

1-1-2014

## Understanding the Power of Law: Engaging Students in Criminal Law Casework

Heather Douglas

*The University of Queensland*

Monica Taylor

*The University of Queensland*

Follow this and additional works at: <https://epublications.bond.edu.au/ler>



Part of the [Legal Education Commons](#)

---

### Recommended Citation

Douglas, Heather and Taylor, Monica (2014) "Understanding the Power of Law: Engaging Students in Criminal Law Casework," *Legal Education Review*: Vol. 24 : Iss. 1 , Article 3.

Available at: <https://epublications.bond.edu.au/ler/vol24/iss1/3>

This Article is brought to you by the Faculty of Law at [ePublications@bond](mailto:ePublications@bond). It has been accepted for inclusion in Legal Education Review by an authorized administrator of [ePublications@bond](mailto:ePublications@bond). For more information, please contact [Bond University's Repository Coordinator](#).

# UNDERSTANDING THE POWER OF LAW: ENGAGING STUDENTS IN CRIMINAL LAW CASEWORK

---

HEATHER DOUGLAS\* AND MONICA TAYLOR\*\*

## I INTRODUCTION

In recent years there has been intense focus on the law student experience, particularly in relation to first year law students and their transition from high school to university.<sup>1</sup> Both in Australia and overseas, a number of empirical studies have been conducted into law students' perceptions of the law and lawyering, and their values<sup>2</sup> and career aspirations.<sup>3</sup> In many studies of clinical legal programs there has been a focus on developing ethical lawyering practices<sup>4</sup> and on conceptions of social justice.<sup>5</sup> Together these studies, at least indirectly, reveal much about students'

\* Heather Douglas is a Professor in the TC Beirne School of Law, The University of Queensland.

\*\* Monica Taylor is the Director of the UQ Pro Bono Centre, TC Beirne School of Law, The University of Queensland.

The authors wish to thank Professor Nick James for his helpful comments on an earlier draft of this paper and Kathryn Thomas for research assistance. An earlier version of this paper was presented at the 12th Australian Clinical Legal Education Conference held in Brisbane in July 2013.

<sup>1</sup> Sally Kift, Mark Israel and Rachael Field, 'Learning and Teaching Academic Standards Project: Bachelor of Laws Learning and Teaching Academic Standards Statement' (Australian Learning and Teaching Council, December 2010).

<sup>2</sup> Tamara Walsh, 'Putting Justice Back into Legal Education' (2007) 17 *Legal Education Review* 119; Irene Styles and Archie Zariski, 'Law Clinics and the Promotion of Public Interest Lawyering' (2001) 19 *Law in Context* 65.

<sup>3</sup> Melissa Castan et al, 'Early Optimism? First-year Law Students' Work Expectations and Aspirations' (2010) 20 *Legal Education Review* 1, 8; Catherine Carroll and April Brayfield, 'Lingering Nuances: Gendered Career Motivations and Aspirations of First Year Students' (2007) 27 *Sociological Spectrum* 225.

<sup>4</sup> For an overview of the role of law schools, and clinical legal education, in ethics education, see generally Josephine Palermo and Adrian Evans, 'Almost There: Empirical Insights into Clinical Method and Ethics Courses in Climbing the Hill Towards Lawyers' Professionalism' (2008) 17 (1) *Griffith Law Review* 252. On ethics education in clinical programs, see also James Moliterno, 'On the Future of Integration Between Skills and Ethics Teaching: Clinical Legal Education in the Year 2010' (2007) 46 (1) *Journal of Legal Education* 67.

<sup>5</sup> See, eg, Marcy Karin and Robin Runge, 'Towards Integrated Law Clinics that Train Social Change Advocates' (2011) 17 *Clinical Law Review* 563; MA du Plessis, 'University Law Clinics Meeting Particular Student and Community Needs' (2008) 17 (1) *Griffith Law Review* 121, 136.

understanding of law and power. In this paper the authors draw on the experience of running a criminal law clinic to consider how students engage with the concept of power in the study of law.

This article first examines the empirical data about law students' perceptions of the law and of power, and their motivations for obtaining a legal education. Second, this article outlines an approach informed by the work of Carol Smart to encourage students to critique the power of law. Third, drawing on students' evaluations and reflections, this article describes a new legal clinic at the University of Queensland (UQ) and examines, through an analysis of student learning, how it prompted students to engage in a deeper critical understanding of power in the context of their clients' circumstances and their role as 'lawyers'. The article concludes by encouraging other clinical legal educators to have regard to the work of Smart when engaging students in reflective practice about the power of law.

## II LEGAL EDUCATION, LAW STUDENTS AND POWER

In his persuasive and early critique of legal education, Duncan Kennedy argued that law students attend law school with the notion that being a lawyer means something more socially constructive than just doing a highly respectable job; it includes a deep belief that, in its essence, law is a progressive force.<sup>6</sup> Recent Australian studies of the career expectations of first year students affirm this view. In a survey of 371 students enrolled in a LLB at Monash University, Castan and her colleagues found that the majority of students they surveyed expected they would work as lawyers on graduation (rather than in another field) and that a law degree would allow them to 'benefit the socially disadvantaged' and 'fight against injustice'. However those surveyed also identified some of the benefits of a law career as 'high social status' and 'high salaries'.<sup>7</sup> Another study conducted with LLB students at the University of New South Wales (UNSW) found that practice in human rights law and criminal law were the primary career aspirations for a high proportion of students in the first year of the LLB program, however by final year it seemed that interest in these areas had ebbed significantly. By the later years commercial law was the primary area of interest for the

largest group of UNSW LLB students.<sup>8</sup> These findings are reflected internationally, with a number of studies conducted in the

<sup>6</sup> Duncan Kennedy, 'Legal Education and Training for Hierarchy' in David Kairys (ed), *The Politics of Law – A Progressive Critique* (Pantheon Books, 1982) 41.

<sup>7</sup> Castan et al, above n 3, 8.

<sup>8</sup> Alex Steel, 'Towards a Profile of Australian Law Students: Indications from the Law School Survey of Student Engagement at UNSW' (Seminar delivered

United States of America documenting the impact of law school socialisation on students' motivations for studying law changing from a 'reform-oriented' approach to one of 'status-seeking' throughout the course of their degrees.<sup>9</sup>

These empirical studies reveal that a considerable number of students commence a law degree with a strong sense of idealism and an assumption that the law can 'fight against injustice', but towards the end of the degree their perception of the law has shifted in favour of the, arguably, more prestigious field of commercial law. Though seemingly opposed, these perspectives may share an underlying characteristic. Students report that they will pursue work as lawyers rather than in another field, perhaps suggesting many perceive that the law is, at least conceptually, powerful. If students are persuaded that the study of law will lead them to power, surely as legal educators we should be encouraging our students to critique (or at least acknowledge) these assumptions. We suggest that clinical legal education, especially in the form of clinics in criminal law, is well-suited to fostering the critical thinking skills needed by students to help them test their own assumptions about the power of law.

### III THE POWER AND LIMITS OF LAW

The legal education literature is rich with overarching statements about the unwieldy power of law. The law has been described as 'the single most powerful social force preserving and legitimating the prevailing distribution of power in our society'.<sup>10</sup> It is 'an aspect of the social totality' in which the rules 'are a factor in the power or impotence of all social actors'.<sup>11</sup> Law is also a 'political mechanism for the acquisition, exercise and defense of power'.<sup>12</sup> It follows that, in order to recognise the full potential of

at TC Beirne School of Law Research Seminar Series, University of Queensland, 10 May 2013). Earlier studies of the backgrounds of Australian law students also concluded that most were from economically affluent backgrounds. See David Weisbrot, 'Access to Legal Education in Australia' in Rajeev Dhavan, Neil Kibble and William Twining (eds), *Access to Legal Education and the Legal Profession* (Butterworths, 1989) 98; David Barker, *Access to Legal Education* (Centre for Legal Education Sydney, 1996).

<sup>9</sup> E Gordon Gee and Donald W Jackson, 'Current Studies of Legal Education: Findings and Recommendations' (1982) 32 *Journal of Legal Education* 447, quoted in Jill Chaifetz, 'The Value of Public Service: A Model for Instilling a Pro Bono Ethic in Law School' (1993) 45 *Stanford Law Review* 1695. In her article Chaifetz documents a range of US studies that support the conclusion that law school acculturation is a significant contributing factor to students' growing disregard for what she refers to as 'public interest work'.

<sup>10</sup> Stephen C Halpern, 'On the Politics and Pathology of Legal Education (Or, Whatever Happened to that Blindfolded Lady with the Scales?)' (1982) 32 *Journal of Legal Education* 383, 389.

<sup>11</sup> Kennedy, above n 6, 49.

<sup>12</sup> Stephen Wizner, 'The Law School Clinic: Legal Education in Interests of Justice' (2001-02) 70 *Fordham Law Review* 1929, 1936.

their skills, law students must be able to ‘conceive of the law as an instrument of power - and legal skills as a means to power’.<sup>13</sup>

While we do not disagree with this line of scholarly analysis about the power of law, we think it is vital that students also understand the *limitations* of the law to redress injustice. This article, and indeed the student clinic we describe below, is informed by the work of feminist legal theorist Carol Smart.<sup>14</sup> We suggest her insights are helpful in a consideration of how students might be assisted to critique their own assumptions of the inherent power of the law to resolve a client’s legal problem.

In her key early work, *Feminism and the Power of the Law*, Smart recognised that the idea that the law has the power to right wrongs is pervasive.<sup>15</sup> In considering law’s power she focuses on the discursive power of law and shows how law works to impose legal definitions on everyday life. For example she considers how the legal definition of rape, which is focussed on consent, can take precedence over a woman’s view of her experience.<sup>16</sup> We suggest this approach is helpful in understanding other contexts where law imposes its definitional boundaries, potentially closing down opportunities to consider other responses. For example a person who is charged with trespass because they are sleeping rough may be defined in law as criminal, while a social worker may see homelessness. Smart expressed concern that the central focus on law, especially by feminists, might result in the disqualification of other knowledge,<sup>17</sup> which led to her to recommend that law should be decentred.<sup>18</sup> As Currie and Kline observe, Smart concentrates on the task of ‘deconstructing the discursive power of law’ in order

<sup>13</sup> Lucy Maxwell, ‘How to Develop Law Students’ Critical Awareness? Change the Language of Legal Education’ (2012) 22(1-2) *Legal Education Review* 100.

<sup>14</sup> Carol Smart, *Feminism and the Power of the Law* (Routledge, 1989). We recognise the limits of our approach and the fact that there are various approaches to understanding power in the context of legal education: see Kaarlo Tuori, Zenon Bankowski and Jyrki Uusitalo (eds), *Law and Power: Critical and Socio-Legal Essays* (Deborah Charles Publications, 1997); Matthew Ball, ‘Legal Education and the “Idealistic Student”: Using Foucault to Unpack the Critical Legal Narrative’ (2010) 36(2) *Monash University Law Review* 80; Matthew Ball, ‘Power in Legal Education: A (New) Critical and Analytical Approach’ (2012) 12(1) *QUT Law and Justice Journal* 157. We note that Foucault, writing before Carol Smart, viewed law as a form of power that was diminishing in significance; see Colin Gordon, *Michel Foucault Power / Knowledge* (Harvester Press, 1980) 107. However Smart takes issue with this position (Smart, 8) as do we. The continuing strong focus on law by politicians as a way to shape problems arguably reflects the continuing power of law; see for example Andrew Trotter and Harry Hobbs, ‘The Great Leap Backward: Criminal Law Reform With Hon Jarrod Bleijie’ (2014) 36 (1) *Sydney Law Review* 1.

<sup>15</sup> Smart, *ibid* 12.

<sup>16</sup> For further discussion see also Gary Simpson and Hilary Charlesworth, ‘Objecting to Objectivity: The Radical Challenge to Law’s Liberalism’ in Rosemary Hunter, Richard Ingleby and Richard Johnstone (eds), *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law* (Allen and Unwin, 1995) 119.

<sup>17</sup> *Ibid*.

<sup>18</sup> *Ibid* 21.

to demystify and decentre it.<sup>19</sup> In this way Smart argues that an approach of decentring law opens up space to consider other non-legal strategies as a response to oppression.<sup>20</sup> While Smart was primarily focussed on the oppression of women, her theory is helpful in considering other forms of oppression that may result from, for example, poverty, race or mental illness. Smart accepted that law cannot be ignored, indeed she found feminists have to engage with it, but she found it must also be challenged.<sup>21</sup> She also accepted that law, while powerful, does not ‘stand in one place, have one direction, or have one consequence’<sup>22</sup> and that law will not always offer the solution.<sup>23</sup>

We suggest that helping students to understand and critique the power of law in the way outlined by Smart will enable law students to appreciate both the capacity and the limits of the law in responding to clients’ concerns. We do not argue it is necessary to push students into a theoretical conversation about the definition of power; rather, the goal of clinical legal education is in part to spark a critical awareness of both the capacities and the limits of law, and students’ role as future legal practitioners in that process. By decentring the law, students can be encouraged to question whether law (in the sense of a legal remedy) or some other response (eg health or social work) may be more empowering for a client or also required. A critical appreciation of both the capacities and limits of the law will help reveal to students what Smart referred to as the law’s ‘over-inflated view of itself’<sup>24</sup> and encourage students to critically analyse their own role as future lawyers in either facilitating or challenging systemic injustice.

#### IV POWER AND CLINICAL LEGAL EDUCATION

Much has been written about how clinical legal education can inculcate an understanding of social justice amongst law students, and revive that original notion of the law being a tool for responding to injustice.<sup>25</sup> In its comprehensive examination of contemporary legal education in the USA in 2007 (commonly known as the *Carnegie Report*) the Carnegie Foundation for the Advancement of Teaching remarked on the integrative features of clinical legal education. It noted that ‘[c]linics can be a key setting

<sup>19</sup> Dawn Currie and Marlee Kline, ‘Challenging Privilege: Women, Knowledge and Feminist Struggles’ (1991) 2 (2) *The Journal of Human Justice* 1, 16.

<sup>20</sup> Smart, above n 14, 5.

<sup>21</sup> *Ibid* 164.

<sup>22</sup> *Ibid* 164-165.

<sup>23</sup> *Ibid* 164-165.

<sup>24</sup> *Ibid* 3.

<sup>25</sup> Walsh, above n 2, 121. See also Adrian Evans and Ross Hyams, ‘Independent Evaluations of Clinical Legal Education Programs: Appropriate Objectives and Processes in an Australian Setting’ (2008) 17 (1) *Griffith Law Review* 52, 53, where the authors suggest that ‘the best [clinical] programs may be progressively humanising Australian legal education ...’.

for integrating all the elements of legal education, as students draw on and develop their doctrinal reasoning, lawyering skills, and ethical engagement, extending to contextual issues such as the policy environment.<sup>26</sup> Clinics have been found to assist students to develop empathy and emotional maturity through their interaction with clients, as well as teaching professional ethics.<sup>27</sup> In addition to pedagogical benefits, clinics can play a ‘distinctive bridging role’<sup>28</sup> in legal education by bringing together law schools, the legal profession and their local communities.<sup>29</sup> As Nicholson has stated:

Perhaps most importantly, clinics reveal the extent of unmet legal need, and social and legal injustice, that legal practice can involve helping others, and that this can be rewarding as well as intellectually challenging.<sup>30</sup>

However, compared to the overwhelming ‘access to justice’ imperatives of clinical legal education, less has been written about the clinic’s role in critiquing the power of law for participating law students. We suggest that a consideration of power is essential to the clinic’s pedagogical mission. Such an approach is necessary not only because it stimulates a deeper understanding by students of the powerful nature of the law and their role as legal professionals, but also because it is now officially recognised as a benchmark for effective clinical legal practice. The 2012 Best Practice Guidelines for Australian Clinical Legal Education state that, *inter alia*, ‘studying law in context also means *analysing the role of power* in shaping the law and legal system; and *analysing the role of lawyers* and how they perpetuate, challenge and reform structures, institutions, systems and relationships’.<sup>31</sup> In our view, a

<sup>26</sup> William Sullivan et. al, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass, 2007) 121, quoted in Peter Joy, ‘The Cost of Clinical Legal Education’ (2012) 32 *Boston College Journal of Law and Justice* 309, 325. In relation to the development of lawyering skills through legal clinics, see also Margaret Martin Barry, John C Dubin and Peter A Joy, ‘Clinical Legal Education for this Millennium: The Third Wave’ (2000) 7 *Clinical Law Review* 5, quoted in Rebecca Sandefur and Jeffrey Selbin, ‘The Clinic Effect’ (2009) 16 *Clinical Law Review* 57, 71.

<sup>27</sup> Donald Nicholson, ‘Education, Education, Education: Legal, Moral and Clinical’ (2008) 42(2) *The Law Teacher* 145, 165.

<sup>28</sup> Jeff Giddings and Jennifer Lyman, ‘Bridging Different Interests: The Contributions of Clinics to Legal Education’ in Frank S Bloch, *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2010).

<sup>29</sup> For an historical discussion of the connection between university legal clinics and the community legal centres in Australia, see Mary Anne Noone, ‘Australian Community Legal Centres : The University Connection’ in Jeremy Cooper and Louise G Trubek (eds), *Educating for Justice: Social Values and Legal Education* (Dartmouth Publishing Company Ltd, 1997).

<sup>30</sup> Nicholson, above n 27, 165.

<sup>31</sup> Adrian Evans et al, *Best Practices: Australian Clinical Legal Education September 2012* (Office for Learning and Teaching, Department of Industry, Innovation, Science, Research and Tertiary Education, 2012) 15 (emphasis added). The *Best Practices* final report also states that, ‘CLE fully supports the objectives of the national Threshold Learning Outcomes (TLOs).’ See Adrian Evans et.al, *Strengthening Australian Legal Education by Integrating Clinical*

critique of whether the law can ‘empower marginalised and disadvantaged people as well as to oppress them’<sup>32</sup> is apposite for the lived experience of prisoners, whose rights and liberties have been significantly curtailed and who are often burdened with multiple disadvantages including lack of formal education, poverty and poor mental health.

#### V A CASE STUDY: CRIMINAL LAW MATTERS CLINIC

Community legal centres (CLCs) in Queensland have generally refused to undertake criminal law casework on the basis that this area of law is the preserve of state-funded Legal Aid.<sup>33</sup> However the case of *Dietrich v R*<sup>34</sup> effectively led to the narrowing of the type of case that should have legal representation. Subsequent cases have found that the principle outlined in *Dietrich’s* case does not apply to appeals<sup>35</sup> or to those cases where the outcome is likely to be something other than imprisonment.<sup>36</sup> Appeals against sentence and conviction are extremely complex and their determination relies almost entirely on the provision by the appellant of a written outline of argument that demonstrates familiarity with legal principles and relevant case-law. This is very difficult, if not impossible, for many unrepresented litigants.

Legal Aid Queensland (LAQ) is the largest criminal law firm in Queensland, providing legal representation to individuals in both summary and indictable criminal law matters. LAQ also provides assistance to convicted persons seeking to appeal their conviction and/or sentence in both State and Commonwealth matters. To be successful in applying for a grant of aid, an individual applicant must generally satisfy a two-pronged test: first, an applicant must not have the means to afford private legal representation (the means test) and, second, the applicant’s legal case must display sufficient legal merit (the merit test). For an appeal against conviction and/or sentence, legal assistance may be granted where a solicitor or advocate certifies that there is a strong likelihood that the conviction will be quashed or the sentence

*Experiences: Identifying and Supporting Effective Practices* (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013) 12.

<sup>32</sup> Maxwell, above n 13, 105.

<sup>33</sup> See generally Mary Anne Noone and Stephen A Tomsen, *Lawyers in Conflict: Australian Lawyers and Legal Aid* (The Federation Press, 2006), in particular chapters 6 and 7 in relation to funding for Legal Aid Commissions and Community Legal Centres.

<sup>34</sup> *Dietrich v R* (1992) 177 CLR 292. In this case the High Court found that, in general, criminal defendants charged with a ‘serious’ offence should be legally represented. ‘Serious’ has generally been understood to refer to those cases where there was a real risk of imprisonment. See Heather Douglas et al, *Criminal Process in Queensland and Western Australia* (Thomson, 2010) 285-286.

<sup>35</sup> *Simmanovic v R* (1998) 103 A Crim R 452.

<sup>36</sup> *R v Essenberg* [2002] QCA 4.

materially reduced. In practice this usually means the involvement of experienced in-house or private counsel considering the applicant's likely prospects of success.<sup>37</sup>

In the 2011-2012 financial year, approximately 30 per cent of applications to Legal Aid to provide representation for an appeal against sentence and/or conviction were unsuccessful.<sup>38</sup> In the 2011-2012 financial year, approximately 27 per cent of criminal cases heard by the Queensland Court of Appeal were unrepresented.<sup>39</sup> The number of individuals who are unrepresented at the Queensland Court of Appeal in relation to criminal matters continues to rise and it is well-known that unrepresented litigants place significant burdens on the court.<sup>40</sup> Without funding for legal aid, and with CLCs having neither the skills nor resources to assist (either through employed staff or by marshalling the pro bono resources of the private profession), these individuals have no choice but to either self-represent in the appellate jurisdiction or relinquish their attempts to bring an appeal. There is some evidence to suggest that continuing to engage with the criminal justice process when unrepresented can become too much for prisoners who become fatigued and who ultimately give up.<sup>41</sup>

### A Clinic Conception and Design

The Criminal Law Matters Clinic (CLMC) was devised by the UQ Law School in consultation with Caxton Legal Centre, Queensland's largest generalist CLC. The main aim of the CLMC was to assist unrepresented appellants to prepare their outline of argument for appeal. It was expected that other criminal matters might also arise in the context of assisting clients with their appeals, and that students would be able to assist with these other matters. The original idea for the CLMC was conceived by Professor Heather Douglas, whose practice and academic work includes criminal law and procedure.<sup>42</sup> The CLMC was loosely

<sup>37</sup> Legal Aid Queensland, *Annual Report 2011-2012* (2012) 23 <<http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2012/5412T1086.pdf>>.

<sup>38</sup> Supreme Court of Queensland, *Annual Report 2011-2012* (2012) 15.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.* See also Elizabeth Richardson, Tania Sourdin and Nerida Wallace, *Self-Represented Litigants: Gathering Useful Information: Final Report – June 2012* (ACJI, Monash University, 2012) 9-11.

<sup>41</sup> Anne Grunseit, Suzie Forell and Emily McCarron, 'Taking Justice into Custody: The Legal Needs of Prisoners' (2008) *Law and Justice Foundation of New South Wales* 141.

<sup>42</sup> Douglas' background includes 'some periods of socio-legal or moral activism [and] publications evidencing that activism'; she is also 'academically supervised'. Douglas' approach to criminal law is also informed by feminist scholarship and in particular the work of Carol Smart. See, for example, Heather Douglas, 'Battered Women's Experiences of the Criminal Justice System: Decentering the Law' (2012) 20 (2) *Feminist Legal Studies* 121. Evans suggests these are the 'normative credentials for a clinical teacher': Andrew Evans, 'Global Agenda, Cultural Capital and Self-Assessment of Clinical Legal Education Programs' (2012) 38 (2) *Monash University Law Review* 55 at

modelled on a similar scheme to assist criminal appellants that operated in Western Australia from 2006 to 2008. The coordinators of that program provided helpful guidance to Professor Douglas in the planning stages of the CLMC.<sup>43</sup> LAQ was consulted in the early days of clinic design and it was agreed that the CLMC would indeed fill a gap in access to justice. Due to LAQ funding constraints the proposed clinic was seen as a welcome addition to existing services available to convicted prisoners in Queensland. There was little concern about service replication by other agencies as the only other specialist CLC in Queensland working with prisoners primarily advises clients in administrative law matters relating to parole board applications and appeals.<sup>44</sup>

Six students were selected to participate in the CLMC in 2012 and 2013 (twelve in total) from within the internal application process for the UQ Law School's clinical law elective program. The elective is currently overseen by the UQ Pro Bono Centre as it aligns with the Centre's objective of creating opportunities for law students to participate in the delivery of pro bono legal services in Queensland. The inaugural 2012 intake attracted a strong number of applicants, and this was repeated with the second intake in semester 2, 2013. The CLMC was the most popular clinical offering in 2013 with 28 students nominating it as either their first or second clinical preference.

There were a number of features of this particular clinic that set it apart from other clinical offerings at UQ. First, of the nine clinics currently offered to UQ students, eight are in civil law. The CLMC is the only clinic with a criminal law focus, satisfying student demand for greater variety in the content of clinical offerings. Second, the CLMC had broad stakeholder support at the outset. Practitioners in private criminal law practice in Brisbane, the Caxton Legal Centre, LAQ, the Office of the Director of Public Prosecutions, the District and Supreme Courts of Appeal and the Court Registrars were all consulted prior to commencement of the clinic. This was particularly helpful in relation to clinic promotion and client referrals. Third, the successful receipt of a university grant meant that additional funds were available to provide comprehensive legal supervision for clinic students. The

75. See also Nigel Duncan, 'Ethical Practice and Clinical legal Education' (2005) 7 *International Clinical Legal Education* 7, 18; Duncan describes the ideal characteristics and skills of clinical teachers.

<sup>43</sup> See David K Malcolm, 'The Court of Criminal Appeal: A New Scheme to Assist Indigent Appellants' (2000) 29 (March) *Western Australian Law Review* 108, for a description of the Western Australian clinical program.

<sup>44</sup> Prisoners' Legal Service. See <[http://www.plsqld.com/Prisoners\\_Legal\\_Service/Home.html](http://www.plsqld.com/Prisoners_Legal_Service/Home.html)>. While the Queensland Bar Association and the Queensland Law Society operate a 'pro bono scheme' to assist unrepresented appellants, this is limited to those convicted of murder or manslaughter and juvenile appellants, leaving a multitude of other unrepresented appellants faced with serious matters (including rape, robbery and drug matters).

supervision of the students each week was shared between Professor Heather Douglas from UQ and a solicitor from private practice specialising in criminal law. The students were awarded a pass/fail result rather than a grade.<sup>45</sup>

### B *Clinic Activities*

Like other clinical offerings at UQ, the CLMC ran for thirteen weeks over two full academic semesters. For the first week students received an induction and overview of criminal appellate procedure. Students also received an organisational induction at Caxton Legal Centre about relevant policies and procedures. Early in the clinic students were introduced to the social worker who worked at Caxton Legal Centre. This approach was informed by Carol Smart's call to decentre law. Students were encouraged at the outset to question whether law was necessarily the only or the best way to characterise or understand a client's issue. In including this introduction the CLMC supervisors hoped to encourage students to realise that there were limitations to their role as 'lawyers' and that sometimes there were non-legal staff better equipped to deal with certain issues. It was hoped that students would comprehend the need for a therapeutic approach to lawyering that considered prevention and on-going support rather than seeing lawyers as an immediate and only solution.<sup>46</sup> This presented an opportunity within the clinic to talk about the differences in professional ethical obligations between lawyers (to their clients) and social workers (to society).<sup>47</sup> As well as various primary legal materials including cases on sentencing and model outlines of argument, students were asked to read two articles in preparation for the clinic. Both of the recommended articles encouraged students to think beyond legal approaches to clients' concerns.<sup>48</sup>

The students undertook a range of activities and tasks during the clinic, including visiting prisons to take client instructions; conducting legal research; drafting letters of advice and information, and letters relating to charge negotiation; preparing outlines of argument for sentencing appeals; preparing outlines of plea material for self-represented litigants; preparing letters to

<sup>45</sup> It is recognised that the question of how to grade clinic students remains a contentious issue. See, for example, Andrew Evans, 'Global Agenda, Cultural Capital and Self-Assessment of Clinical Legal Education Programs' (2012) 38(2) *Monash University Law Review* 55, 72.

<sup>46</sup> See generally Bruce Winick and David Wexler, 'The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic' (2006) 13 *Clinical Law Review* 605. See also Tamara Walsh, 'Lawyers and Social Workers Working Together: Ethic of Care and Feminist Legal Practice in Community Law' (2012) 21 (3) *Griffith Law Review* 752.

<sup>47</sup> Jonathan Dickens, *Social Work, Law and Ethics* (Taylor and Francis, 2012) 14-16.

<sup>48</sup> The two readings were Philip Lynch, 'Human Rights Lawyering For People Experiencing Homelessness' (2004) 10(1) *Australian Journal of Human Rights* 4 and Walsh, above n 2.

prosecutions in relation to charge negotiation; attending at the Court of Appeal and Magistrates Courts to observe their clients' proceedings; and engaging with non-legal services such as mental health and social work services.

Over the course of the two semesters the students provided information and advice on a number of applications for appeal (on sentence and conviction and to the District Court, Court of Appeal and High Court.) The students ultimately prepared outlines for seven appeals against sentence, two in 2012 and five in 2013.<sup>49</sup> The students reported that their involvement in preparing outlines of argument for appeal was one of the highlights of the clinic. In their reviews of the course, students were able to identify the strong connection between theory and practice involved in this task. As one student commented, 'being able to put our theory into practice really helped understand the processes that used to be quite confusing'. Another student observed that 'writing the outlines taught us to utilise our legal research skills in a practical context as well as writing a legal document at the same time'.

Students usually worked in pairs to prepare outlines, but in more complex matters teams grew to three or four people working on the same matter. Some students commented on this aspect of the clinic in their reviews. For example, one student said that preparing outlines 'was also useful in further developing my skills to work in a team'. Another student observed:

I was very anxious about working in a group environment... I was afraid that the other students would have such greater knowledge that it would be difficult to work together. However, we have a great group dynamic in which everyone is willing to help when someone is struggling with a problem.

Of the seven outlines of argument prepared, *R v Andrews* was a successful appeal and resulted in the reduction of Andrews' non-parole period from 15 months to 9 months.<sup>50</sup> While four other completed appeal matters<sup>51</sup> were unsuccessful, they resulted in written reasons that were made publicly available. The work of students thus contributed to the development of Queensland jurisprudence on the appropriate approach to sentencing in cases involving Indigenous people with mental health issues, and on sentencing in the context of recidivist fraud offenders, in drug matters and in relation to the offence of causing harm to a child by failing to provide appropriate medical treatment. Preparing appeal outlines for appellants and sentencing submissions provided

<sup>49</sup> *R v Andrews* [2012] QCA 266; *R v Roberts-O'Keefe* [2012] QCA 260; *R v Hazelgrove* [2013] QCA 243; *R v Miller* [2013] QCA 346; *R v WAV* [2013] QCA 345 (two other appeals are not yet finalised).

<sup>50</sup> *R v Andrews* [2012] QCA 266.

<sup>51</sup> *R v Roberts-O'Keefe* [2012] QCA 153; *R v Hazelgrove* [2013] QCA 243; *R v Miller* [2013] QCA 346; *R v WAV* [2013] QCA 345.

students with a very good opportunity to think about how clients' narratives of their personal backgrounds, the events related to the offending and the application of the law can be built into a coherent narrative for the court.<sup>52</sup> At the same time students needed to think about who the narrative 'belonged' to when they were writing their outlines and submissions, especially given that ultimately clients would be self-represented and might need to answer questions about the story presented.<sup>53</sup>

Students claimed that they learned a lot from their visits to prisons. The students visited a number of sexual offenders in prison who sought advice about the possibility of appeal against conviction and sentence. The narratives presented by some of these clients were challenging for the students and caused them to reflect on their role as a legal advocate. Initial comments from the students often revolved around whether the person was guilty or innocent before moving to further discussions of their role of informing the person of the legal alternatives available to them, regardless of their guilt or innocence.<sup>54</sup> This context provided an opportunity to consider one of the key ethical issues in criminal lawyering.<sup>55</sup> It also reflects Smart's recommendation that non-legal strategies and solutions should always be considered.

### C Student Reflections about Power

Student reflections about power were captured in three ways. First, two formal evaluation forms were completed by students at the end of each clinic. One was a standard UQ electronic course evaluation and the other was a customised evaluation developed specifically for the clinic. In both evaluation forms students were asked a series of questions including one question asking them to identify the most worthwhile aspects of the clinic. The students were asked to ensure that the responses were not identifiable. There was a 100% response rate. Second, as part of the course assessment students were required to submit two written reflections about their time in the clinic.<sup>56</sup> The first reflection was

<sup>52</sup> Kimberly Thomas argues that this skill (in the US referred to as 'case theory') risks being an afterthought in clinical teaching. See Kimberly Thomas, 'Sentencing: Where Case Theory and Client Meet' (2009) 15 *Clinical Law Review* 187, 188.

<sup>53</sup> See Laurie Shanks, 'Whose Story Is It, Anyway?: Guiding Students to Client-Centred Lawyering through Storytelling' (2007-2008) 14 *Clinical Law Review* 509, 510. In one matter Caxton Legal Centre represented the client: *R v WAV* [2013] QCA 345.

<sup>54</sup> See, eg, Geneva Brown, 'Deconstructing Innocence: Reflections from a Public Defender: Can Student Attorneys Accept Paradigm Guilt and Continue Zealous Representation?' (2008) 13 *International Journal of Clinical Legal Education* 33, 34, 41.

<sup>55</sup> See Peter Joy, 'Teaching Ethics in the Criminal Law Course' (2004) 48 *Saint Louis University Law Journal* 1239, 1246.

<sup>56</sup> For an overview of the importance of reflection in clinical legal education see generally Rachel Spence, 'Holding Up the Mirror: A Theoretical and Practical Analysis of the Role of Reflection in Clinical Legal Education' (2012) 18 *International Journal of Clinical Legal Education* 181. Note also the high level

due mid-semester and the final reflection was due at the end of semester. The course profile and UQ course induction provided guidance for students about the value of reflective practice, including its role in producing adult learners who reflect on their experience for the purposes of self-evaluation and improvement,<sup>57</sup> the development of critical legal thinking skills<sup>58</sup> and the identification of assumptions.<sup>59</sup> Once the assessment was complete, students were asked in writing if material from their evaluations and reflections could be referred to anonymously in further research. Only comments made by those students who provided written consent have been presented in this article.

Finally, a rich source of students' reflections about power came from informal debriefs and group discussions that took place every week. For the clinic supervisors it was important that students be encouraged to decentre law and thus reflect on the limitations of law as a way of understanding problems confronted by clients and identifying possible solutions. Students made a range of observations about their clients' structural disadvantage throughout the course, both in their verbal debriefs with clinical supervisors and with each other in a peer-learning context. As Buhler observes, 'images of suffering clients and stories about traumatic events experienced by clients ...routinely appear within the discourse of the clinical classroom'.<sup>60</sup> This environment makes the debriefing discussions extremely important so that students can discuss their emotional responses and also to consider how their clients' suffering can be understood in a wider social and political framework.<sup>61</sup>

Students began to view individual marginalisation as a consequence of systemic disadvantage encompassing poverty, low education, poor access to healthcare and often a history of trauma or family violence or abuse. One student observed that 'the prisoners whose appeal cases we handled often had a troubled family background and a history with drug addiction'. Students articulated an awareness of the law's role in perpetuating disadvantage, but also its inability to comprehensively solve the multifaceted nature of problems which defined the lived

of depression documented among law students has led to the development of guidelines for the promotion of student well-being and these encourage reflection as part of law school education; see Guideline 3 in Council of Australian Law Deans, *Promoting Law Student Well-being: Good Practice Guidelines for Law Schools* (2013) 5 <<http://www.cald.asn.au>>.

<sup>57</sup> Donald Schon, *The Reflective Practitioner: How Professionals Think in Action* (New York, 1983).

<sup>58</sup> Nick James, *Critical Legal Thinking* (Pearson, 3<sup>rd</sup> ed, 2011).

<sup>59</sup> Jane H Aiken, 'Provocateurs for Justice' (2000-2001) 7 *Clinical Law Review* 287.

<sup>60</sup> Sarah Buhler, 'Painful Injustices: Encountering Social Suffering in Clinical Legal Education' (2013) 19 *Clinical Law Review* 405, 406.

<sup>61</sup> *Ibid* 428.

experience of their clients. These observations reflect Smart's view of the limitations of the law in being able to redress injustice.

One student reflected on the inadequacy of the law to provide an appropriate response to unlawful behaviour triggered by underlying health issues:

The time spent on lesser criminal matters also highlighted for me the interaction between criminal law and broader social issues, most notably drug abuse or dependence or mental health. It was extremely frustrating to see clients with serious underlying health issues be subjected to a succession of criminal penalties which appeared to give only a superficial response to the conduct in question while doing nothing to address (and possibly even worsening) the root problems of the defendant.

Another student commented on the fact that the legal response alone would not deter criminal activity. In observing that the 'law will not always offer the solution',<sup>62</sup> this student commented:

Transition back into the community [after prison] can be difficult. Better support systems need to be made available to mentally ill offenders upon release. Such services should also be made available to the general community to divert them from the CJS [criminal justice system]. Furthermore, as mental health is a health issue, Queensland Health should be working with corrective services to ensure assessment and proper care of mentally ill inmates.

The role of police and their willingness to charge clients with multiple offences also struck a chord with many of the students:

Often I was struck by how easily many of the clients managed to fall into trouble with the law, and how police discretion to charge could result in enormous overcharging for conduct which was at most, reckless and at least, merely misguided.

Students explained that they had learned that the various powers conferred upon law enforcement authorities and the discretionary exercise of those powers may, in some circumstances, lead to the commission of an offence. For example a student commented: 'the majority of clients attributed at least part of their offending to the conduct of police which had, at least in some way, exacerbated the situation'. One student observed that 'the wide scope of the offences [of public nuisance and obstructing police] appears to enable police to target particular categories of people in the name of public order'. In speaking with a particular client in the clinic, another student observed:

The initial incident by no means warranted police intervention yet police officers, who were coincidentally nearby, decided to become involved. The unnecessary intervention and ongoing conduct of the police officers caused the situation to escalate and the client was charged with an array of offences, including obstructing police.

<sup>62</sup> Smart, above n 14.

Students also displayed an awareness of systemic failures within the criminal justice system to provide appropriate services and resources for clients with compounded social disadvantage. For example one student commented: that ‘the court system, embodying procedures which are not designed to accommodate social disadvantage, struggles to ensure access to justice for persons with a mental health disorder’. In particular, the inability of Legal Aid to provide grants of aid in summary criminal law matters to enable individuals to defend the charges brought against them concerned one of the students:

I have helped several clients who have been relentlessly prosecuted despite suffering from clearly established mental health disorders which lie beneath their legal problems. Clients such as these represent a gap in the criminal justice system where defendants who lack the resources to pay for legal advice and face charges too minor to warrant Legal Aid are denied the chance to present their best possible case in court.

Students also exhibited a good understanding of their privileged position as university-educated individuals, able to both access and understand the law. They displayed an awareness of the power of the law and of lawyers in both creating and responding to disadvantage. One student commented that the clinic ‘definitely gave me a great perspective of the difference lawyers can make at a community level’. Similarly another student commented on the difference access to a lawyer makes to an individual’s case, observing that the client with a lawyer ‘is more likely to be the better prepared one [and] is more likely to have his case carefully considered’. This was certainly the case after visits to prison. Another student commented: ‘studying law and criminology at university sometimes makes me take for granted a lot of the knowledge I take as inherent regarding my rights within the criminal justice system’.

Students also commented on the institution of law school, and the chasm between one’s substantive legal education and the need to communicate with ordinary clients:

As students we were required to articulate clearly and simply legal advice so as to be understood by a legal layperson, a skill which it seems is often undervalued in the verbose judgement-oriented environment of law school.

## VI CONCLUSION

Giddings remarks that criminal law is a substantive area particularly well-suited to discussion of legal ethics and professional responsibility.<sup>63</sup> To this we would add that criminal law clinics - perhaps more so than civil law clinics given the

<sup>63</sup> Jeff Giddings, ‘Teaching the Ethics of Criminal Law and Practice’ (2001) 35 (2) *The Law Teacher* 161.

circumstances of incarceration and lack of alternative legal service provision - also provide a helpful forum for educating students about the interrelationship of law and power. The work of Carol Smart remains relevant to an analysis of the power of law in the clinical context. As Avrom Sherr has said in relation to legal education, 'any new vantage point is good, provided it is aimed at law, its nature, its effects, its practice, or its theory'.<sup>64</sup> It is hoped that the analysis presented in this article will encourage legal clinicians to have regard to the work of Smart when engaging students in a critique about the power of law. A student clinic focussed on criminal law provides a context that can, of course, help to teach students legal and practice skills, and build on their understanding of the nature of substantive law and the nature of legal ethics; it can also engage students in a consideration of the power and limits of law.

<sup>64</sup> Avrom Sherr, 'Legal Education, Legal Competence and Little Bo Peep' (1998) 32 (1) *The Law Teacher* 37, 43.