced it. The frame of analysis suggested within a critical pedagogy of suffering cautions students to be suspicious of defining clients’ suffering as “objects in themselves”, or responding to client suffering as a problem solely of the individual client rather than a manifestation of a larger social problem.³⁵⁴ Thus, a closer examination of the links between suffering and larger social and political forces challenges the private/ public divisions that underlie much “legal” thinking about suffering, and also challenges the notion that individual legal approaches, or for that matter, individual emotional responses, are adequate as a response.

What insights about legal practice and social justice might be gained from this kind of analysis of social suffering? First, this kind of analysis shows that emotions and embodied experiences of suffering of clients can be produced by larger legal, political and social forces. Furthermore, it shows that the emotional responses of lawyers to their encounters with suffering are also political and significant. More importantly, if suffering is produced by larger social and political forces, then this approach suggests that the

³⁵³ Good, *supra* note 270 at 57. See also Judith Butler’s recent work on the concept of “precarious lives”, where she describes the ways in which certain lives are not “counted as human” in dominant consciousness. J. Butler, *Precarious Life: the Power of Mourning and Violence* (London: Verso, 2004) at 20.

³⁵⁴ Thus, “forms of suffering derived from class relations may be defined as illness, medicalized”, constructed as objects in themselves.” See Good, *supra* note 270 at 57.

proper response to suffering should also include a social and political response.³⁵⁵ This suggests that lawyers can respond to social suffering by learning more about the context of the community in which the suffering arises, which in turn requires a commitment to move beyond the “compressed” space of the legal clinic and into the community, and towards a commitment to addressing the systemic political and legal forces that have created the experiences and legal problems of individual clients.³⁵⁶ Of course, as advocated by “community lawyering” writers such as Nancy Cook and others, such an approach should be tempered by an acute awareness of the limits of lawyers, who are usually “outsiders” to the community, to bring about any change without community collaboration.³⁵⁷ Therefore, lawyers should seek to collaborate with communities themselves, and to seek to understand how communities define the solutions to social suffering. This approach may thus entail involvement by law students in community-based campaigns, law reform initiatives, and so on as a critical response to the individual encounters with social suffering in clinical contexts.

However, this approach also does not deny the importance of the individual relationships between law students or lawyers with their clients in clinical law contexts, and the emotional and affective dimensions of these relationships. Indeed, through practices of critical witnessing, listening, and critical emotional praxis, students can be

³⁵⁵ Adelson, *supra* note 283 at 97. Adelson writes that if social suffering derives from a colonial and postcolonial history of disenfranchisement and attempts to eradicate a cultural history, then the proper response to that suffering must include the reconstitution and reaffirmation of social identity.

³⁵⁶ Amarsingham Rhodes writes about the ways in which medical clinics tend to “compress practitioners into a small and active space”: L Amarsingham Rhodes, “The Shape of Action: Practice in Public Psychiatry” in S Lindenbaum and M Lock, eds, *Knowledge, Power, and Practice: the Anthropology of Medicine and Everyday Life* (Berkeley: University of California Press, 1993) 129 at 142.

³⁵⁷ See Cook, *supra* note 321.

encouraged to identify how individual responses to clients are always political. That is to say, students can be encouraged to identify the ways in which dominant approaches to professional identity and legal practice reproduce particular views about clients, the suffering of clients, and how lawyers ought to respond, and to question whether these approaches to social suffering challenge or transform the conditions that produce suffering in the first place. That is, they can be encouraged to identify the ways in which individual “feelings” and emotions (their own and their clients’) are politically significant and related to understandings about legal practice, and can either maintain or challenge dominant norms in this regard.³⁵⁸

In addition, students can be encouraged to understand that “practical moments” within lawyer-client relationships can challenge dominant tropes that render the lives of poor people “superfluous”, and thus assume what Shdaimah calls “social justice ramifications”.³⁵⁹ Thus, students can be challenged to balance and connect their individual, practical, day-to-day responses to their clients with a larger political analysis about social suffering. As David Morris writes, the challenge is to “validate, illuminate, and authenticate suffering – especially the easily ignored suffering of minority groups – while seeking to alleviate and oppose it.”³⁶⁰ Students can be challenged then, to seek responses to individual suffering of clients that do not tame or depoliticize the claims of clients.³⁶¹

Practices of critical witnessing and listening would encourage students to make space with

³⁵⁸ Zembylas writes about the “affective economies” of feelings that maintain social norms in society: Zembylas, *supra* note 293 at 4.

³⁵⁹ Shdaimah, *supra* note 229 at 141.

³⁶⁰ Morris, *supra* note 328 at 216-217.

³⁶¹ Shdaimah, *supra* note 229 at 141.

their clients for a contextual understanding of the client’s particular history and story, underscoring the point made by Leslie Espinoza that “legal interaction should incorporate cultural and sociopolitical exploration.”³⁶² As Zembylas notes, “one way of understanding injustice is to describe it as the failure to connect with others and respond to their suffering.”³⁶³ By linking social suffering to the question of justice and social justice, this approach may challenge law students to understand the profoundly political dimensions of lawyering in clinical law contexts.

³⁶² L Espinoza, “Legal Narratives, Therapeutic Narratives: the Invisibility and Omnipresence of Race and Gender” (1996-1997) 95 Mich L Rev 901 at 908.

³⁶³ *Supra* note 293 at 4.

Chapter Five: Conclusion

When we come to you
Our rags are torn off us
And you listen all over our naked body.
As to the cause of our illness
One glance would
Tell you more. It is the same cause that wears out
Our bodies and our clothes.

The pain in our shoulder comes
You say, from the damp; and this is also the reason
For the stain on the wall of our flat.
So tell us:
Where does the damp come from? ³⁶⁴

Like the poor workers who come before Brecht's physician, some clients come to their encounters with clinical law students with stories and embodied expressions of suffering. As a clinical law teacher, I have observed how law students respond to these encounters by struggling to shore up professional boundaries while simultaneously grappling with complicated emotional responses, including responses of compassion and empathy. While the encounter with suffering can reinforce dominant images of professionalism and the proper terrain of legal practice, it can also profoundly challenge and destabilize these notions.

In this thesis, I have traced the ways in which dominant discourses and pedagogical practices in legal education work to shape views of human suffering as being unrelated to law and lawyering, and how these practices encourage law students to respond to clients as

³⁶⁴ Bertolt Brecht in "A Worker's Speech to a Doctor": Quoted in Farmer, *supra* note 341 at 3.

tough experts working in a clearly defined “legal realm”, guarded by defined professional boundaries. However, I have argued that these boundaries, upon closer inspection, reveal themselves to be far from firm or neutral. Rather, I have argued that the legal gaze “reads” suffering in distinctly political ways. This reading of suffering can work in poverty law contexts to tacitly reinforce conceptions of professional, racial and class superiority and also to perpetuate individualized and apolitical notions of legal practice and a disdain for larger political and contextual action or study.

I have attempted to critically investigate the ways in which various streams of clinical law scholarship have dealt with the issue of lawyers’ encounter with human suffering, and have noted that this scholarship, though generally critical of dominant conceptions of lawyering, has a tendency to adopt dominant approaches to the issue of suffering. Within this scholarship, ideas of suffering as an individual and private emotional problem, acting as a barrier to the lawyer’s role, or requiring individual emotional or empathetic responses, reappear. Alternately, critical lawyering scholarship, in its emphasis on client empowerment and larger political or community-based initiatives, has tended to diminish the importance of the stories and expressions of client and social suffering that appear in legal clinics. As a result, clinical law pedagogies that are based primarily upon client-centred lawyering, therapeutic jurisprudence approaches, ethic of care approaches and even critical lawyering scholarship may still leave clinical law students and teachers struggling with the question of how to understand and respond to their clients’ suffering.

Clinical law teaching and practice therefore requires a deeper theoretical analysis of the encounter with human and social suffering in clinical and poverty law contexts. Thus, a pedagogy of suffering would take at its starting point an acknowledgement of the importance of the law student-client encounter as a deeply important “pedagogical site” - a place where certain views about lawyering, law, and justice are played out, and therefore a place that ought to be the subject of close attention by clinical law scholars and teachers. I have urged that a critical pedagogy of suffering would focus specifically on the presence of human suffering in many of these encounters. Such a pedagogy would seek to distill the ways in which larger social and systemic forces produce and distribute social suffering, and how the dominant legal gaze and dominant legal practice are too often incapable of assessing or responding to these forces. It would also work to challenge notions that emotions and suffering are apolitical and unrelated to progressive legal practice, and to build a conception that engaged, critical “witnessing” of social suffering by lawyers and law students might lead to passionate and thoughtful lawyering for social justice in clinical law settings. By adopting practices of critical listening and witnessing and by engaging in critical emotional praxis, students will access deeper understandings about the opportunities and challenges within the lawyer’s role – as agent for her client inside a multi-layered legal, social, personal and political relationship.

Although I have not attempted to identify or catalogue specific suggestions regarding how practices of witnessing, listening and critical emotional praxis in the face of suffering might be implemented in clinics and clinical law classrooms, this is a project that requires further elucidation. Questions about how, within the four walls of a clinic

interview room, students might concretely respond to their clients in ways that avoid the traps of empty empathy and false “rescue missions”, are certainly ones that need to be thought about and developed in more detail. Questions such as how students can learn to listen to expressions of emotion and distress, and to engage clients in projects of defining the larger systemic factors that have produced suffering, are ones that must be engaged in by teachers seeking to implement a critical pedagogy of suffering in their clinical law classrooms. Certainly, I would argue that is important for clinical law teachers to be prepared, during case rounds or routine supervisory interactions with students, to critically interrogate dominant discourse about suffering, and to be willing to urge students to ask questions about their assumptions about the proper terrain of legal practice in these moments. This may require clinicians to be prepared to push students into examining their own emotional responses, and to help them to develop a critical vocabulary for understanding and contextualizing these experiences. I believe that a critical pedagogy of suffering would also entail a deliberate challenging of the tendency to suppress or divert emotional responses within the clinical law classroom, and to encourage students to understand their own anger and sadness about their clients’ stories as resources for thinking about larger questions of justice and injustice in society. The use of critical and reflective journals, and exposing students to multidisciplinary literature about social suffering might be a good place to start. Certainly, these practical pedagogical matters are ones that invite ongoing dialogue among clinicians.

I have argued that there is a need in clinical law pedagogy for a deeper theoretical analysis of the encounter with human and social suffering that inevitably occurs in poverty

law contexts, one that seeks to inquire whether the encounter with suffering can teach students about larger questions of legal practice in the face of deep social injustice. In the end, it is my argument that a pedagogy of suffering would seek to show that suffering, lawyers' "readings" of suffering, and legal practice in response to suffering, are profoundly political. Sara Ahmed has written of the importance of bringing "pain into politics..." , which, she writes, would entail a commitment to showing how past injustices manifest in the "very wounds that remain open in the present".³⁶⁵ Similarly, a critical pedagogy of suffering in clinical law contexts would seek to bring "pain into lawyering", and into clinical law classrooms, and to seek to understand how understandings of, and approaches to, the suffering of individual clients is an important aspect of lawyering for social justice.

³⁶⁵ Ahmed, *supra* note 103 at 33.

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