

LAW SCHOOLS, CLINICAL LEGAL EDUCATION, AND THE PANDEMIC PORTAL

Sarah Buhler¹

Introduction

In an article published on April 3rd, 2020, writer and activist Arundhati Roy argues that the Covid-19 pandemic has created a “rupture” – a break between the past and the future. Roy explains that although many of us long for a return to “normal”, past pandemics teach us that our world will be forever altered – that we will never go back to how things were. Besides, Roy argues, “[n]othing could be worse than a return to normality.” This is because the pandemic has exposed the deep injustices of our former world, like a “chemical experiment that suddenly illuminated hidden things.” Roy writes that instead of fighting to return to the way things were, we have a chance now to imagine and build the world we want to see on the other side – a chance to “rethink the doomsday machine we have built for ourselves”. In this way, she says, the pandemic is a “a portal, a gateway between one world and the next.” It is up to us to choose how we walk through it to the other side, what we want to leave behind and what we want to take with us. In this essay, I argue that law schools should hang on to clinical legal education as they walk through the pandemic portal. I will focus on three main reasons why we need clinical legal education in this time. First, in the age of Zoom and online learning, clinics remind us that law must centrally concern itself with living, breathing human beings. Second, clinics have local and deep expertise about what Roy calls the “doomsday machine” and law’s complicity with it: in other words, clinics have important knowledge about the relationship between law and injustice. Finally, clinical legal education is a vital site to imagine and build legal practice for a more just world after the pandemic.

The Pandemic’s Impact on Clinical Law Programs

The pandemic entered the reality of the University of Saskatchewan College of Law’s Intensive Clinical Law Program on the evening of Friday

¹ Associate Professor, College of Law, University of Saskatchewan

March 13th, 2020, two days after the World Health Organization declared a global pandemic. Twelve students were enrolled in the program, which is hosted by Community Legal Assistance for Saskatoon Inner City (CLASSIC), a community legal clinic located in the heart of Saskatoon. Our program, like many other Canadian clinical law programs, is centred on a social justice mandate. Since January, the students had been spending four days a week at CLASSIC, working with clients in a broad range of areas including prison law, social assistance appeals, housing law, human rights, criminal law, and refugee law. On Fridays, students attended my clinical law seminar. On the morning of Friday March 13th, our seminar discussion focussed on a theme we had discussed earlier in the term – trauma and self-care. We reflected on the unequal distribution of suffering in our world and the ways that the law produces, maintains, and sometimes mitigates injustice experienced by our clients. Students talked about how much they learned from their clients and how motivated they were to challenge unjust systems in their work as lawyers. We talked about how this work and learning is hard and exhausting.

That evening, the university sent an announcement about its shut-down plan. Courts, tribunals, and law offices across the country were also closing their doors and moving online. CLASSIC needed to transform its practices in order to maintain its obligations to clients while physical distancing. The students rose to the challenge – working from home, meeting clients by phone, appearing remotely at hearings, and working with clinic staff to triage matters and create new protocols and systems. CLASSIC immediately began focussing its systemic advocacy work on issues relating to the pandemic, including advocating for an eviction freeze and the release of prisoners, producing pandemic-related legal information, and joining with community partners in Covid-response planning.

The experience at CLASSIC is similar to what is happening in other clinical programs in Canada and beyond, where programs are adapting their pedagogies and practices, and responding to the intersecting legal, social, and economic challenges faced by clients and communities in the Covid-19 era. The legal troubles of clients have carried on, and indeed in many cases have been exacerbated by the pandemic. Physical distancing, telephone or Zoom instead of in-person client meetings, and navigating courts and tribunals remotely are all challenges that are compounded when clients are struggling with health problems, trauma, precarious

housing, insecure incomes, and scarce access to technology. CLASSIC made the decision to operate in the summer without students, and we are currently considering what our program will look like in the fall term and beyond. As noted, many other Canadian law schools appear to be continuing with their clinical programs during the pandemic. However, social-justice focussed clinical legal education has never had a central place in Canadian legal education, and it is possible that law schools will be assessing its continuing existence going forward. Clinical legal education is resource-intensive, messy, complicated, and exhausting at the best of times, but even more so now.

Why We Need Clinical Legal Education

a. Centrality of human experience with law

The messy, complicated and exhausting nature of clinical legal education is one key reason why we need to hang on to it. Clinical legal education is about learning skills in legal research, drafting, and advocacy, but at its heart it is about learning about how legal problems are experienced by human beings, and how to respond ethically and with humility and self-reflection. In clinics, we witness that too often, justice institutions unleash pain and harm on marginalized people. Listening to clients and building relationships is how those without lived experience of these realities can begin to understand. We may not be in a situation where students can work physically side by side with their clients any time soon. But clinical legal education insists on the centrality of living, breathing, human beings and their experiences - an antidote to the “cardboard clients” that often appear in law schools (Kruse, 2008). As Jenny Odell (2019, p.24) argues, digital platforms tend to disconnect us with the realities of human bodies: the “matter-of-fact presence of the body in front of me.” As legal education moves online, this reminder that we need to stay focussed on the law’s impacts on human beings is more important than ever. In clinical work, even in the world of social distancing, it is impossible to forget that law and legal practice should be concerned first and foremost with human beings.

b. Insights into law’s relationship with the “doomsday machine”

Arundhati Roy writes that the pandemic has made visible the pre-existing entrenched structural inequities and injustices in our society – the

“doomsday machine we have built for ourselves”. Similarly, the Global Health Justice Partnership observes that “the pandemic is throwing into stark relief the deep failures and inequities in our current economic, social, legal and political orders.” Howard Ramos, Alan Walks and Jill Grant write that the pandemic “shows cracks in the current system and points a glaring spotlight on the inequities that were overlooked before” (2020). Of course, these injustices have always been visible to oppressed and marginalized communities. This calls to mind Leanne Betasmosake Simpson’s observation that “[t]he monster has arrived, and the monster was always here” (2018). Indeed, as Lawrence Gross points out, Indigenous communities are already living as “postapocalypse people” (2014, p.33). In this way, the pandemic and its fallout are “precedented times” (Waterfall, 2020).

Through their relationships with oppressed and marginalized clients, legal clinics gain expertise about how law and legal processes are too often complicit with injustices experienced by these clients and their communities. This close attention to the connections between law and injustice has been a feature of clinical legal education from the beginning. William Pincus, one of the early American founders of clinical legal education, said that clinical legal education teaches 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” (Wizner, 2002, p.1934). At CLASSIC, students witness that law and legal processes routinely sanction the evictions of single mothers, the locking up of prisoners into solitary confinement, and the criminalization of people who fail to report small amounts of income to social assistance authorities. Students witness and learn how, for their clients, legal process is all too often “a means by which the powerful are able to legitimize the system’s outcomes, violent as they may be” (Ashar & Lai, 2019, p.83). While critical perspectives can be, and are, developed in non-clinical law school classes and seminars, Sameer Ashar argues that they “cannot replicate the experience of an immersive confrontation with an intractable social problem and close work with clients and organizers on that problem” (2016, p.219).

c. *Legal practice for Justice*

Janet Mosher has argued that dominant methods of legal education tend to produce “anti-critical” approaches to legal practice, where students are

“unlikely to search for systemic patterns of oppression, are unlikely to attempt to understand the structural roots of client problems, and are even less likely to challenge those structures” (1997, p.626). Mosher notes that law students learn in law school that the role of lawyers is to “work within the existing order, marginally, incrementally modifying it through litigation” (p.626). While many law professors seek to introduce critical perspectives on lawyering and the roles of lawyers in their classes, lawyering and legal practice remain undertheorized and understudied in legal education.

Because theory and practice are fully intertwined in clinical legal education, clinics are vital places to imagine, enact, critique, and refine lawyering in furtherance of justice, and there is a long history of this in clinical law scholarship and practice. As Wendy Bach and Sameer Ashar write, “Our job, most days, is to act and to react. So we wield theory when it is accurate and we revise it when it is not, but in either case we wield it for our clients and for ourselves” (2019, p.92). Clinics have long histories of encountering injustice, and (with their clients) critically assessing and building strategies for responding. Clinics can continue to be vital sites for theorizing justice and legal practice for our post-pandemic world. The Global Health Justice Partnership has stated that our goal for the world after the pandemic should be to “build a new infrastructure of care that supports our collective wellbeing in the long-term.” Surely, law schools should contribute to an infrastructure of care and justice on the other side of the pandemic portal: clinical legal education has the relationships, pedagogies, and practices to be a leader in this work.

Sources

Sameer M Ashar and Annie Lai, "Access to Power" (2019) 148 *Daedalus* 82.

Sameer M Ashar, "Deep Critique and Democratic Lawyering in Clinical Practice" (2016) 104 *Calif L Rev* 201.

Wendy A Bach and Sameer Ashar, "Critical Theory and Clinical Stance" (2019) 26 *Clinical Law Review* 81.

Global Health Justice Partnership, "Responding to the Justice and Rights Implications of the Covid-19 Pandemic" online: <https://law.yale.edu/ghjp/projects/infectious-disease-and-justice/covid-19>

Lawrence W. Gross, *Anishinaabe Ways of Knowing and Being* (Surrey: Ashgate, 2014).

Katherine Kruse, "Beyond Cardboard Clients in Legal Ethics" (2008) UNLV William S. Boyd School of Law Legal Studies Research Paper No. 09-02. Online: <http://dx.doi.org/10.2139/ssrn.1266342>

Janet Mosher, "Legal Education: Nemesis or Ally of Social Movements?" (1997) 35 *Osgoode Hall LJ* 613.

Jenny Odell, *How to Do Nothing: Resisting the Attention Economy* (New York: Melville House, 2019).

Howard Ramos, Alan Walks & Jill L Grant, "Coronavirus pandemic is an opportunity to create affordable cities" (April 1, 2020) *The Conversation*, online: <https://theconversation.com/coronavirus-pandemic-is-an-opportunity-to-create-affordable-cities-134735>

Roy, Arundhati, "The Pandemic is a Portal" (April 3, 2020) *The Financial Times*, online: <https://www.ft.com/content/10d8f5e8-74eb-11ea-95fefcd274e920ca>

Leanne Betasamosake Simpson and Dionne Brand, "'Temporary Spaces of Joy and Freedom': Leanne Betasamosake Simpson in Conversation with Dionne Brand" (June, 2018) *Literary Review of Canada*, online: <https://>

reviewcanada.ca/magazine/2018/06/temporary-spaces-of-joy-and-freedom/

Hilistis Pauline Waterfall, "For First Nations, These are Precedented Times" (22 May, 2020) The Tyee online: https://thetyee.ca/Opinion/2020/05/22/First-Nations-Precedented-Times/?utm_source=daily&utm_medium=email&utm_campaign=250520

William Pincus, "Educational Values in Clinical Experiences for Students", Council for Legal Education for Professional Responsibility Newsletters 1969-1972 [quoted in Stephen Wizner, "The Law School Clinic: Legal Education in the Interests of Justice" (2001-2002) 70 Fordham L Rev 1929]