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*Volume 59, Issue 1 (Winter 2022)*  
*Special Issue: Law and Development*  
*Guest editor: Ruth Buchanan*

Article 3

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2-3-2022

## Seeing Like a Clinic

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### Citation Information

Smith, Adrian A.. "Seeing Like a Clinic." *Osgoode Hall Law Journal* 59.1 () : 37-76.  
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## Seeing Like a Clinic

### Abstract

The prevailing commitment in clinical law programs like the Intensive Program in Poverty Law at Osgoode Hall Law School is to an engaged-contextualism, which serves to see law in action. It has provided participating students with some insight into the everyday life of ordinary people, approaching—but not necessarily fully perceptive to—certain socio-legal perspectives. But what does clinical legal education vision and envision? How precisely do clinics see? And from what source or place is that visual authority derived? Here, by attending to the prevailing “pedagogy of seeing” in contemporary poverty law clinical practice, I engage with teaching, learning, and praxis in clinical legal knowledge production. I contend that engaged-contextualism troublingly adheres to a pedagogy of seeing that is indebted to the very authority it should strive to dismantle: state power. With a view to the capitalist state as a nationally-inscribed territorial ordering authority, evidenced through settler and imperialist articulations, I undertake a speculative re-envisioning of knowledge production in and about poverty law. The aim is to encourage an alternative pedagogy motivated by an emancipatory praxis. It is a praxis not of saving poverty law but of constant struggle against sovereign state authority rooted in the creative capacities and self-organizing activities—and ultimately the “freedom dreams”—of poor and otherwise oppressed communities; or in a phrase, the reflexive self-authorization of social movement. The perceptible challenge of all legal education, clinical or otherwise, is ultimately not to see like the settler and imperialist, capitalist state but to look through or beyond it—through the persistent and reckless reproduction of poverty and marginalization as a basis of social order.

## Seeing Like a Clinic

ADRIAN A. SMITH\*

The prevailing commitment in clinical law programs like the Intensive Program in Poverty Law at Osgoode Hall Law School is to an engaged-contextualism, which serves to see law in action. It has provided participating students with some insight into the everyday life of ordinary people, approaching—but not necessarily fully perceptive to—certain socio-legal perspectives. But what does clinical legal education vision and envision? How precisely do clinics see? And from what source or place is that visual authority derived? Here, by attending to the prevailing “pedagogy of seeing” in contemporary poverty law clinical practice, I engage with teaching, learning, and praxis in clinical legal knowledge production. I contend that engaged-contextualism troublingly adheres to a pedagogy of seeing that is indebted to the very authority it should strive to dismantle: state power. With a view to the capitalist state as a nationally-inscribed territorial ordering authority, evidenced through settler and imperialist articulations, I undertake a speculative re-envisioning of knowledge production in and about poverty law. The aim is to encourage an alternative pedagogy motivated by an emancipatory praxis. It is a praxis not of saving poverty law but of constant struggle against sovereign state authority rooted in the creative capacities and self-organizing activities—and ultimately the “freedom dreams”—of poor and otherwise oppressed communities; or in a phrase, the reflexive self-authorization of social movement. The perceptible challenge of all legal education, clinical or otherwise, is ultimately not to see like the settler and imperialist, capitalist state but to look through or beyond it—through the persistent and reckless reproduction of poverty and marginalization as a basis of social order.

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\* As I was putting the finishing touches on the article, I received the shocking, devastating news of the passing of my comrade and one-time collaborator, Aziz Choudry, who had recently left Canada for a teaching position in South Africa. Aziz was a transnational activist-scholar extraordinaire whose unflinching emancipatory commitments centred around taking social movements seriously as a site of knowledge production. Aziz’s influence, already deeply enmeshed in the claims of this piece, take on even greater prescience with his passing. More personally, Aziz’s death leaves a considerable void as he often directed his biting sardonic wit at the hypocrisy of the neoliberal university and its apologists, providing considerable support and comfort to myself and a great many others faced with navigating that terribly uncomfortable terrain. I miss him dearly. My sincerest gratitude goes to Ruth Buchanan for showing great patience as I struggled to finalize the article.

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Looking is laborious. But looking is also dreaming.<sup>1</sup>

**CLINICAL LEARNING IS ALL THE RAGE** in legal education in the opening decades of the twenty-first century.<sup>2</sup> It is *seen* to catapult law students into "real-world contexts" through an "engaged, contextual approach" to law practice, as indicated

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1. Hannah Frank, *Frame by Frame: A Materialist Aesthetics of Animated Cartoons* (University of California Press, 2019) at 156. I came across Frank's text in the context of research in a different context—that of a materialist aesthetics of international law. While the framing initially drew me in, the painstaking and wonderfully inventive method of the investigation proved intriguing, and tragically so given Frank's premature death. At the risk of taking Frank's framing out of context, I provide it here as an indication of its lasting impression on my thinking, perhaps well beyond the particular context in which Frank intended.
  2. In 1983, the influential *Arthurs Report* noted that "clinical legal education has not yet become a significant element in Canadian law schools." *Consultative Group on Research and Education in Law, Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Minister of Supply and Services, 1983) at 51 [*Arthurs Report*]. Since that time, clinical programs not only proliferated but also served as a precursor to the experiential turn within legal education. The history of clinical legal education in Canada is documented in numerous sources. See e.g. Sarah Buhler, Sarah Marsden & Gemma Smyth, *Clinical Law: Practice, Theory, and Social Justice Advocacy* (Emond Montgomery, 2016); James C Hathaway, "Clinical Legal Education" (1987) 25 Osgoode Hall LJ 239. For recent accounts, see Deborah J Cantrell, "Are Clinics a Magic Buller" (2014) 51 Alta L Rev 831 (addressing demands for "practice ready" law graduates which are imposed on legal education generally and clinical education specifically); Lorne Sossin, "Experience the Future of Legal Education"

in the first subject-specific text in Canada.<sup>3</sup> The well-entrenched perspective is that clinical education is committed to social contextualization aimed at seeing law in action. As an increasingly prominent approach to law and learning turning on visual acuity, the perspective invites consideration of its particular pedagogical commitments, what we might term its “pedagogy of seeing,”<sup>4</sup> understood as a way to focalize processes of knowledge production, namely teaching, learning, and praxis, through modes of seeing.<sup>5</sup>

In what follows, I consider the emergent pedagogy of seeing embedded in a pioneering clinical program, the Intensive Program in Poverty Law at Osgoode Hall Law School. The Poverty Law Intensive is a semester-long clinical placement for upper-year law students run through Parkdale Community Legal Services (PCLS), a community legal clinic in downtown Toronto on the cusp of its

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(2014) 51 Alta L Rev 849; Harry W Arthurs, “Law and Learning in an Era of Globalization” (2009) 10 German LJ 629.

3. Buhler, Marsden & Smyth, *supra* note 2 at 2-3.
4. I have borrowed the term from Janet Zandy, a stalwart professor of working-class studies in the United States. See “Photography and Writing: A Pedagogy of Seeing” (2008) 41 Exposure: J Society for Photographic Education 26. Just as Zandy invites readers to think “deeply...about how photographs work in the world and about the worlds inside photographs,” this piece issues a similar invitation for thinkers of clinical legal education (*ibid* at 26). See also John Berger, *Ways of Seeing* (Penguin Group, 1972).
5. Others have stressed “the visualization of law as an object of contemplation” in socio-legal history, legal philosophy, criminal law, legal geography, as well as at the intersection of law and “race” in the highly specialized inquiry of legal semiotics and in other ways. See e.g. Christopher Tomlins, “After Critical Legal History: Scope, Scale, Structure” (2012) 8 Annual Rev L Social Science 31 at 32; Richard K Sherwin, *Visualizing Law in the Age of the Digital Baroque: Arabesques and Entanglements* (Routledge, 2011); Rodney GS Carter, “Ocular Proof: Photographs as Legal Evidence” (2010) 69 Archivaria 23; Irus Braverman, “Hidden in Plain View: Legal Geography From A Visual Perspective” (2011) 7 L Culture & Humanities 173; Osagie K Obasogie, “Do Blind People See Race? Social, Legal, and Theoretical Considerations” (2010) 44 Law & Soc’y Rev 585; Peter Goodrich, “Specters of Law: Why the History of the Legal Spectacle Has Not Been Written” (2011) 1 UC Irvine L Rev 773; Neal Feigenson, “The Visual in Law: Some Problems for Legal Theory” (2011) 10 L Culture & Humanities 1.

fiftieth anniversary.<sup>6</sup> Within its legal service mandate, PCLS clings to a tradition of pursuing individual client work along with community organizing and law reform-focused systemic advocacy work.<sup>7</sup> It is an incessantly contested if not imperiled tradition to which I am deeply indebted, having participated in the Program some two decades ago as a third-year law student in Workers' Rights, and, as I write, approaching the end of a three-year stint as the Academic Director.<sup>8</sup> But as the half-century mark rapidly approaches, PCLS is once again faced with an existential threat.<sup>9</sup> A dispute with a longstanding landlord forced a clinic move into two temporary locations, one of which was situated outside of the Parkdale

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6. The Intensive Program in Poverty Law places twenty students during each of the fall and winter semesters at PCLS. The Program is a full-time, full-term commitment that promises to provide an enriching and challenging experience. Students are assigned to one of four divisions: Housing Rights; Workers' Rights; Social Assistance, Violence, and Health (SAVAH); or Immigration. As the front-line faces of the clinic, students conduct initial intake and have hands-on responsibility for developing cases and legal arguments, carrying a steady caseload of active files. Student caseworkers work under the tutelage of supervisory staff, including a lawyer for each divisional grouping, and community legal workers (or rights advisers), and administrative support workers, to provide legal information, advice, and representation to workers, newcomers, tenants, and social assistance claimants and recipients.
  7. PCLS pursues a three-fold mandate: to provide legal services to low-income individuals; to build social movements to reduce poverty and fight for equality; and to train law students in "social justice" or "community" lawyering and poverty law—integrating strategies designed to redress individual legal problems with those designed to facilitate broader systemic change. There are wide-ranging perspectives on the efficacy of the mandate, and especially on how well law students are integrated into systemic advocacy work. My aim here is not to downplay these contrasting perspectives but instead to encourage an alternative normative account that contests the very basis of the individual work-systemic work distinction, how it is drawn, and what work is done in its name. Ultimately, mine is an account rooted in support of the collective self-activity of ordinary people in emancipatory social movements, contesting and clearing obstacles imposed to that activity. To qualify as anti-poverty work it necessarily must have a "systemic" character, understood as that which does not permit the structuring of the systemic outside of the individual nor the individual outside of the systemic.
  8. A roster of Osgoode Hall faculty colleagues—currently Amar Bhatia, Fay Faraday, Janet Mosher, and Sean Rehaag—rotate as Academic Director on a two or three-year mandate (though the first two are expected to serve their first terms in the coming years). It is worth noting that, while the article relies on personal observation coupled with the insights of some current and past roster members who have written about the program, it is not meant to suggest the adoption of a universally singular approach by directors. For some discussion of program tensions over time, see Shelley AM Gavigan, "Twenty-Five Years of Dynamic Tension: The Parkdale Community Legal Services Experience" (1997) 35 Osgoode Hall LJ 443.
  9. This is the language employed by some academic roster colleagues.

community.<sup>10</sup> Occurring around the same time, a quite sizeable reduction in provincial legal aid funding resulted in staffing cuts through layoffs and (forced) retirement of several clinic workers, as well as shifts in clinical operations and capacity.<sup>11</sup> The funding cuts fall within a wider review of the regime governing the

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10. See Alyshah Hasham, “This Parkdale legal clinic has helped tenants fight landlords for nearly 50 years. Now it’s the one being evicted,” *Toronto Star* (7 December 2018), online: <[www.thestar.com/news/gta/2018/12/07/this-parkdale-legal-clinic-has-helped-tenants-fight-landlords-for-nearly-50-years-now-its-the-one-being-evicted.html](http://www.thestar.com/news/gta/2018/12/07/this-parkdale-legal-clinic-has-helped-tenants-fight-landlords-for-nearly-50-years-now-its-the-one-being-evicted.html)>.
  11. The funding cuts were ushered in during 2019. Faced with these cuts, the PCLS Board of Directors—which currently includes the Academic Director as a voting member—took the difficult decision of carrying out staff worker reductions. Contrast this with statements made in July by Attorney General Doug Downey, who called the cuts an opportunity to “make legal aid sustainable.” In reference to PCLS, Downey asserted the following: “Parkdale has received funding at a higher level than other areas of the province with significant, and in some cases greater, low-income populations. Even with the changes to Parkdale’s funding, it is still one of the highest funded clinics in the GTA per low-income resident....While some lawyers and special-interest groups may be critical of the renewed era of accountability at Legal Aid Ontario, it is necessary.” See “Job cuts coming to local legal clinic,” *City News* (12 July 2019) at 00h:01m:49s, online (video): <[youtu.be/VVvwt7NVKOk](https://youtu.be/VVvwt7NVKOk)>. Critics forcefully disagreed, viewing the move as a continuation of the neoliberal attack on poor and other marginalized communities. For critical accounts, see e.g. Shiva Bakhtiary, “Misguided cuts to Legal Aid Ontario’s funding,” *The Lawyer’s Daily* (24 June 2019), online: <[www.thelawyersdaily.ca/articles/13270/misguided-cuts-to-legal-aid-ontario-s-funding-shiva-bakhtiary](http://www.thelawyersdaily.ca/articles/13270/misguided-cuts-to-legal-aid-ontario-s-funding-shiva-bakhtiary)>; Samantha Beattie & Emma Paling, “Legal Aid Cuts Designed to Muzzle Ford’s Critics, Clinics Say,” *The Huffington Post* (12 June 2019), online: <[www.huffpost.com/archive/ca/entry/legal-aid-ontario-slashes-toronto-budgets\\_ca\\_5d00f6b7e4b07551039acbb3](http://www.huffpost.com/archive/ca/entry/legal-aid-ontario-slashes-toronto-budgets_ca_5d00f6b7e4b07551039acbb3)>; Jacques Gallant, “Sweeping Cuts to Legal Clinics Called a ‘Directed Attack’ on Toronto and Organizations Challenging Ford Government,” *The Toronto Star* (12 June 2019), online: <[www.thestar.com/news/gta/2019/06/12/sweeping-cuts-to-legal-aid-disproportionately-hit-toronto-clinics-parkdale-site-to-lose-1-million.html](http://www.thestar.com/news/gta/2019/06/12/sweeping-cuts-to-legal-aid-disproportionately-hit-toronto-clinics-parkdale-site-to-lose-1-million.html)> [Gallant, “Sweeping Cuts”]; Emily Mathieu, “Toronto’s most vulnerable residents will bear the cost of legal clinic cuts, advocates say,” *Toronto Star* (12 June 2019), online: <[www.thestar.com/news/gta/2019/06/12/torontos-most-vulnerable-residents-will-bear-the-cost-of-legal-clinic-cuts-advocates-say.html](http://www.thestar.com/news/gta/2019/06/12/torontos-most-vulnerable-residents-will-bear-the-cost-of-legal-clinic-cuts-advocates-say.html)>; Jessica Owen, “Provincial review could jeopardize legal aid clinics: official,” *Barrie Today* (24 June 2019), online: <[www.barrietoday.com/local-news/provincial-review-could-jeopardize-legal-aid-clinics-official-1520878](http://www.barrietoday.com/local-news/provincial-review-could-jeopardize-legal-aid-clinics-official-1520878)>; Chris Ramsaroop, “Cuts to legal clinics a sinister plan to harm the most vulnerable,” *Toronto Star* (29 July 2019), online: <[www.thestar.com/opinion/contributors/2019/07/29/cuts-to-legal-clinics-a-sinister-plan-to-harm-the-most-vulnerable.html](http://www.thestar.com/opinion/contributors/2019/07/29/cuts-to-legal-clinics-a-sinister-plan-to-harm-the-most-vulnerable.html)>; Toronto Star Editorial Board, “Ontario’s New Attorney General Should Reverse Cuts to Legal Aid,” *Toronto Star* (23 June 2019), online <[www.thestar.com/opinion/editorials/2019/06/23/ontarios-new-attorney-general-should-reverse-cuts-to-legal-aid.html](http://www.thestar.com/opinion/editorials/2019/06/23/ontarios-new-attorney-general-should-reverse-cuts-to-legal-aid.html)>. On forced changes to clinical case work, see Nicholas Keung, “Legal Aid Stops Taking New Immigration, Refugee Cases,” *Toronto Star* (15 April 2019), online: <[www.thestar.com/news/gta/2019/04/15/legal-aid-stops-taking-new-immigration-refugee-cases.html](http://www.thestar.com/news/gta/2019/04/15/legal-aid-stops-taking-new-immigration-refugee-cases.html)>.

provision of legal aid services in Ontario, the “Legal Aid Modernization Project,” initiated by the Clinic’s primary funder Legal Aid Ontario (LAO) in conjunction with the Ministry of the Attorney General.<sup>12</sup> This cadre of ruling elites have made it abundantly clear that the systemic advocacy work at the heart of the Parkdale Intensive program is far less valuable than individual client work.<sup>13</sup>

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12. See Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 42-1, No 143 (19 February 2020). The reforms were criticized in a report issued by a group of Ontario law professors, of which I am a signatory. See e.g. Mosher et al, “Neither Smarter nor Stronger: Bill 161 is a Step Backwards for Access to Justice and Community-Based Legal Services in Ontario” (9 March 2020), online: <osgoode.yorku.ca/wp-content/uploads/2020/03/Bill-161-Brief-March-6-1.pdf>; Jacques Gallant, “Ford government’s legal aid plan will have ‘profoundly negative’ effect on low-income Ontarians, law professors say,” *Toronto Star* (10 March 2020), online: <www.thestar.com/news/gta/2020/03/10/ford-governments-legal-aid-plan-will-have-profoundly-negative-effect-on-low-income-ontarians-law-professors-say.html> [Gallant, “Ford government”]. This article has been conceived in the midst of the modernization exercise. The explicit reference to modernization would no doubt bring pause to critical readers familiar with sociology and development studies, including law and development, where it has had a pervasive presence. Associated with the likes of Émile Durkheim, Max Weber, and later Walter Rostow, among countless others, modernization theory upholds foundational binary and hierarchical distinctions in Western or liberal political and legal knowledge production beginning with modern versus traditional and extending to developed versus underdeveloped, rich versus poor, and more. Rostow’s work is particularly telling in that it identifies five stages of economic growth or development through which modern society is said to emerge, presenting a linear and regressive developmentalism meant to justify status quo global power relations. Its political significance, evident in the subtitle of his 1960 text *The Stages of Economic Growth: A Non-Communist Manifesto*, articulated a justificatory program to undermine the then growing momentum of colonial independence movements and their search for alternatives to orthodox capitalist development. It faced intense criticism within development studies from world systems and dependency theories, both of which sought to bring the “Third World” into the historical structure of global relations. In other words, critical suspicion of political reform agendas carried out under the modernization mantra is deep-seated and not misplaced. See Walter Rostow, *The Stages of Economic Growth: A Non-Communist Manifesto* (Cambridge University Press, 1960).
13. According to then Legal Aid Ontario Vice President of Clinic Law Services Jayne Mallin,

This was a really difficult exercise, because we recognize that there’s value in systemic work because it creates efficiencies, we recognize there’s value....But we also wanted to ensure that if we’ve got to take the money from somewhere, we did not want to take it from clinics providing direct client services in the community.

See Mathieu, *supra* note 11. Here, then, the individual client-systemic work distinction forms a basis for carrying out the funding cuts and wider modernization exercise. For an alternative approach, see Gemma Smyth, “Evaluating Systemic Advocacy: A Primer & Tools for Evaluating Systemic Advocacy in Ontario’s Legal Clinics” (Report to the Law Foundation of Ontario, 2017), online (pdf): *University of Windsor* <www.scholar.uwindsor.ca/cgi/viewcontent.cgi?article=1049&context=lawpub>.

In taking the Parkdale program as a prominent and particularized version of engaged-contextualism, I contend that clinical law's engaged-contextualist pedagogy of seeing is essentially shaped by and troublingly beholden to the visual authority (*i.e.*, "visuality")<sup>14</sup> of territorial state power, especially its settler capitalist and imperialist articulations, in contemporary Canada.<sup>15</sup> It is this visuality and

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14. Nicholas Mirzoeff, *The Right to Look: A Counterhistory of Visuality* (Duke University Press, 2011). For an alternative account of visuality as a matrix of cultural practices and values, see Hal Foster, *Vision and Visuality* (Bay Press, 1988).
15. While space does not permit a comprehensive development of Canadian state imperialism, it would be prudent to sketch the general contours of the claim. It develops from an understanding of the new imperialism or what Ellen Wood once termed an "empire of capital" emergent from about the mid-twentieth century onwards. See *Empire of Capital* (Verso, 2003). It is the idea that today's powerful states rely on global economic hegemony somewhat distinct from the imperial projects of European empires rooted in colonial rule. Though Wood's account is framed solely in terms of the US capitalist empire, the insights are generalizable. The continuing if not deepening need of global capital is for "a closely regulated and predictable social, political and legal order" (*ibid* at xi), which occurs through an "orderly" global system of multiple territorial states. The empire of capital, as Wood explains, is shaped by "the complex and contradictory relationship between capital's expansive economic power and the more limited reach of the extra-economic force that sustains it," a force mobilized through the sovereign state. See *ibid* at 5-6. States like Canada leverage economic hegemony, including to continue the subordination of other states (primarily of the global South), in service of global capitalist accumulation. Canada's ongoing settler-colonial dislocation and dispossession of Indigenous peoples and communal authority "at home," as Todd Gordon astutely shows, provides the ongoing basis for its imperialist excursions abroad. See Todd Gordon, *Imperialist Canada* (Arbeiter Ring, 2010). And as Gordon and Jeffrey Webber forcefully demonstrate, these violent extractivist excursions occur to devastating social and ecological effect throughout—and no doubt beyond—Latin America. See Todd Gordon & Jeffrey R Webber, *Blood of Extraction: Canadian Imperialism in Latin America* (Fernwood, 2016). These deeply disturbing dynamics begin to explain how peoples of the world find themselves displaced and slotted into circuits of migration extending into neighbourhoods like south Parkdale. And yet, Canada is held out as a beacon of benevolence in global affairs, not as a purveyor or perpetrator of the world's problems. Indeed, what Anton Allahar and James Côté noted over two decades ago remains true today, Canada is a "nation in denial" over its colonial roots and racism and the class-based nature of its profoundly unequal society, and I would add over its capitalist imperialist interventions. See *Richer and Poorer: The Structure of Inequality in Canada* (James Lorimer & Company, 1998). For other useful works of interest, see *e.g.* Sherene Razack, *Dark Threats and White Knights: The Somalia Affair, Peacekeeping and the New Imperialism* (University of Toronto Press, 2004); Jerome Klassen & Greg Albo, eds, *Empire's Ally: Canada and the War in Afghanistan* (University of Toronto Press, 2013); Yves Engler & Anthony Fenton, *Canada In Haiti: Waging War On the Poor Majority* (Red, 2005). For an account pertaining to Caribbean migrant farm labour in Canada see Adrian A Smith, "'Troubling Project Canada': The Caribbean and the Making of 'Unfree Migrant Labour'" (2015) 40 *Can J Latin American & Caribbean Studies* 274.

its embrace which permits the enforcement of the individual–systemic work distinction. Clinical programs like the one linked with Parkdale, I contend, must take more seriously the need for constant and rigorous contestation of the visuality of the Canadian state’s settler capitalist imperialism. For the prevailing visuality to be dismantled, a counter-visuality must emerge, which demands a re-envisioning of legal knowledge production against and beyond the oppressive confines of territorial state authority. It calls for a radical prefigurative praxis committed to the daily pursuit of what Himani Bannerji terms “self and social emancipation” to be infused in all clinical activities, regardless of how mundane.<sup>16</sup> It is a commitment beholden not to state power, but to the collective (and no doubt

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16. “Marxism and Anti-Racism in Theory and Practice: Reflections and Interpretations” in Abigail B Bakan & Enakshi Dua, eds, *Theorizing Anti-Racism: Linkages in Marxism and Critical Race Theories* (University of Toronto Press, 2014) 127 at 140. For an influential early social movement account of radical prefigurative praxis, see Carl Boggs, “Marxism, Prefigurative Communism, and the Problem of Workers’ Control” (1977) 11 *Radical America* 99 at 100. By “prefigurative,” Boggs meant “the embodiment, within the ongoing political practice of a movement, of those forms of social relations, decision-making, culture, and human experience that are the ultimate goal.” See *ibid.* Simply stated, a radical prefigurative politics refuses the use of certain liberal distinctions—between individual and systemic, means and ends, real(ism) and idea(ism), present and future, and so on—which subordinate emancipatory commitments to status quo or incremental ones. Motivated not by tinkering and other reformist measures, it is a commitment to building another world informed by our daily practices and agendas. It is apparent in a range of contexts. For instance, in a rhetorical exchange found in the ground-breaking text, *Policing the Crisis*, Stuart Hall and interlocutors, anticipating the charge that their proposals were idealistic and not suitable for the present, stated: “if someone says to us: ‘Yes, but given the present conditions, what are we to do now?’, we can only reply ‘Do something about the present conditions.’” Referencing Oscar Wilde, they go on to argue that “it is an outrage for reformers to spend time asking what can be done to ease the lot of the poor, or to make the poor bear their conditions with greater dignity, when the only remedy is to abolish the condition of poverty itself.” See Stuart Hall et al, *Policing the Crisis: Mugging, the State, and Law and Order* (London & Basingstoke, 1978) at 4. For differing accounts and applications of radical prefigurative politics in and around law, see Robert Knox, “Strategy and Tactics” (2010) 21 *FYBIL* 193; Irina Ceric, *Lawyering From Below: Activist Legal Support In Contemporary Canada and the US* (PhD Dissertation, Osgoode Hall Law School, York University, 2020) [unpublished]; Michael Blazer, “The Community Legal Clinic Movement In Ontario: Practice and Theory, Means and Ends” (1991) 7 *J L & Soc Pol’y* 49 at 52; Davina Cooper, “Prefiguring the State” (2017) 49 *Antipode* 335.

messy) power of ordinary people.<sup>17</sup> Armed with this commitment, I encourage an alternative approach—a pedagogy of looking, not merely seeing—rooted in anti-settler-capitalist and anti-imperialist social movement learning in action.<sup>18</sup>

The opening section attends to clinical law’s pedagogy of seeing. It takes the prevailing pedagogical approach as a particular set of claims about the nature of processes of knowledge production. We can understand this in two respects. First, clinical law’s pedagogy of seeing makes a claim about how knowledge is produced in and about law, with “in” representing the specific ranks of professional legal education usually taken as teaching and learning relations situated within law schools and law faculties, and “about” applying to social relations more broadly and generally. Second, the claim of seeing is suggestive of a cornerstone distinction, first articulated within legal realism and developed by law and society scholars, between “law in books” and “law in action.”<sup>19</sup> Though clinical pedagogy might be taken as an attempt at seeing law in action—that is, as an invitation to turn clinical pedagogy towards the law books–action gap so prevalent in certain law and society accounts—it might also be differentiated from a more trenchant set of concerns about looking. To appreciate that processes of knowledge production are contingent on modes of seeing is not the same as appreciating that looking

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17. I concur with Pierre Bourdieu’s contention that “to endeavour to think the state is to risk either taking over, or being taken over by, the thought of the state.” Pierre Bourdieu, “Rethinking the State: Genesis and Structure of the Bureaucratic Field” in George Steinmetz ed, *State/Culture: State-Formation after the Cultural Turn* (Cornell University Press, 1999) at 53, cited in Mark Neocleous, *Imagining the State* (Open University Press, 2003) at 6 [Neocleous, *Imagining the State*]. As such, I follow Mark Neocleous who, in venturing to “think beyond the instructions and parameters” of the state, writes “against” and “outside the statist political imaginary” (*ibid*).
18. On social movement learning, see e.g. Aziz Choudry, *Learning Activism: The Intellectual Life of Contemporary Social Movements* (University of Toronto Press, 2015); Sara Carpenter & Shahrzad Mojab, *Revolutionary Learning: Marxism, Feminism and Knowledge* (Pluto Press, 2017); Paula Allman, *Revolutionary Social Transformation: Democratic Hopes, Political Possibilities and Critical Education* (Bergin & Garvey, 1999). For a rich account of Indigenous sovereignty, see Glen Coulthard, *Red Skin, White Mask: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, 2014). On poor peoples’ movements, see e.g. Frances Fox Piven & Richard A Cloward, *Regulating the Poor: the Functions of Public Welfare*, 2nd ed (Vintage Books, 1993); Bryan D Palmer & Gaétan Héroux, *Toronto’s Poor: A Rebellious History* (Between the Lines, 2016).
19. Roscoe Pound, “Law in Books and Law in Action” (1910) 44 Am L Rev 12. Pound may have coined the terminology, but it was not until the emergence of legal realism that they found meaning, a meaning further developed by early socio-legal or what is also termed law and society scholarship. For a recent overview, see Jon B Gould & Scott Barclay, “Mind the Gap: The Place of Gap Studies in Sociolegal Scholarship” (2012) 8 Annual Rev L & Social Science 323.

provokes further inquiry—into where one should look, for how long, through what lens(es), with what aims, and more crucially, with what or whose authority.

An alternative to the prevailing pedagogy of seeing is an inquiry of looking that is organized around a radical prefigurative praxis, to encourage one to look with rigour without losing sight of emancipatory commitments and futures. In short, it is an invitation to *vision* and *envision*. As a consideration of vision, as noted in the epigraph which animates this piece, “[s]eeing becomes a form of labor.”<sup>20</sup> But, as the epigraph also indicates, looking is at once to dream and envision. Deployed here as radical prefigurative tools, visioning and envisioning provide the basis for the critique of clinical law’s prevailing pedagogical orientation, useful in countering existing and anticipated calls to turn more deliberately to law and society perspectives, and alive to the issue of authority.

The second section then turns to address the key issue of visual authority. It develops the concept of *visuality*, loosely drawing on methodological reckoning with emergent technocratic and bureaucratized authority—termed “seeing like a state” by anthropologist James S. Scott<sup>21</sup>—as a way of framing the terms of visual authority implicated in liberal state power, including in law. The framing helps in two respects. First, as I show, it helps to re-situate a critical engagement with the existing legal aid regime governing the provisioning of legal services to low-income people in Ontario. Second, it also opens questions about the statist national-territorial constitution of belonging and community which, when recast in global terms, invites questioning that takes us back to concerns about legal imperialism raised within first wave studies in law and development. In both respects, the account presented herein is a speculative analytical endeavour borne out of a search for a pedagogy capable of contesting the perpetual crisis of PCLS and other community legal clinics. The article ends by considering the basis of an alternative pedagogy for legal education, clinical or otherwise, rooted in a critique

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20. The framing belongs to film scholar Karl Schoonover. See Karl Schoonover, “Wastrels of Time: Slow Cinema’s Labouring Body, the Political Spectator, and the Queer” (2012) 53 *Framework: J Cinema & Media* 65. Credit to Hannah Frank’s work for the initial reference. My use of the term “vision” breaks from that of Hal Foster’s, which attaches a bio-physiological understanding associated with the human eye and corresponding visual system. See Foster, *supra* note 14.

21. *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, 1998). The engagement with Scott’s work pertains to its general method, and in particular, my account takes up the invitation to reimagine the method through a turn to the visual. It is not an attempt to adopt Scott’s substantive claims. For one, the insights around *visuality* in colonial histories are not fully accounted for in Scott’s framing.

of political economy, and in the reflexive authority of oppressed communities and social movements.

## I. PEDAGOGY OF SEEING IN CLINICAL CONTEXTS

What and how does clinical legal education *see*? In attending to clinical law's pedagogy of seeing, understood in terms of producing knowledge in and about law through a claim to a particular mode of seeing, I consider the social worlds of clinical legal education. The discussion rests on the understanding that clinical education can be situated in relation to orthodox legal education.<sup>22</sup> An investigation into clinical social worlds, therefore, reveals something about the nature of its relationship to the worlds of its referent. But to refer to a thing is not to defer to it, and as such, I draw an elementary analytical distinction between a referential (descriptive) and deferential (prescriptive) relationship as a way to clarify a central premise of the critique. Clinical education, I contend, is referential to legal educational orthodoxy, but it need not remain deferential to it.<sup>23</sup>

There have been a rich set of interventions on the nature and limits of orthodox legal education.<sup>24</sup> While clinical law pedagogy emerged from within legal educational orthodoxy, it did so armed with a healthy distrust of status quo approaches and commitments.<sup>25</sup> It seems important to focus on Stephen Wexler's pathbreaking account as its insights continue to resonate within clinical

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22. By orthodox, I am referring to a whole host of approaches and perspectives that contest the need for rich and nuanced social contextualization as a necessary premise of legal education. In the contemporary period in which "social justice" figures prominently, these accounts adhere to a thin or shallow contextualization in which "law" and "society" are sharply delineated and jurists (including prospective ones) remain at the pinnacle of the schema.

23. As it unfolds in relation to non-clinical legal educational orthodoxy, clinical law teaching and practice offer critical insight into that orthodoxy but has had some difficulty escaping it—and it must come to grips with its own—in this latter respect. In other words, clinical education appears to have an orthodoxy too: engaged-contextualism.

24. See Harry J Glasbeek & Reuben A Hasson, "Some Reflections on Canadian Legal Education" (1987) 50 Mod L Rev 777.

25. For a relatively recent account from a highly influential commentator in Canada, see Harry W Arthurs, "The Future of Law School: Three Visions and a Prediction" (2014) 51 Alta L Rev 705. For a US-based legal realist account that continues to carry a certain scholarly importance, see Karl N Llewellyn, *The Bramble Bush: On our Law and its Study* (Quid Pro Books, 2012). The critiques are voluminous but for an especially compelling one, see Patricia J Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Harvard University Press, 1991).

legal pedagogy with a critical bent.<sup>26</sup> Working from the perspective of poverty law practice, a precursor to contemporary clinical education,<sup>27</sup> Wexler famously problematized the construction of personal legal problems and approaches to problem solving through orthodox learning materials, most notably the legal casebook. Wexler incisively attends to the worlds created within the casebook organized around the appellate case method and judicial interpretation of statutes. The “casebook people,” as Wexler describes, are not poor people but rather those who, in terms of law, “lead harmonious and settled private lives,” save for the occasional legal disruption.<sup>28</sup> Conventional wisdom is to “retur[n] the client to [their otherwise] smooth and orderly world.”<sup>29</sup> However, according to Wexler, the disruptive and unsettled nature of poor peoples’ lives stems from law’s constant intrusion.<sup>30</sup> Poverty, as he put it in a celebrated passage, “creates an abrasive interface with society; poor people are always bumping into sharp legal things.”<sup>31</sup>

For Wexler, then, the social worlds perceived in legal education fail to reflect the concrete lived existence of poverty. In contrast, the envisioning on offer from Wexler takes aim at the legal profession. In taking the practice of law as a primary target, Wexler strives to convince (prospective) lawyers to redress “the scandalous failure of the legal profession to serve those who need it most.”<sup>32</sup> It is an agenda for reorienting orthodox lawyering practices towards community organizing

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26. “Practicing Law for Poor People” (1970) 79 Yale LJ 1049 [Wexler, “Practicing”].

In a follow-up reflection nearly four decades later, Wexler credits labour organizer and professor, Tim Sampson, with teaching him the lessons conveyed in the article. See Steve Wexler, “Some Further Reflections on Poor People and Law” (2007) 40 UBC L Rev 859. See also Gerald P Lopez, *Rebellious Lawyering: One Chicano’s Vision of Progressive Legal Practice* (Westview Press, 1992).

27. A modest summation of the clinic-based critique of legal education suggests key deficiencies. Legal educational orthodoxy operates within what revolutionary educator Paulo Freire notably termed the “banking concept of education.” See Paulo Freire, *Pedagogy of the Oppressed* (Continuum, 2005), ch 2. Such a model enforces hierarchies of knowledge production in which knowledge is seen to emanate from a singular interpretive authority, the professor, radiating out—or more properly down—to students. The classroom relations are organized along the same hierarchical and dualistic logic of the solicitor–client relationship and courtroom encounter where, cast as all-knowing deities, the jurist stands at the pinnacle.

28. Wexler, “Practicing,” *supra* note 26 at 1049.

29. *Ibid* at 1050.

30. *Ibid*.

31. *Ibid*. The theory of law implicit in Wexler’s account is not entirely straightforward. The legal and the social are treated as distinct spheres, poverty is a—perhaps the—meeting point between these, and poor people seemingly cannot navigate around law’s harmful protrusions.

32. *Ibid* at 1067.

and social movement building. It prioritizes the self-organizing activities and potential of poor people and, as such, even if one disagrees with certain aspects, the emancipatory spirit of the sentiment remains both prescient and urgently necessary, a point I return to below. However, the account offers little in the way of a specific agenda to redress the pedagogical deficiencies of orthodox legal education.<sup>33</sup>

## II. THE EMERGENCE OF CLINICAL LEGAL EDUCATION

Clinical legal education received no actual consideration in Wexler's account despite its emergence in early twentieth-century US legal education.<sup>34</sup> Though the earliest clinics were developed in the opening decades of the twentieth century, mostly through student initiative and without formal educational credit, the storefront clinic model found its expression some decades later. By around mid-century, over a quarter of the existing US law schools had adopted a form of clinical education.<sup>35</sup> The first student clinical placement programs in Canada mirrored the storefront clinic model.<sup>36</sup> That model found support in Ontario as a counter to the British model of *judicare* upon which legal aid in the province had

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33. *Ibid.* To the extent that legal educational reforms are considered by Wexler, it is to illustrate how certain curricular practices of the day, namely the addition of “Law and the Poor” courses—courses which in their very existence serve a “useful function” of reinforcing that “the remainder of the curriculum deals with law and the rich” (*ibid* at 1050). Not only do these curricular exceptions prove the norm, asserts Wexler, but they “do little...to change the law schools’ treatment of legal problems, or their perception of the proper roles and concerns of a lawyer” (*ibid*). My suspicion is that the latter claim is far more controversial than the former, given the proliferation of “law and” courses across law schools in Canada since the time of Wexler’s account—much of this spawned by interventions like Wexler’s. These courses typically include instructors and students who share some interest in redressing the legal profession’s service failures.
34. That said, Wexler is credited with encouraging the search for alternative approaches. See Frederick H Zemans, “The Dream Is Still Alive: Twenty-Five Years of Parkdale Community Legal Services and the Osgoode Hall Law School Intensive Program in Poverty Law” (1997) 35 *Osgoode Hall LJ* 499 at 503 [Zemans, “Dream”].
35. Margaret Martin Barry, Jon C Dubin & Peter A Joy, “Clinical Legal Education for This Millennium: The Third Wave” (2000) 7 *Clinical L Rev* 1.
36. On the early history of legal aid clinics in Ontario specific to PCLS and more broadly, see Zemans, “Dream,” *supra* note 34; Mary Jane Mossman, Karen Schucher & Claudia Schmeing, “Comparing and Understanding Legal Aid Priorities: A Paper Prepared for Legal Aid Ontario” (2010) 29 *Windsor Rev Legal Soc Issues* 149.

been established.<sup>37</sup> PCLS, a west end Toronto community clinic, launched in late 1971 through the concerted efforts of Osgoode students and faculty operating with the approval of the Law School's Clinical Education Committee.<sup>38</sup> The first of its kind in the province, it functioned to provide legal services to residents in the geographically-defined boundaries of Parkdale,<sup>39</sup> and to educate upper-year law students in poverty law practice.<sup>40</sup> Within a dozen years, forty-one clinics were in existence across the province.<sup>41</sup>

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37. Mary Jane Mossman, "Community Legal Clinics in Ontario" (1983) 3 Windsor YB Access Just 375 at 381 (noting that "all of the early legal aid clinics were established as alternatives to the government-funded legal aid Plan"). In the judicare system, lawyers in private practice provided analogous services under legal aid to those provided to traditional "fee-paying clients in certain areas, such as Supreme Court-related or related to serious criminal offences, where in other proceedings, including small claims court, family and tribunal, a local legal aid official wielded discretion over representation" (*ibid* at 385). Judicare, as Mossman et al note, adhered to "legal categories of services available to paying clients" (Mossman, Schucher & Schmeing, *supra* note 36 at 160). For accounts of the historical emergence of legal aid in Canada and Ontario respectively, see James Edmund Jones, "Legal Aid for the Poor" (1931) 9 Can Bar Rev 272; John D Honsberger, "The Ontario Legal Aid Plan" (1969) 15 McGill LJ 436. For an investigation into the rationale behind legal aid not strictly focused on Canada, see Richard Moorhead, "Legal Aid in the Eye of a Storm: Rationing, Contracting, and a New Institutionalism" (1998) 25 JL & Soc'y 365; Richard L Abel, "Law without Politics: Legal Aid under Advanced Capitalism" (1985) 32 UCLA L Rev 474.

38. Zemans, "Dream," *supra* note 34 at 500.

39. The articulation of clinic service boundaries is identified as beneficial for the incorporation of community members into clinical governance, which occurred in a contested and protracted way, though, as we will see, the enforcement of catchment areas is a form of the clinic's mundane internalized projection of state power. For a discussion of the contested nature of community in early clinics see Mossman, *supra* note 37 at 393-97. The service boundaries have since been expanded, though not uncontroversially. In addition to controversies surrounding boundary struggles, clinical governance provided additional tensions. For instance, there were internal attempts to share decision-making responsibility among clinic staff and executives. As noted at the time, "The office developed a democratic and horizontal method of decision making. Wherever possible all decisions were brought to the 'community of workers' within the office for their discussion and resolution." See Zemans, "Dream," *supra* note 34 at 510. These were more properly understood as contested struggles which continued throughout. For some early insight from the perspective of a founding student see Doug Ewart, "Parkdale Community Legal Services: Community Law Office, or Law Office in a Community?" (1997) 35 Osgoode Hall LJ 475.

40. *Ibid* at 505. An early evaluation of the program, conducted by then Professor Roland Penner and referred to as the Penner Report, noted the "apparent conflict between quality legal services on a large scale and a legal education clinic operating on limited resources" (*ibid* at 505). Yet, in a November 1972 review conducted by a federal official, clinic financial resources were seen as strong: "[I]ts generous budget permits the hiring of personnel and the purchase of high-quality facilities without the need to skimp" (*ibid* at 519).

41. Mossman, *supra* note 37 at 384.

PCLS received initial funding support from the federal government (through its then Department of Health and Welfare) and a Ford Foundation subsidiary, the Council on Legal Education for Professional Responsibility (CLEPR), which provided a grant spread over a two-year period.<sup>42</sup> The CLEPR assumed a significant role in the development of legal clinics in the United States in the late 1960s and into the 1970s, and in the creation of clinical legal education initiatives in Argentina, Bangladesh, Chile, China, India, Peru, South Africa, Sri Lanka, and elsewhere.<sup>43</sup> PCLS therefore emerged during the first “moment” of law and development with its “social engineering” projects for export.<sup>44</sup> Although at the time some commentators, including a key insider, expressed general concerns about “legal imperialism,” noting the Ford Foundation’s instrumental role in the exportation of US rule of law agendas, those concerns have had little if any lasting impact in the scholarship on legal clinics.<sup>45</sup> I find this to be a curious absence.

Importantly, the early community clinics saw as their mandate the provision of “specialized services for poor and disadvantaged clients” and the use of “legal

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42. Zemans, “Dream,” *supra* note 34 at 504. Others term it the Council on Legal Education and Professional Responsibility.

43. Aubrey McCutcheon, “University Legal Aid Clinics: A Growing International Presence with Manifold Benefits” in Mary McClymont & Stephen Golub, eds, *Many Roads to Justice: The Law Related Work of Ford Foundation Grantees Around the World* (The Ford Foundation, 2000) 267.

44. David M Trubek & Alvaro Santos, “Introduction: The Third Moment in Law and Development Theory and The Emergence of a New Critical Practice” in Trubek & Santos, eds, *The New Law and Development: A Critical Appraisal* (Cambridge University Press, 2006) 1. For an overview of US-based law and development, see James A Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (University of Wisconsin, 1980) at 6-26. A critique is mounted in the remainder of the text. For the foundational account, see David M Trubek & Marc Galanter, “Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States” (1974) *Wis L Rev* 1062. For a recent reflection on Trubek and Galanter’s piece, see Ruth Buchanan, “A Crisis and its Afterlife: Some Reflections on ‘Scholars in Self-Estrangement’” in Gráinne de Búrca, Claire Kilpatrick & Joanne Scott, eds, *Critical Legal Perspectives on Global Governance: Liber Amicorum David M Trubek* (Hart, 2014).

45. James Gardner, a former official with the Ford Foundation, identified the flawed and imperialist assumptions upon which the projects operated. See Gardner, *supra* note 44. For a recent consideration of Gardner’s account, which ultimately rejects the legal imperialist framing, see Richard J Wilson, “Beyond Legal Imperialism: U.S. Clinical Legal Education and the New Law and Development” in Frank S Bloch, ed, *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011). See also J P Sandy Ogilvy, “Celebrating CLEPR’s 40th Anniversary: The Early Development of Clinical Legal Education and Legal Ethics Instruction in U.S. Law Schools” (2009) 16 *Clinical L Rev*. See generally Special Issue, *CLEPR’s 40th Anniversary: Papers and Speeches from the AALS-ABA-CLEA Celebration of CLEPR* (2009) 16 *Clinical L Rev* [CLEPR Special Issue].

strategies to confront systemic barriers to equality and democratic participation for vulnerable communities.”<sup>46</sup> Clinics did not necessarily pursue the traditional “case-by-case” law office approach but instead worked to integrate carriage of individual case files with systemic-oriented work.<sup>47</sup> Early participants like Mary Jane Mossman, the first articling student at PCLS, understood that

the case-by-case approach, by itself, may frequently do little or nothing to promote the legal welfare of the poor. Thus, while there is a basic clinic responsibility to get involved in the day-to-day legal problems faced by the poor, clinic boards must also systematically assess the nature of the services they provide in terms of the real problems of their low-income community.<sup>48</sup>

Doug Ewart, one of the founding students expressing explicitly emancipatory sensibilities, added to the insight:

[PCLS] should represent far more than another Osgoode innovation in legal education: it should stand as evidence that the law school has begun to take seriously its obligation to society to utilize its vast resources of time, talent and money to push for the radical social change needed by our country today.<sup>49</sup>

It is apparent that, at the time, certain actors in the emergent clinic system perceived “poverty law” relatively broadly as a range of social concerns in relation to rental housing, community development, and refugee resettlement.<sup>50</sup> The early clinical services targeted “gaps” in the judicare-centred legal aid model with fundamental importance placed on the “unmet” legal needs of poor people, as Mossman and others remind us. Poverty law, in other words, effectively described notable areas of service that legal aid failed to provide and did not, in and of itself, describe a particular set of legal tools, nor a settled legal regime. It is a pertinent insight that allows one to appreciate that what we have come

46. Mossman, Schucher & Schmeing, *supra* note 36 at 159.

47. Mossman, *supra* note 37 at 384; Gavigan, *supra* note 8.

48. Mossman, *supra* note 37 at 398. As Mossman noted in a 2019 talk during the clinic system’s Access to Justice week, community legal clinics defined “access and justice” from the perspective of marginalized communities such that poverty law responded to the particular needs of those communities, always in the face of budgetary constraints. See Association of Community Legal Clinics of Ontario, “Access to Justice Week 2019–Mary Jane Mossman” (30 October 2019), online (video): <[www.youtube.com/watch?v=GdPZHNsRZb0](http://www.youtube.com/watch?v=GdPZHNsRZb0)>.

49. See Ewart, *supra* note 39 at 482. The journal article is a reprint of Ewart’s article in the Osgoode student newspaper, *Obiter Dicta*, from 30 September 1971.

50. For instance, the *coup d’état* in Chile on 11 September 1973 mounted against the socialist Salvador Allende government installed dictator Augusto Pinochet which generated a flood of dissidents into Canada. The clinic system emerged as a way to support Chilean refugee claimants. Association of Community Legal Clinics of Ontario, “Fundamentals of Community Legal Clinics” (24 October 2018), online (video): <[youtu.be/ofdfW6eQYp8](https://youtu.be/ofdfW6eQYp8)>.

to term poverty law emerged through the largely successful, counter-hegemonic approach of clinics and communities to extend or widen the range of services for poor people.<sup>51</sup>

### III. THE NATIONALLY INFLECTED GLOBAL LEGAL REGIME OF POVERTY

Clinical legal education is a mode of teaching and learning which situates pupils in a specific lived context, which in the case of PCLS constitutes “poverty law” or “social justice” in other respects. But to adhere to Mossman’s account is to appreciate that “poverty law”—and social justice clinical practice more broadly—is a necessarily contested realm that gains expression from those very contestations or struggles. The existing regime, in itself, is not worthy of fighting for—it is far too inadequate and contradictory to justify on its own woefully deficient terms. It gains its real worth through struggle. There is no poverty law—no social justice clinical practice—outside of the historically specific struggles within and against state production of poverty. Here, we might see that just as poverty creates an abrasive social interface, as Wexler asserts, it is no mere accident or natural occurrence: “Poverty does not just happen,” it is “created, maintained, and regulated.”<sup>52</sup> In other words, poverty constitutes “a legal regime.”<sup>53</sup>

These struggles over poverty law occur within and against the structures of global capitalism. It is ongoing global capitalist violence that produces, and in turn enforces and naturalizes, the existence of material injustices. But these global systemic injustices have national and local points of inflection by virtue of our twenty-first century system of territorially inscribed sovereign national states. Global capitalism reduces the deeply skewed and uneven distribution of necessities of human life across the planet to a problem for national states and,

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51. Mossman, *supra* note 37. Mossman suggests that clinics “extended the full range of services needed by the poor in the justice system” thereby “transform[ing] the concept of legal aid in Ontario” (*ibid* at 385). As Ontario’s Grange Commission noted in its report, “[i]t was to plug these gaps that the clinical movement was born” (*ibid* at 385). In noting this, Mossman identified a regulatory mandate “to take on the systemic legal problems of the poor rather than to be limited to merely ad hoc remedies,” drawing a distinction seemingly illustrative of differences in perspective at the time. See *ibid* at 398.

52. Jason Beckett, “Creating Poverty” in Anne Orford & Florian Hoffmann, eds, *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 985 at 989.

53. *Ibid* at 989. As Beckett continues, “Poverty is created by socio-economic processes, and those processes are in turn effected through, and regulated by...law” and “[t]he processes of wealth creation and concentration are managed through law; consequently, the corollary processes of poverty creation are also creatures of law” (*ibid*).

in turn, through their respective constitutional arrangements, to a competition between levels of government. It is here that we find the political-legal production of people deserving and underserving social support.<sup>54</sup>

But what we also learn is that, even in the compelling framing offered by Mossman, state power is not conceived of in robust enough terms. Orthodox legal education is organized around a notion of state law in which the state largely exists in un-problematized terms. For its part, clinical legal education has presented an historically specific vision of the law–society relationship tied to national state and capital. To critique the widened imaginary offered by Mossman is to ask about the perceived gaps and how they are derived or arrived at in the first place, which has everything to do with state power. Which theories and conceptions of power are privileged and neglected in clinical legal education? How does clinical pedagogy orient knowledge production in terms of mounting a critique of liberal conceptions of power and social change? What is revealed is a dismissiveness in relation to how our social worlds are shaped through state power.

#### IV. REFLECTIONS ON A CLINICAL “COUNTER-PEDAGOGY”

Clinical legal education, as the student-focused practice of practicing as a lawyer under supervision,<sup>55</sup> turns on a commitment to an engaged-contextualist approach to seeing law in action. As a pedagogy of seeing anchored in clinical context,<sup>56</sup> engaged-contextualism is perceived to rest on at least four core claims. First, it provides participating students with grounded insight into the impacts of law and legal institutions on the everyday life of ordinary people.<sup>57</sup> Though approaching certain socio-legal perspectives, clinical pedagogy is not

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54. See Joe Hermer & Janet Mosher, *Disorderly People: Law and the Politics of Exclusion in Ontario* (Fernwood, 2002); Dorothy E Chunn & Shelley AM Gavigan, “Welfare Law, Welfare Fraud, and the Moral Regulation of the ‘Never Deserving’ Poor” (2004) 13 Soc & Leg Stud 219; Janet Mosher & Joe Hermer, *Welfare Fraud: The Constitution of Social Assistance as Crime* (Law Commission of Canada, 2005).

55. Jonathan Black-Branch, “A Pedagogic Paradigm Shift in Clinical Legal Education: Towards Placing Practical and Theoretical Knowledge on an Equal Footing?” *Slaw* (15 June 2017), online: <[www.slaw.ca/2017/06/15/a-pedagogic-paradigm-shift-in-clinical-legal-education-towards-placing-practical-and-theoretical-knowledge-on-an-equal-footing](http://www.slaw.ca/2017/06/15/a-pedagogic-paradigm-shift-in-clinical-legal-education-towards-placing-practical-and-theoretical-knowledge-on-an-equal-footing)> (stating that “[c]linics can take countless forms and deal with almost any area of law, but the key is that they are providing students the opportunity to practice as lawyers with close supervision”).

56. Legal clinics, understood as an institutional mode or expression of legal practice—analytically distinct from other modes of practice such as law firm, in-house counsel, legal collective, and sole practitioner—emerged as a collectivized response to societal legal dilemmas.

57. Buhler, Marsden & Smyth, *supra* note 2 at 4.

necessarily fully perceptive to the nuance and intricacy of those perspectives.<sup>58</sup> Second, it engages substantive law in “specific and sometimes messy” real-world contexts, in contrast to orthodox classroom experience where learning typically occurs through engagement with appellate decisions.<sup>59</sup> Third, it provides “lawyers-in-training” with critical immersion in professional identity formation.<sup>60</sup> Fourth, it is an opportunity for the development and pursuit of social justice commitments.<sup>61</sup>

Clinical education draws a distinction in terms of pedagogical commitments from legal educational orthodoxy. Just as Wexler argued that the emergence of “Law and Poverty” courses illustrated the anti-poor nature of the orthodoxy, so too might we say that certain clinical programs have had a similar effect. Indeed, clinical practice is now widely accepted as having important pedagogical purchase and value—so valuable, in fact, that ongoing efforts seek to deepen its entrenchment in legal educational orthodoxy. The varied nature of responsibilities and experiences across clinical programs, and within programs and across respective areas of legal practice, make it somewhat challenging to generalize. But important work has been directed at producing what Shin Imai refers to as a “counter-pedagogy” of clinical legal education.<sup>62</sup> According to Imai, a former Academic Director of Osgoode’s Poverty Law Program, the work of clinical practice requires that one “unteach” and unlearn legal educational orthodoxy.<sup>63</sup> A counter-pedagogy is therefore necessary for the alteration of in-class knowledge production and hierarchical power relations more consistent

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58. For instance, a recurring criticism of the so-called gap studies prominent in law and society scholarship is that they are constructed narrowly as reformist policy prescriptions.

59. Buhler, Marsden & Smyth, *supra* note 2 at 4.

60. *Ibid.*

61. *Ibid.*

62. To a certain extent, these efforts have resulted in the erosion of well-worn divisions between skills and doctrine. See Shelley Gavigan & Sean Rehaag, “Poverty Law, Access to Justice, and Ethical Lawyering: Celebrating 40 Years of Clinical Education at Osgoode Hall Law School” (2014) 23 J L & Soc Pol’y 1.

63. Shin Imai, “A Counter-Pedagogy for Social Justice: Core Skills for Community Lawyering” 9 Clinical L Rev 195 at 200. Imai calls on the clinical instructor to “integrate the teaching of community lawyering skills throughout the clinical course by teaching substantive law using techniques and exercises that are informed by the counter-pedagogy” (*ibid* at 200).

with local community understandings.<sup>64</sup> Imai's intervention has been helpful in orienting myself—and seemingly students—towards visioning and envisioning learning encounters. From my standpoint as Academic Director of the Poverty Law Intensive, the teaching expectations are thrilling yet no doubt daunting.<sup>65</sup> A comprehensive list of detailed program learning objectives totals more than two dozen. And while these are shared across the in-clinic and in-class dimensions of the program, they go some way in signalling the relatively challenging nature of the pedagogical task.

The seminar affords the opportunity to address core themes in law and poverty. It calls upon a capacity to consider a breadth of issues related to substantive law in at least four core service areas, and several tangential others, as well as the regime governing legal aid, wider liberal legal and political thought (with a view to its tendencies and limits), social movement history and theory, critical social theory (including in relation to domains of class, racialization, gender, sexualities, and dis/ableism), professional ethics, low-barrier approaches to client service, methods of public legal education and community engagement, and more. This notion of “poverty law” does not “keep politely to a ‘level’ but [is] at every bloody level”; as law moves, the course instructor is expected to move too, performing an E.P. Thompson-esque *cotillion* dance.<sup>66</sup>

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64. *Ibid.* Imai identifies a symmetry between classroom learning and community organizing work. He discusses “the problem-solving approach” to clinical teaching in which participants, who are actively engaged in sharing the “sense of responsibility for making contributions” (*ibid* at 203), “begin with a consideration of ill-structured everyday problems. Each problem is approached, not as a given, but as a starting point for an inquiry into the social context in which the problem is embedded” (*ibid* at 204).

65. I say daunting because, having previously spent a great deal of teaching energy encouraging students to become comfortable with the discomfort of asking difficult questions, I now find myself in a strangely disorienting position of clinical “insider” in which posing such questions can be interpreted as profane.

66. I am referring to Marxist historian EP Thompson's brilliant characterization of law in capitalist society—a critique of crude “base-superstructure” formulations. The original quote reads:

I found that law did not keep politely to a ‘level’ but was at every bloody level; it was imbricated within the mode of production and productive relations themselves (as property-rights, definitions of agrarian practice) and it was simultaneously present in the philosophy of Locke; it intruded brusquely within alien categories, reappearing bewigged and gowned in the guise of ideology; it danced a cotillion with religion, moralising over the theater of Tyburn; it was an arena of politics and politics was one of its arms; it was an academic discipline, subjected to the rigour of its own autonomous logic; it contributed to the definition of self-identity both of rulers and of ruled; above all, it afforded an arena for class struggle, within which alternative notions of law were fought out.

As the instructor is called upon to traverse subject areas, topics, themes, ideas—and to participate in clinical governance as a voting member of the Board of Directors and faculty governance as a member of the law school’s Clinical Education Committee—it becomes increasingly apparent that clinical legal education at Parkdale is uneasily situated within non-clinical legal educational orthodoxy. Any “dynamic tension,” to borrow Shelley Gavigan’s phrase,<sup>67</sup> that may once have existed is undercut as clinical education becomes further entrenched within the orthodoxy.<sup>68</sup> Where it once promised some critical distance, it now operates in a shared field of knowledge production with non-clinical orthodoxy, emerging in part out of deepening institutional attachments and indebtedness.<sup>69</sup> Its relative proximity undermines the alternative visions and envisioning that a counter-pedagogy affords.<sup>70</sup> Worse, in its adherence to a thin engaged-contextualism, prevailing forms of clinical education exhibit something approaching an orthodoxy of its own.<sup>71</sup>

Clinical pedagogy has produced a criticality that, though no doubt well-meaning, remains comfortable with its acceptance of certain core assumptions and underpinnings of the liberal state and its legality. This is apparent in several respects, as identified in ongoing engagements with placement students. A non-exhaustive canvassing of a few of these may help to make the point.<sup>72</sup>

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See EP Thompson, “The Poverty of Theory or an Orrery of Errors (1978)” in EP Thompson, ed, *The Poverty of Theory and Other Essays* (Merlin Press, 1978) 96.

67. *Supra* note 8.

68. Lorne Sossin, “Experience the Future of Legal Education” (2014) 51 *Alta L Rev* 849. Entrenched to the extent that experiential education initiatives, and the emphasis on “practice readiness,” as narrowly constructed, professionalizing trends, are becoming the expected norm in legal education.

69. *Ibid.*

70. To be sure, clinical education has helped to reshape the orthodoxy—experiential education is what some call this outcome. But, the question becomes, how does one escape the prevailing sensibilities?

71. For instance, programs have emerged that carry the name “clinical” but that share little with the core sensibilities.

72. This is not a comprehensive list but rather some admittedly anecdotal personal reflections identified during my period as Academic Director, undoubtedly informed by my scattered recollections as a former placement student at PCLS nearly two decades prior. I have left a great deal of detailed reflection out. It is worth saying that I do not intend to suggest that all placement students subscribe to these views. While in certain cases they do, they also reflect considered perspectives of students themselves who have identified them as part of a critique of their fellow clinical students and others.

## A. THE “SOCIAL ORGANIZATION OF KNOWLEDGE” IN AND ABOUT LAW

The weekly seminar presents an opportunity to attend to what celebrated Marxist-Feminist scholar-activist Dorothy Smith terms the “social organization of knowledge,” in the context of law, including in stories and everyday consciousness.<sup>73</sup> It is an insight not necessarily specific to law or legal education but that, to my mind, has particular relevance to both. I have encouraged students to abide by Smith’s understanding that “to know is always to know on some terms.”<sup>74</sup> The insight invites consideration of standpoint, epistemology, ontology, and praxis—encouraging reflection on dominant and alternative ways of knowing and being in law. I (and I think they) have generally appreciated the opportunity afforded through the clinical seminar to engage these considerations while immersed in clinical practice.<sup>75</sup> In addition to what it offers in terms of reflection upon knowledge production *in* law, it opens avenues for exploring processes of production *about* law. In this latter sense, it has produced a realization that ordinary people’s experiential knowledge is considered in highly problematic ways in legal pleadings and hearings. As placement case workers, law students are called upon to “translate” personal predicament into a language of liberal legal dispute, which typically encourages the depiction of clients as people enduring miserable and crisis-ridden personal lives, never well-adjusted, always in dire circumstances.<sup>76</sup> It promotes the objectification of poor people’s experiences as the primary basis for accounting for experiential knowledge about law’s profound

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73. Dorothy E Smith, *The Conceptual Practices of Power: A Feminist Sociology of Knowledge* (Northeastern University Press, 1990) at 62.

74. *Ibid* at 40; Dorothy E Smith, *Institutional Ethnography: A Sociology for People* (AltaMira Press, 2005). For a sophisticated deployment of Smith’s rich ideas, see Himani Bannerji, *Thinking Through: Essays on Feminism, Marxism, and Anti-Racism* (Women’s Press, 1995).

75. There is an intriguing but seemingly under-explored parallel between clinical praxis and qualitative research which finds its expression during regular in-class discussions and student research projects (*i.e.*, a final research paper produced to draw on a student’s placement experience). That said, anecdotally, I have found that university-level research ethics approval processes do not sufficiently contemplate the unique position of clinical students as legal practitioners and researchers situated within social context.

76. Sarah Buhler, “Troubled Feelings: Moral Anger and Clinical Legal Education” (2014) 37 Dal LJ 397; Sarah Buhler, “Painful Injustices: Encountering Social Suffering in Clinical Legal Education” (2013) 19 Clinical L Rev 405. Buhler’s thoughtful consideration of the relationship between law and emotions contests the privileging of dispassionate engagements in liberal law. Students in the academic seminar regularly raised concerns about their role in the “performance of trauma” of their clients, as several students put it. Others objected to the claimed objectivity embedded in case file-based storytelling and narrative construction in legal pleadings.

impacts.<sup>77</sup> It is an illustration that everyday knowledge production in clinical practice remains largely under-problematized and under-theorized.<sup>78</sup>

## B. (REGNANT) LAWYERING AS FRAME

Why is lawyering the accepted frame of reference for teaching and engaging in poverty law? While the limits of legal professionalism are well-rehearsed,<sup>79</sup> and may even have registered within certain parts of the legal clinic system, the critique appears not to capture the full extent of the limitations of lawyering as a frame. Wexler, Tremblay, and countless others have questioned the approach and underlying commitments of status quo or “regnant” lawyering, positing a reframing around a range of alternatives including “rebellious,” “social justice,” and “community” lawyering.<sup>80</sup> While the extent to which clinical education privileges regnant lawyering remains an ongoing debate, what is not contentious

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77. The established refrain that poor people experience different legal problems than non-poor people can be taken as a claim of exceptionalism.
78. Consider how one would distinguish between the teaching, learning, and law practice dimensions of clinical legal education. With respect to the relations of pedagogical instruction, certain questions are raised. Who teaches and learns from whom? How do each of these occur and on what terms? In what contexts do teaching and learning occur and how do we account for the role of context? It is not meant as a way to enforce a distinction between the course instructor, clinical practitioners, and administrative support staff. Indeed, we begin to see the emergence of a tension between the ways in which academic teaching and learning are associated with instructor and professional law and legal practice—enforced through a division of labour. Instruction flows not just from the course instructor, in the clinical context, but from supervisory staff through the production of practice-oriented knowledge. Teaching and learning remain compartmentalized such that the classroom encounter is privileged and even fetishized as the site of academic knowledge. A sharp distinction between the academic and the real is readily enforced. Supervisory staff are not always recognized for their role in teaching, and, in turn, organizational divisions of labour are treated as the unquestioned basis of authority. This serves to carry over hierarchies of power into teaching. The authority and directional flow of knowledge production also fail to be problematized. Community members are regarded as clients, not as capable knowledge contributors or producers.
79. Constance Backhouse has argued that the “very concept of ‘professionalism’ has been inextricably linked...to masculinity, whiteness, class privilege, and Protestantism.” See “Gender and Race in the Construction of ‘Legal Professionalism’: Historical Perspectives” (First Colloquium on the Legal Profession, Faculty of Law, University of Western Ontario, 20 October 2003) at 3. See also Michael D Ornstein, *Racialization and Gender of Lawyers in Ontario: A Report for the Law Society of Upper Canada* (LSUC, April 2010).
80. Wexler, *supra* note 26; Paul R Tremblay, “Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy” (1992) 43 *Hastings LJ* 947.

is that a notion of lawyering continues to anchor the clinical educational project.<sup>81</sup> How might we invite consideration of alternative assumptions and framings that emphasize social justice advocacy while de-emphasizing, if not doing away with, staid lawyerly commitments?<sup>82</sup> The appeal of such an alternative is that it de-centres jurists as primary knowledge producers, but if it runs into the assumptions and commitments embedded within legal educational orthodoxy, can it still be characterized as “legal education?” Or to put it differently, can law schools only produce “lawyers?”

### C. LAW’S ROLE IN SOCIAL CHANGE

The place of law in agendas of social change has received considerable attention. What theory of the role of state law in transformative social change does clinical

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81. The earliest academic course work for clinic students congealed around pedagogical treatment of lawyering as process. Zemans, *supra* note 34. See also Ron Ellis, “The Ellis Archives—1972 to 1981: An Early View from the Parkdale Trenches” (1997) 35 Osgoode Hall LJ 536; Gavigan, *supra* note 8. I draw on social movement conceptualizations of advocacy, anchored in overlapping modes of solidarity related to decolonization, abolitionism, and “internationalism from below,” below.

82. For instance, clinical law professor Lucie White once posed the following set of prescient questions in “The Transformative Potential of Clinical Legal Education” (1997) 35 Osgoode Hall LJ 603 at 609:

[H]ow much potential do we really have to change ourselves—the profession and the pedagogy of lawyering—before we cease to be lawyers in any common sense meaning of the term? We can only address that question as we work to stretch the boundaries of the lawyer role through new, less lawyer-dominated advocacy practices. Second, as a practical matter, how do we find time for self-transformation amid the pressing demands of our day to day work? And how do we motivate our students to challenge the lawyer’s traditional privilege, just as they are beginning to enjoy it? And third, why should we bother taking the challenge of self-transformation seriously? Why should we worry over the ethical questions that are embedded in our claim to transform others? Why should we seek to change our own self-concepts and modes of practice? Why not just get on with the urgent work of helping the poor?

practice promote, and what are the assumptions about knowledge production embedded in that theory?<sup>83</sup>

To the extent that law is treated uncritically as an instrument of social change, without regard to how it is actively engaged to inhibit such change, the concern is that sovereign state authority is permitted to exist on unproblematic and even privileged terms. It functions in a state of impunity, which is most evident in the range of orthodox “lawyering” practices that placement students are typically called upon to carry out. These practices exhibit a certain deference to the sensibilities of liberal legality, such as in the form of liberal humanitarianism and related tropes of state nationalism. The territorial state’s authority to constitute the national community is taken for granted, even though it is, as I argue below, the very basis of the problems we have come to refer to as poverty law.

These admittedly brief reflections, taken along with the emergence of clinical legal education and interventions like Wexler’s and Imai’s in support of a clinical counter-pedagogy, are indicative of pedagogical commitments critical of the status quo. Yet teaching, learning, and praxis in clinical legal contexts continue to carry certain key values of orthodox legal education. It is this concern that informs my claim that clinical pedagogy is seemingly referential to legal educational orthodoxy, in part stemming from, but not reducible to, legal education orthodoxy’s prevailing institutional location and configuration; but it need not continue to develop in deference to it. To the extent that it is deferential (and I would suggest that it largely is), it runs counter to the normative project of supporting the production of a vision of contesting existing systemic injustices and an envisioning of alternative social worlds. Though my reflections raise several concerns, these congeal around a failure to forcefully interrogate state power. Not fully contemplated in clinical pedagogy, I surmise, is the need for an account of national state authority. Central to that account is the constitution of the

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83. *Ibid.* The question conforms with, as White put it, a “challenge to our own legitimacy as the agents of other people’s transformation” (*ibid* at 609). White asks:

Can we, as progressive clinicians, transform who we are, how we see ourselves, what we do—our own practices—so as to open those practices to the knowledge, power, and human agency of the people with whom we work? Do we as clinical legal educators have any potential to deprivilege our own self-concepts, routines, and institutions, in the interest of a more collaborative practice of advocacy toward social justice?

In terming transformative interests as “vanguardist pretensions,” White expressly aligns with what she identifies as postmodernist legal and political thought and leadership—pointing to the likes of Boaventura de Sousa Santos, Michel Foucault, and Nelson Mandela. According to White, a transformative agenda “replicates” the subordination of poor people “to the world-making power of the elites who dominate their lives.” See *ibid* at 608-610.

national community, on the stratified terms of poverty and oppression, through statutory regimes like legal aid. These regimes, which emerge out of and articulate through foundational structural relations of settler and capitalist imperialism, produce and enforce the systemic social injustices that legal clinics are tasked with addressing. I turn now to explore the authority of the settler-imperialist capitalist state through the register of visibility.

## V. VISUALITY AND A CLINICAL COUNTER-PEDAGOGY

That clinical law's pedagogy of seeing takes legal educational orthodoxy as referent is neither a surprise nor is it necessarily problematic. It is the deference shown towards legal educational orthodoxy that raises grave concern. Through its deference, clinical pedagogy adheres to a deeply troubling conception of political-legal authority that undermines the development and prioritization of an alternative. This alternative is something I refer to as an emancipatory set of pedagogical commitments—derived through a mode of looking. Legal educational orthodoxy, I assert, is shaped through liberal state power, which is indispensable to the production of law as an academic discipline (Law) and as sets of practices of administration and enforcement. State authority infuses the discipline, structuring subjects, objects, and categories, setting parameters on what passes as “law” and what constitutes appropriate behaviour in law, but not without struggle.<sup>84</sup> Prevailing social relations of knowledge production in and about law are therefore enconced in state authority and practices. From this perspective, appreciating how and what the state sees becomes a necessary feature of a clinical legal counter-pedagogy.<sup>85</sup> I turn to visibility—or, more properly,

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84. Boundaries are stretched and blurred, ideas and concepts revised, sensibilities shifted, and practices reconsidered; reform is the outcome. If this evidence of struggle over disciplinarity signifies anything, it is that, to the extent that we can be seen collectively, legal scholars show a real spatial ingenuity in terms of moving around “the problem”—*the* problem of the socially and ecologically destructive nature of capitalist relations—without necessarily addressing root causes. There is a sense that we as scholars are always and forever re-disciplining. The particular nature of legal disciplinary engagements is so modest, so measured, so sensible, and practical that modesty, judiciousness, sensibility, and practicality form the sensibilities through which accepted debate is permitted to occur.

85. Is seeing like a clinic akin to seeing like the state? Not necessarily, although a recurring preoccupation—one might even say anxiety—of distinct cohorts of PCLS students is about placement work vis-à-vis the work of the state. Students regularly express discomfort about this relationship, ranging from mild concern to expressions of guilt.

a critique of it—to reorient the development of a counter-pedagogy alive to the liberal state’s ways of seeing.<sup>86</sup>

A consideration of visibility is meant to account for the aestheticized role of the state in fashioning the socio-spatial order of the national community. It carries with it a concern for how authority is constituted. Visibility, taken in this light, is a means to produce, represent, and naturalize state power foundational to the production of order.<sup>87</sup> It is a mechanism for concealment of “the inherent violence of states in a vocabulary that leaves intact the very logics, infrastructures and institutions necessary for the violence to occur in the first place.”<sup>88</sup> Visibility is the rendering of the “quotidian violence underwriting authority [as] illegible and un-seeable.”<sup>89</sup> State reliance on classificatory devices such as the census and the grid, following Benedict Anderson’s pathbreaking account, empowered the production of the “imagined communities” of nationality and supported their global proliferation.<sup>90</sup> Cartography, which constituted a space-defining “factual science” of the territorial state, utilized the map as an instrument of power through which the European state could invent boundaries and borders.<sup>91</sup> The passport would come to serve an analogous purpose.<sup>92</sup> Through these and other devices, the state bolstered its authority “to say of anything that it was this, not that; it belonged here, not there.”<sup>93</sup>

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86. I am borrowing loosely from Mirzoeff’s account, though I have not sought to maintain complete congruence. Visibility, as Mirzoeff tells us, “is not a trendy theory word meaning the totality of all visual images and devices” but rather is “an early-nineteenth-century term meaning the visualization of history.” See Mirzoeff, *supra* note 14 at 2. Here, I use it to capture the visualization of the history of political-legal or liberal state authority.
87. This occurs through what Mark Neocleous now refers to as police power, understood as wide-ranging powers through which social order is produced and subjectivities constituted. It is structural power tied to visibility. See *The Fabrication of Social Order: A Critical Theory of Police Power* (Pluto Press, 2000) [Neocleous, *Fabrication*].
88. Judah Schept, “Visibility and Criminology” in *Oxford Research Encyclopedia of Crime, Media, and Popular Culture* (Oxford University Press, 2016). For insights on social order, see Neocleous, *Fabrication*, *supra* note 87.
89. Schept, *supra* note 88.
90. Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1991).
91. Neocleous, *Imagining the State*, *supra* note 17 at 119. The map served as “part of the totalizing classificatory grid” utilized by the state to “stabilize” and enforce order and apprehend civil society. See *ibid* at 121.
92. See e.g. John C Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge University Press, 2000).
93. Anderson, *supra* note 90 at 184.

Ultimately, therefore, visibility captures the general development and expansion of state authority. It marks the attempted creation of “a terrain and a population with precisely those standardized characteristics that will be easiest to monitor, count, assess, and manage.”<sup>94</sup> To see like a modern state, suggests James Scott, is to engage in techniques of legibility and simplification in relation to a population and social life.<sup>95</sup> It is to render subjects and social differences legible and simple—to produce a “common standard necessary for a synoptic view”<sup>96</sup>—in service of sovereign authority. These techniques reversed the premodern state’s lack of “a measure, a metric.”<sup>97</sup>

Visibility is reliant upon the production or assemblage of legitimacy and consent, which occur as the basis of liberal order.<sup>98</sup> But to refer to legitimacy and consent, and to ground the account in visibility more broadly, is not to disregard the contested nature of the process of order making. Social struggles are an enduring feature of a liberal capitalist order. Violence is endemic to liberalism. In the production of “order-in-and-through-disorder,” violence is rendered

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94. Scott, *supra* note 21 at 81-82.

95. For a recent critical take on the application of Scott’s method in law and development, see Fleur Johns, “From Planning to Prototypes: New Ways of Seeing Like a State” (2019) 82 *Mod L Rev* 833. For a critique in the context of urban governance, see Mariana Valverde, “Seeing Like A City: The Dialectic of Modern and Premodern Ways of Seeing in Urban Governance” (2011) 45 *Law & Soc’y Rev* 277.

96. Scott, *supra* note 21 at 2. The techniques of legibility and simplification gain authority through an appeal to scientific rationality and, due to their authoritative nature, fall on the law-administration continuum or as an aspect of police power, to follow Neocleous’s account.

97. *Ibid.* Scott contends that the development of these techniques, in planning, statistics, engineering, and elsewhere, occurred at the expense of local and practical knowledge or what he terms “*métis*.”

98. Schept, *supra* note 88; Nicholas Mirzoeff, “The Right to Look” (2011) 37 *Critical Inquiry* 473 [Mirzoeff, “The Right to Look”]; Mirzoeff, *supra* note 14. In teasing out how social order is made and remade, there is a concern that a singular focus on order disregards the persistence of disorder. The understanding is borne out of a refusal to uphold a binary distinction between order and disorder of social relations. Disorder is not “synonymous with an absence of order” but rather, to employ Anwar Shaikh’s framing, “the resulting systemic order is generated in-and-through continual disorder.” Disorder, as Shaikh asserts, is an “immanent mechanism” of order. See Anwar Shaikh, *Capitalism: Competition, Conflict, Crises* (Oxford University Press, 2016) at 5. The approach marks an acknowledgment of disorder as formative to visibility, whether through the devices mentioned in text, through institutional forms like prisons, or through other methods of capture. These capturing methods, simplifications of coding and statistical counting, and a range of modes of surveillance function under the guise of liberal security, as Neocleous and others indicate.

necessary to enforce the state's "self-authorizing of authority."<sup>99</sup> Because of its need for violence to secure and maintain authority, the state resorts to visuality as a supplement to render its authority "self-evident."<sup>100</sup>

The nature of visuality can be further specified through reference to the development of the capitalist state in contemporary Canada. We can observe the process of visuality in two overarching and interlocking "ocular logics" and material relations: settler and imperialist.<sup>101</sup> Settler visuality emerges through the need to secure the means for accumulation organized through extractivism.<sup>102</sup> The foundational project of settler displacement and dispossession serves as a basis for ongoing capitalist accumulation on "home" territory. In this we find the "state's grounds to inaugurate law on land acquired through colonial settlement" in its claiming of jurisdiction or rightful authority.<sup>103</sup> That project extends into the conditions and relations of poverty produced through racialized and gendered, among other oppressive class dynamics. Imperialist visuality stems from the contradictory nature of the state's national form and capital's persistent tendency towards world market development.<sup>104</sup> On each of these logics, the modern state functions as a nationally-inscribed territorialized authority to enforce an inward imposition of a liberal order at the behest of Indigenous peoples through differential structural relations of non-Indigenous peoples, and projects outwardly in support of capitalist accumulation strategies on peoples and territories abroad. Politically, the national constitution, the character of the state, and the internationalizing tendency of capital converge within state

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99. Mirzoeff, "The Right to Look," *supra* note 98 at 480.

100. *Ibid.*

101. This includes the material relations and logics of state authority, and intertwined articulations or branches of settler colonialism and capitalist imperialism.

102. See *e.g.* Coulthard, *supra* note 18; Tia Dafnos, "Pacification and Indigenous Struggles in Canada" (2013) 9 *Socialist Studies* 57; Shiri Pasternak, *Governing Authority: The Algonquins of Barriere Lake Against the State* (University of Minnesota Press, 2017).

103. Shiri Pasternak, "Jurisdiction and Settler Colonialism: Where Do Laws Meet" (2014) 29 *CJLS* 145 at 145.

104. See *e.g.* Gordon, *supra* note 15; Gordon & Webber, *supra* note 15; Adrian A Smith, "Troubling 'Project Canada': The Caribbean and the Making of 'Unfree Migrant Labor'" 40 *Can J Latin American & Caribbean Studies* 275.

authority as projected through national bordering practices.<sup>105</sup> Settlement and imperial domination are the specific modalities of the visibility of the Canadian state that clinical pedagogy must confront.

## VI. THE VISUALITY OF STATE POWER IN COMMUNITY CLINICS

I turn now to consider visibility in Ontario's statutorily-enforced legal aid regime.<sup>106</sup> It is through this regime that the provision of legal services to poor people and their communities is sanctioned. How precisely does the visibility of the Canadian state impact the legal aid governance of community legal clinics? Legal aid is provincially-mandated support for the provision of legal services to low-income residents. Administered through LAO, an arm's length agency of the provincial government, legal services are delivered in three core ways, with clinic services forming the most important for our purposes.<sup>107</sup> Meaningful critique of the governing regime must begin with clear recognition of its inbuilt limitations. It is a regime widely deemed to suffer from considerable and severe deficiencies,

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105. Generally stated, liberalism is the default political mode of the Canadian state. The structure of the liberal state emerged out of the struggle over processes of visibility and the state's general thrust to capture a population and impose order through repressive enforcement of law. However, the historical contingency of that struggle is shaped by the state's liberalized formation or default form. The liberal foundations of the Canadian state—the state–civil society separation governed by the rule of law as expressed through liberal constitutionalism and filtered through statutory and common law—pushes struggle into a nationally-bounded form. Yet the essential relations of private property and contract, and credit, breach national boundedness and so capitalists, motivated by worldwide market development, are not necessarily constrained by the state's national form.

106. *Legal Aid Services Act*, RSO 1998, c 26 [*LASA*]. The Doug Ford regime passed new legislation governing legal aid in the province in the spring of 2020. See *Legal Aid Services Act, 2020*, RSO 2020, c 11 [*LASA II*]. Proposed in late 2019, and momentarily delayed during the COVID-19 pandemic in early 2020, *LASA II* came into force in October 2021. Among other changes, the new statutory regime grants LAO the authority to renegotiate agreements with individual community clinics. For criticisms see Mosher et al, *supra* note 12; Gallant, "Ford government," *supra* note 12. For more general criticisms surrounding the project, see e.g. Gallant, "Sweeping Cuts," *supra* note 11.

107. Clinics are recognized as "the foundation for the provision of legal aid services in the area of clinic law." See *LASA*, *supra* note 106, s 14(3). Legal aid certificates and duty counsel are the other two forms of legal aid in Ontario. *LASA*'s mandate is organized around "clinic law," defined as the areas of law that particularly affect low-income individuals or disadvantaged communities. This includes legal matters related to: (1) housing and shelter, income maintenance, social assistance, and other similar government programs; and (2) human rights, health, employment, and education.

yet still relentlessly fought for by staff, current and former students, community members, and others.<sup>108</sup> Indeed it has been through these struggles that the legal aid regime has provided a modicum of support for a marginalized segment of the province's working class.

From what sources do clinics derive their authority to act in the world—*i.e.*, to take legal action, intervene in disputes, and teach students? *LASA* is the enabling legislation of the clinic system. As a statutory regime tasked with governing the allocation of poverty law services, *LASA* provides a clear legal aid mandate. Three core characteristics or principles of the legal aid model are identified.<sup>109</sup> First, the model preserves the independence of community clinics from the provincial government and funders.<sup>110</sup> LAO provides primary

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108. I intervene not to question the persistence of the struggle, nor should my intervention be misconstrued as an *ad hominem* attack on any given set of people within the clinic system. It is instead a critique operating at a rather general level of abstraction sufficient to capture and consider the place of PCLS in the social world, with a view to reorienting it in terms of location and requisite commitments. I gesture towards ways in which this might be carried out. The intervention relies upon a skeletal critique of the political economy of social welfare provisioning in capitalist societies, paying special attention to how claims of scarcity are deployed as a political-legal mechanism utilized to delimit social welfare or resource allocation. It implicitly rejects the production of scarcity or “fixed resources” in the ongoing practices of Ontario’s provincial government. See McCamus et al, *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services* (Ontario Legal Aid Review, 1997) at 67. “[T]he problem of priority-setting for legal aid in the context of fixed resources requires consideration of some fundamental questions of public policy.” See Mossman et al, “Comparing and Understanding Legal Aid Priorities: A Paper Prepared for Legal Aid Ontario” (2010) 29 Windsor Rev Legal & Soc Issues 149 at 150-51. For a recent discussion on the political dimensions of scarcity, see Nicholas Hildyard, “Scarcity, ‘Polite Society’ and Activism” (2019) 101 Geoforum 294. A critique of scarcity is also pertinent for the divisional work undertaken at PCLS, whether in terms of tenancy and the discourse of absence of affordable housing, labour markets and the absence of decent work, the allocation of residency status, or the provisioning of social assistance and disability support payments.
109. For a discussion see Blazer, *supra* note 16; Lenny Abramowicz, “The Critical Characteristics of Community Legal Aid Clinics in Ontario” (2004) 19 J L & Soc Pol’y 70; Michael Cormier, “A Response to the Critical Characteristics of Community Legal Aid Clinics in Ontario” (2004) 19 J L & Soc Pol’y 82. See also Ministry of the Attorney General, *Legal Aid Ontario Review* (26 April 2017), online: <[www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lao\\_review](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lao_review)>.
110. On the origins of the tensions over clinical independence and legal aid funding support, including in the Osler Task Force and Grange Report, see Mossman, *supra* note 37 at 382-84. *LASA* contains a recognition of clinics and clinic law services. The legislation also includes provisions that ensure clinics are independent community-based organizations, with the right to determine the needs of their communities and the appropriate services to meet those needs, including systemic services such as law reform, community development, test cases, and public legal education.

funding for clinical services which it receives from three sources: the Ministry of the Attorney General, the Federal government, and the interest earned on lawyers' and paralegals' mixed trust accounts via the Law Foundation of Ontario. Second, the model guarantees the provision of core presumptive funding for clinics. Third, the model provides for local governance of clinics through boards of directors populated by community members. Community boards are tasked with identifying the legal needs of individuals and communities and setting the appropriate legal services to meet those needs, including systemic services such as law reform and advocacy.<sup>111</sup> The model's core principles underpin the notion of access to justice, understood as access to lawyers' services, though commentators tussle over the need to incorporate wider social justice commitments.<sup>112</sup>

Should a clinical counter-pedagogy accept that the authority of clinics derives from the governance structure set out in *LASA*? I argue for a reconsideration of clinical authority based on a reading of the visibility of state power in legal aid governance. Visibility is apparent in at least two key respects: in the constitution of community in community clinics, and in the measurement of the eligibility of prospective service users. The latter relies upon the imposition of stringent financial eligibility criteria and on methodologies utilized to rationalize the particular allocation of clinic funding.

#### A. SEEING THE "COMMUNITY" IN COMMUNITY CLINICS

At first glance, legal aid's principle of local governance appears to contradict Scott's claim that states see in ways that undermine local knowledge; however, on closer inspection, it is evident that the gesture is fleeting. The regime renders clinic staff and boards beholden to the financial support of LAO as a primary funder. This plays out through the spatial mapping of clinical boundaries. LAO's bounded conception of community is drawn along national-territorial and provincial lines, and within the latter along local community boundaries or catchment areas. LAO has found ways to redraw local boundaries to alter the number and scope of eligible users of community clinics, such as when the catchment area of

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111. For a trenchant critique of the construction of clients' legal service needs, see Tremblay, *supra* note 80.

112. Parker explains that "[t]he first wave of access to justice reform focused on increasing the availability of formal legal means of access to justice by increasing access to lawyers' services." See Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, 1999) at 31-32. For a more general account specific to Canada, see Trevor Farrow, "What is Access to Justice?" (2014) 51 Osgoode Hall LJ 957. See also Organisation for Economic Cooperation and Development, "Understanding Effective Access to Justice" (Workshop paper delivered at the OECD Conference, Paris, 3 November 2016).

PCLS expanded to incorporate the neighbouring communities of Roncesvalles and Swansea. While catchment areas have expanded, there is pressure to ensure that community clinics serve only residents of their respective catchment areas. In both respects, clinic staff are called upon to enforce catchment area—among other forms of—residency requirements. Boundary enforcement is performed by clinical frontline workers, including placement students.

## B. “POOR PEOPLE DON’T COUNT”<sup>113</sup>

The emergence and development of community clinics are contingent on a range of classificatory devices of state visibility. In addition to mapping, empirical measurements of poverty, inequality, marginalization, and exclusion are central features of provincial public policy. In the context of legal aid, it provides a cogent illustration of visibility.<sup>114</sup> LAO engages in the implementation of metrics for the stated purposes of tailoring public policy to redress income disparities. Describing its mandate as the provision of “legal help” to “financially eligible low-income” people, LAO employs a “financial eligibility test” to determine whether a prospective client qualifies based on the nature, income, and assets of the person’s family unit.<sup>115</sup> A cut-off threshold is imposed above which legal aid services typically are not provided.

LAO utilizes the Low-Income Measure (LIM), which is a relative measure at the level of the household calculated by taking half of the median adjusted or equivalent household income. Households that fall below the median are considered low income. The measure is used to determine the allocation of funding to clinics.<sup>116</sup> It is generally applied across the province without consideration of relative differences in the cost of living. LAO has faced censure on two occasions

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113. The phrase, “poor people don’t count,” may come from James Galbraith, cited in David Schweickart, “How Rethinking Capitalism May Save the Planet” (4 April 2019) at 00h:17m:05s, online (podcast): *CBC Ideas* <<https://www.cbc.ca/radio/ideas/how-rethinking-capitalism-may-save-the-planet-1.5084547>>.

114. Luann Good Gingrich & Naomi Lightman, “The Empirical Measurement of a Theoretical Concept: Tracing Social Exclusion among Racial Minority and Migrant Groups in Canada” (2015) 3 *Soc Inclusion* 98.

115. Legal Aid Ontario, “Legal Aid Ontario’s Financial Eligibility Guidelines” (November 2016), online: <[www.legalaid.on.ca/more/corporate/about-lao-landing-page/legal-aid-ontarios-financial-eligibility-guidelines](http://www.legalaid.on.ca/more/corporate/about-lao-landing-page/legal-aid-ontarios-financial-eligibility-guidelines)>.

116. Between 2016 and 2017, the highest-funded clinic in Ontario received \$145 per low-income person in its catchment area, compared with eleven dollars per low-income person for the lowest-funded clinic. Office of the Auditor General of Ontario, “2018 Annual Report” (5 December 2018), online (pdf): <[www.auditor.on.ca/en/content/annualreports/arreports/en18/v1\\_305en18.pdf](http://www.auditor.on.ca/en/content/annualreports/arreports/en18/v1_305en18.pdf)>.

from the Auditor General, in December 2011 and reiterated in December 2018, for the dismal standard of support issued through the financial eligibility guidelines.<sup>117</sup> The inadequacy of existing metrics in terms of accounting for the value of community organizing is also deeply concerning, especially to a clinic like PCLS, which expresses a longstanding commitment to organizing.<sup>118</sup> The contestation over metrics carried into the most recent round of legal aid cuts in which PCLS suffered a massive budget reduction, though this was partially rolled back on a reconsideration of an LAO committee. Critics point to the devaluation of organizing work as evidence of the inadequacy of existing metrics.

Though one must concede that certain social justice claims are made in support of notions of measurement,<sup>119</sup> a great deal of concern should surround the visibility of state power in legal aid metrics. Counting “the poor” as a homogenous and indivisible grouping encourages objectification and ultimately discounts the rich texture of poor people’s lives and struggles.<sup>120</sup> Further, it is through these modes of measurement that state visibility is produced and bolstered. There is a

117. It is worth noting that government financial support for legal aid in Ontario has been mostly stagnant or declining in recent decades, though modest provincial increases have occurred more recently. This helps to explain these problematic financial eligibility guidelines. See Frederick Zemans & Justin Amaral, “A Current Assessment of Legal Aid in Ontario” (2018) 29 *J L & Soc Pol’y* 1.

118. One concern about producing community work metrics is that it renders clinical legal service work “transactional.” The metrification of community work also undermines a key social movement insight: that success is a contingent value and that failure is common. See *e.g.* Choudry, *supra* note 18; Frances Fox Piven & Richard A Cloward, *Poor People’s Movements: Why They Succeed and How They Fail* (Vintage Books, 1979).

119. For instance, in certain circles measurement equates to accountability and has been elevated to a level approaching a legal right—the right to be measured, perhaps. The concept of “right” claims both recognition and representation, which are seen to either bolster or displace redistributive claims. Lenin once remarked that “[i]n capitalist society, statistics were entirely a matter for ‘government servants’, or for narrow specialists; we must carry statistics to the people and make them popular.” V I Lenin, *Collected Works*, 4th ed, vol 27 (Progress, 1972) 235, online: *Marxists Internet Archive* <[www.marxists.org/archive/lenin/works/1918/mar/x03.htm](http://www.marxists.org/archive/lenin/works/1918/mar/x03.htm)>. This view can be taken with the dictum—often attributed to Albert Einstein but in fact from sociologist William Bruce Cameron—that “not everything that can be counted counts, and not everything that counts can be counted.” William Bruce Cameron, *Informal Sociology: A Casual Introduction to Sociological Thinking* (Random House, 1963) at 29. For an intervention on quantification and measurement in the project(s) of international development, see Ruth Buchanan, Kimberley Byers & Kristina Mansveld, “‘What Gets Measured Gets Done’: Exploring the Social Construction of Globalized Knowledge for Development” in Moshe Hirsch & Andrew Lang, eds, *Research Handbook on the Sociology of International Law* (Edward Elgar, 2018).

120. For a critique of the framing “the poor,” see Hermer & Mosher, *supra* note 54.

way in which poor people—*qua* “the poor”—become object or thing in law more generally. This objectification—“thingification” in Marx’s words—emerges as an expression of state visibility.<sup>121</sup> And, when one must appeal to those methods to secure an existence—for communities the means of survival, for clinics the means of continued existence—it seems quite troublesome to not interrogate state power and its infusion in *LASA* and liberal state law generally. This analysis points towards a rejection of the state’s inauguration of clinical authority. But if not from *LASA*, then from where should clinics claim authority?<sup>122</sup>

## VII. POOR PEOPLE ARE SHARP LEGAL THINGS

There is a need to reorient clinical pedagogy with a view to the infusion of state power in knowledge production in and about law. An alternative pedagogy must properly account for the situated knowledge of poor and marginalized peoples and communities. The task is to contextualize understandings of the social world not by seeing law in action as it works to pacify ordinary people, including by deeply constraining collective action, but by looking through the socio-spatial order imposed by the settler and imperialist state.

A task of an alternative clinical pedagogy is to re-situate all involved to appreciate the visibility of poverty law.<sup>123</sup> This should occur by transforming clinical teaching, learning, and praxis through an emancipatory politics not beholden to the authority of the state and its law. My intention is to encourage an alternative pedagogy motivated by an emancipatory praxis. It is a praxis not of saving the poverty law regime, but of constant struggle against sovereign state authority rooted in the creative capacities and self-organizing activities—and ultimately what Robin Kelley terms the “freedom dreams”<sup>124</sup>—of poor and otherwise oppressed communities.

My argument here does not strive to question the strategic decision to utilize or defend poverty law. Wexler’s insight, that sharp legal things search out poor

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121. See Karl Marx, *Capital: A Critique of Political Economy Volume 1*, translated by Samuel Moore & Edward Aveling (Progress, 1887).

122. Clinical legal education is not given serious attention in *LASA*. Clinical teaching occurs through partnerships between respective legal clinics and law schools and faculties. In the case of PCLS, the Osgoode Hall partnership is organized through a Memorandum of Understanding.

123. In this respect, we might say that poverty law superintends the making of capitalist order. Scarcity is one of the defining ways in which this occurs.

124. Robin D G Kelley, *Freedom Dreams: The Black Radical Imagination* (Beacon Press, 2002).

people,<sup>125</sup> is indicative of the fact that the liberal state necessarily resorts to law's violence to secure its authority. Yet even as they try, people subjected to poverty law have not yet escaped state law in their everyday struggles. My claim is that the underlying social relations of poverty face little in the way of reckoning. Poverty law should be regarded as another way of characterizing the valence and nature of state power. It stands for the regressive apparatus which communities have fought and, normatively speaking, not the thing(s) that people fight for. What people fight for is but a dream. In other words, poor people do not just bump into law's protracted form; "law" and "legality" are defined in direct relation to poor people. And while law's violence is certainly protracted, it is not just law: Poor people are sharp legal things too. Poor people find their own ways to fight back, to fashion a legal consciousness developed through concerted and sustained resistance. Their knowledge about law, informed by everyday lives subjected to law's violence, can no longer be displaced by knowledge in law.

The struggles of poor and otherwise oppressed people can underpin an alternative clinical pedagogy. It is an agenda rooted in social movements, understood as the creative capacities and self-organizing activities of poor and oppressed communities. It is through these capacities and activities self-reflexively pursued that social movements gain authority. Knowledge production embedded within social movements in action must inform an alternative clinical pedagogy. It is the way through which we can contest and re-envision nationally-inscribed settler and imperialist compositions of community belonging.<sup>126</sup> The perceptible challenge of clinical legal education—and all legal education for that matter—is ultimately not to see like the settler and imperialist state, but to look through its persistent and reckless reproduction of poverty and marginalization as a basis of liberal legal order. This requires one to contest visibility to claim what one scholar terms "a right to look," understood as an assertion of autonomy and rupturing of the self-evidence of settler-imperialist sovereign authority.<sup>127</sup> It shuns the voyeuristic nature of seeing, claiming instead authority as self-reflexively derived by and within social movements. This is done on their own terms and not

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125. Wexler, "Practicing," *supra* note 26 at 1050.

126. For longstanding examples characterized as the pursuit of "internationalism from below," see David Featherstone, *Solidarity: Hidden Histories and Geographies of Internationalism* (Zed Books, 2012).

127. Mirzoeff, *supra* note 14 at 1. Here "right" does not signify "liberal right," and thus the framing sidesteps well-rehearsed controversies surrounding rights and liberalism. For a recent critique of rights, see Radha D'Souza, *What's Wrong with Rights: Social Movements, Law and Liberal Imaginations* (Pluto Press, 2018).

that of the settler and imperialist capitalist state. In short, what is needed is a counter-visuality for an alternative pedagogy.

## VIII. FROM SEEING TO LOOKING AS PEDAGOGY

Imagination is more important than knowledge. For knowledge is limited, whereas imagination embraces the entire *world*....It is, strictly speaking, a real factor in scientific research.<sup>128</sup>

With some liberties, we might see that Einstein is right: We do not need more of the same in terms of legal knowledge production—we need a transformative global legal imaginary. But how and on what terms? One way forward turns on a critique of the disciplining of law as a professional enterprise devoid of defensible normative commitments. Orthodox legal education readily references the authority of the national state and capital in settler and imperialist formations.<sup>129</sup> Legal clinics like PCLS need not be accepted as a “mere adjunct to the state.”<sup>130</sup> They must be situated within a global clinical movement through the development of an appropriately robust and unbounded praxis of self and social emancipation.<sup>131</sup> A key task should be to force a “systematic dislocation” between clinical legal education and orthodox legal education. Pedagogical attentiveness to the social whole may offer opportunities to pursue such a dislocation.<sup>132</sup> A political economy of law approach—or what elsewhere I refer to as critique of political economy<sup>133</sup>—presents a viable way forward which rests not on reducing law to social context, subtext, or even text, but on appreciating law as a social process and relations of a nationally-inflected global legal order, namely a global legal regime of poverty.

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128. Albert Einstein, *Einstein on Cosmic Religion and Other Opinions and Aphorisms* (Dover, 2009) at 97, cited in Stephen Gill, *Critical Perspectives on the Crisis of Global Governance: Reimagining the Future* (Palgrave Macmillan, 2015) at xiv.

129. Stated differently, professional legal knowledge is a commodity indebted to police power.

130. Jamie Cassels & Maureen Mahoney, “Critical Legal Education: Paralysis with a Purpose” (1989) 4 *Can J L & Soc’y* 99 at 125.

131. Frank S Bloch, *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011); CLEPR Special Issue, *supra* note 45; Richard J Wilson, *The Global Evolution of Clinical Legal Education: More Than a Method* (Cambridge University Press, 2018); Gavigan, *supra* note 8.

132. Adrian A Smith, “Bordering on Racism: Police Power and the ‘Fugitive Movement’ of Unfree Migrant Labour” [on file with author].

133. See Adrian A Smith, “Toward a Critique of Political Economy of ‘Sociolegality’ in Settler Capitalist Canada” in Mark Thomas et al, eds, *Change and Continuity: Canadian Political Economy in the New Millennium* (McGill-Queen’s University Press, 2019).

An analogous refrain is echoed in a critique of contemporary economics.<sup>134</sup> Susan Buck-Morss complains about the disappearance of the social whole in the professionalization of economics as “science.” For Buck-Morss, “[t]he image prototypical of this vision is the supply-demand curve” in which “quantitative measurement was the criterion of scientific knowledge.<sup>135</sup> Buck-Morss continues in terms broadly applicable to the argument advanced herein:<sup>136</sup>

Why is it, today, that theory generally shirks the challenge of envisioning the social whole? Is it the taboo against “totalizing” discourses? If so, it might be noted that the global system will not go away simply because we theorists refuse to speak about it.

Although Buck-Morss termed her account “Envisioning Capital”, in light of what I have argued, we might more properly view it as a visioning and envisioning of the end of capital and the state. It is a visioning and envisioning not on behalf of global capital performed through the national state, which offers nothing more than a debased and regressive conception of national community and belonging. Rather, though there is real complexity to the task, we might see it as a way of looking at and through the social worlds created by the legal regime of poverty.<sup>137</sup> Essential to such an outlook are counter-pedagogical commitments of an open-ended nature, unafraid to imagine and embrace the entire world, unwilling to shirk the challenge of visioning and envisioning the social whole.

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134. Susan Buck-Morss, “Envisioning Capital: Political Economy on Display” (1995) 21 *Critical Inquiry* 434 at 460-61. Buck-Morss chastises the professionalization of western economic thought with the introduction of neoclassical economics:

The attempt to purge the “science” of economics from such concerns about normative values marks the deepest epistemological break between the classical economists of the late eighteenth century and the neoclassical economists at the nineteenth century’s close...[e]conomic theory is now concerned with the far narrower task of describing “laws” that account for regularities of market behaviour as a self-interested rationality of means, while it remains totally indifferent to the normative questions about the reasonableness of individual motives or the substantive rationality of social ends.

135. *Ibid* at 463 [emphasis in original]. Buck-Morss explains further:

Neoclassical economics is microeconomics. Minimalism is characteristic of its visual display. In the crossing of the supply-demand curve, none of the substantive problems of political economy are resolved, while the social whole simply disappears from sight. Once this happens, critical reflection on the exogenous conditions of a “given” market situation becomes impossible, and the *philosophy* of political economy becomes so theoretically impoverished that it can be said to come to an end.

136. *Ibid* at 466-67 [emphasis added].

137. For instance, commercial landlords, gig economy employers, and social assistance and immigration status purveyors, among others, give off visual cues and displays of visibility.

## IX. CONCLUSION

Knowledge is useless unless it assists us to question habits, social practices, institutions, ideologies and the state. This questioning cannot end even when victories are won.<sup>138</sup>

In attending to clinical law's teaching, learning, and praxis, the article has considered the pedagogy of seeing that is prevalent in a poverty law program like the storied Poverty Law Intensive located in Toronto's Parkdale neighbourhood. Taking as a point of departure the widely shared commitment to an engaged-contextualist approach to seeing law in action, I question the failure to fully contemplate the intimate relationship to national state authority as it informs the production of clinical and orthodox legal pedagogical commitments. The Canadian state's law schools and faculties need not do the bidding of the national state, yet they seemingly do. This is, of course, not without struggle. But as an institutional expression of the social organization of knowledge, law schools in Canada and their legal educational orthodoxy are beholden to the visual authority of the state, too readily acquiescing to dominant ways of seeing, including the state's categories and practices, which are foundational to the production of the socio-spatial order that constitutes a profoundly unequal and exclusionary national community. This should be deeply regrettable, if not deplorable.

Visuality marks the ongoing history of state power presented in the register of the visual. It is not reducible to what is seen but instead is concerned with the ways in which power is projected. Projections of state power can occur in the most mundane of ways, as evidenced by Ontario's legal aid regime. And if the dictum attributed to E P Thompson is correct, that for liberal law to claim to be just it must at times actually be "seen" to be just—that is, to "inhibit power and afford some protection to the powerless"<sup>139</sup>—visuality reminds us that law is frequently a visual display of material injustice.

What is needed, as Angela Davis surmises, is a pedagogical commitment to processes of knowledge production that question, disrupt, and re-imagine habits, practices, institutions and ideologies, and ultimately the state's claim to authority. Clinical pedagogy must labour for the "right to look" to the struggles and dreams

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138. Angela Davis, "Legacies and Unfinished Activisms" (Steve Biko Memorial Lecture, University of South Africa, 9 September 2016), cited in Aziz Choudry & Salim Vally, *History's Schools: Past Struggles and Present Realities* (Routledge, 2018) at 13 [emphasis added].

139. See EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (Penguin Books, 1985) at 266. "The forms and rhetoric of law acquire a distinct identity which may, on occasion, inhibit power and afford some protection to the powerless. Only to the degree that this is seen to be so can law be of service in its other aspect, as ideology" (*ibid.*). For the original, see *Rex v Sussex Justices*, [1924] 1 KB 256 ("Justice must not only be done, but must also be seen to be done").

of poor and other oppressed people to inform our challenges to the violence of law in contemporary Canada's settler and imperialist state.