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When Law Reform Is Not Enough: A Case Study on Social Change and the Role That Lawyers and Legal Clinics Ought to Play

JEFF CAROLIN*

En se fondant sur l'expérience qu'il a vécu en tant qu'étudiant dans un programme clinique à la « Parkdale Community Legal Services » en 2010, l'auteur dresse un portrait de la frustration qu'il ressent à l'endroit d'un projet de réforme concernant la réunification des familles de réfugiés sur lequel il a travaillé. Le détenteur de la bourse en droit de la pauvreté exprime sa principale critique de la réforme d'être centrée sur un droit particulier et de le construire de manière à créer des injustices. Cela occasionne deux problèmes subsidiaires. Premièrement, les campagnes de réforme ignorent le contexte sociopolitique qui est à la source du droit limitant une transformation plus large au niveau social. Deuxièmement, les campagnes de réforme positionnent les avocats comme agents du changement social en omettant l'opportunité de construire un mouvement et en créant indirectement une diminution de pouvoir chez les communautés touchées. En appliquant ces critiques, l'auteur démontre l'échec de la campagne des cliniques de démontrer l'attitude classique et xénophobe du Canada en matière de contrôle des frontières et de créer un mouvement social pour contrer ces problèmes. Une stratégie alternative de réforme juridique répond à quelques-uns de ces problèmes par l'entremise de « Collaborative Legal Play », ou CLA, une organisation sur le terrain qui crée des ateliers sur des thèmes juridiques en utilisant des principes d'éducation populaires comme le jeu et le théâtre.

Based on his experience as a law student in the clinical legal education program at Parkdale Community Legal Services in 2010, the author draws on poverty law scholarship to better understand his frustrations with a law reform campaign he worked on related to refugee family reunification. The scholarship's central critique of law reform campaigns is that they are excessively narrow: they focus on a particular law and construct the law itself as the social injustice. This leads to two subsidiary problems. First, law reform campaigns ignore the underlying socio-political context that produced the law, foregoing opportunities for broader societal transformation. Second, law reform campaigns position lawyers as the agents for social change, missing an opportunity for movement building and even disempowering affected communities. In applying these critiques, the author articulates the failure of the clinic's campaign to address Canada's xenophobic and classist approach to border control, and to build social movements to challenge this approach. An alternative strategy for law reform that addresses some of these problems is embodied in Collaborative Legal Play, or CLAY, a grassroots organization that creates workshops on legal topics using principles of popular education and game-based and theatre-based facilitation.

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Activists for social change have long relied on three questions in evaluating prospective strategies and tactics. ... : 1. Will it educate people? 2. Will it build the movement? 3. Will it address the root of the problem, rather than merely a symptom?¹

FROM JANUARY TO APRIL 2010 I was a student legal worker at Parkdale Community Legal Services (PCLS), a community legal clinic in Toronto funded by both Legal Aid Ontario and Osgoode Hall Law School. I was one of the five students in the immigration division and, under the supervision of a staff lawyer, I was responsible for a caseload that hovered around twenty-five files. I was also expected to take part in one of PCLS's legal and political advocacy initiatives, which are spearheaded by the community legal workers in each of PCLS's four divisions. This paper was originally written as a series of recommendations for how the law reform campaign to which I was assigned—called *Reunite*—could be improved. Three and a half years later, this paper has been adapted into a reflection on my involvement with this campaign.

Reunite was initiated by PCLS in the summer of 2009 and ceased to be active in 2011. The purpose of *Reunite* was to advocate for legal reforms that would make it easier for refugees² in Canada to be reunited with loved ones left behind overseas. Following both a review of PCLS family reunification casework and strategic consultation with former Member of Parliament Gerard Kennedy in July 2009, *Reunite* was primarily premised on two demands for legislative and regulatory reform. The first was that the *Immigration and Refugee Protection Act*³ be amended such that refugees would be granted a full appeal in light of a negative family reunification decision. This would be in addition to the limited judicial review rights already available and would be the same type of appeal that already exists for family reunification applications submitted by permanent residents and citizens. The second was that the *Immigration and Refugee Protection Regulations*⁴ (the *Regulations*) be amended such that children over the age of twenty-two would be able to join their parents in Canada.

Soon after I began working on this campaign in January 2010, I became critical of the narrowness of *Reunite*'s demands. Refugees in Canada can only seek reunification with their spouses or common-law partners, their dependent children (usually defined as children under the age of twenty-two), and the dependent children of their dependent children.⁵ The fulfillment of

¹ Luke W Cole, "Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty" (1992) 19:4 Ecology LQ 619 at 668.

² Canadian legislation differentiates between "Convention Refugees" and "Protected Persons": see *Immigration and Refugee Protection Act*, SC 2001, c 27, ss96-97 [the *Act*]. However, as there are no differences between these classifications with respect to family reunification, I will use "refugee" as a general term to cover both categories. I also focus in this paper on refugees who make claims inland as opposed to those who seek Canada's protection from outside of Canada through the refugee resettlement program.

³ *Ibid.*

⁴ *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the *Regulations*].

⁵ See *ibid* at s1(3) (definition of "family member") and *ibid* at s2 (definition of "dependent child") for greater specificity on these rules. I also note here that refugees often have a difficult time reuniting with loved ones who they are *permitted* to have join them under these rules. For example, refugees have difficulties convincing Citizenship and Immigration Canada (CIC) that their relationships with their partners or children are, in the words of CIC, "*bona fide*." This is because many refugees do not have the rigorous documentation CIC demands in order to substantiate the relationship, such as birth certificates, marriage certificates, passports, photographs, and evidence of ongoing communication: see Canadian Council for Refugees, *More Than a Nightmare: Delays in Refugee Family Reunification*, online: <<http://www.ccrweb.ca/nightmare.pdf>> at 11 [*Nightmare*]. This has led CIC to ask family members of refugees to provide DNA evidence to prove that they are biologically related. The negative aspects of this practice were canvassed in *MAO v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1406 at paras 81-87.

Reunite's demands would hardly have changed this. I was also critical of the narrowness of *Reunite*'s scope. *Reunite* was advocating for these specific law reform demands without any engagement in the political debate around refugee policy that had begun swirling around the Minister of Citizenship, Immigration and Multiculturalism, Jason Kenney, due to the (at that time) impending legislative overhaul of the refugee system. Nor was there any connection to the broader migrant justice movement with which I had been involved in the past. The goal of this paper, then, is to unpack *Reunite*'s narrowness in terms of both its specific law reform demands as well as its engagement (or lack thereof) with broader refugee politics. In this way, *Reunite* will serve as a vehicle to explore the nature of law reform campaigns generally, as well as the role of legal clinics and lawyers in movements for social change.

In Part I, I elaborate on what I perceived to be the narrowness of *Reunite*. In Part II, I review some of the initial explanations I canvassed as to why *Reunite* might be so narrow—none of which seemed satisfactory. In Part III, I examine *Reunite* through the prism of the poverty law literature that has developed in response to legal advocacy work undertaken with or on behalf of low-income communities. I argue that insights from this literature are applicable to *Reunite* and provide the best explanation as to why the campaign was so narrow. Specifically, I find that *Reunite* is a paradigmatic example of the central problem that afflicts law reform campaigns: the particular law itself is constructed as the social injustice. This leads to two subsidiary problems. The first problem is that these campaigns, by focusing on the law, fail to engage with the underlying socio-political context that produced that law. In order to demonstrate the importance of engaging with the socio-political context when it comes to refugee family reunification, I review the way in which racism and classism permeated political and media discourse about changes to the refugee system during the 2010 to 2012 period when the federal Conservatives were instituting drastic reforms to the refugee system—with a particular focus on how the Roma community was targeted. The second problem that flows from constructing the law itself as the social injustice is that they end up privileging lawyers as the agents of social change instead of political movements—be they movements rooted in the legislature or in the streets. In Part IV, I describe my current involvement with Collaborative Legal Play, or CLAY, a grassroots group that was created in part as a reaction to my experience with *Reunite*. In Part V, I discuss how the lessons from the poverty law literature and CLAY might be applied in a legal clinic setting, and in Part VI, I conclude by reiterating my belief that legal clinics and lawyers do have a role to play in movements for social change, and, perhaps, even an obligation to play such a role—but it is essential that we adopt this role and obligation in a mindful and sensitive way.

I. THE NARROWNESS OF THE CAMPAIGN

A. NARROW DEMANDS

On their face, *Reunite*'s two demands—to remove the twenty-two-year-old age limit for “dependent” children and to create an administrative appeal process for failed family reunification applications—seemed reasonable. My own caseload included seven files to which these demands were directly applicable. However, soon after I became involved I noticed that two additional problems, which also flowed directly from our files, were not addressed by the campaign: the long

wait times for family reunification⁶ and the inability for refugee minors to reunite with their parents.⁷ I was perplexed as to why these issues were not being addressed by additional campaign demands.

I also came across a third issue I thought might have merited being a campaign demand when I began to research refugee family reunification for the original version of this paper: the inability of refugees to be reunited with extended family.⁸ Although this did not emerge directly from PCLS casework, that it might be of relevance to PCLS clients occurred to me upon review of two reports from Australia: one published by the United Nations High Commissioner for Refugees (UNHCR)⁹ and the other by the Refugee Council of Australia (RCOA).¹⁰ A central theme of both reports was that Australia's narrow legal definition of family—one that is similar to Canada's¹¹—was a point of “frustration and devastation” for many refugees.¹² The UNHCR report notes that by only allowing sponsorship for parents, children, and partners, Australian family reunification law privileges a culturally-biased notion of the nuclear family. On the other hand, refugees who participated in the study, when describing their principal family members, “generally included at least three generations and they often lived together in the same house or at least within walking distance.”¹³ A participant in the RCOA study explained that in the Assyrian language the word “cousin” did not exist because cousins were regarded as brothers and sisters.¹⁴ Therefore, in spite of the fact that *Reunite* had no demand relating to extended family reunification, it seemed likely that such a demand would address a need of the refugee community both in the Parkdale neighbourhood and in the rest of Canada.

I was also aware that *Reunite* was kept distinct from another PCLS law reform campaign that applied to the same client group: those who had already been granted refugee status. This second campaign, called *Drop the Fee*, demanded that the federal government eliminate the \$550 and \$150 processing fees for permanent resident applications charged to those already accepted as refugees.¹⁵ Furthermore, it occurred to me that both of these campaigns, *Reunite* and *Drop the Fee*,

⁶ In an article called “Remaking Family Life” about refugee family reunification in Canada, the authors cite a Canadian study that found that the *average* time it takes for Central American and African refugees to be reunited with their spouses is over three years, and the wait is even longer for parents being reunited with children: Cécile Rousseau et al, “Remaking Family Life: Strategies for Re-establishing Continuity among Congolese Refugees During the Family Reunification Process” (2004) 59:5 *Social Science & Medicine* 1095 at 1096.

⁷ See generally Nathan Higgins, “Family Reunification for Unaccompanied Minors in Canada: Moving Forward with s15 of the *Charter*” (Paper submitted for PCLS Seminar, Osgoode Hall Law School, 2010) [unpublished, on file with author].

⁸ As will become clear in Parts I and II, “extended family reunification” is a loaded term that does not reflect how close many refugees feel to their “non-nuclear” relatives. Nevertheless, I will use this term for the sake of clarity.

⁹ Brooke McDonald-Wilmsen & Sandra M Gifford, *Refugee Resettlement, Family Separation and Australia's Humanitarian Programme*, online: UNHCR <<http://www.unhcr.org/4b167ae59.html>>.

¹⁰ Refugee Council of Australia, *Australia's Refugee and Humanitarian Program: Community Views on Current Challenges and Future Directions (January 2009)*, online: <http://www.refugeecouncil.org.au/docs/resources/submissions/2009-10_intakesub.pdf> [RCOA].

¹¹ *Migration Regulations 1994*, (Cth), r 1.12AA [*Australia Regulations*]. Australia allows for refugees to invite “immediate family members” to come join them. Immediate family members are defined as partners, dependent children who are under 18 years of age and, if the refugee is herself under 18, as parents of the refugee.

¹² McDonald-Wilmsen, *supra* note 9 at 9.

¹³ *Ibid.*

¹⁴ RCOA, *supra* note 10 at 24.

¹⁵ Once the Immigration and Refugee Board (IRB) accepts that you are a refugee, you then have a 180-day window within which you may apply for permanent resident status. The result of the imposition of the processing fees is that some refugees who claim inland do not end up applying for permanent residency within the 180-day window. When they do come up with the money, they then have to seek an exemption on humanitarian and compassionate (“H&C”)

could have been united with the refugee family reunification campaign initiated by the Canadian Council for Refugees (CCR) called *Wish You Were Here*, which featured two relevant demands: that section 117(9)(d) be struck from the *Regulations*,¹⁶ and that the applications of refugee family members be processed in Canada instead of overseas.¹⁷ To deal with all of these demands in separate campaigns—when they were all directly relevant to the needs of refugees who had already received positive decisions—seemed to unnecessarily divide up lobbying and advocacy energy.

B. NARROW SCOPE

I was even more struck by how *Reunite*'s message did not stray beyond the limited scope of the particular law reform demands. There was no engagement in the broader debate around refugee policy that was occurring under the minority Conservative government in the spring of 2010. Three and a half years later, the regressive policy overhaul that was first put forward at that time has now been finalized. These changes have made Canada's refugee system less accessible and will allow for swifter deportations with fewer procedural protections. I elaborate on these policies below.

Therefore, it occurred to me that even if *Reunite*'s two demands were achieved, not only would they have failed to fully remedy the needs of PCLS's individual clients, but any such victory would also have seemed hollow in the face of the federal Conservatives' refugee legislative agenda. PCLS would have found itself in the somewhat perverse situation of celebrating that their clients could appeal negative family reunification decisions at the same time as Canada was disappearing as a place of refuge for asylum seekers around the world.

II. WHY WERE THE LAW REFORM DEMANDS SO NARROW?

In this section I will leave aside for the moment what I perceived to be *Reunite*'s failure to broaden its scope to engage in the refugee policy debate. Instead I will focus on my perception that the two demands seemed arbitrary and restrictive given the full gamut of possible demands. In so doing, this section reflects the process I undertook when I was developing the original series of recommendations I offered to PCLS about *Reunite* in April 2010. Rather than simply rely on my snap judgment that the three additional demands I had identified, the single demand of *Drop the Fee* and the two demands of *Wish You Were Here*, should have been added to *Reunite*'s two demands, I decided that I would give the campaign the benefit of the doubt and try to determine why the campaign might have been structured in this way.

grounds when they apply for permanent residency: Citizenship and Immigration Canada, *PP 4: Processing Protected Persons' in-Canada Applications for Permanent Resident Status*, online: <<http://www.cic.gc.ca/english/resources/manuals/pp/pp04-eng.pdf>> at 9, 31.

¹⁶ Section 117(9)(d) of the *Regulations*, *supra* note 4, becomes a problem when refugees—either due to misinformation or a misunderstanding of the application—do not include their out-of-country immediate family members on their applications for permanent residency. If they fail to do so, s 117(9)(d) ensures that these family members will never be able to be sponsored later on by the same person: see Canadian Council for Refugees, *Families Never to be United: Excluded Family Members*, online: <<http://www.ccrweb.ca/documents/famexcluprofilesEN.pdf>>.

¹⁷ *Nightmare*, *supra* note 5 at 9. See also Canadian Council for Refugees, *Manifesto on Family Reunification*, online: <<http://www.ccrweb.ca/Manifesto.pdf>>.

A. DID THE TYPES OF ARGUMENTS BEING PUT FORWARD BY PCLS ONLY APPLY TO THE TWO DEMANDS?

I began this process by first identifying the types of arguments that PCLS was using to convince the government that the *Reunite* demands should be accepted. I did this with an eye to determining whether the same arguments might apply to the additional demands I had identified or whether they were specific to the ones already a part of *Reunite*. I quickly concluded, however, that *Reunite* was relying on the same types of arguments that have been used repeatedly to argue that refugee family reunification policies ought to be changed: moral, rights-based, and economic arguments that flow from the psychosocial effects of forced separation.

Moral arguments are based on the injustice of the suffering caused by the forced separation of families. The reality that supportive and intimate relationships are so important to almost every human—and that multi-year disruptions of those relationships are incredibly painful—has frequently been posited as sufficient justification to overhaul Canada’s approach to dealing with refugee family reunification.¹⁸ Rights-based arguments are similar in nature to moral arguments. At the heart of each argument is the injustice inherent in keeping families apart. The only difference with rights-based arguments is that it is not necessary to explain that injustice; the fact that, for example, children have a *right* for their family reunification applications to be treated in a “positive, humane, and expeditious manner” is viewed as a sufficient basis for the policy or legislative change that is being put forward.¹⁹

Both of these types of arguments emphasize that, while being separated from loved ones is hard for anyone, the fact that refugees are often leaving family members to face war, persecution, and poverty²⁰ means that in addition to loneliness and longing they describe feelings of intense anxiety, guilt, powerlessness, and depression.²¹ These feelings of guilt and powerlessness are compounded by suspicions from family members that their family in Canada is not making every effort to achieve reunification. These suspicions are often based on the belief that a “developed” country like Canada could not possibly be so slow in processing refugees. These feelings, combined with the distance created over the years, can cause considerable stress when families do come together. Children never regaining trust for parents and the breakdown of marriages are the two most common examples.²²

The flipside of these high rates of stress, depression, and anxiety while waiting for reunification is the detrimental effect on integration and settlement in the new country. This is where the economic arguments come in. Refugees explain that concerns about their family

¹⁸ See e.g. McDonald-Wilmsen, *supra* note 9 at 1; and W Gunther Plaut, *Refugee Determination in Canada* (Ottawa: Minister of Supply and Services Canada, 1985) at 152-53. Even CIC’s own policy manuals make reference to this: Citizenship and Immigration Canada, *OP 5: Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian-protected Persons Abroad Classes*, online: <<http://www.cic.gc.ca/english/resources/manuals/op/op05-eng.pdf>> at 65-66, “Family – Resettlement.”

¹⁹ *Convention on the Rights of the Child*, online:

OHCHR <<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>>, art 10(1). The following sources provide comprehensive reviews of international human rights provisions that pertain to the rights of families: *Nightmare*, *supra* note 5 at 4-5; McDonald-Wilmsen, *supra* note 9 at 1; and Anne Staver, *Family Reunification: A Right for Forced Migrants?*, online: University of Oxford <http://www.rsc.ox.ac.uk/publications/working-papers-folder_contents/RSCworkingpaper51.pdf> at 13-15.

²⁰ *Nightmare*, *supra* note 5 at 3, 14.

²¹ Rousseau, *supra* note 6 at 1097.

²² *Nightmare*, *supra* note 5 at 4, 17-18. See also Rousseau, *supra* note 6 at 1096-97; and McDonald-Wilmsen, *supra* note 9 at 4.

members make it difficult to learn new languages, to adapt to life in their new countries, and to make long-term plans.²³ Recovery from traumatic experiences is also hindered by the absence of family members.²⁴ The need to provide childcare, and having to do so without the support of extended family members, means that women are especially restricted in terms of adaptation.²⁵ The result is that refugees often find themselves unemployed and reliant on state benefits, a situation that creates feelings of “dependency, frustration, poverty and a loss of pride and dignity.”²⁶

On the other hand, if extended family members were present, they could help care for children and free up other family members to go to school or work.²⁷ Extended families in Canada also provide essential labour for “start up enterprises,”²⁸ create an alternative social safety net,²⁹ and remove the need to send remittances home, thereby allowing for all money earned to go towards local establishment.³⁰ The result in this situation would be that refugees would not have to rely as much on social assistance, thereby improving their overall quality of life and lessening the “perceived ‘economic burden.’”³¹ The UNHCR itself has confirmed this “economic” wisdom of reunification: “the family unit has a better chance of successfully ... integrating in a new country rather than individual refugees. In this respect, protection of the family is not only in the best interests of the refugees themselves but is also in the best interests of States.”³² Even more importantly, this is also confirmed in Canada’s own legislation. One of the objectives of the *Act* “with respect to refugees ... [is] to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada.”³³

Returning to *Reunite*, it seemed to me that the three additional demands I articulated above—allowing for the reunification of refugee children with parents, creating fixed timelines for deciding reunification applications, and including extended family—and the two demands in CCR’s campaign—eliminating s. 117(1)(d) and allowing for reunification before the processing is completed—could have easily been justified by the moral, rights-based, and economic and psychosocial arguments. The single demand of the *Drop the Fee* campaign—to drop the \$550 processing fee—did not seem to fit in quite as well, but it could definitely have been framed as an unnecessary economic impediment to the establishment of refugee families. Therefore, from an advocacy standpoint, there did not appear to be an obvious reason to keep these demands separate.

²³ *Nightmare*, *supra* note 5 at 15; RCOA, *supra* note 10 at 25.

²⁴ McDonald-Wilmsen, *supra* note 9 at 3, 17-20.

²⁵ RCOA, *supra* note 10 at 25.

²⁶ *Ibid.*

²⁷ McDonald-Wilmsen, *supra* note 9 at 20.

²⁸ RCOA, *supra* note 10 at 26.

²⁹ McDonald-Wilmsen, *supra* note 9 at 1; Staver, *supra* note 19 at 6.

³⁰ McDonald-Wilmsen, *supra* note 9 at 22. See also Kate Jastram & Kathleen Newland, “Family Unity and Refugee Protection” in Erika Feller, Volker Turk & Frances Nicholson, eds, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) 555 at 563-565.

³¹ McDonald-Wilmsen, *supra* note 9 at 3, 17-20.

³² Arturo John, *Family Reunification for Migrants and Refugees: A Forgotten Human Right?*, online: <<http://www.fd.uc.pt/igc/pdf/papers/arturojohn.pdf>> at 2.

³³ The *Act*, *supra* note 2, s 3(2)(f).

B. DID CROSS-JURISDICTIONAL COMPARISONS ALLOW FOR ONLY TWO DEMANDS?

Next I considered whether law and policy from other jurisdictions might have led to the limited two-demand campaign. I did so with an awareness that this jurisdictional ‘benchmarking’ approach is used by critics of Canada’s refugee laws who argue that Canada is *too kind* to refugee claimants. In other words, because Canada lets claimants work and does *not* detain them on arrival—unlike the United States, the United Kingdom, and Australia—Canada is seen as a more desirable place to make a refugee claim, which, from these critics’ perspective, is a bad thing.³⁴ As such, I thought it was possible that if other jurisdictions had family reunification policies that were more limited than Canada’s this might have in turn impacted on the formulation of the demands for *Reunite* and led to a decision to restrict them. In other words, it would have been politically unpalatable to seek changes that would make Canada even more desirable when the refugee system was already under such scrutiny for being *too* open compared to other jurisdictions.

However, it turned out that with the particular case of family reunification, rather than other jurisdictions being more restrictive than Canada, law and policy from the European Union (EU) and Australia regarding refugee family reunification were *more* generous than Canada’s—at least on paper. As such, ‘benchmarking’ could have actually been used by PCLS to push for at least three of the additional demands that I articulated above.

The first additional demand—to amend the *Regulations* such that they would allow refugee minors in Canada to reunite with their parents—could have been supported by legislation found in both Australia and the EU. In Australia, the definition of immediate family for refugee reunification purposes explicitly included parents of children who are under the age of 18.³⁵ In the EU, the 2003 EU Council Directive on the Right to Family Reunification, which established a baseline for family reunification policies in EU countries, mandated that refugee minors must be allowed to reunite with their parents.³⁶ Moreover, if the child had no living parents, then grandparents, legal guardians, or other relatives would be allowed to join them.³⁷

For the second additional demand—to establish fixed processing timelines and to ensure the attendant resources that would be required to make this a reality—the EU Council Directive could have again offered support. It mandated that written notification of reunification decisions had to be given “as soon as possible and in any event no later than *nine months* from the date on which the application was lodged.”³⁸

The third additional demand—creating an immigration class dedicated to extended families and friends—could have been based on Australia’s special humanitarian program. In short, this

³⁴ Critics like Stephen Gallagher use this to justify making the refugee system less hospitable: see Stephen Gallagher, *Canada’s Dysfunctional Refugee Determination System: Canadian Asylum Policy from a Comparative Perspective*, online: The Fraser Institute, <http://www.immigrationwatchcanada.org/wp-content/uploads/2010/11/refugee_pps781.pdf>. Gallagher was appointed to the IRB of Canada in 2010: Citizenship and Immigration Canada, *Background – Appointments, Reappointments and Designation to the Immigration and Refugee Board of Canada*, online: <<http://www.cic.gc.ca/english/department/media/backgrounders/2010/2010-03-19a.asp>>.

³⁵ *Australia Regulations*, *supra* note 11.

³⁶ *EU Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification*, c V, art 9, s 3(a) [*EU Council*].

³⁷ *Ibid*, s 3(b). For critical accounts of the EU legislation see European Council on Refugees and Exiles, *ECRE Information Note on the Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification*, online: <http://www.ecre.org/topics/areas-of-work/integration/188.html>; and John, *supra* note 32.

³⁸ *EU Council*, *supra* note 36, c III, art 5, s 4 [emphasis added].

program enabled those who were granted asylum in Australia to propose that their family members and/or friends also be granted asylum in Australia.³⁹ The central deciding factor was whether the proposed individuals were facing persecution. Although the RCOA has offered extensive criticism of this program,⁴⁰ nothing like it existed in Canada at that time, and this is still the case. Establishing this as a specific class for permanent residence immigration would have been, and would still be, a great victory for refugee family reunification. It would enable refugees in Canada to be reunited with loved ones and key members of their social support networks even if they did not fit within Canada's narrow restrictions on who counts as a family member for the purpose of reunification. In sum, jurisdictional 'benchmarking' did not provide an explanation for the narrowness of the two-demand campaign either.

C. DID PCLS'S ORGANIZATIONAL CAPACITY LEAD TO ONLY TWO DEMANDS?

Finally, I considered the possibility that *Reunite* was founded with a subconscious recognition of PCLS's own limited capacity to engage in such work (given its substantial caseload) and an understandable desire for tangible successes. I say "subconscious" as opposed to deliberate because when I investigated the roots of the campaign, which only meant going back to the spring of 2009, there did not seem to be a conscious intent to create a streamlined and straightforward law reform campaign. Rather, it seemed that PCLS simply followed a 'path of least resistance' approach to creating a campaign with potentially winnable demands: case files were reviewed, two of the more common difficulties faced by PCLS refugee clients (in particular Tibetan clients) were identified, two law reform demands were formulated, specific representative clients were selected, a meeting was sought and held with former Member of Parliament Gerard Kennedy to gain his support, and a community event was held to inform the broader PCLS refugee client base of the campaign's existence. Within a few short months *Reunite* was already on its way.

Viewed in this way, I recognize that the path taken to establish the campaign and the likelihood of success might have been rendered more difficult had attempts been made to include my proposed additions. For example, connecting *Reunite* with CCR's *Wish You Were Here* campaign might have resulted in protracted work to make sure both organizations agreed on all points, and would have required ongoing communications to ensure consistency in messaging and materials. Speed and simplicity would also have had to be sacrificed in order to reach the conclusion that a new immigration class for extended family members was necessary and that it should have been proposed as a demand. This is because the necessity of such a demand could only have been discovered with outside research (as I undertook here) or with some process for assessing client needs that did not arise directly out of intake rooms.⁴¹ Such a demand would also

³⁹ RCOA, *supra* note 10 at 26. See also *Australia Regulations*, *supra* note 11, subclass 201-202.

⁴⁰ The RCOA is critical of how strict the quotas are for this immigration class (RCOA, *supra* note 10 at 22) and of how people who come through this class do not have access to settlement services available to other refugees (RCOA, *supra* note 10 at 30).

⁴¹ When I was at PCLS we rarely dealt with refugees who wanted to bring extended family members to Canada for the simple reason that there is almost nothing that could be done for them. One, albeit limited, option is for refugees to rely on humanitarian and compassionate ("H&C") considerations and list their "non-family member" as a "de facto dependant": see Citizenship and Immigration Canada, *OP 4: Processing of Applications under Section 25 of the IRPA*, online: <<http://www.cic.gc.ca/english/resources/manuals/op/op04-eng.pdf>> at 18. The chief problem with this option is that it is entirely discretionary. If the H&C decision is negative, the only recourse is judicial review. Moreover, few refugees would ever come to know about the existence of this exception because the refugee

be admittedly very difficult to win.⁴² As for what I perceived to be the failure to include other issues that we *did* see in our files—such as the reunification of parents with refugee children and lengthy processing timelines—this might have just been an oversight due to the speed with which the campaign was created. And as a final example, subconscious pragmatism could entirely account for *Reunite*'s failure to engage with the then incipient legislative war against the refugee system. Campaigns for sweeping political changes are neither straightforward nor easily won.

Ultimately, however, I did not find this explanation to be sufficient either. The very fact that it appeared subconscious made me think that *Reunite*'s construction reflected a deeper and problematic pattern in the way legal clinics conduct legal and political advocacy. A pattern that resulted in both *Reunite*'s failure to address all of the family reunification problems at PCLS that were strictly legal, as well as its failure to engage with the socio-political framework in which these problems are rooted. With this in mind, I turned to the poverty law literature to help me articulate what I was observing.

III. REUNITE AS A PARADIGMATIC EXAMPLE OF A PROBLEMATIC LAW REFORM CAMPAIGN

The poverty law literature has developed over the last forty years in response to the variety of ways that lawyers work with and advocate on behalf of communities and individuals living in poverty. While this literature by no means deals exclusively with law reform as a strategy for social change, law reform campaigns have nevertheless been discussed extensively. In general, commentators have challenged the logic that seems to shape law reform efforts. This logic dictates that lawyers who want to go beyond the individualized needs of their clients and engage in social change projects ought to begin by identifying laws that are both injurious to their clients and are unjust with respect to progressive values. These lawyers then ought to advocate to have these laws changed.

The problem, however, with using the law—and only the law—to effect social change, is that the law itself ends up being constructed as the problem. This is viewed in the literature as problematic for two interrelated reasons. First, attention is focused on the individual laws as opposed to the non-legal systemic or root causes that led to the creation of the challenged law in the first place. Second, lawyers are privileged as the agents of social change instead of the people—usually already disempowered and marginalized—who face the legal problem, which, in turn, undermines the building of political movements that could challenge the non-legal systemic roots of the unjust law that created the law in the first place.⁴³ In the remainder of Part III, I will

applications for permanent residence make no mention of it. Because of this, PCLS was often in the position of asking visa officers to reconsider negative decisions by presenting H&C considerations that were not provided at the time of the original application. That a decision has already been made would seriously weaken the request. (I note that the *de facto* dependant category is made more explicit for refugees who are accepted abroad through the refugee resettlement programs—as opposed to those who make inland claims—since it is actually included on the form.) Another option for refugees making inland claims is to use the family class category, but that comes with its own set of difficulties and limitations that are beyond the scope of this paper.

⁴² Of course, the fact that there could have been a range of proposals—from the more modest to the more elaborate—could have played a strategic role in terms of PCLS's bargaining position. That is, granting *Reunite*'s two demands regarding the age limit for dependent children and an appeals process might have seemed more palatable to politicians and policymakers in the face of a demand for an entirely new immigration class.

⁴³ Although there is much debate among poverty law scholars, there does appear to be consensus in the work of the last 40 years about at least these two problems concerning the use of law reform as a tool for social change.

expand on these two insights and apply them to *Reunite*.

A. THE FIRST INSIGHT: LAW REFORM CAMPAIGNS FAIL TO ENGAGE WITH THE NON-LEGAL ROOT CAUSES OF UNJUST LAWS

In his seminal article from 1970, “Practicing Law for Poor People,” Stephen Wexler makes a simple yet powerful observation that continues to hold relevance today. He states that

poor people do not lead settled lives into which the law seldom intrudes; they are constantly involved with the law in its most intrusive forms. ... The law school model of personal legal problems, of solving them and returning the client to the smooth and orderly world in television advertisements, doesn’t apply to poor people.⁴⁴

In making this observation, Wexler is specifically addressing the deficiency of providing legal services, and only legal services, to people living in poverty. To do so ignores the fact that when a person living in poverty has a legal problem, it is usually a symptom of “political and economic power relations”⁴⁵ that are stacked against that person. For example, while a lawyer may be able to assist someone living in poverty who is charged with fraud for not reporting income to Ontario Works, it is unlikely that this will mark the end of that person’s legal problems. Let us assume that this person was indeed receiving some money under the table to supplement her social assistance payment of \$590 per month and that this additional money allowed her to pay rent. If she is now reluctant to seek out that additional money owing to possible criminal charges, it is likely that she will soon be facing eviction for rent arrears. The point is that if the fundamental power relations go unchanged—and miserly social assistance programs remain the norm—legal problems will keep emerging.

Although Wexler was not explicitly addressing law reform campaigns in his article, the same underlying logic applies. In a capitalist society, in which the wealthy have substantial power to shape the political and legal system,⁴⁶ it is insufficient to simply go beyond direct provision of legal services to advocating for a new law under which financial entitlements could be supplemented by irregular employment. While successfully changing this regressive law would certainly be a victory on some level, it does nothing to prevent the rise of new obstacles. It is just too easy for the next government to attack social assistance entitlements in some other (or even the same) way. As such, law reform efforts without more fail to address “the core issue of unequal power” because the law itself is “circumscribed within the existing political order.”⁴⁷ In other words, changing the law will not affect the underlying root causes.

Tove Stang Dahl offers an additional reason for why law reform efforts ought to explicitly address non-legal root causes. Channelling Antonio Gramsci, he argues that “[l]aw is an important part of the cultural hegemony that men have in our type of society, and a cultural hegemony means that a ruling group’s special way of viewing social reality is accepted as normal and as a part of the

⁴⁴ Stephen Wexler, “Practicing Law for Poor People” (1970) 79:5 Yale LJ 1049 at 1050.

⁴⁵ Cole, *supra* note 1 at 649.

⁴⁶ See generally Charles E Lindblom, *Politics and Markets: The World's Political Economic Systems* (New York: Basic Books, 1980).

⁴⁷ Scott Cummings & Ingrid Eagly, “A Critical Reflection on Law and Organizing” (2001) 48 UCLA L Rev 443 at 453. See also Anthony V Alfieri, “Antinomies of Poverty Law and a Theory of Dialogic Empowerment” (1987-1988) 16:4 NYU Rev L & Soc Change 659 at 671.

natural order of things, even by those who are in fact subordinated by it.”⁴⁸ From this perspective, an attempt to remedy a poor person’s problem only through law reform means that the “ruling group’s” power to create the unjust law goes unquestioned. Therefore, engagement with the law, even through law reform efforts, “depoliticizes”⁴⁹ and lends a “cloak of juridical legitimacy”⁵⁰ to the status quo—even though it is a status quo that actively subordinates the very person or people that you are trying to help. In other words, law reform efforts without more confirm that the problem is a ‘legal’ one (that can be solved through legislative or regulatory tinkering) as opposed to a political problem (that can only be changed with a radical reordering of the prevailing power structure).

B. VIEWING *REUNITE* THROUGH THE FIRST INSIGHT

With these points in mind, it becomes easier to explain the narrowness of *Reunite*’s law reform demands. *Reunite* responded to the specific legal problems that PCLS clients walked through the clinic door with: (i) dependent children over the age of twenty-two who had been rejected as being too old for reunification, and (ii) reunification claims that had been denied and that could only be challenged on a judicial review application for which the granting of leave was necessary. In this way, *Reunite* constructed law as the problem and proffered legal fixes as the solution. And, of course, it only offered this solution for the very specific problems that came up in the intake room. This allowed PCLS to miss the legal barriers that were likely just out of sight—like the desire to be reunited with extended family and friends.

Of even greater import, in my view, was how proceeding from individual client legal problems outwards to a law reform campaign resulted in a failure to engage with or even acknowledge the broader political context. While I recognize that not all campaigns can (or should) do all things (which is a point that I return to below), I would nevertheless argue that the decontextualized nature of this campaign was not a conscious strategic decision but the precise outcome that the poverty law literature tells us will flow from constructing law as the problem. There did not appear to ever have been a discussion as to whether it made strategic sense for *Reunite* to engage with the broader socio-political context. Rather its very construction foreclosed that possibility.

Of course, some readers might take the view that it is too much of a leap to offer this insight from the poverty law literature as a wholesale explanation for why *Reunite* did not engage with the contentious refugee politics taking place in early 2010. I recognize that the legal problems of refugees trying to reunite with a family member might at first glance appear different from the legal problems of a poor person dealing with a suspicious welfare worker. While the poverty law literature explores how the ‘legal’ problems of poor people are created by the underlying division of political power, the politics that underlie a refugee’s family reunification problems might not be as obvious. Without such an analysis, it might appear that a simple law reform campaign—for example, *Reunite* as it was originally conceived—could effect lasting changes to the family reunification regime without attracting the criticisms outlined above.

The goal of the following section, then, is to expose what I believe are the politics—or the

⁴⁸ *Ibid* at 678-79, n 108.

⁴⁹ *Ibid* at 665.

⁵⁰ *Ibid* at 679-80.

root causes⁵¹—that ultimately shape the restrictive family reunification system with which refugees in Canada must contend. I will argue that family reunification laws, regulations and policies ought to be seen as a component part of a broader immigration and refugee system that is shaped by a xenophobic—verging on racist—and classist approach to border control. In this way, just as a successful law reform victory regarding welfare fraud might only be a fleeting victory if it did not in some way address the root political causes, if a specific goal of *Reunite* had been accomplished it would unlikely have been a lasting victory if the underlying causes had not been addressed as well. While there are a number of ways that this discussion could be approached,⁵² I decided to focus on how Canada treats refugee claimants because I believe it provides us with a window through which we can glimpse the root causes that shape Canada’s restrictive family reunification policies.

1. THE ROOT CAUSES OF RESTRICTIVE FAMILY REUNIFICATION REGIMES

In June 1939, Canada refused entry to the 907 German-Jewish refugees aboard the MS *St. Louis*. Prime Minister William Lyon Mackenzie King’s government was adamant that Jewish immigration be halted.⁵³ The MS *St. Louis*—also known as the Voyage of the Damned—was forced to return to Europe, where it is estimated that about twenty-five per cent of the passengers were killed in the Holocaust.⁵⁴ Today as yesterday, asylum seekers who arrive in Canada are usually destitute, often do not speak English or French, and more likely than not are people of colour.⁵⁵ And although there is now a formalized process through which asylum seekers can arrive in Canada and apply for refugee status, a review of Canada’s immigration laws and policies reveals

⁵¹ I recognize that in discussions concerning immigration issues “root causes” is often a term that is used to explain the reasons behind migration. Here I will be using it to describe the reasons behind Canada’s immigration legal regime.

⁵² For a historical account of racism in Canadian immigration law see Emily Carasco et al, *Immigration and Refugee Law: Cases, Materials, and Commentary* (Toronto: Edmond Montgomery Publications, 2007) at 3-15; see generally Ninette Kelley & Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration* (Toronto: University of Toronto Press, 1998). For a modern example of racialized, exploitative immigration policy see Diane Lindquist, “Abuses Cited in Model Canadian Guest-Worker program,” *San Diego Union-Tribune* (2 July 2001) A1, cited at 276-79 in Carasco.

⁵³ Irving Abella & Harold Troper, “‘The Line Must be Drawn Somewhere’: Canada and Jewish Refugees, 1933-39” (1979) LX:2 *Canadian Historical Review* 41.

⁵⁴ Sarah A Ogilvie & Scott Miller, *Refuge Denied: the St. Louis Passengers and the Holocaust* (Madison: University of Wisconsin Press, 2006) at 174.

⁵⁵ When the *MS St. Louis* reached Canadian shores, Jews were not considered “white”: see e.g. Karen Brodtkin, *How Jews Became White Folks and What That Says about Race in America* (New Brunswick, NJ: Rutgers University Press, 1998). In terms of the demographics of asylum seekers today, the IRB statistics compiled by Professor Sean Rehaag of Osgoode Hall Law School are helpful: 13,405 refugee decisions were issued in 2009 and of these 836 were in respect of claims from the USA, Australia, and countries in Europe (as far east as Russia and as far south as Greece). The remaining 12,569 decisions involved claimants coming from Latin America, Africa, and Asia. While this geographic approach cannot hope to produce a *precise* representation of the number of people of colour who seek asylum, I would argue that it reveals that at least a majority of refugee claims are made by people of colour. See Sean Rehaag, “2009 Refugee Claim Data and IRB Member Grant Rates,” online: <<http://ccrweb.ca/documents/rehaagdatamarch10.htm>>. See also an older statistical analysis of the 1980-2001 period in which it was reported that after two years in Canada “refugees report the highest rates of social assistance usage,” that 6.3 per cent of refugees from outside of the US and Europe had educational attainment levels of a bachelor degree or higher (compared to 32.6 per cent in the economic class), and that 43.1 per cent of those same refugees spoke English and/or French (compared to 67.8 per cent in the economic class): Don Devoretz et al, “The Economic Experiences of Refugees in Canada,” online: <<http://ftp.iza.org/dp1088.pdf>> at 7, 10-11.

that asylum seekers and their family members—due to these demographic characteristics—are still seen by Canada as undesirable today.

Such an argument can in part be premised on the contrast between the demographics of asylum seekers and the demographics of those who qualify through the largest permanent residency category as “economic immigrants.”⁵⁶ Canadian immigration laws create this contrast by evaluating economic class applicants on a point system that favours certain socio-economic groups over others. For example, to gain entry in this class you must have work experience as a skilled professional, post-secondary education is essentially obligatory, and being able to speak English and/or French offers you a healthy advantage.⁵⁷ Nor can it be said that the point system is justified by Canada’s economic needs or job market, as is demonstrated by the Seasonal Agricultural Workers Program (SAWP). The workers who come through SAWP are never able to transform their years of work experience in Canada into permanent residency, and are more demographically similar to asylum seekers on race and class lines than economic immigrants.⁵⁸ As such, the point system demonstrates how Canada’s immigration regime constructs as desirable permanent residents.

Of course, the very fact that a permanent resident asylum class exists might seem to undermine this argument. It could be said that although Canada would ideally take migrants who fit the stringent categories of the economic class (and their family members), clearly it is still willing to take migrants (and their families) who fit in the refugee class. However, even before the recent Conservative legislative overhaul, a closer look at Canadian immigration policy as of early 2010 reveals the so-called interdiction methods that Canada actively uses to prevent refugees from arriving here in the first place. What is offered with one hand is denied with the other.

For example, the Canada Border Services Agency (CBSA) states in a 2011 report that it employs fifty-seven migration integrity officers in forty-one countries.⁵⁹ One of the goals of these officers (now called liaison officers⁶⁰) is to “interdict ... irregular migrants” who are also referred to as “high-risk people.”⁶¹ By referencing the MV Sun Sea in the following passage—a ship that arrived in Canada carrying asylum seekers from Sri Lanka—the CBSA report makes clear who counts as an irregular migrant and a high-risk person:

Global and domestic demographic patterns suggest the possibility of increased irregular migration from high-risk countries as well as an expected increase in the number of mass arrivals of irregular migrants (e.g. Marine Vessel Sun Sea). As the number of people and goods from non-traditional sources continues to grow, they may pose new threats and increase the risk of Canadians being exposed to acts of terrorism, transnational organized crimes, disease outbreaks and infectious

⁵⁶ *Ibid.* See also Citizenship and Immigration Canada, “Immigration Overview: Permanent and Temporary Residents,” online: <<http://www.cic.gc.ca/english/resources/statistics/facts2010/permanent/02.asp>>.

⁵⁷ See the *Regulations*, *supra* note 4, ss 75-83.

⁵⁸ Through SAWP, approximately 25,000 agricultural workers come to Canada each year, primarily from Mexico, Central America, and the Caribbean. Although they are clearly fulfilling an economic need in Canada, under the current laws they would never qualify as permanent residents in the economic class: see UFCW, *The Status of Migrant Farm Workers in Canada 2008-2009*, online: <<http://www.ufcw.ca/Theme/UFCW/files/PDF%202009/2009ReportEN.pdf>> at 1, 8.

⁵⁹ Canada Border Services Agency, *Part III: Report on Plans and Priorities, 2011-12 Estimates*, online: <http://publications.gc.ca/collections/collection_2011/sct-tbs/BT31-2-2012-III-120-eng.pdf> at 3 [CBSA Report].

⁶⁰ Canada Border Services Agency, *Fact Sheet: CBSA International Network*, online: <<http://www.cbsa-asfc.gc.ca/media/facts-faits/113-eng.html>>.

⁶¹ *CBSA Report*, *supra* note 59 at 15.

diseases.⁶²

I would argue that it is no coincidence that the reference to the MV Sun Sea is followed by a sentence that includes the words “terrorism,” “organized crimes,” and “infectious diseases.” The vilification of asylum seekers is clear. Turning to a technical perspective, the reason why these asylum seekers are “irregular” is because one cannot legally obtain a visa to come to Canada to make refugee claim. That is, if a visa officer believes the person will make a refugee claim on arrival, the officer must refuse the visa because the person does not intend to leave Canada on the expiration of the visa.

Another interdiction method is the \$3,200.00 fine that an airline must pay if it transports a person to Canada without a valid visa, something that, again, an asylum seeker will almost never have for the reason just described.⁶³ There is also the Canada-United States (U.S.) Safe Third Country Agreement implemented on 29 December 2004, which prevents asylum seekers from making claims at the Canada-U.S. border.⁶⁴ Due to the fact that refugee claimants in the U.S. face a one-year time bar on making a claim, this agreement means that Canada is currently turning away asylum seekers from its borders knowing that they will not be able to make a claim in the U.S., and will likely be deported back to the very countries they have fled.⁶⁵

Another way that we can see the undesirability of refugees as permanent residents is by the rhetorical demonization that faces people once they have arrived in Canada and make refugee claims. For example, beginning from when he took office, Canada’s former Minister of Citizenship, Immigration and Multiculturalism, Jason Kenney, continually referred to refugee claimants derisively as fraudsters and queue jumpers.⁶⁶ From his point of view, these asylum seekers should have waited patiently in the “queue” along with the other twelve million refugees and twenty-six million internally displaced persons around the world⁶⁷ until they were selected through Canada’s refugee resettlement program—at an underwhelming rate of about 10,000 per year.⁶⁸

Over the last four years this rhetorical demonization has been backed by significant legislative and regulatory changes. One of the groups most directly targeted has been the Roma, many of whom have migrated to the Parkdale area and are therefore finding their way into PCLS. Kenney’s first regulatory attack on Roma claimants came when a visa requirement was imposed on

⁶² *Ibid* at 5.

⁶³ The *Act*, *supra* note 2, s 148(1)(a); The *Regulations*, *supra* note 4, ss 279(1), 280(1).

⁶⁴ Citizenship and Immigration Canada, *Canada-U.S. Safe Third Country Agreement*, online: <<http://www.cic.gc.ca/english/department/laws-policy/menu-safethird.asp>>.

⁶⁵ See Audrey Macklin, “Disappearing Refugees: Reflections on the Canada–U.S. Safe Third Country Agreement” (2005) 36:2 *Colum HRL Rev* 365. See also Monica Zanchettin, “Asylum and Refugee Protection after September 11: Towards Increasing Restrictionism?” in Andrzej Bolesta, ed, *Refugee Crises and International Response: Towards Permanent Solutions?* (Warsaw: Libra, 2005) 141 at 169.

⁶⁶ See e.g. Richard J Brennan, “Canada’s failed asylum seekers will be shown the door”, *The Toronto Star* (30 March 2010), online: <<http://www.thestar.com/news/canada/article/787507--canada-s-failed-asylum-seekers-will-be-shown-the-door>>. See also Andrew Brouwer & Judith Kumin, “Interception and Asylum: When Migration Control and Human Rights Collide” (2003) 21:4 *Refuge* 6 at 6.

⁶⁷ UNHCR, *2008 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons*, online: <<http://www.unhcr.org/4a375c426.html>>.

⁶⁸ Citizenship and Immigration Canada, *Facts and Figures 2008: Immigration Overview*, online: <<http://www.cic.gc.ca/english/resources/statistics/facts2008/permanent/02.asp>>.

the Czech Republic in July 2009.⁶⁹ The second attack, one that targets all asylum seekers, began when I was working on the *Reunite* campaign with the introduction of the Conservatives' proposed legislative changes to the refugee system—changes that received royal assent in the form of Bill C-31 on 28 June 2012. Of particular note to Roma claimants is that since early 2010 Kenney had been hinting that under the new rules Hungary would be declared a “safe” country—or “designated country of origin.” This happened officially on December 15, 2012. This means that Roma claimants from Hungary (i) are barred from accessing the newly established Refugee Appeal Division; (ii) do not receive an automatic stay on their removal while their judicial review application is being processed; (iii) are only be able to access the Pre-Removal Risk Assessment application 36 months after their negative decision, which means it is unlikely that they will be able to access this fail-safe measure before they are deported,⁷⁰ (iv) are denied a work permit for the first six months after making their claim;⁷¹ and (v) like all refugees as of June 2012, they are no longer be able to access health coverage while waiting for their claim to be decided.⁷²

The Roma have also suffered particularly harsh rhetorical demonization through the media strategy that Kenney rolled out in early 2010 to accompany these technical changes. For example, on 2 April 2010, a story in the *Edmonton Journal* described Kenney's meeting with the *National Post's* editorial board, in which he was defending the “safe country” approach:

[Kenney] said a two-stream approach—one for refugee claims from democratic countries, another for the rest—is needed to discourage periodic flash floods of thousands of asylum claims from countries that generally offer their citizens robust human rights protection.

“It is simply an additional tool that we'll use on a very limited, discreet basis for countries from which we are receiving a high number of unfounded claims, and which are democratic and generally conform to international human rights conventions,” he said.

The most recent such deluge arrived from Hungary, a member of the European Union. Of more than 2,500 claims from that country last year, only three people were deemed to need Canada's protection.

Often, Kenney said, organized criminals are sending pawns to Canada to collect welfare cheques.⁷³

⁶⁹ Nicholas Keung, “Minister's comments prejudiced Roma refugee's case, lawyer argues,” *The Toronto Star* (22 March 2010), online: <<http://www.thestar.com/news/investigations/immigration/article/783487--minister-s-comments-prejudiced-roma-refugee-s-case-lawyer-argues>>.

⁷⁰ Julie B  chard & Sandra Elgersma, *Legislative Summary of Bill C-31*, Library of Parliament Research Publications (revised 4 June 2012), online: <http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c31&Parl=41&Ses=1> [B  chard].

⁷¹ Citizenship and Immigration Canada, *Backgrounder – Designated Countries of Origin* (16 February 2012), online: <<http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-02-16i.asp>>.

⁷² Citizenship and Immigration Canada, *Interim Federal Health Program: Summary of Benefits*, online: <<http://www.cic.gc.ca/english/refugees/outside/summary-ifhp.asp>>.

⁷³ Adam McDowell, “Immigration Changes Needed to Stop Refugee ‘Gaming,’ Kenney Says,” *Edmonton Journal* (2 April 2010) A7.

This excerpt is alarming for two reasons. First, Kenney's statistics were deliberately misleading. Given the backlog at the Immigration and Refugee Board, only eight of these 2,500 claims had gone to a full hearing, of which three had been accepted and five rejected.⁷⁴ Second, Kenney's implications about the safe nature of Hungary belied the rise in Hungary of Jobbik, an anti-Roma (and anti-Semitic) neo-fascist party.⁷⁵ In the first round of national elections held in April 2010, the Jobbik party won seventeen percent of the popular vote,⁷⁶ ultimately coming in third place, winning forty-seven parliamentary seats.⁷⁷ In September 2010, Jobbik's vice chairman and European Parliament representative, Csanad Szegedi, reportedly told Reuters that any Roma people who are considered a threat to public safety should be placed in camps:

We would force these families out of their dwellings, yes. ... Then, yes, we would transport these families to public order protection camps. ...

At these camps, there would be a chance to return to civilized society. Those who abandon crime, make sure their children attend school, and participate in public works programmes, they can reintegrate. ...

No doubt there will be people who show no improvement. They can spend the rest of their lives in these camps.⁷⁸

Kenney did not just visit with the *National Post* editorial board. He went to editorial boards across the country, decrying provincial welfare systems that were allowing "bogus" refugee claimants to "milk" Canada's generosity. This anti-poor, anti-refugee line received wide coverage in the mainstream media at that time. For example, a Montreal *Gazette* editorial from April 2010 read as follows: "Kenney told *The Gazette's* editorial board this week that his department knows of at least one case involving numerous false refugee claimants from one country cashing in, in an organized fashion, on Ontario's welfare system. The same thing could well be happening in Quebec or elsewhere."⁷⁹ Margaret Wentle clarified in *The Globe and Mail* which country Kenney was talking about:

Has there been a sudden outbreak of human-rights abuse in Hungary? Well, yes, in a way. Scam artists tell their victims how easy it is to get refugee status in Canada, then sell tickets to them. They coach them on how to lie to the authorities. Once in Canada,

⁷⁴ According to the Annex to the UNHCR Statistical Yearbook 2009, 2,440 refugee claims from Hungary were initiated in Canada. At the end of the year, three had been accepted, five had been rejected, and 259 had been "otherwise closed." Two thousand one hundred and seventy three had not yet been decided: UNHCR, *Statistical Yearbook 2009: Annex*, online: <<http://www.unhcr.org/4ce5327f9.html>>.

⁷⁵ Ian Traynor, "Hungary party to follow European Extremism's Move Away from Fringes," *The Guardian* (8 April 2010), online: <<http://www.guardian.co.uk/world/2010/apr/08/jobbik-hungary-move-from-fringes>>.

⁷⁶ Bruno Waterfield, "Hungary Elections: First Step to Power for Far-Right Since Nazi Era," *The Telegraph* (11 April 2010), online: <<http://www.telegraph.co.uk/news/worldnews/europe/hungary/7578561/Hungary-elections-first-step-to-power-for-far-right-since-Nazi-era.html>>.

⁷⁷ John Nadler, "Center-Right Win Means Changes for Hungary," *Time* (26 April 2010), online: <<http://www.time.com/time/world/article/0,8599,1984570,00.html>>.

⁷⁸ Marton Dunai, "Hungary's Far-Right Wants to Round Up Roma in Camps," *The Toronto Star* (1 September 2010), online: <<http://www.thestar.com/news/world/article/855668--hungary-s-far-right-wants-to-round-up-roma-in-camps>>.

⁷⁹ "A Sensible Attempt to Fix the Refugee Mess," Editorial, *The [Montreal] Gazette* (3 April 2010) B6.

police say, many of these people fall under the control of criminal gangs, who force them to work for free and help them apply for welfare. The welfare money goes to the gangs. Of the 2,500 claimants from Hungary, only three have been declared in need of protection.

Our broken refugee system is not new news. Criminals and phony refugees who simply want to jump the queue have been gaming Canada for decades.⁸⁰

Robert Silver, also of *The Globe and Mail*, seemed to be one of the few people in the mainstream media who was willing to critically assess the matter. In response to Kenney's visit to *The Globe*, he wrote:

Ah yes, the dubious canard that people are risking life and limb to get to Canada and then committing fraud on our system all for the princely sum of \$585 a month (in Ontario). Almost \$7,000 a year is driving wealthy foreigners to a life of crime.

And his statistical evidence that welfare programs are driving bogus refugee claims? He doesn't have any—or at least didn't provide it to *The Globe* yesterday.

His anecdotal evidence? Why, he "cited a police investigation into allegations of human trafficking involving Hungarian asylum claimants in Hamilton, Ont."⁸¹

In spite of sceptical accounts like this, if the Conservative majority victory in the fall of 2010 is any indication, it seems that Kenney won the media war. This has, in turn, paved the way for the legislative overhaul that followed.

Unfortunately, it appears that the rhetorical demonization has only increased since the initial wave of media coverage two years ago. On 5 September 2012, right-wing media pundit Ezra Levant, host of Sun News Network's television show *The Source*, made clear what he thought of Roma refugees:

On Friday, I told you about the wave of fraudulent refugee claims made by Gypsies trying to lie their way into Canada. ... They're coming from Hungary for crying out loud, a rich, generous liberal democracy. No one's a refugee from Hungary, at least not since it was liberated from the Nazis and then from the Soviets. For more than twenty years, it's been free. But these are Gypsies, a culture synonymous with swindlers. The phrase Gypsy and "cheater" have been so interchangeable historically that the word has entered the English language as a verb: "he gyped me." Well, the Gypsies have gyped us. Too many have come here as false refugees. And they come here to gyp us again, to rob us blind, as they have done in Europe for centuries. ...

Now I believe that anyone out there regardless of their race, or their religion, or their language, or their place of birth can choose to live a moral life. I must believe that

⁸⁰ Margaret Wente, "When It Comes to Refugee Claims, It's Pretty Easy to ID the 'Safe' Countries," *The Globe and Mail* (1 April 2010) A17.

⁸¹ Robert Silver, "Kenney Veers Right on Refugees?," *The Globe and Mail* (1 April 2010), online: <<http://www.theglobeandmail.com/news/politics/second-reading/kenney-veers-right-on-refugees/article4188883/>>.

because I believe that each of us was made in the image of God and that the whole challenge in life is to take responsibility for ourselves and make the right choices every day. But Gypsies aren't a race, they aren't a religion, they aren't a linguistic group. They're the medieval prototype of the Occupy Wall Street movement, a shiftless group of hobos that doesn't believe in property rights for themselves—they're nomads—or others. They rob people blind. Now the scourge has come to Canada through fake refugee claims—over five thousand of them in the past five years, all from Hungary. ...

And today, police in Ontario are taking to the courts more cases of the damage they have found in the streets. Look at this list of suspects released by Durham police. Gypsy after gypsy after gypsy. They gyped their way into Canada, and now they're gyping the rest of us. ... Twenty-nine people, 263 charges that we know about so far. There are five thousand of these Gypsies here. ...

For centuries, these roving highway gangs have mocked the law and robbed their way across Europe. Now because of our broken refugee system they're here in Canada by the thousands and they brought a Gypsy crime wave with them. Yeah, no thanks. I'm not interested in calling them Roma or travellers or having a Human Rights Commission investigate where we as a society have done them wrong and maybe dispatching social workers to them. Ha. Those social workers would just have their wallets stolen. I want to dispatch cops and send them bad Gypsies back to Hungary on the next plane. Just warn the flight attendants, heh, not to wear any jewellery on the flight.⁸²

While Levant's comments obviously cannot be attributed to Kenney specifically or the Conservative Party generally, Levant was a staffer in the Reform Party of Canada and the Canadian Alliance Party, working for both Preston Manning and Stockwell Day. He was also an activist alongside Kenney in the burgeoning Reform Party in the late 1990s.⁸³ Kenney is also a frequent guest on his show.⁸⁴ As such, I would argue that Levant's racist rhetoric is the other side of the coin of the legislative and regulatory amendments that are being introduced by the Conservative Party—that it represents the animus behind the technical changes. When rhetoric of this tenor is combined with the changes described above as well as another new component of the refugee system I have not even mentioned yet—the mandatory detention and otherwise harsh and differential treatment for asylum seekers who arrive without visas in groups⁸⁵—it reveals a bleak future for Canada as a country of asylum.

In this way, it would appear that the same underlying xenophobia and classism from 1939

⁸² Sun News Network has removed access to this segment on the internet. The author accessed it here: <https://www.youtube.com/watch?v=2JHQRBi9LY8>.

⁸³ See Sheldon Alberts, "New Rebels on the Right Fight for Reform," *Hamilton Spectator* (8 February 1997) B7; William Walker, "Manning's 'Backroom Boy' Raises Eyebrows Albertan Once Wanted Quebec to Leave Canada," *The Toronto Star* (21 September 1997) A3; and The Canadian Press-Broadcast Wire, "Day-staff Change," (14 February 2001).

⁸⁴ For example, Jason Kenney has appeared on Levant's show on 18 October, 2011, 12 December, 2011, 23 February, 2012, 31 March 2012, and 20 July 2012: see Sun News Network video archives, online: <<http://www.sunnewsnetwork.ca/video/>>.

⁸⁵ Béchard, *supra* note 70.

has endured to this day. In 1939 it led to an executive decision that prevented the MS St. Louis from docking. Today, decades after the rights of asylum seekers have been recognized by almost every country around the world, it is almost more troubling that this same xenophobia and classism is leading to a legislative overhaul overseen by our democratically elected Parliament. In any event, the result is similarly grim.

I note that such a comparison may seem overblown to some readers. However, it is important not to view the Voyage of the Damned with the benefit of hindsight. When the MS St. Louis left Germany in May 1939, few would have predicted the extent of the genocide that the Nazi regime would carry out of Roma, Jews, and many other targeted groups. While the rise of the neo-fascist right in Hungary does not mean that genocide will return for the Roma, one of the central points of the modern day refugee system was to *prevent* what occurred during World War II. This by necessity involves taking acts of persecution and hate-mongering rhetoric seriously and providing asylum to targeted groups *before* it is too late—even if Hungary today only looks like Germany during the ascendancy of the Nazis in the early 1930s and not how Germany looked in 1939.

Returning to the overall argument, my main contention is that to confront the restrictive family reunification regime without acknowledging and challenging the systemically racist and classist ways in which refugees are treated ignores the wisdom of the poverty law literature concerning the importance of challenging non-legal root causes. Family reunification schemes are another way that countries can control their borders and shape the character of their populations,⁸⁶ and it makes sense that if you want to keep refugees out, you would want to keep their families out as well. Therefore, if we only challenge the ‘superficial’ laws and not the underlying demonization of refugees, we reinforce a status quo in which it is acceptable to discriminate against a group of mostly poor, mostly racialized people. Moreover, by advocating for family reunification law reform without more at that particular moment, when the Conservatives had begun to overhaul the entire refugee system, seemed to me to be akin to asking for table scraps while the whole table was being set on fire.

C. THE SECOND INSIGHT: LAW REFORM CAMPAIGNS DO NOT CONTRIBUTE TO SOCIAL MOVEMENTS THAT COULD CHALLENGE ROOT CAUSES

1. A STRAIGHTFORWARD LAW REFORM CAMPAIGN IS A DISEMPOWERING STRATEGY

The argument in the poverty law literature that underlies this second insight is usually posited in this manner: by constructing the law as the problem, the lawyer, as the professional expert, is immediately placed in a position of power in the lawyer-client or lawyer-community relationship. The client or community, on the other hand, is constructed as dependent and powerless.⁸⁷ Quigley argues that this disempowerment can occur both during the provision of legal services as well as during law reform campaigns: “Both focus the power and decision-making in the lawyer and the

⁸⁶ Staver, *supra* note 19 at 19-25.

⁸⁷ See Alfieri, *supra* note 47 at 674. See also Wexler, *supra* note 44 at 1053; Joel F Handler, “Community Care for the Frail Elderly: A Theory for Empowerment” (1989) 50:3 Ohio St LJ 541 at 542; Gerald P Lopez, “Living and Lawyering Rebelliously” (2005) 73:5 Fordham L Rev 2041 at 2042; and Lucie E White, “To Learn and Teach: Lessons from Driefontein on Lawyering and Power” 1988:5 Wis L Rev 699 at 762, n 223.

organization which employs the lawyer. ... The lawyer decides what is a reasonably achievable outcome. The lawyer and her employer decides how much time and resources can be committed to the effort.”⁸⁸ Therefore, the key point for our purposes is that even well-meaning law reform campaigns perpetuate the powerlessness and dependency of people who are already marginalized and disempowered in society.⁸⁹ The end result is that the perceived “inability of the poor to interconnect and exercise shared control over their own lives and communities”⁹⁰ is affirmed and “the natural development of client and community leadership”⁹¹ is stifled.

2. CONNECTING EMPOWERMENT TO MOVEMENT BUILDING

As mentioned in the introduction to Part III, the criticism of law reform efforts that is embedded in this second insight (that the lawyer and not the community is privileged as the agent of change) and the criticism embedded in the first insight (that law reform efforts obfuscate the root causes of the problem) stem from the same underlying critique. That is, both criticisms are the result of lawyers treating the particular social problem, whatever it may be, as if it were only legal in nature—as opposed to being political as well.

What I would add here is that in the literature these two criticisms are often framed as mutually reinforcing. The argument usually proceeds in this way: because the root causes of the particular problem can be traced to the current unequal allotment of political power, and because the particular problem is usually faced by a group marginalized from that political power, the necessary solution is that those who are marginalized must organize and empower themselves in a widespread social movement that can challenge this distribution of political power. The necessity of a movement-type structure—as opposed to, for example, traditional political or legal structures—is a result of the fact that “the normal channels of politics tend to be impervious” to the needs and/or demands of the communities facing marginalization.⁹² This is another way of saying that the political goals of such communities—like the migrant community—are so far removed from the status quo that an alternate political structure is necessary to advocate for their demands. Non-citizens are of course uniquely disempowered in ostensibly democratic systems as they are literally disenfranchised. They do not enjoy even the minimal political power associated with the right to vote, thereby making normal political channels structurally inaccessible.

As such, law reform efforts without more both fail to address the underlying problem—the root causes—and do little to advance the solution to that problem: movement building. In fact, it may even be argued that the disempowering and dependency-inducing components of law reform efforts can actively hinder the development of such movements. I would suggest that Wexler, in another oft-quoted passage, is getting at this idea when he argues that “poverty will not be stopped

⁸⁸ William P Quigley, “Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations” (1995) 21:2 Ohio NUL Rev 455 at 465. See also Handler, *supra* note 87 at 542-43; and Cole, *supra* note 1 at 668.

⁸⁹ See Jennifer Gordon, “We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change” (1995) 30:2 Harv CR-CLL Rev 407 at 438.

⁹⁰ Alfieri, *supra* note 47 at 673.

⁹¹ *Ibid* at 689.

⁹² Austin Sarat & Stuart A Scheingold, “What Cause Lawyers Do For, and To, Social Movements: An Introduction” in Austin Sarat & Stuart A Scheingold, eds, *Cause Lawyers and Social Movements* (Stanford: Stanford University Press, 2006) at 9. Another way to conceive of the type of movement to which I am referring is to distinguish them from causes. A cause tends to be “abstract and disembodied”—for example, *Reunite* as it was originally formulated—whereas “movements tend to be more concrete and embodied in the people who work in and for them, the organizations that represent them, and in the actions taken to advance the movement’s goals” (Sarat at 2).

by people who are not poor. If poverty is stopped, it will be stopped by poor people. And poor people can stop poverty only if they work at it together. The lawyer who wants to serve poor people must put his skills to the task of helping poor people organize themselves.”⁹³ What seems to have happened with *Reunite*, however, was that rather than heeding this advice, we had fallen into the “trap” articulated by Sameer Ashar:

Clinics often fall into the trap of constructing clientless community education and policy advocacy projects. This is inherently in conflict with the mobilization agenda, which relies on organizers or a group of clients to determine their needs and devise at least a few rough collective solutions, which may or may not require the assistance of attorneys.⁹⁴

3. EMPOWERMENT AND MOVEMENT BUILDING IN ACTION

How, then, does one go about engaging with marginalized communities and building social movements? While this is a huge topic that could easily be its own paper, this section is simply meant to be a rough summary of some of the conclusions that have emerged in the literature as to how lawyers can engage successfully with social movements and avoid some of the pitfalls already discussed. One such conclusion is that lawyers may have a role in helping to organize a group composed of clients who all face similar legal problems. The immediate and explicit goal for such a group might be to take collective non-legal action to solve their particular problem. For example, based on an archetypal tale from 1965, the group might consist of tenants who use public pressure tactics, rather than legal means, to get rid of a rat infestation.⁹⁵ While this immediate goal might be essential to building intra-group solidarity, the underlying hope is that it would help create a space for mutual emotional support,⁹⁶ would allow for new leaders to emerge, and would give “participants a voice, often for the first time, in the governing of their lives.”⁹⁷ From this perspective, the success of any law reform campaign would be measured both by whether or not the law reforms proposed were actually implemented and by whether or not the “legal advocacy ha[d] empowered client communities.”⁹⁸

Ultimately, the overarching goal is that this group would link up with other similar groups and would join a movement that is committed to challenging the root political causes that necessitated the group’s establishment in the first place. In the case of the tenants facing the rat-infested building, an appropriate movement would likely be an anti-poverty movement that might demand adequate state support for marginalized communities, decent and rat-free affordable housing, and, more radically, a new political order that does not favour the propertied elite.

Lawyers involved in this type of work—sometimes referred to as the law and organizing movement⁹⁹—also discuss how these group interactions can be structured so that they lead to these ideal outcomes. A common strategy is to use popular education techniques that privilege having “oppressed groups ... reflect together about concrete injustices in their immediate world” so that they move from being passive recipients of oppression to being active creators of the world they

⁹³ *Supra* note 44 at 1053. See also Alfieri, *supra* note 47 at 664-65.

⁹⁴ Sameer M Ashar, “Law Clinics and Collective Mobilization” (2008) 14:2 *Clinical L Rev* 355 at 399, n 177.

⁹⁵ Cole, *supra* note 1 at 679-82.

⁹⁶ *Ibid* at 664.

⁹⁷ *Ibid* at 668.

⁹⁸ Cummings, *supra* note 47 at 479.

⁹⁹ *Ibid*.

want to see—what is also called the development of “critical consciousness.”¹⁰⁰ There are also discussions about how lawyers must come to this work seeing themselves as “co-eminent collaborators” with community members. That is, lawyers and community members must each recognize the gifts and knowledge brought by the other and attempt to avoid establishing a hierarchy that reflects mainstream society.¹⁰¹

D. VIEWING *REUNITE* THROUGH THE SECOND INSIGHT

Just as I did following the discussion of the first insight, I will offer two justifications for why I think these assertions about engaging with marginalized communities and movement building ought to be applied to any clinic-based campaign.

The first justification flows deductively from the logic contained in the foregoing discussion. That is, if it is indeed the case that the root cause of the restrictive laws, regulations and policies around family reunification is a xenophobic approach to border control, and if it is accepted that no mainstream political or legal structures are capable of challenging this xenophobia, then it seems that one way to challenge this root cause is to build a social movement that is outside of mainstream politics but is capable of engaging with it from a position of power. As such, legal clinics like PCLS could help organize a group composed of refugee clients, or collaborate with a group that was already established. This group would be organized around the immediate issue of family reunification or any other immediate needs expressed by the group, would be empowering, and would ideally link up with the broader migrant justice social movement.

The second justification flows from my experiences at the clinic. In early 2010 I had seven refugee clients who were facing difficulties—from minor to extraordinary—in having their partners and children come to Canada. Although I may have been projecting my own feelings onto them, it seemed as if they were constantly being buffeted by an impenetrable bureaucracy that operated incredibly slowly, made impossible demands of them, and caused intense heartache. This was especially apparent when someone would arrive with a letter explaining that a child had been denied a visa. The shock was often palpable as I would try to explain the intransigence in the *Regulations* concerning the age of the child¹⁰² and how entirely inadequate judicial review is as a means to challenge this denial.

I still cannot even think about these interactions without tears welling up in my eyes, tears that mirror the tears that I saw every week. Even the smiles and laughter in the intake rooms were at times hard to bear because—real or imagined—I saw suffering just below the surface.

In the relatively little time I would spend with each lonely mother or father, husband or wife, I would try my best to describe the relevant legislation and regulations concerning family reunification so that they might understand what they were up against. I would sometimes try to add the government perspective that animates these laws. I would explain how the government views all applications with deep scepticism, always watchful for that person trying to ‘cheat’ their way into Canada. Sometimes this would be met with confusion: “I am not trying to cheat. I just want my son to be here.”

I recognized those moments as points of potential engagement. Moments when I could

¹⁰⁰ White, *supra* note 87 at 760. See also Gordon, *supra* note 89 at 435-36 where she describes how this method is used at the Workplace Project in Long Island.

¹⁰¹ Lopez, *supra* note 87 at 2043.

¹⁰² *Supra* note 5.

have offered my “root causes” analysis as to why it is that I think that the government treats all applications with such scepticism. But it seemed both inappropriate and futile to begin such a discussion in the intake room. In such a setting, would an onslaught of Canadian immigration and refugee politics create an empowering experience? Would I not be abusing their need to access this information? Without taking the time to explore their experiences and knowledge, and to open myself to learning from them, would I not be just another imposition of power from above? Instead, I simply retreated into my role of a legal professional-to-be. I would merge with the system that was actively hurting my clients. I would fill out their forms and write letters on their behalf to embassies and high commissions.

It is these experiences, even though they are drawn from such a short period of time, that lend emotional conviction to the rational justification I offered first. Taken together, I feel that it is imperative that lawyers who wish to truly help clients facing structural oppression must at least be able to offer their clients some way of engaging with the root causes that is empowering—even if the lawyers are not the ones to carry it out themselves. Whether clients accept that offer would, of course, be entirely up to them.

In the three and a half years since I was a student at PCLS, inspired both by my experience with *Reunite* and my pre-law-school interest in popular education and community building, I have worked with groups that are experimenting with ways that legal professionals might undertake this. In the following section, I briefly review the project I am currently involved in with the hope that it might be useful for future legal advocacy campaigns and provide a concrete manifestation of some of the ideas discussed above.

IV. COLLABORATIVE LEGAL PLAY

Collaborative Legal Play, or CLAY, is a grassroots, volunteer organization founded in November 2011 that is loosely affiliated with a network of progressive legal professionals called the Law Union of Ontario. What follows in this section is a brief review of some of our work to date. I have focused in particular on elements of the project that were, in part, inspired by the limits of law reform campaigns that I grappled with during my time at PCLS.

It is also relevant to note that, as a group, we are also inspired by the related traditions of Paolo Freire’s pedagogy of the oppressed and Augusto Boal’s theatre of the oppressed. What follows, however, is not an attempt, by any means, to fully explore the rich literature on these approaches or to review how they have been applied in legal contexts.¹⁰³ Rather, this is nothing more than a sketch of one project that has drawn on these ideas. It is a project that is attempting through its practices to develop some alternative approaches to how legal professionals can use their knowledge and societal privilege to support groups engaged in social change efforts without, ideally, falling into some of the traps highlighted above.

As a starting point for our group, rather than first identifying legal problems from individual case files (as law reform campaigns tend to do) and building our work around that, one of the original goals of the group was to respond to the expressed needs of grassroots organizations, community groups, and other folks engaged in social change projects across Toronto who wanted access to legal knowledge in order to further their struggles, campaigns, and projects.

¹⁰³ For another example of law and theatre see Gillian Calder, “Embodied Law: Theatre of the Oppressed in the Law School Classroom” (February 2009) 1 *Masks: The Online Journal of Law and Theatre* 1.

The first ‘need’ we identified came to us through another grassroots group called the Immigration Legal Committee (ILC). The ILC had been asked by a variety of grassroots organizations and service provider agencies in Toronto whether people without immigration status had any legal rights and how the legal rights of people with status could be used to support those with precarious status. After publishing a ‘Know Your Rights’ guide in September 2011,¹⁰⁴ the ILC and CLAY collaborated in creating a workshop that would bring the written material to life.

We recognized from the outset that if we simply explained the relevant laws through a PowerPoint presentation or panel discussion, we would have been in a similar situation to the one critiqued above. We would have been placing ourselves in a position of power or authority as the ones who had the knowledge to give. Instead we consciously acknowledged that lived experience of the law was just as, if not more, important than knowledge of the law learned from a book. With this in mind, we designed a workshop that we began to run in the fall of 2012.

Although it is our intention to change the workshop agenda to respond to the specific needs of whatever group we happen to be working with, at its core the workshop follows a game-based and theatre-based approach to facilitation. The games are superficially simple and invite participants to move and play together, often necessitating a departure from their comfort zones—with a recognition, of course, that anyone can opt out at any time. What is key is the reflection that follows each game. Participants are invited first to identify the visceral feelings that came up in their bodies during the games—be they anxiety, fear, joy, et cetera—and to then connect those feelings to experiences in the rest of their lives where forces of power and oppression have made their bodies respond in similar ways. By sharing in this emotionally exploratory and vulnerable work that is rooted in the knowledge that the body carries, the experiences already present in the room begin to emerge, and the dynamic shifts from one where a teacher directs the learners to one where everyone is learning from everyone else.

Take for example the game called fear/protector. At the beginning of this game, participants stand in a circle and the facilitator asks them to choose someone who will be their F and someone who will be their P. Once all Fs and Ps are chosen, the facilitator reveals that the F stands for fear and the P for protector. The facilitator then explains the rules of the game: the goal of each participant is to position herself such that her protector is in between her and her fear. The result is a chaotic, swirling mass where everyone is trying to move themselves in order to get behind their protectors while often being oblivious to the fact that others might be trying to stay behind them for protection—or being oblivious to the fact that they might even be their protectors’ fears.

Following the game comes the reflection. Participants generally experience a whole range of emotions and feelings during this game. Some enjoy it, some find it anxiety-producing. Some are surprised to realize that they never noticed the three people following in their shadow seeking protection. Those three people might point out how frustrating it was to try and seek protection from someone who did not know that they were there. Through the reflection these immediate emotions are connected to experiences in one’s life. In the context of the workshop that we have developed—for which the participants have primarily been those with immigration status who provide services to those without—this game elicits a variety of anecdotes and thoughts. For example, participants have reflected on times where clients living in legal limbo have looked to them as protectors while they themselves have felt powerless to provide any protection, and have

¹⁰⁴ Immigration Legal Committee, *Migrants: Know Your Rights!* (September 2011), online: <http://toronto.nooneisillegal.org/sites/default/files/KYR%20ENGLISH%20PDF%20FINAL_0.pdf>.

even felt that they were actually enmeshed with the immigration system that their clients feared because of the source of their organization's funding.

The fact that the group has already shared in movement and play together during the game makes the discussion easier. Participants seem to feel that they are able to speak more openly and honestly. Of course, we recognize that openness and honesty can precipitate conflict. As people reduce the self-censorship that they might otherwise adopt among strangers or work colleagues and reveal more of their authentic selves, they might say things that offend others. However, we have found that when potentially contentious statements are put forward as someone's individual experience and when they follow a game where the group has supported each other through the feelings of vulnerability that can come with adults being silly together, there appears to be a greater willingness to consider that person's individual experience and to understand it—rather than to reject it out of hand. This can ultimately produce a richer conversation and allow the group to explore the complexity and differing opinions that inhere to any socio-political issue.

The trust and connection that builds through these games also helps us move towards a short theatre-piece in which the characters attempt, with mixed success, to enforce their legal rights in real-life scenarios either as people with precarious status or people with full status supporting those people. Rights to education, workers' rights, and rights with immigration or police officers in public, at community centres, in cars, on bikes, and at home are all canvassed. Following a 'forum theatre' approach, the theatre-piece then becomes interactive when we begin the play again and invite participants to replace one of our actors at moments of their choosing to either change the scenes to better reflect their own experiences, to practice enforcing their rights, to experiment with ways of supporting people with precarious immigration status, or to explore non-legal solutions to the scenes presented.

This game- and theatre-based facilitation also provides the opportunity to engage with the root causes (as discussed above) if that is indeed where participants want to go. This type of participant-led workshop design and facilitation is premised on the notion that humans, when given the proper context, are able to reflect on their own social conditions and to begin the process of transforming them. By building a workshop that creates moments in which oppression is palpable—either through the game or theatre components—it provides participants with an opportunity to reflect on the power and oppression inherent in their lives and in the particular scenarios discussed. For example, the intrinsic violence in arresting someone in their home for being on the wrong side of a border—and the few legal rights that one can avail themselves of in that situation—can lead to questions that probe the socio-economic and political reality that has created this legal regime.

The desired result at the end of this workshop is not that participants will have adopted the various systemic analyses that might have led the facilitators to be there in the first place, but rather that both participants and facilitators will have taken a moment to reflect on the injustice that can occur even in day-to-day interactions with state actors and institutions, and, perhaps, will have begun to contemplate how to change those interactions through political resistance. All of this is undergirded by participants having experienced what might be for some a novel way of sharing space together—one that invites connection and mutual support through vulnerability. In my limited experiences working with this model of social engagement over the last few years in the grassroots context, I have seen the potential for this approach to provide a sounder basis for participatory collective political action than the ones adopted by groups that share a political set of beliefs but who have never laughed or played together as part of their process.

As a final point, and in further contrast to law reform campaigns, one of the long-term goals of this project is movement building. We do not intend for these workshops to be one-off events. The hope is that the collaborative process in creating the workshop and the solidarity and community-building nature of engaging in the honest and vulnerability-inducing work will trigger the building of relationships between individuals and groups in a way that other approaches used in movement building—such as panel discussions and film screenings—fail to do. In other words, if I am correct in perceiving both that movement building, at its core, involves the deepening and broadening of social networks that share a basic unity around a particular issue, and that movement building in the migrant justice movement in the context of a diverse city like Toronto involves forging connections across race, language and class lines, I would argue that engaging with each other through workshops such as this—whether the content is legal or non-legal—provide a unique opportunity to build and strengthen social networks across diverse sectors. In the specific context of our group, this might mean that a single workshop will lead to further collaborations down the road with the same group—through which the social network or movement will be deepened—or might lead us to collaborate with another group that is known to the first one—meaning that the social network or movement will be broadened. After having only run this workshop a few times, we have already been approached by groups who want to use a similar format with migrant workers and with racialized youth who are profiled and targeted by police.

V. HOW IS THIS TO BE APPLIED IN THE LEGAL CLINIC SETTING?

There are a number of ways that I think the approaches outlined above are relevant to the clinic context. First, when clinics move outside of client-specific service provision, it is essential that they take at least some direction from the affected client group as to what kinds of legal or political action are most desired. I have already discussed how *Reunite* was initiated without any consultation with the Tibetan population in Parkdale which, at the time, was the most affected by family reunification problems. Such consultation might have produced a campaign that included some of the additional demands cited above, or, importantly, it might have led PCLS to divert its resources into something that was even *more* relevant to the Tibetan community that did not emerge from casework. By seeking out the experiences and perspectives of the Tibetan community, and by involving them in the creation of a campaign, this would also have checked, to some extent, the power and authority vested in those who hold the legal knowledge.

Second, the types of popular education techniques discussed above can be used even in settings where the ostensible goal is fairly concrete: such as advocating for law reform. This type of process is oriented to community or team building, and I would argue that it is useful for any group hoping to engage in a collective project together. The kind of environment that this approach engenders—in which contributions are encouraged from everyone attending no matter their prior experiences—might be able to steer a law reform campaign in a new creative direction that was not initially anticipated. This would also help, once again, to breakdown some of the inherent power carried by legal professionals.

Third, even if a legal clinic's campaign begins with a focus on a specific law reform goal, there is no reason why an analysis of root causes cannot be built into that group's activities. At an initial meeting, participants' lived experience of refugee family reunification problems could be used as a way to initiate a discussion about root causes. For example, a point of discussion might

be: why is it that, in spite of all the justifications for a swift and more inclusive approach to family reunification (as discussed above), it is still such a lengthy and restrictive process? While the facilitators might have in mind an answer similar to the one I set out above, it would be essential to create a space where all manner of answers could come forward. Provided that participants found this kind of reflection to be beneficial, the straightforward law reform campaign might then begin to link up with other migrant justice groups in order to further develop their root causes analysis. Not only would this have the wider benefit of building the migrant justice social movement, but having broader popular support for specific law reform demands might make them that much more capable of achievement.

VI. CONCLUSION

Refugee family reunification remains a serious problem. The federal Conservatives are actually considering lowering the age of a dependent child for all immigration categories under the *Regulations* from twenty-two to nineteen years of age, which will only add to the difficulties faced by refugees (and other immigrants as well). It is a policy change in direct contrast to *Reunite's* campaign demand to raise the age limit.

The justification offered in the Canada Gazette is that economic outcomes for those who migrate at a younger age are better than those for immigrants who migrate at an older age.¹⁰⁵ Aside from the lack of consideration for moral or rights-based arguments that would support a more inclusive rule—at least for refugees if not for all immigrants—this perspective does not even accord with what the scholarship tells us about the economic benefits of allowing for refugees to immigrate with their social networks, namely, that economic success is more likely when a family unit is together, as compared to when individual refugees try to establish themselves.¹⁰⁶

It is, of course, possible to view this proposed change as more innocuous than some of the fundamental changes made to the refugee determination system. In fact, it is possible to simply view this proposed change as one that could be headed off by a law reform project, which is precisely what happens when each law or regulation is viewed in isolation. Stepping back, however, this is another example of regulatory tinkering that takes on a different hue when viewed in light of a broader immigration and refugee regime that is predicated on the race- and class-based considerations as discussed above. The federal Conservatives are clearly intent on reducing the number of people who permanently immigrate here, and on increasing the number of people—largely working class people of colour—who come as temporary workers with all the exploitation that that entails. This change would just be another little shift in that direction. For those who want to resist this shift, the necessity of challenging the underlying ideology through broad social and political movements ought to be clear.

Turning to the initial sketch I offered as to how this might look in the clinic context, I recognize that what I describe is essentially a community organizing project. Readers might resist the suggestion that legal clinics should be engaging with communities in this way. After all, legal services are both so time-consuming and so in-demand that it would seem absurd to dedicate so much effort to adopting a community organizing model¹⁰⁷—especially when community organizing is an intensely difficult task. A related concern might be that lawyers simply do not

¹⁰⁵ Canada Gazette, “Regulatory Impact Analysis Statement,” online: <<http://www.gazette.gc.ca/rp-pr/p1/2013/2013-05-18/html/reg1-eng.html#archived>>.

¹⁰⁶ See *e.g.* John, *supra* note 32.

¹⁰⁷ See *e.g.* Gordon, *supra* note 89 at 438.

have the appropriate skill set to take on this kind of role.¹⁰⁸ This concern would be further aggravated in a student legal clinic context like PCLS where the caseworkers rotate every four months, making it even harder to conceive of building something in which long-term interpersonal relationships would be central.

Nevertheless, Ontario legal clinics in general, and PCLS specifically, have a history of taking advantage of their legal knowledge, political connections, legitimacy, and relatively secure funding (which often includes paid community organizers) to take part in political organizing activities in addition to the individualized casework.¹⁰⁹ Rather than foregoing this history because of the tendency to create lawyer-centred, narrow law reform campaigns, I think it is crucial to impart to students in a legal clinic setting the issues raised above, and to encourage them and all lawyers to continue to experiment (as CLAY is doing) with how they can use their privileged access to legal knowledge in solidarity with communities facing systemic oppression—so long, of course, as they take this on in a way that is mindful of all the concerns outlined above.

¹⁰⁸ Cummings, *supra* note 47 at 491-98. But see White, *supra* note 87 at 765.

¹⁰⁹ See for example PCLS Board of Directors, “Poverty Law and Community Legal Clinics: A view from Parkdale Community Legal Services” (1997) 35:3&4 Osgoode Hall LJ 595 at 599. See also Ontario Project for Inter-clinic Community Organizing, “10 Reasons why Legal Clinics make good Community Organizers”, online: <http://www.opicco.org/?q=Legal_clinic_materials#attachments>.