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Just Clinics: A Humble Manifesto

SARAH MARSDEN*

Les cliniques juridiques étudiantes sont situées à l'intersection entre la crise de disponibilité des services juridiques et la pression exercée sur les écoles de droit de former des étudiantes et étudiants prêts pour la pratique. Dans le contexte des politiques néolibérales qui valorisent les résultats fondés sur le marché et la réification des services, un contexte qui cache également les racines structurelles de l'inégalité, il est tentant de mesurer le travail des étudiantes et étudiants des cliniques juridiques selon leur efficacité à fournir des services à une grande clientèle. Dans cet article, j'avance que les cliniques des écoles de droit devraient plutôt être reconnues comme sites de justice, pour aller au-delà du critère du « nombre de personnes desservies ». En utilisant l'idée de « l'accès à la justice réelle » plutôt que les versions conventionnelles de « l'accès à la justice », je propose que le travail des cliniques juridiques étudiantes soit mesuré selon trois principes de base : leur adoption d'une approche critique à l'accès à la justice, leur responsabilisation véritable envers les communautés desservies, et leur degré de définition des compétences nécessaires pour être prêt à travailler en justice.

Student legal clinics are poised at the intersection of the crisis in the availability of legal services and pressure on law schools to produce practice-ready graduates. In a neoliberal policy environment, which emphasizes market-based outcomes, commodifies services, and obscures the structural roots of inequality, it is tempting to measure the work of student legal clinics in terms of their efficiency in providing services to large numbers of clients. In this article, I argue that law school clinics should instead be recognized as sites of justice, moving beyond the construct of “numbers served.” Using the idea of “access to actual justice” as opposed to mainstream versions of “access to justice,” I propose that the work of student legal clinics should be measured by way of three main tenets, namely, their adoption of a critical approach to access to justice, their meaningful accountability to the communities in which they work, and the extent to which they define competencies in terms of justice-readiness.

THERE ARE DOZENS OF STUDENT LEGAL CLINICS¹ across Canada. Most law schools are affiliated with at least one clinic providing direct client service, and many schools also offer an increasing array of externship, moot, and other non-classroom-based credit options. Several law faculties have made clinical or experiential programs or courses a mandatory requirement for graduation. Student legal clinics are poised at the intersection of a complex constellation of problems facing the legal profession: the growing crisis in the availability of legal services; pressure on law schools to produce practice-ready graduates amidst growing student debt; and the

* Associate Professor, Faculty of Law, Thompson Rivers University. I would like to thank the two anonymous reviewers as well as the editorial staff of the Journal of Law and Social Policy for their detailed and valuable feedback on initial drafts of this article.

¹ For the purposes of this paper, I take “student legal clinics” or “law school clinics” to include clinics in which law students provide direct client services, either in community settings or within in-house law clinics located at universities.

very real possibility of the elimination of articling as a prerequisite to licensing. All of this has arisen against a decades-old backdrop of neoliberalism, in which both policy and cultural ideology naturalize the desirability of market-based outcomes, commodify services, and obscure structural and historical factors in creating inequality. In this context, law school clinics could be viewed primarily as a solution to the erosion of legal services, as well as a training ground to replace traditional articling and a source of practice-ready entrants to a competitive job market. It is tempting to measure the work and worth of student legal clinics in terms of their efficiency in addressing these problems, whether through sheer numbers of clients served or by way of mandatory skills checklists used to determine the basic competencies required to be admitted to the practice of law.

In this article, I argue that student legal clinics should instead be recognized as sites of justice, and that this requires an approach to measuring their value that moves beyond the constructs of numbers served and practice readiness. Instead, I assert that the work of student legal clinics should be measured in terms of their engagement with justice. As a foundation for this, I propose that this work should be guided by three specific tenets, each of which has implications not only for the scope and orientation of clinical work, but for the valuing of that work in how we measure it. First, I propose that clinics should take a critical approach to mainstream assumptions about access to justice—an approach that is characterized by a focus on substantive outcomes and the deep integration of those most affected by injustice. In rejecting mainstream conceptions of access to justice, I suggest the use of new terminology to reinscribe the role of justice, specifically through the concept of “access to actual justice.” Second, I argue that clinics must be meaningfully accountable to the communities in which they work. Finally, I propose that clinics should enact a critical perspective on legal competencies by way of “justice-readiness.” I propose these not to increase the workload of clinics, which we can safely assume is already too heavy, but rather to suggest that the work they do should be measured in terms of values that go beyond the neoliberal rubrics of numbers served and the checking off of standard skills for law students entering the job market. I also assume here that the measurement of clinical work is relevant to both the service and teaching roles of clinics; the two roles can be at odds with each other in what Shelley Gavigan calls “dynamic tension,”² but for my purposes I take the position that service and teaching goals should be joined under the broader banner of critical approaches to justice. What is essential here is to refigure *how* we measure the work of student legal clinics, whether in their service role or in their teaching role; the measurement of clinical work is critical in understanding the present role of student legal clinics and also in shaping their future, with corollary impacts on access to justice, legal education, and the profession. Clinical programs have diversified, and while many maintain a social justice mission, many others have different aims. In this article, my focus is on student legal clinics that aim to improve access to justice or serve marginalized communities, and when I refer to clinics, I am referring to this specific subset.

My perspective on clinical legal education is shaped by lived experience in both personal and professional life. I am the descendent of white, Western European settlers and a beneficiary of colonialism. I also have direct personal experience with welfare, shelters, and food banks, and I was exposed to extensive violence and addiction from a young age, but white privilege mitigated some of this and opened doors for me. In law school, in the profession, and in academia I continue to experience alienation on the basis of class and experiential differences from what I see as the

² Shelley AM Gavigan, “Twenty-five years of dynamic tension: The Parkdale Community Legal Services Experience” (1997) 35:3/4 Osgoode Hall LJ 443.

“normal” status of my professional peers. But my background is an asset as well—it also allows me to have a meaningful connection to the frontline work of clinics. I do not share all of the lived experiences of the people that clinics work with, but that I share some is valuable in understanding my own place and motivation in this work. In professional life, I have worked as a supervising lawyer at a high-volume student legal clinic in British Columbia which bears much of the legal work previously covered by legal aid under the banner of poverty law, such as income assistance and residential tenancy, as well as legal work for low-wage workers, immigrants, and refugees.

I. THE PLACE OF STUDENT LEGAL CLINICS

An informal review of publicly available information online shows approximately forty in-house, direct service legal clinics operating within the twenty-one law schools in Canada. The websites of several law schools disclose no legal clinics, and predictably, the larger schools (notably the University of Toronto and Osgoode Hall) operate multiple student legal clinics (as defined above). In addition to in-house clinical programs, there is a proliferation of externships and a smaller number of internships, as well as innocence projects, test case litigation projects, and programs (whether called “clinical” or not) that provide research rather than representation services. Clinics vary in structure, funding sources, and integration with law faculties. They may be funded by government legal aid programs, law foundations, charitable funds, university funds, and private donations, have different requirements in terms of clinic mandate, and use different methods for measuring clinical performance. The structure of clinics also varies: they may be separate legal entities, components of the law faculty, or informal associations. Some are led and staffed by supervising lawyers with no status within the law schools, and some have formal involvement from faculty in close or distant relationships. In terms of curricular integration, a majority of clinical programs operate primarily on a credit basis, but some also use student volunteers and provide paid student positions. Law school clinics hold unique potential as sites of transformation: by allowing students to meet and work with clients they would never otherwise encounter, whether in community settings or within in-house clinical programs, they provide a crucible for professional development in terms of skills and values. Clinics open rare spaces for the development of advocacy based on a specific mandate rather than on clients’ ability to pay, and they create opportunities for the establishment of relationships between nascent professionals and communities who might not otherwise interact.

Law school clinics are also especially vulnerable to the risk of commodification. Sameer Ashar raises the examples of the replacement of in-house legal clinics based on social justice missions with low-cost externships and apprenticeships, and the possibility that systemic advocacy will lose out to demands for ever-increasing numbers of individual clients served.³ For example, at the time of writing, clinical programs in Ontario were facing funding cuts in which one-on-one client service was explicitly prioritized, and clinics doing systemic advocacy work faced the biggest reductions in funding.⁴ The academic marginalization of clinical legal education, but also its susceptibility to the easy normalization of neoliberal premises, can be seen as an outgrowth of

³ Sameer M Ashar, “Deep Critique and Democratic Lawyering in Clinical Practice” (2016) 104:1 Cal L Rev 201 at 204.

⁴ Anita Balakrishnan, “Legal Aid Ontario to Cut \$14.5M from Clinic System” *Law Times* (12 June 2019), online: <www.lawtimesnews.com/news/general/legal-aid-ontario-to-cut-14.5m-from-clinic-system/266875> [perma.cc/7FGZ-MWLB].

the history of legal education in Canada and a result of the influence of American legal education.⁵ Until the 1960s, legal education in Canada was dominated by the legal profession. As described by Harry Arthurs, in the 1960s the democratization of universities was a catalyst for the transformation of law schools to include more academic aspirations, including control by the professoriate rather than the profession. This paved the way for educational aims quite separate from the professional training of lawyers, including the development of new and critical perspectives on law and the transformation of the profession through engagement beyond the practising bar, with an audience of policymakers, administrators, scholars, and the public.⁶ Unsurprisingly, this resulted in disputes over resources at law schools, of which law students were often on the side of what they saw as more practical offerings, including clinics, rather than those more focused on critical scholarship or “purely academic” courses.⁷ Demands for more practical offerings by students were fueled by students’ concerns over the marketability of their skills, concerns which could be couched more persuasively in terms of “consumer demands” due to an increasingly neo-conservative political environment.⁸ Arthurs’ comments were published twenty years ago, but I hear the same consumer- and commodity-based arguments from students, faculty, and administrators in present-day law schools.

This commodification risks taking clinical legal education further from its transformative potential, and, as I outline in detail below, redefining how outcomes of student legal clinics are measured is one necessary component of resisting this commodification. In the next section, I ground this argument by considering empirical work measuring student clinical legal services and legal services generally, as well as Canadian access to justice literature from academic and professional perspectives.

II. CLINICS AND THE MEASURE OF JUSTICE

To consider how we might best measure the work of student legal clinics in terms of their contribution to justice, in this section I will draw on work from several corners. First, I draw briefly on theories of justice to give, in broad strokes at least, the definition of justice that I use in this article. I also introduce the concept of “access to actual justice,” and differentiate it from “access to justice.” Second, I use empirical studies of outcomes of both student legal clinics and civil legal aid providers in the United States to provide examples of how outcomes might be concretely measured in the clinical context. Third, I turn to samples of Canadian research on the provision of legal services, with a focus on work that considers the perspectives of people receiving services. Finally, I offer a critical examination of two examples of mainstream access to justice literature (*i.e.* work emanating from the legal profession).

A. MEASURING JUSTICE

The assessment of clinical work builds values into it, whether explicitly or implicitly, particularly through the relationships between measurement, reporting, and clinical funding. For example, if a student legal clinic is measured primarily in terms of the number of instances of legal service

⁵ For a detailed treatment of the history of Canadian common law education, see *e.g.* W Wesley Pue, “Common Law Legal Education in Canada’s Age of Light, Soap, and Water” (1995) 23 *Man LJ* 654.

⁶ Harry W Arthurs, “The Political Economy of Canadian Legal Education” (1998) 25:1 *JL & Soc’y* 14 at 20.

⁷ *Ibid* at 21.

⁸ *Ibid* at 28.

provided (such as through summary advice or representation at a hearing) and funded accordingly, this emphasizes quantity. It also means the clinic must prioritize individual service (rather than, for example, systemic advocacy) and structure its procedures to maximize the reported number of service instances. If a clinic is funded in terms of the number of clients, rather than the number of service instances, this fails to account for the clients with multiple legal issues, or those requiring hundreds of hours of work. Accounting for legal work in terms of “billable hours” (*i.e.* capturing time spent, rather than or in addition to the number of files) would address some of the problems of the latter two methods, but still falls short of capturing many aspects of justice.

Premising the assessment of clinical legal work on the idea of justice invites the question of how justice is (and should be) defined. It is beyond the scope of this article, and beyond the capacity of a single viewpoint, to fully canvass the definition of justice and the relationship between law and justice. In articulating the barest outlines of a notion of justice by which clinical legal work could be measured, I draw on conceptions of justice which depart to some degree from western liberal models. Two main points of departure from standard western conceptions of justice bear mentioning here, namely, taking a relational view, and inclusion of those most affected, which might be referred to as “voice” or “recognition.”

Western liberal legal cultures tend to be based on an individualistic model in which benefit and blame are assumed to accrue to individual persons as rational actors, and in which the relevance of relationships, systems, institutions, and social and historical context is minimized. The emphasis on individualism as a central tenet of rights has deep roots in liberal thought, and has also been subject to longstanding critique, particularly within feminism. In conceptualizing justice, I propose that a more relational view is appropriate. As described by Jennifer Nedelsky, this involves taking the starting point that “the persons whose rights and well-being are at stake are constituted by their relationships such that it is only in the context of those relationships that one can understand how to foster their capacities, define and protect their rights, or promote their well-being.”⁹ We should place relationships at the centre of an understanding of justice, considering the social ties between individuals, communities, and institutions, but also their complex links with ecological, political, and economic outcomes. While student legal clinics often do serve individuals, justice should be understood in terms of structures as well, and in particular, with attention to what Iris Marion Young calls “structural injustice” (in which law itself may be implicated). In Young’s definition, structural injustice exists when “social processes put large categories of persons under a systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time as these processes enable others to dominate or have a wide range of opportunities for developing and exercising their capacities.”¹⁰

In terms of the issue of “voice” or “recognition,” I mean that we should promote an understanding of justice which takes close account of processes and outcomes from the perspective of those most affected and in terms of the needs and priorities they define. Especially in fields generally associated with the redistribution of material resources, such as welfare, Canadian law is founded on a charity-based model, in which people living in poverty have traditionally been characterized as intellectually or socially inferior, and subject to moral and religious regulation in

⁹ Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (New York, NY: Oxford University Press, 2011) at 121.

¹⁰ Iris Marion Young, “Responsibility and Global Justice: A Social Connection Model” (2006) 23:1 *Social Philosophy and Policy* 102 at 114.

exchange for redistributive benefits.¹¹ Nancy Fraser argues that the characterization of individuals as inferior in this way is “not simply to be thought ill of, looked down on, or devalued in others’ conscious attitudes” but rather “to be denied the status of a full partner in social interaction and prevented from participating as a peer in social life as a consequence of institutionalized patterns of interpretation and evaluation that constitute one as comparatively unworthy of respect or esteem.”¹² Fraser thus frames recognition as an essential prerequisite to parity of participation, in which members of society interact as peers.¹³ As I elaborate below, standard definitions of justice, and access to justice, do little to engage the views, much less the leadership, of the individuals most affected by patterns of social and economic marginalization—in many ways, access to justice still looks like a charity model. As such, robust recognition and inclusion of those most affected is also a primary component of justice. In the next section, I offer an alternative conception of access to justice.

B. ACCESS TO JUSTICE AND “ACCESS TO ACTUAL JUSTICE”

By “access to actual justice” I mean simply a conception of access to justice that takes a relational view, explicitly confronts social and economic inequality and the structures that perpetuate it, and attends to voice and recognition as defined above. This expression is consistent with what has elsewhere been called the “democratic thesis” on the end point of access to justice initiatives: that access to justice should enhance people’s participation and “ability to engage with law-making institutions and process as well as concepts of justice as ends in themselves.”¹⁴ I use this term in contrast to the term “access to justice” which, as I elaborate upon below, refers predominantly to access to legal processes, legal information, and legal representation and does not tend to engage deeply with issues of substantive justice. This implies, among other things, that the determination of what constitutes a “justiciable” problem should not be limited to existing legal pathways, but should instead be founded on justice as defined in relation to establishing substantive equality and improving material and political conditions over time.¹⁵ Ascanio Piomelli’s elucidation of the practice of “democratic lawyering” is also helpful in considering lawyering for purposes not limited to access to or improvement of existing systems: lawyering in which the aim “is not primarily legal reform, but rather the transformation of living conditions for those whom our political economy and society routinely deny dignity and equal justice.”¹⁶ To take a straightforward example, Indigenous people did not gain universal political enfranchisement in the Canadian electoral system until 1960. Prior to 1960, this would have been a “non-justiciable” issue

¹¹ For a detailed treatment of the development of the welfare state in Canada, see *e.g.* Dennis Guest, *The Emergence of Social Security in Canada*, 3d ed (Vancouver, BC: University of British Columbia Press, 1997). For examples of work dealing with the moral regulation of people living in poverty, see *e.g.* Dorothy E Chunn & Shelley AM Gavigan, “Welfare Law, Welfare Fraud, and the Moral Regulation of the ‘Never Deserving’ Poor” (2004) 13:2 Soc & Leg Stud 219; Serena Romano, *Moralising Poverty: The ‘Undeserving’ Poor in the Public Gaze* (Abingdon, Oxon: Routledge, 2017).

¹² Nancy Fraser, “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation” in The Tanner Lectures on Human Values, *Conferencia dictada en Stanford University* (1996) at 25–26.

¹³ *Ibid* at 30.

¹⁴ Jennifer A Leitch, “Having a Say: ‘Access to Justice’ as Democratic Participation” (2015) 4:1 UCL Journal of Law and Jurisprudence 76 at 79.

¹⁵ For a discussion of the more conventional use of justiciable problems, see *e.g.* Ab Currie, “The Legal Problems of Everyday Life” in Rebecca L Sandefur, ed, *Access to Justice*, Sociology of Crime, Law and Deviance, 12 (Bingley, UK: Emerald Group, 2009) 1 at 10.

¹⁶ Ascanio Piomelli, “The Challenge of Democratic Lawyering” (2009) 77 Fordham L Rev 1383 at 1385.

under a thin definition, as there was no legal mechanism through which the vote could be obtained. But clearly it does not follow that justice was not at stake. The thin version of access to justice uses a self-referential definition of justice, and fails to give voice to or recognize the most appropriate participants in defining justice: no doubt the exclusion of Indigenous people from the Canadian vote would have been seen as justiciable from the perspective of those materially impacted by this exclusion. The definition of justice, and justiciability, must be understood as dynamic and expansive, and should not be limited to the content of particular legal systems. Put another way, if a conception of justice is limited to the idea of access to particular legal systems, which inevitably reflect particular values (at the present moment, Canada's could be said to reflect capitalist, colonialist, racist, and hetero-patriarchal values, among others) these underlying values remain unquestioned as components of justice. Access to actual justice, at a minimum, makes space for questioning both the structures that perpetuate inequality and the values that underlie them, and critically, in so doing, it must build on the voice and recognition of those most impacted. Far from being abstract, I would argue that this concept forms a concrete, and essential, basis for the measurement of student clinical work in all three proposed tenets of measurement: it provides an initial frame for developing critical approaches to access to justice; through embedding voice and recognition, it aligns with meaningful accountability; and by attempting to define justice dynamically and inclusively, it provides content to the concept of justice-readiness.

Measurement is critical to both the material existence and the structure and mandate of clinics. If the "service numbers" or "billable hours" models do not capture well whether a student legal clinic is contributing to access to actual justice, and influence the work of clinics by forcing them to structure operations to maximize certain numbers, the question of measurement deserves attention.¹⁷ This section will explore the ways in which the work of legal clinics is currently measured, drawing primarily on recent American literature in this area. With little analogous work in Canada, the American example is instructive in considering how the assessment of clinical work could better be connected to justice in the Canadian context.

C. THE EMPIRICAL EVALUATION OF CLINICAL LEGAL WORK IN THE UNITED STATES

In one of the few empirical studies measuring outcomes in student legal clinic programs in the American context, Colleen Shanahan and her colleagues looked at a large dataset of unemployment insurance cases in Washington, DC using two rubrics to assess outcomes in line with their description of the dual functions of clinics, namely: 1. How well clinics teach students to practise law, as measured by how often students used legal procedures relative to lawyers working in the same legal field (the "teaching mission" of clinics); and 2. How well clients served their clinics, as measured by the (win/loss) outcomes of students' files relative to those in which

¹⁷ The assertion that clinical work in Canada is measured by way of "numbers served" is based on my experience as a supervising lawyer and academic clinic director at two law school clinics in British Columbia, and similar experiences I am aware of within other jurisdictions. Funders do not usually publicize their performance measurement rubrics, and it is therefore difficult to provide direct evidence of this practice. This article proceeds on the assumption that measuring numbers served is a central method used in assessing the work of clinics and determining their funding eligibility. While there is no explicit mention of "numbers served" as a funding rubric, the CLASSIC clinic in Saskatoon makes its annual reports public, and they reflect a strong emphasis on numbers of clients assisted. See "Annual Reports" 2007-2018, online: <www.classiclaw.ca/newsanddocs.html> [perma.cc/XFT4-PZ5X].

lawyers represented clients in the same court (the “service mission” of clinics).¹⁸ The study combined quantitative analysis on case outcomes and representation with qualitative data gathered from open-ended interviews with legal representatives and judges who regularly appear in unemployment insurance cases.

The authors conclude that clinical law students are learning how to act like lawyers, at least insofar as the frequency with which they engage with a case procedurally through the provision of pre-hearing evidence, appearance at hearing, and the provision of documentary and testimonial evidence at hearing, all of which they did incrementally more often than lawyers handling similar files. The authors theorize that students dedicate more time to each client (because they have fewer clients than lawyers), and may bring the benefit of more collaborative work (with other students, supervisors, and lawyers). The judges interviewed expressed both frustration with the length of hearings under student conduct, which they described as being done “by the book,” and appreciation for the attention the students gave to their clients and cases.¹⁹ The study concluded that cases in which clients were represented by students fared almost as well (in terms of formal “wins”) as when they were represented by lawyers, and both represented groups “won” significantly more often than self-represented litigants.²⁰

The authors set their work apart from broader understandings of client service that go beyond wins and losses in formal court procedures. Likewise, they specifically distinguish their first broad research question (how well do clinics teach students to practise law, as measured against the win/loss outcomes for practicing lawyers), from that of determining what the learning goals of a clinic should be. Taking the latter question into account might lead to different analytical uses of the same data, or the capture of different data (to answer what it means to “practice like a lawyer”). Importantly, though, variations on this type of study could be developed to address questions which depart from the use of win/loss or similarity to practising lawyers as the determinative variable. They could be linked to other research questions that open up these variables (*e.g.*, what are the most valuable outcomes for the communities served, and are these met)?²¹ The importance of documenting the efficacy of student legal work in terms of its similarity to the work of lawyers should not be understated: in addition to contributing to knowledge about clinical teaching and learning, it provides strong support to justify the important role of student clinics in terms of both service and teaching. However, if we wish to uncover the full potential of clinical work in terms of access to actual justice, it is necessary to broaden the measurement of student clinical work to engage the values and assumptions underlying the legal profession, and the way in which access to justice is defined. In this way, rather than taking as given that the profession already knows what is useful for clients, and therefore what makes for “good” practice and learning, both client and learning outcomes could be explored while maintaining openness to redefining professional values. I provide specific examples of how we could go about this in the final section of this article.

American clinicians Jane Aiken and Stephen Wizner propose an approach to justice that goes beyond formal wins and losses and suggest that multiple aspects of justice are measurable in the

¹⁸ Colleen F Shanahan et al, “Measuring Law School Clinics” (2018) 92:3 Tul L Rev 547 at 549.

¹⁹ *Ibid* at 574–575.

²⁰ *Ibid* at 582.

²¹ Without wading into the debates on the definition of community, for the purposes of this article, “community” refers to a group of people linked by place, culture, social status, shared identity, or norms, whether localized or disparate. See *e.g.* Ted K Bradshaw, “The Post-Place Community: Contributions to the Debate about the Definition of Community” (2008) 39:1 Journal of the Community Development Society 5. By “service” I do not mean to imply utility, but simply the act of making legal and associated services available to people.

context of student legal clinics, while acknowledging that measuring less obvious facets of justice may be an exercise in “measuring the unquantifiable,” particularly as many of these features would not be appropriately measured through regression analyses.²² Although they do not propose a methodology by which to measure these, the authors suggest multiple facets of student-client interactions that should be considered in determining whether clinics are contributing to justice, including the following:

- empathy,
- advocacy (with a focus on the preliminary and informal negotiation of disputes),
- the potential value added in work on representative or multiple-client proceedings,
- larger-scale justice work, such as policy reform,
- client satisfaction with the advocacy relationship: whether clients felt understood and found their advocates responsive, regardless of win/loss,
- community mobilization in conjunction with clinical work, and
- clients’ subjective elements and perceptions of justice, including being heard, having accessible information, and being treated with respect.²³

The importance of clients’ perspective is supported by empirical research, as well. In their work on procedural justice, Rebecca Hollander-Blumoff and Tom Tyler distinguish procedural justice (subjective assessments about the fairness of a decision-making process) from both subjective assessments of outcomes and outcome favourability (*i.e.*, how good the outcome is for a particular party).²⁴ While they are careful to say that procedural justice does not negate the importance of material outcomes, their empirical work and that of others shows that procedural justice influences parties’ acceptance of outcomes in formal and informal legal processes.²⁵ They identify four main factors that tend to guide evaluations of procedural justice, namely: the opportunity to tell one’s story; the perceived neutrality of a decisionmaker or authority; the trustworthiness of the decision-maker or authority; and respectful and courteous treatment in terms of both social courtesy and respect for rights.²⁶ Although this work was done in the specific context of alternative dispute resolution, the findings also serve as support for a notion of justice in which attention to relationships, voice, and recognition is key. I will return to some of these elements below, in terms of how we might prioritize some of these in both the assessment of student legal clinics and future research agendas in an attempt to shift away from neoliberal understandings of access to justice and toward something more like access to actual justice.

While not specific to student legal clinics, the assessment of community legal providers at large also forms part of the springboard from which we can move to consider the measurement of student clinics. In the American context, in 2018 the National Center for Access to Justice at Fordham Law School released a report on outcomes measurement for civil legal aid providers in the United States. The report rests on an important distinction between outputs and outcomes. The authors define “outputs” as “things that civil legal aid programs produce using inputs” (inputs being “things that allow civil legal aid programs to be productive,” such as the number of lawyers

²² Jane H Aiken & Stephen Wizner, “Measuring Justice” (2013) *Wis L Rev* 79 at 81.

²³ *Ibid* at 81–83.

²⁴ Rebecca Hollander-Blumoff & Tom R Tyler, “Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution” (2011) *2011:1 J Disp Resol* 1 at 4.

²⁵ *Ibid* at 5.

²⁶ *Ibid* at 5–6.

or staff).²⁷ “Outcomes,” on the other hand, are much more broadly defined, as they describe “the consequences, impacts, or effects of the services provided” to the client.²⁸ In the Canadian context, Gemma Smyth distinguishes outcomes from “impacts,” in which evaluation would go beyond looking at the immediate effects of advocacy to longer term effects, such as increases in organizing power, knowledge transfer, or change to government policy.²⁹

The National Center for Access to Justice report notes that the wide variety of different types of outcomes measured by service providers gives rise to difficulty in comparing programs or discerning larger patterns.³⁰ One of the report’s recommendations is for legal service providers to establish consensus on what it calls “big goals”—giving examples like stabilizing housing and financial security for clients—which may stand in contrast to outcomes measured based primarily on values traditionally important to lawyers.³¹ They connect the articulation of “big goals” as the frame of reference for outcomes as important not only to make outcomes more client-centred, but to better express the contribution of clinical programs in terms that better capture the impact of legal work and express it to non-lawyers. Furthermore, they recommend developing outcomes in collaboration with clients and frontline service providers, as well as using existing datasets (such as those established through the census) to contextualize their own goals.³² Other recommendations about the process and content of outcomes measure that are especially relevant to the Canadian context are:

- improvement of communication between providers and funders, particularly where there is an emphasis on “high numbers of people served;”³³
- determining and measuring systemic outcomes and ripple effects between multiple providers;
- obtaining post-service outcomes reporting from clients; and
- understanding outcomes data as one piece in a context that includes factors like social and economic resources in a particular community, or the presence and quality of responding counsel.

Although there is no precisely equivalent research in Canada, I turn now to consider two examples from the small body of Canadian literature dealing with the definition of access to justice in which the perspectives of affected communities, or the public, are included.

D. DEFINING ACCESS TO JUSTICE IN CANADA

In a recent Canadian example of legal services assessment, legal scholar Noel Semple sets out a detailed metric for determining the value of legal services to clients. His proposed metric sets out

²⁷ National Center for Access to Justice, *Tracking Outcomes: A Guide for Civil Legal Aid Providers & Funders* (New York, NY: Fordham Law School, 2018) at 7. The report contains multiple examples of specific outcomes measured by various providers in its appendix.

²⁸ *Ibid* at 7.

²⁹ Gemma Smyth, *Evaluating Systemic Advocacy: A Primer & Tools for Evaluating Systemic Advocacy in Ontario’s Legal Clinics (Report to the Law Foundation of Ontario)* (Windsor, ON: Scholarship at UWindsor, 2017), online: <scholar.uwindsor.ca/lawpub/50> [perma.cc/398H-BSJN] at 25.

³⁰ *Supra* note 27 at 12.

³¹ *Ibid* at 13.

³² *Ibid* at 16, 20.

³³ *Ibid* at 23.

four pillars of practice value, namely effectiveness, affordability, client experience, and third-party effects. All four require measurement not only from the perspective of legal professionals, but include output metrics: measurable products of legal services broadly speaking, including win/loss outcomes but also relational characteristics like client trust; internal metrics (structural features within legal service providers that are likely to support certain outcomes); and input metrics (the features of the service providers).³⁴ Semple defines “effectiveness” in terms of legal win/loss outcomes, such as more compensation for personal injury plaintiffs or lower rates of conviction for criminal accused. “Affordability” is measured in terms of the financial cost of legal services, but also considers payment arrangements, such as contingency-based fees. “Client experience” includes interpersonal aspects of the lawyer-client relationship such as listening, respect, and communication, regardless of win/loss effectiveness. “Third-party effects” include benefits to the legal system as well as the value conferred by supporting systemic advocacy or firms that support pro bono work.³⁵ Building on this research to connect legal services more explicitly to justice aims, one might use specific outcomes (as defined by communities) to assess particular features of legal services: Is representation contributing to long-term housing security? Are there relationship “costs” or gains which accrue through the process of representation? How are “client experience” metrics connected to the idea of justice? Are client voice and recognition integrated meaningfully, superficially, or at all in measuring clinical work?

In Canada, recent years have seen an upsurge in both academic and policy literature considering the issue of metrics for measuring access to justice. Law students are posited as part of the response to access to justice shortfalls in Canada³⁶—and whether or not this is ideal, in reality clinical students do provide a significant source of legal work to those who would otherwise have no representation, particularly where publicly-funded legal aid has been removed or severely restricted, as was the case in the clinic where I once worked. It stands to reason that the work of student legal clinics will be informed by the discourse on access to justice, and in particular, how access to justice is defined—and the question of measurement has been canvassed in much more detail in the area of access to justice than in the situation of student clinics specifically.

Few studies consider the definition of justice, or access to justice, from the perspective of non-experts or affected communities, but doing so is critical to working toward access to actual justice. The conditions and relationships that are most relevant to understanding what justice might mean are simply not visible from a perspective that excludes those most affected. Janet Mosher et al.’s fieldwork with Black youth in north Toronto examined the role of formal dispute resolution and perceptions of the law and access to justice. Participants in their study disclosed deep skepticism about the law’s capacity to provide justice.³⁷ The results confirmed that barriers to

³⁴ Noel Semple, “Measuring Legal Service Value” UBC L Rev [forthcoming] at 1–2.

³⁵ *Ibid* at 6–11.

³⁶ See e.g. Federation of Law Societies of Canada, *Report of the Access to Legal Services Working Group* (np. Action Committee on Access to Justice in Civil and Family Matters, 2012), online: <flsc.ca/wp-content/uploads/2014/10/services3.pdf> [perma.cc/JK72-Q7F9] in which law students are listed as one type of cost-effective legal service provider, as well as noting that there is “no shortage of lawyers (principally young or entry-level), paralegals, and law students willing ... to provide pro bono service” (page 15). In British Columbia, student legal clinics, alongside non-lawyer advocates, largely took up the poverty law work that was dropped from legal aid when BC’s legal clinic system was gutted in 2002. While from a service perspective, law students may be seen as a cost-effective source of legal help, from the perspective of the university departments, they may in contrast be seen as an expensive form of education, rather than a cheap source of services. For a discussion on the cost of clinics generally, see e.g. Peter A Joy, “The Cost of Clinical Legal Education” (2012) 32:2 Boston College JL & Soc Just 309.

³⁷ Janet E Mosher, “Lessons in Access to Justice: Racialized Youths and Ontario’s Safe Schools” (2008) 46:4 Osgoode Hall LJ 807 at 812.

justice were not rooted in inefficiency in legal service delivery, but instead in “a profound lack of engaged dialogue about the meaning of justice.”³⁸ Legal information was of limited utility to the youths in some cases as well, because “[f]or them, powerful authority figures are unconstrained by law, and the ability to invoke knowledge of legal rights in an encounter with the police or school authorities does not alter the power dynamic in the relationship.”³⁹ Youths defined “justice” as requiring respect, acknowledgment, the chance to be heard, and understanding, including understanding of the circumstances in which a youth acted; one youth gave the example of a theft charge, in which the economic circumstances of the accused and the lack of job opportunities should be understood as part of justice.⁴⁰

In another example, Trevor Farrow considered the definition of access to justice based on interview data collected from members of the public in Toronto. Farrow’s team asked participants to define justice, as well as multiple questions about access to justice. Participants defined justice in terms of fair and affordable access to legal systems, but also in terms of substantive outcomes, referring to fairness and access to systems, but also to economic equality, non-discrimination, participation, and democracy.⁴¹ Farrow also notes the theme of people’s alienation from the law, and suggests in his conclusion that the access to justice conversation must engage people broadly, and that once it does “it will be much more difficult for elected officials, and those charged with the research and policy work of the nation, to avoid putting those voices and views at the centre.”⁴² In the next section, I provide a critical assessment of reports dealing with access to justice measurement in mainstream (*i.e.*, professional) access to justice dialogue.

E. ACCESS TO JUSTICE METRICS IN THE MAINSTREAM: TWO RECENT EXAMPLES

The need to establish metrics and taxonomies for measuring responses to access to justice is well recognized in conversations within the legal profession.⁴³ The framing of access to justice has implications for law school clinics, increasingly so as clinics are asked to provide a frontline solution to access to justice shortfalls. Here I will consider two recent examples of the mainstream perspectives of access to justice measurement, offering a critical perspective as a bridge to the potential of student legal clinics to challenge and improve upon thin versions of access to justice.

The Canadian Bar Association, a voluntary-membership professional organization for lawyers in Canada, established in 2011 a Standing Committee on Access to Justice with a mandate to “coordinate and integrate[] CBA activities to improve and promote access to justice for the poor and middle class in Canada.” The mandate stresses the centrality of publicly funded legal aid, and the members of the committee are determined based on experience with legal aid delivery, policy, and research, *inter alia*.⁴⁴ Its largest initiative to date is the “Reaching Equal Justice” project, of which one of the major products was a report of the same name, published in 2013.

³⁸ *Ibid* at 810, 812.

³⁹ *Ibid* at 813.

⁴⁰ *Ibid* at 849.

⁴¹ Trevor CW Farrow, “What is Access to Justice?” (2014) 51:3 Osgoode Hall LJ 957 at 970–971.

⁴² *Ibid* at 984.

⁴³ See *e.g.* M Jerry McHale, QC, “The Current Justice Metrics Landscape” *UVic ACE Blog* (3 May 2017), online: <www.uvicace.com/blog/2017/5/3/the-current-justice-metrics-landscape?rq=metrics> [perma.cc/8Q92-K2AK].

⁴⁴ Council of the Canadian Bar Association, Resolution 11–05–M, Mid-Winter Meeting (19–20 February 2011), online: <www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2011/Standing-Committee-on-Access-to-Justice/11-05-M-ctt.pdf> [perma.cc/Q85Y-UUHP].

The report defines an inclusive justice system in terms of six fundamental features, namely that it should focus on the needs of people, that it should “empower” people and build their “capacity to participate, by managing their own matters and having a voice in the system,” that it should prevent legal problems, that it should provide multiple paths to justice, that it should respond holistically to individuals, and that practices should be evidence-based.⁴⁵ In its recommendations for reform, the report highlights the need for public participation in the oversight of justice.⁴⁶ It specifically avoids defining a single standard for assessing whether access to justice has been achieved, instead opting for a flexible approach in which “whether the system, process, service or resource provides meaningful access to justice depends on the nature of the right, interest or legal problem at issue, the capacity of the individual, the complexity of the legal process or proceeding, and the seriousness and impact of potential outcomes.”⁴⁷

The report notes that the “justice system dialogue” (legal system insiders) and the “community justice dialogue” are disconnected, and should be better linked through inclusive, respectful, reciprocal dialogue.⁴⁸ The report deals briefly with the question of metrics, emphasizing their importance and providing general principles for the development of metrics, such as integration of community voices, the measurement of needs, efficiency, outcomes, and inclusivity at a national level.⁴⁹ In a separate paper released the same year, the Committee notes the lack of comprehensive metrics and the resulting difficulty in assessing the scope and nature of access to justice shortfalls, as well as the lack of capacity to determine objectively whether these shortfalls are actually growing (as seems to be the case anecdotally), and importantly, how to know what is working in terms of responses.⁵⁰ The authors note that outcome measurement should consider the input of “all stakeholders” and should take into account “the perspective of both providers and users of justice system services.”⁵¹

The *Reaching Equal Justice* report is premised on a thin version of access to justice as access to existing systems, triage, and procedural accessibility. It focuses on multiple approaches to increase peoples’ capacity to approach legal institutions, and to make institutions more accessible. One example is the concept of “law as a life skill”—in which capacity-building for people in legal skills through the provision of legal education and information is better integrated into legal service delivery.⁵² Promoting the idea of increasing peoples’ capacity to understand and engage with law is understandable from an instrumental perspective, but making this a necessary part of achieving justice also embeds neoliberal assumptions about individual responsibility. That is to say, focusing on the improvement and education of individuals implies both that individual shortcomings comprise (at least partially) the root of injustice and that individuals are responsible for making up this shortcoming. Increasing public legal education is not damaging to the cause of equality and is certainly valuable if the goal is understanding how to use existing legal systems, but it is dangerous to pretend that any amount of education or rights knowledge is a substitute for empowerment by equating it with justice. As noted by Roderick MacDonald, focusing on public

⁴⁵ Canadian Bar Association Access to Justice Committee, *Reaching Equal Justice: An Invitation to Envision and Act* (Ottawa, CAN: Canadian Bar Association, 2013) at 60–61.

⁴⁶ *Ibid* at 63, 128.

⁴⁷ *Ibid* at 63.

⁴⁸ *Ibid* at 129.

⁴⁹ *Ibid* at 146.

⁵⁰ Standing Committee on Access to Justice, *Access to Justice Metrics: A Discussion Paper* (Ottawa, CAN: Canadian Bar Association, 2013) at 1.

⁵¹ *Ibid* at 6.

⁵² *Supra* note 45 at 66.

legal education also carries the risk of “co-opt[ing] the public into thinking that it cannot obtain justice without the aid of lawyers, judges and official law. Far from inducing the law to talk the language of the public, public legal education programmes typically wind up inducing the public to talk like lawyers.”⁵³ This caution does not mean that public legal education is useless or necessarily bent to the neoliberal frame, however—for example, legal education processes that actively take Freirean, feminist, or both approaches integrate critical consciousness, challenge dominant understandings of law, and move toward mobilization.⁵⁴ But like other aspects of access to justice, this type of approach is only possible with a commitment to examining and changing the assumption that the legal system defines and serves justice adequately, and that access to justice is attainable through the provision of more descriptive information.

The report also canvasses ways in which judges and lawyers could make law more accessible through their respective roles, and underscores the necessity of public legal aid as a cornerstone of access to justice, especially for those areas of law that most deeply affect people’s lives, such as housing and income security. The premise that individual access to existing legal systems is the primary aim of access to justice initiatives remains unchallenged. The report emphasizes the need to prioritize types of legal services in which people’s immediate material needs are affected, but does not query the inevitability of those circumstances for a certain proportion of the population. This embeds another facet of neoliberal thinking—that the social ordering that produces inequality is natural, or inevitable (*i.e.*, as part of the market system). In this way, justice is implicitly framed as a set of methods by which people may attempt to obtain compensation for inequality, rather than challenging it. At worst, this analysis entrenches neoliberal norms that contribute to deepening and justifying inequality, and at best, it misses an opportunity to turn access to justice conversations to acknowledge and contend with the social and economic ordering that frames all uses of law—what Harry Arthurs calls Canada’s “real” constitution.⁵⁵ In contrast, using the frame of access to actual justice, as I have proposed it here, requires naming and confronting inequality as a product of social and institutional relations as well as taking as fundamental the meaningful inclusion of affected communities at all stages of analysis.

I turn now to a second example of the current status of mainstream access to justice conversations with specific regard to the issue of measurement. The British Columbia Access to Justice Working Group is a network whose leadership is comprised of judges, lawyers, and high-level representatives of professional and non-profit organizations. In 2017, this group released an “Access to Justice Measurement Framework.” It, too, focuses primarily on access to existing legal systems, defining access to justice as encompassing: “all the elements needed to enable people to identify and manage their everyday legal needs and address their legal problems, seek redress for their grievances, and demand that their rights be upheld.”⁵⁶ The report articulates a “Triple Aim” framework as the foundation for its proposal on the measurement of access to justice initiatives. The three aims it proposes are “improved population access,” “improved user experience,” and “improved costs.” “Population access” is to be measured on the basis of the following:

⁵³ Roderick A Macdonald, “Special Section to Celebrate Twenty Years of Publishing: Access to Justice and Law Reform # 2” (2001) 19 Windsor YB Access Just 317 at 318.

⁵⁴ See *e.g.* Susan McDonald, “Beyond Caselaw – Public Legal Education in Ontario Legal Clinics” (2000) 18 Windsor YB Access Just 3 at 33–34.

⁵⁵ Harry W Arthurs, “Labour and the “Real” Constitution” (2007) 48:1/2 Les Cahiers du Droit 43 at 61.

⁵⁶ Access to Justice BC, *Access to Justice Measurement Framework* (np., Access to Justice BC, 2017), online: <accesstojusticebc.ca/wp-content/uploads/2018/08/A2JBC-Measurement-Framework-0818.pdf> [perma.cc/8CES-K97S] at 1.

- the prevalence of legal problems within a given population or for the entire province,
- the system’s response to legal needs,
- fair and equitable access to justice, and
- the social and economic impact of access to justice.

Under the heading of “user experience,” assessment is based on the following factors:

- users’ experience of the justice system and obstacles encountered,
- the quality of the users’ experience,
- the effectiveness of access to justice in addressing user legal problems, and
- the appropriateness of the justice process.

In terms of costs, the framework aims to capture per capita costs, per user costs, and other costs.⁵⁷ The report describes its metrics as “intuitive, non-controversial, and referring in clear terms to the outcomes the system is intended to deliver.”⁵⁸ It identifies the need to specify target groups in order to understand access to justice issues for specific populations.⁵⁹ While the report recognizes the importance of responding to equity concerns and understanding the legal needs of marginalized populations, it, too, relies on a thin version of access to justice, in which the primary concern is to increase timely and effective access to existing legal systems, to educate about and protect rights, and to increase public confidence in legal systems. As with the CBA report, obstacles to access to justice are analyzed based on the assumption that on the other side of these barriers (lack of information, affordability, failure to see a problem as “legal”) is justice. In this model, the justice system is subject to critique in terms of procedural accessibility, but not in terms of its history, its relationship to a particular population, its substantive content, its place among multiple legal systems (such as Indigenous legal systems), its definition of justice, or its inadequacy to provide it. There is little room for voice, recognition, or respectful relations in such an analysis. The report describes its own metrics as intuitive and non-controversial—and they are, assuming that what one wants to measure is whether the legal system is doing what it says on the tin. But what if the “outcomes the system is intended to deliver” are themselves problematic or incomplete? The report hints at the importance of social and economic impacts under the heading of “population access,” and considers the appropriateness of the justice process under “user experience,” but does not link these to a consideration of how justice itself might be defined, and what law has to do with it.

As noted by Sarah Buhler, legal systems themselves are a source of violence and oppression for many communities, and improving access does not improve justice. In other words, the assumption that ““justice” is located squarely within law and the justice system”⁶⁰ is built into many accounts of access to justice, and “legal or justiciable problems tend to be seen as emerging through individual disputes that interrupt ordinary lives that are otherwise unencumbered by the heavy weight of law.”⁶¹ Buhler’s conclusions, which draw directly upon community-based fieldwork, suggest that to create a meaningful alternative to this, we must take account of the

⁵⁷ *Ibid* at 5.

⁵⁸ *Ibid* at 7.

⁵⁹ *Ibid* at 8.

⁶⁰ Sarah Buhler, ““Don’t Want to Get Exposed”: Law’s Violence and Access to Justice” (2017) 26:1 J L & Soc Pol’y 68 at 77.

⁶¹ *Ibid* at 78.

structural violence inherent in legal systems and consider the normative content of justice such as “equality, health, housing, and an end to racialized and oppressive policing and carceral practices.”⁶² Without diminishing the important role of representative advocacy, public legal education, and the removal of barriers to direct access to legal systems, this article proceeds on the assumption that a critical account of the normative content of justice is also integral to understanding and responding to access to justice problems. At the very least, it seems reasonable to question the assumption that more lawyers (more summary advice sessions, more access to court processes, more pamphlets), or more efficient access to existing systems truly responds to justice concerns of subordinated people, especially in the absence of research which places those people at the centre. The notion of access to actual justice allows us to refresh the frame, reinstate the importance of understanding justice beyond existing systems, and place affected communities at the centre of conversations that materially affect them.

Providing access to legal systems alone is a partial response, and inadequate in the absence of considerations of what justice means, especially to communities that have been on the receiving end of what Buhler calls “law’s violence.”⁶³ This has direct implications for measuring the work of student legal clinics, important especially because clinics are positioned as both frontline service providers and crucibles of the legal profession. Measuring clinical work by virtue of the number of transactions, or “clients served,” is particularly appealing as a response to the thin version of the access to justice problem. For example, if the problem is framed solely as people’s lack of ability to represent their interests before an income assistance tribunal, one could measure the number of self-represented applicants, enumerate their barriers, and examine the win/loss outcomes. The description and justification of a clinic’s work could be fit into this by showing how many more people now have representation, how many received summary advice, and how many received legal education, and potentially even demonstrate an increase in the number of win outcomes for clients. The clinic could prove itself efficient at increasing representation levels. But this, like the thin versions of access to justice explored above, does not consider the relationship between representation levels, or even win/loss outcomes, and the multiplicity of other outcomes and impacts that could be associated with justice. I propose that student legal clinics are an ideal site in which to challenge the standard assumptions about what access to justice means, and to move toward understanding what justice means across multiple communities and enacting it beyond simple access to legal services and existing legal systems. In order to do so, clinics must be unshackled from the requirement to prove efficiency primarily in terms of “numbers served” and instead move toward a more complex approach to measurement, taking up MacDonald’s challenge to go beyond instrumentalism and “to rethink our attitudes about what law in a modern, pluralistic society actually comprises, about who owns this law, and about what official law can realistically contribute to our achieving a more just society.”⁶⁴ The performance of clinics should be measured in terms of justice, or what I have called “access to actual justice,” which must mean more than measuring the numbers of clients served or access to lawyers, law students, and legal formal processes as an end point. Legal services stand to benefit from this shift, but so does legal education. Questioning underlying structural causes of inequality and understanding justice in terms of the material and social position of clients can be integrated into the learning outcomes as well as into client service assessment, signaling to students that a critical approach is central, and not peripheral. Ideally, this would increase the potential for students to gain perspective on the

⁶² *Ibid* at 89.

⁶³ *Ibid*.

⁶⁴ *Supra* note 53 at 317.

neoliberal policy environment woven into the legal systems they are learning, overcome cynicism, and strengthen the potential for viable counterpoints to the neoliberal pull in legal culture more broadly.

III. JUST CLINICS: A HUMBLE MANIFESTO

In this section, drawing on the perspectives outlined above, I will sketch out an initial proposal for the measurement of student legal clinics in Canada, in terms of client service, as well as learning and teaching. I proceed on the assumption that it is possible to shift the measurement of clinical work to reflect a broader understanding of justice than that currently reflected in mainstream access to justice scholarship and current systems of measurement. While they do build on or respond to the various bodies of work referenced above, none of these suggestions have been empirically validated in the Canadian context. All would benefit from further research, which should prioritize the perspectives of those communities most affected by justice shortfalls in Canada. I have called this a manifesto simply because it represents an individual perspective which can be justified in reference to existing research but is based at least as much on my own experience and position as on any academic research. It is humble for a few reasons: of necessity, the definition of the role of clinics cannot rely on a single perspective, and the perspective of a white academic should not be prioritized in the discussion of work which most deeply affects marginalized communities; and even if these prove appropriate as starting points, each merits detailed research and contemplation that I cannot attempt within the bounds of this article. I do not see this list as complete and wholeheartedly invite improvements and corrections, particularly from those most affected; voice is essential not only to the definition of justice, but also to the development of systems of measurement.

A. JUST CLINICS MUST ASSUME A CRITICAL PERSPECTIVE ON ACCESS TO JUSTICE

Access to justice discourse in Canada tends to be framed in terms of access to lawyers, or access to legal services. Much of the Canadian research that attempts to measure access to justice barriers, in particular, tends to focus on the availability of legal counsel or various substitutes for this, such as legal information and resources for self-represented litigants. Access to these resources is framed as central to access to justice, and the explosion of academic and policy research in Canada under the banner of access to justice seeks to quantify, explain, or resolve the absence of legal resources as a critical link between individuals and the justice system. While the role of counsel is undoubtedly important in the Canadian legal system and reducing barriers to adequate self-representation is a worthy goal, the prevailing focus on access to lawyers or alternatives to lawyers tends to minimize or erase the role of normative questions about what constitutes justice as an integral component of measuring access to justice.⁶⁵

If the access to justice problem is defined primarily in terms of numbers of people without access to legal representatives or resources, then the provision of access to legal representatives and resources appears to be a compelling solution, particularly given the urgency of certain legal needs and the documented impact of unresolved legal problems. But this neglects the social and

⁶⁵ Gerard J Kennedy & Lorne Sossin, “Justiciability, Access to Justice and the Development of Constitutional Law in Canada” (2017) 45 *Federal Law Review* 707 at 711.

transformative responses of which legal clinics are capable. Any rubric for measuring just clinics should distinguish between access to justice and access to lawyers, should take account of the place of the justice system itself in perpetuating violence and oppression, and should promote a vision of justice that goes beyond access to existing systems to the work of furthering justice as defined by those most affected by its deficiencies. Legal clinics are on the frontlines, with ample opportunities to name both the inequality they encounter and its sources, as I have proposed as an essential component of access to actual justice, rather than naturalizing poverty as an inevitable precursor to the question of how to provide more legal services. Unquestioningly accepting market values as central drivers of clinical legal education is a form of cynicism that neither law schools, the legal profession, nor society can afford—both communities and students deserve better.

A critical perspective on access to justice need not reject entirely the notion of access to courts, lawyers, and public legal education, but must question the endorsement of these features as constituting access to justice. This is not a new position, but it is one we should not lose sight of as Canadian society faces ever-greater income inequality, continuing retrenchment of the welfare state, and the ongoing impact of settler colonialism in law and policy.

A critical approach must have at its centre what justice means, and to whom, the relationship between law and justice, and the multiplicity of relationships between people, communities, nations, and legal systems that are shaped by particular legal histories. It must not ask only whether people can efficiently access courts, for example, but must query the function of courts in the context of lived experience. Important to this is the inversion of the standard framework promoted in access to justice literature within the profession, in which people's experience is acknowledged to some degree but never considered as a shaping force in terms of the definition of priorities. Research questions and implicit assumptions in the design of services like, "what would help you know more about the law or get to court more easily," still assume that law is singular, unassailable, and central to justice. This suits the profession, but we know too little about whether it suits those most affected. Engaging clinics and the communities they serve in conversations about how justice is understood and the ways in which legal systems meet or fail to meet it, would be one starting point.

As it stands, this is the kind of conversation that law faculties and funders may see as extraneous to the actual work of student legal clinics. To the contrary, I argue that such conversations should inform clinical mandates as well as research questions, and that clinics should be credited for this work quite apart from the number of clients served. This is not to say that standard representation and information services are inappropriate, but that their use must be determined on the basis of understandings of justice that should not emanate wholly, or primarily, from the profession and legal experts.⁶⁶ The language of "stakeholders" appears often, especially in the professional literature on access to justice, and I would propose that in the work of clinics, a more nuanced and appropriate form of this concept becomes available: justice is not a table at which lawyers, service providers, judges, academic experts, middle class people, and marginalized people sit as equal partners. We live in a socially stratified society, one in which opportunities are distributed unequally, often along the lines of race, gender, social class, gender identity and sexual orientation, disability, and migration status, to name a few. When it comes to access to legal services or access to actual justice, the stakes are not the same for everyone. Someone in a position of privilege can act as an ally, but they will never have as much at stake as someone who is actually

⁶⁶ For an elaboration of a broadened understanding of "expertise" that prioritizes lived experience, see Elizabeth C Britt, *Reimagining Advocacy: Rhetorical Education in the Legal Clinic* (University Park, PA: Pennsylvania State University Press, 2018).

at risk of losing their home, income, or custody of their children due to the operation of law and/or the absence of legal counsel—they cannot be said to be equal stakeholders. As documented by Rebecca Sandefur in the American context, “while all groups experience civil justice problems, the weight of them does not fall equally.”⁶⁷

Similarly, the idea of “stakeholders” should be modified to consider the material stakes in justice. People with relevant lived experience should be central at all stages of access to justice research, and research methodologies should ensure that the views of affected communities are integrated proportionately not only to their prevalence within a population, but also to their relative material stakes. Those with little at stake materially should understand their role more as allies than as leaders, in both research and policy development.⁶⁸ In a similar vein, relevant lived experience exists within academia, the profession, and among law students, and this could also be used to diversify the voices framing the discussion on access to justice. But it is difficult to identify such experience directly, particularly as there may be stigma that serves as a disincentive to self-identification. While there is some research considering diversity in the profession and among law students in Canada,⁶⁹ socioeconomic status, in particular, is not well captured. In my own classes, in-class polling exercises show that some students have first- or second-hand experience with welfare, food banks, and child protection, but without more research, it is difficult to know how this lived experience might best be destigmatized and how, if at all, it might be considered within the context of clinical education.

Drawing on the distinctions outlined above in the work of the National Center for Access to Justice study, clinics are well situated to better understand outcomes and impacts holistically in terms of how justice is understood in particular communities, and to act accordingly. This may well include standard representation or strategic litigation, but it cannot be assumed that legal insiders know best about justice from the outset. We need more research to understand the definition of justice and its relationship with legal systems from the perspective of affected communities, and this research should include insider leadership (*i.e.*, from people within those communities) at all stages of design and implementation—a concept that is well developed in other fields.⁷⁰ Research could also be used to know more about whether, and how, student legal clinics are already fostering critical understandings of access to justice in their work, and if so, how this is accounted for in existing assessments and funding models, if at all.

B. JUST CLINICS MUST BE MEANINGFULLY ACCOUNTABLE TO THE COMMUNITIES IN WHICH THEY WORK

Here I return to the Canadian Bar Association’s *Reaching Equal Justice* report, which relied in part on consultations with people living in marginalized communities. While the methodology for these is not described in detail, it does refer to guiding questions used in town hall meetings in Manitoba, which canvassed both access to the “justice/legal system” and asked for input on

⁶⁷ Rebecca L Sandefur, “What We Know and Need to Know About the Legal Needs of the Public” (2016) 67 SCL Rev 443 at 446–447.

⁶⁸ Vikki Reynolds, “Fluid and Imperfect Ally Positioning: Some Gifts of Queer Theory” (2010) 111 Context 13.

⁶⁹ See *e.g.* Avner Levin & Asher Alkoby, “Is Access to the Profession Access to Justice? Lessons from Canada” (2012) 19:2/3 International Journal of the Legal Profession 283 at 287–288.

⁷⁰ See *e.g.* Fran Baum, Colin MacDougall & Danielle Smith, “Participatory Action Research” (2006) 60:10 Journal of Epidemiology & Community Health 854; C Susana Caxaj, “Indigenous Storytelling and Participatory Action Research: Allies Toward Decolonization? Reflections From the Peoples’ International Health Tribunal” (2015) Global Qualitative Nursing Research 1.

change.⁷¹ The report concluded from these consultations that respondents believed their rights were “just on paper,” that justice systems cannot be trusted, are “person-dependent” (with regard to the exercise of frontline discretion by gatekeepers), and difficult to navigate. The authors also report the results of interviews with members of the public and self-represented litigants. The report conveys the types of barriers to legal system access through a series of hypothetical stories, based on common or likely concerns arising in the lives of affected individuals. The inclusion of these perspectives shows a recognition of the need to listen, which I would argue is one component of respect. But some components of this report feel less respectful, and less inclusive. For example, the report displays a full-page image of a person lying on a piece of cardboard on the street, covered by a garbage bag. It is a powerful image, presumably included to provoke consideration by readers of the impact of marginalization. When I viewed the image, however, my first thoughts were not of the material impacts of access to justice shortfalls, but rather “Was this person at the Access to Justice Summit that precipitated this report? (I assume not, because the Summit cost \$450-595 to attend⁷² and invitees were limited by and large to legal professionals) Was their consent obtained for this photo? Is it assumed that this person will never see this report? Is it assumed that this person’s community and the “legal insider” community are mutually exclusive?”

The inclusion of this image was surely not meant to be disrespectful, but it does seem to build on the assumption that the person in it is treated more as a signifier of concerns and feelings held by more charitable members of the legal profession than as an actual or potential participant in the work of addressing justice issues. I propose that if legal insiders are serious about justice, they must also be serious about establishing respectful relationships which will require a willingness to move outside existing comfort zones, assumptions, and stereotypes to establish real, ongoing, equal, and respectful relationships with the communities they purport to represent. Clinics are connected directly to communities, and thus able to forge these relationships much more readily than other professional circles who do not work within those communities. By extension, this work must also be valued by funders and law schools quite apart from the number of clients served or billable hours. Many clinics may already, implicitly or overtly, be involved in developing such relationships. But within funding models that do not take account of the necessity of building respectful relationships as a core component of justice, this work is devalued.

How should student legal clinics build and maintain respectful relationships? While this question cannot be answered comprehensively in the small space of this article,⁷³ I (with colleagues Sarah Buhler and Gemma Smyth) have elsewhere drawn on First Nations pedagogy to suggest that “respectful relations” in the clinical context would include at a minimum:

- (1) engagement with clients and communities on terms which are meaningfully

⁷¹ These questions can be found online:

<<https://web.archive.org/web/20181105021958/http://www.johnhoward.mb.ca/wp/wp-content/uploads/2013/03/Town-Hall-Meetings-on-Access-to-Justice-Final-Report-Manitoba-Bar-Association-2011.pdf>> [perma.cc/V4TY-YR6Q].

⁷² Conference registration information online:

<https://web.archive.org/web/20160423071323/https://www.cbapd.org/details_en.aspx?id=na_just13> [https://perma.cc/M5HD-JHGT].

⁷³ See e.g. Celia Haig-Brown & Kaaren Dannenmann, “A Pedagogy of the Land: Dreams of Respectful Relations” (2002) 37:3 McGill Journal of Education/Revue des Sciences de L’Éducation de McGill 451; Dawnis Minawaanigogizhigok Kennedy, *Aboriginal Rights, Reconciliation and Respectful Relations* (LLM Thesis, University of Victoria, 2009) [unpublished]; Julie A Nelson & Paula England, “Feminist Philosophies of Love and Work” (2002) 17:2 Hypatia 1.

- collaborative (for example, through arranging meetings in spaces convenient and comfortable for clients, or by understanding cultural traditions);
- (2) an understanding of the interrelatedness of multiple relationships;
 - (3) education of students, clinic staff, and lawyers about the particular histories and contexts which inform present-day interactions;
 - (4) a willingness to critically approach existing assumptions about the way relationships should be, including mainstream understandings of the lawyer-client relationship;
 - (5) a commitment to listen and respond to issues raised by communities concerning all aspects of clinical work;
 - (6) the capacity to clearly define interests (including the interests of students and academic faculties), identify conflicts, and prioritize the needs of clients and communities where there is a conflict; and
 - (7) active recruitment within the clinic of students, supervisors, and staff who are members of the communities served by the clinic.⁷⁴

While standard legal ethics tends to emphasize the relationship between a client and a lawyer (or student), the set of relationships relevant to clinical practice is much broader, and includes (to name a few):

- (1) other individual relationships (such as those between peers, between students and supervisors, as well as clients' individual relationships outside the lawyer-client dyad);
- (2) social and institutional relationships, such as those between the law school and the clinic, between the clinic and non-profit organizations, between clients and institutions, or between the clinic and the communities it serves (whether represented by community leaders or otherwise); and
- (3) systemic relationships, such as the relationship between a community and Canadian legal systems, or between legal systems.

As noted earlier, Western legal culture tends to take a heavily individualistic approach to rights, and the same can be said of legal services—so much of how we practise is formulated based on the primacy of the individual client, dimming the view of the complex web of relations in which they live. Even naming such relations can start to change the way we think. I would propose that student legal clinics are sites in which these relationships can be better accounted for in practice, and that they can (and perhaps do) shift our thinking on what constitutes “good” or “effective” practice to take a more relational approach to both file work and legal systems.⁷⁵ I would further propose that accounting for relationships is not something amorphous, but can be concretely measured. If, for example, a law school or funder considered the relationship between the clinic and a particular community as a core aspect of measuring justice work, it could seek to know: Is the relationship respectful, and reciprocal? Has the work of the clinic contributed to building or maintaining ties to that community? How has it done so? Is that community's relationship to law

⁷⁴ Sarah Buhler, Sarah Marsden & Gemma Smyth, *Clinical Law: Practice, Theory, and Social Justice Advocacy* (Toronto: Emond, 2015) at 65.

⁷⁵ See Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York, NY: Oxford University Press, 2011).

changed (for the better or for the worse) by way of this work? Similar questions could be used to discover more about various individual, social, and institutional relationships in which the clinic's work is embedded. I propose relationship-based measurement not to increase the burden on clinics, but instead to find ways of recognizing their work and potential. These questions may have little correlation with the traditional measures of "numbers served," billable hours, wins and losses, or even increased access to legal processes, but may provide a view on justice that is otherwise unavailable.

C. JUST CLINICS SHOULD DEFINE STUDENT COMPETENCIES IN TERMS OF JUSTICE-READINESS

While I have focused here in large part on the relationship between clinical work and the people and communities most affected by justice conversations, the teaching role of clinics also merits attention. Clinical legal education is not immune from the ideological currents that shape legal education, and as noted by Sameer Ashar, the diminishment of social justice commitments in legal education and the shift to a focus on "practical" education are especially relevant for clinics, whose foundational connection to social justice work has been eroded in recent decades alongside the sidelining of conversations about justice in law schools.⁷⁶ Ashar notes that even critical perspectives on the reform of legal education tend to draw on neoliberal assumptions, with an emphasis on commodified services and individual client advocacy. "Practical" legal education is often contrasted with theoretical or "doctrinal" classroom education, and the importance of preparing students to practise law is an argument often marshalled in favour of investment in clinical education. While Ashar's work is based on research in the United States, the same focus on individual skills and practice-readiness is evident in the Canadian literature as well.⁷⁷

The standard dispute is not whether clinical education provides better preparation for practice than standard "doctrinal" education (it does), but whether this is what a law school should do. For the purposes of connecting clinical legal education with justice, however, this purported dualism of practice and theory is a distraction, and casting clinics primarily as fertile sites of practice-readiness neglects their potential as sites of justice. Clinics do provide vital practical experience, but if this is what matters most, then we may as well send students to serve as unpaid interns with large urban law firms, use simulations in class, and consider practice-readiness fulfilled. What would be lost in so doing is central to the history and potential of clinics—not only that students are practising, but how and what they are practising. Taking the latter approach promotes a vision of legal education in which it, like other forms of higher education "helps one avoid becoming a captive of socialization more than it socializes."⁷⁸ As Sarah Buhler and I have argued elsewhere on the basis of empirical research, standard lists of entry-level competencies for admission to the legal profession in Canada omit the basic competencies that are required to work with marginalized communities, including relationship-building capacity, advanced

⁷⁶ *Supra* note 3 at 203.

⁷⁷ See *e.g.* Debra Moss Curtis, "'They're Digging in the Wrong Place:' How Learning Outcomes Can Improve Bar Exams and Ensure Practice Ready Attorneys" (2018) 10 *Elon Law Review* 239; Margaret Martin Barry, "Practice Ready: Are We There Yet?" (2012) 32 *Boston College JL & Soc Just* 247. For critiques, see *e.g.* Martha Kanter & Grace Dodier, "Discarding the Fiction of the Practice-Ready Law Graduate to Reclaim Law as a Profession" (2016) 17:3 *TM Cooley J Prac & Clinical L* 265.

⁷⁸ Robert J Condlin, "'Practice Ready Graduates': A Millennialist Fantasy" (2014) 31:1 *Touro L Rev* 75 at 79.

communication skills, critical self-reflexivity, and cultural humility.⁷⁹ Sameer Ashar proposes a vision of law schools in which non-market values are emphasized through “connected, cogenerative learning and practice” and in which law schools work to “defend community and solidarity against the effects of concentrated wealth and subordination along multiple dimensions of identity, status, and power.”⁸⁰

Student legal clinics are sometimes described in terms of a “dual mission” with separate teaching and service roles, but following Ashar’s model, equality-seeking values are unapologetically promoted across teaching and practice in clinics. Jane Aiken’s concept of “justice-readiness” is also helpful here: it captures what is unique about the potential of education in student legal clinics, and provides a more nuanced platform from which to consider how clinics might define their teaching role to serve access to actual justice. Aiken argues that to prepare students to be justice-ready, clinical faculty should determine the skills and knowledge that serve this goal and develop teaching interventions that support their development.⁸¹ She relies on transformative learning theory to suggest that clinics are rich sources of moments in which students may gain insight through unexpected experiences, and reflect on the relationships between inequality, law, and their own roles. Gerald López provides a list of competencies that may more closely approximate justice-readiness:

- capacity to observe closely, listen attentively, and understand a situation;
- capacity to read discerningly, to write convincingly, and to speak effectively;
- capacity to understand problems from multiple perspectives;
- capacity to collaborate with diverse others within and outside the profession;
- capacity to learn about communities in which they work and connectivity to global issues;
- ability to generate strategies (including formal legal and other political, economic, and social strategies);
- ability to monitor the effectiveness of strategies; and
- the capacity to think critically about and to generate new forms of institutions.⁸²

To build a more substantive connection between clinics and access to actual justice, law schools and funders should also recognize and attend to the way in which teaching and learning happens in clinics, focusing on articulating justice-readiness and resisting a frame in which clinics are simply one example of “practical” teaching contributing to competencies associated with the profession at large. The power of quantitative research on legal competencies is evident in such work as the recent Institute for the Advancement of the American Legal System study in the US, in which thousands of law firms and government employers identified from a detailed set the most important skills for lawyers in their particular type of practice.⁸³ There is no reason that similar research could not be conducted with a view to the competencies required to contribute to access

⁷⁹ Sarah Marsden & Sarah Buhler, “Lawyer Competencies for Access to Justice: Two Empirical Studies” (2017) 34:2 Windsor YB Access Just 186.

⁸⁰ *Supra* note 3 at 205.

⁸¹ Jane H Aiken, “The Clinical Mission of Justice Readiness” (2012) 32 Boston College JL & Soc Just 231.

⁸² Gerald P López, “Transform—Don’t Just Tinker With—Legal Education (Part II)” (2018) 24 Clinical L Rev 247 at 248.

⁸³ Institute for the Advancement of the American Legal System, *Foundations for Practice: The Whole Lawyer and the Character Quotient* (Denver, CO: Institute for the Advancement of the American Legal System, 2016), online: <iaals.du.edu/sites/default/files/reports/foundations_for_practice_whole_lawyer_character_quotient.pdf> [perma.cc/M42V-LXMY].

to actual justice. Likewise, rather than relying on formulations of legal competencies developed without consideration of justice readiness, funders and law schools that are concerned with access to actual justice should explicitly recognize the teaching work of clinics in terms of how they foster justice-readiness.

IV. CONCLUSION

Clinical legal education has a long history of association with substantive justice. To maintain the vital role of student legal clinics in access to actual justice under the pressure of a neoliberal policy environment and the predominant, instrumental vision of access to justice requires more than good casework at clinics. Clinics are a vital site in which the definition of access to justice can be revisited with a view to meaningful engagement of communities, and active resistance to inequality, but this is only possible if the work of clinics is approached such as to prioritize these goals and support clinics in pursuing them. I have argued that this requires a refiguring of the way justice is understood and a reconceiving of the way in which clinical work is measured. In this article, I have provided a critical view of the mainstream understanding of access to justice in Canada, in which the problem is viewed primarily as failure to adequately connect people with, and educate people about, existing legal systems, with limited attention to the concept of justice. I have linked this to common methods of measuring the work of clinics in terms of “numbers served.” I have emphasized the importance of attending to the assumptions implicit in this thin version of access to justice and suggested the alternative rubric of “access to actual justice” in which relationships, rather than individuals, are at the core, and in which challenging social and economic inequality at a structural level is central. I have provided three major tenets which I propose as the bedrock for using a rubric of “access to actual justice,” namely, that clinics should maintain critical perspectives on access to justice, that clinics must be meaningfully accountable to the communities in which they serve, including through deep attention to voice and recognition, and that student competencies should be defined in terms of justice-readiness. I would also like to re-emphasize that none of this should serve to increase the workload of clinics, but rather to recognize their work using a different frame, one in which, for example, their impact on the nature and quality of relationships at multiple levels is valued more than the sheer number of cases closed. I also do not propose that clinics do this work alone.

The question of methodology deserves much more attention than can be given in the space of this paper, but funders, clinics, and academics who seek alternatives to neoliberal understandings of access to justice and new ways of evaluating clinical work will find no shortage of methodological work in other fields in which relational structural injustice has been critically approached. Starting from critical Indigenous research methodologies, such as those enumerated by Linda Tuhiwai Smith and colleagues in their seminal treatise⁸⁴ it could be asked of any community-serving clinic: does the community “own” the work that is done for it? To what extent does the community guide the direction of advocacy? Are outcomes and benefits defined by those served by the clinic, or through assumptions about the value of access to existing legal systems? If a community identifies law itself as a source of harm, how is this included in valuing or shaping a clinic’s work? The contributions explore in detail the implications of taking anticolonialism and diverse feminist epistemologies seriously in research design and application, and much of this

⁸⁴ See, e.g. Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples*, 2d ed (London, UK: Zed Books, 2012).

work coheres well with the approach to justice I have described here, and could be applied both in the development of research questions to support clinical practice, and in the evaluation of clinical work itself. Methodologies might also draw on progressive academic work seeking to shift traditional power imbalances and distribution of benefit in favour of affected communities, notably by way of participatory action research,⁸⁵ systemic action research,⁸⁶ as well on understandings of transformative action developed through grassroots movements that operate completely outside of academia.⁸⁷ The work of communities and scholars who resist the tide of neoliberalism and seek to name and dismantle the sources of structural oppression serves as both a source of practical instruction and a cause for optimism in seeing the potential of student clinics as sites of justice.

⁸⁵ See *e.g.* Paul Stewart & Miguel Martínez Lucio, “Research, Participation and the Neo-liberal Context: The Challenges of Emergent Participatory and Emancipatory Research Approaches” (2017) 17:3 *Ephemera* 533.

⁸⁶ See *e.g.* Danny Burns, *Systemic Action Research: A Strategy for Whole System Change* (Bristol, UK: Policy Press, 2007).

⁸⁷ See *e.g.* Charles V Willie, Steven P Ridini & David A Willard, eds, *Grassroots Social Action: Lessons in People Power Movements* (Lanham, MD: Rowman & Littlefield, 2008); Paul Ekins, *A New World Order: Grassroots Movements for Global Change* (London, UK: Routledge, 1992).