

A VINEYARD IN A LAW CLINIC: THE PRACTICAL APPLICATION OF A THERAPEUTIC JURISPRUDENCE PHILOSOPHY IN A UK LAW CLINIC

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This paper examines the development and practical operation of a UK-based law clinic, founded on Therapeutic Jurisprudence (“TJ”) principles. It discusses how the authors have sought to infuse TJ’s core values, style and techniques, underpinned by humanitarian philosophies, into Clinical Legal Education (and as a starting point for its legal pedagogy). To date, most papers in this area have examined criminal law clinics in the US, but this paper is made unique by its focus upon the linkage between TJ and refugees against the UK contextual backdrop.

TJ is becoming an increasingly important skills-base for graduates, particularly for those students who will become the next generation of lawyers/advisors, and must therefore, we argue, be incorporated into global legal education.

I. INTRODUCTION

Over recent years, the Western World has begun embedding comprehensive law approaches into many legal systems, changing their emphasis quite significantly in parts.¹ Creative Problem Solving, Holistic Justice, Preventive Law, Problem Solving Courts, Procedural Justice, Restorative Justice (“RJ”), Transformative Mediation, and Therapeutic Jurisprudence (“TJ”) are key examples of such. These approaches are premised on the idea that “social justice” and “human rights” should be predominant values within justice processes and/or when establishing justice outcomes. International jurisdictions, including the United States (“US”), have taken the lead for incorporating their conceptual frameworks, theoretical principles, and practical methodologies into legal practice. As such, they are becoming increasingly apparent in US legal training and education.² Whilst the United Kingdom (“UK”), significantly, has not yet caught up with this movement, and still has some distance to

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¹ Jane Donoghue, *Transforming Criminal Justice?: Problem-Solving and Court Specialisation* (Abingdon: Routledge Frontiers of Criminal Justice, 2014) at 16.

² Evelyn H Cruz, “Through the Clinical Lens: A Pragmatic Look at Infusing Therapeutic Jurisprudence into Clinical Pedagogy” [2009] 30 *Thomas Jefferson L Rev* 463.

go before humanitarian-based approaches are considered “mainstream,” they are nevertheless beginning to surface. A key example is RJ. As UK policy³ strives towards taking restorative oriented, or RJ, adjudications more regularly and readily within Criminal Justice (“CJ”) conflicts, RJ-based approaches continue to expand in the UK.⁴ Already research has surfaced demonstrating RJ’s powerful effect on UK offenders, victims and communities.⁵ However, this paper moves away from UK CJ-based conflicts by focusing upon an issue affecting refugees arriving in the UK—family reunion.

TJ has received much less political attention and support in the UK than in other jurisdictions (such as the US) and also in comparison to other humanitarian-based approaches, such as RJ. Nevertheless, the close alignment between the rationales of TJ and the Helena Kennedy Centre for International Justice (“HKC”)⁶ makes TJ of particular interest to the centre, allowing it (and its students) to learn from TJ’s principles. This is particularly important when considering the recent (albeit slow growing) expansion of UK comprehensive initiatives; as these approaches flourish in “the real world,” there is increasing need to incorporate them into practical legal education. Thus, the application of TJ, as a comprehensive law lens, remains of great relevance to the HKC as an enterprise that cultivates our next generation of lawyers.

The HKC hosts a number of work-based learning clinics, providing students with experience of advising clients on civil and criminal issues, on national and international bases, each with human rights components. Given the long history of Sheffield Hallam University in clinical legal education, the centre was deemed to be an effective resource for providing a basis of assistance in response to the consequences of the developing refugee crisis. Refugees (typically male) who had settled in Sheffield, UK with disunited spouse and children, were in particular need of help to complete the necessary applications to have their pre-existing (referred to as “pre-flight”) family to join them in the UK. The British Red Cross, one of numerous national and local organisations involved in assisting refugees, contacted the lead

³ United Kingdom, Ministry of Justice, *Restorative Justice Action Plan for the Criminal Justice System: November 2016 to March 2018*, by Philip Lee (2017).

⁴ House of Commons, Justice Committee, *Restorative Justice Fourth Report of Session 2016-17* (September 2016) (Chair: Robert Neill); Andrew Coyle, “Restorative Justice in the Prison Setting” (Paper delivered at the International Prison Chaplains Association (Europe), Driebergen, Netherlands, 13 May 2001).

⁵ United Kingdom, Home Office, *Implementing Restorative Justice Schemes (Crime Reduction Programme) A Report on the First Year*, by Joanna Shapland *et al* (London: Home Office Online Report, 2004); United Kingdom, Home Office, *Restorative Justice in Practice: Findings from the Second Phase of the Evaluation of Three Schemes*, by Joanna Shapland *et al*, (London: Home Office Online Report, 2006); United Kingdom, Ministry of Justice, *Restorative Justice: The Views of Victims: The Third Report from the Evaluation of Three Schemes*, Ministry of Justice Research Series 3/07, by Joanna Shapland *et al*, (London: Ministry of Justice Research Series, 2007); United Kingdom, Ministry of Justice, *Does Restorative Justice Affect Reconviction? The Fourth Report from the Evaluation of Three Schemes*, by Joanna Shapland *et al*, (London: Ministry of Justice Research Series, 2008).

⁶ The Helena Kennedy Centre for International Justice is intentionally “branded” by its academic, teaching, and research imperatives that strive towards achieving social justice. “The Helena Kennedy Centre for International Justice is a leading centre for social justice and human rights. It provides a vibrant environment at the cutting edge of legal and criminal justice practice which prepares students for excellence in their chosen professional career.” Online: Helena Kennedy Centre for International Justice <<https://www.shu.ac.uk/about-us/academic-departments/law-and-criminology/the-helena-kennedy-centre-for-international-justice>>.

author to develop a clinic which, run by volunteer students under the supervision of qualified staff, would be able to offer such support. Given the nature of the HKC, its international focus, desire to assist local communities, and its interest in developing the pedagogic experience of its students, the HKC Refugee Family Reunion Law Clinic (“HKC Law Clinic”) was established.

Unlike the existing law clinics provided through HKC, the clients who would use the HKC Law Clinic were particularly vulnerable. Beyond the practical problems including language and cultural barriers, limited IT skills and obstacles around Western constructs of, for example, celebrating and registering births and the collection, collation and maintenance of supporting documents, they had already experienced significant disruption to their lives. They had been separated from their families and frequently displayed signs of distress and mistrust of organisations in authoritative positions. The authors were interested in a lens that we had become aware of from the seminal works of Wexler and Winick⁷ and Gould and Perlin,⁸ through which the emotional effects of the law could be viewed and assessed. TJ appeared to us to be a perfect fit and an antidote to the negative effects that refugees had experienced on the travel to the UK, but also to their treatment within its legal and administrative system (including enforced separation from family members, forced detention pending administration of their applications for refugee status, *etc*). We intended to provide a TJ approach to the training of the student volunteers, to instil its values and infuse its ideology in their work and interaction with these clients, and to thereby observe its therapeutic value and its potential impact on social justice.

II. WHAT IS THERAPEUTIC JURISPRUDENCE?

TJ is a form of legal philosophy that discusses the importance of overlooked areas of the law/legal process in terms of their “human, emotional, psychological side[s].”⁹ The TJ literature theorises that the law and its associated legal rules, procedures, and roles, have adverse therapeutic and anti-therapeutic effects on people, irrespective of the intention or whether one “knows it or not.”¹⁰ TJ develops approaches to help maximise positive (psychological/emotional) effects and has a history of bringing the behavioural sciences into its scholarship to help inform its development and to tease out therapeutic outcomes. TJ’s scope is broad, covering all legal domains (for example, criminal law, estates, family law, juvenile law, torts and trusts) and is

⁷ David B Wexler & Bruce J Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Durham, North Carolina: Carolina Academic Press, 1996); David B Wexler & Bruce J Winick, *Essays in Therapeutic Jurisprudence* (Durham, North Carolina: Carolina Academic Press, 1991); David B Wexler & Bruce J Winick, “The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law” (2006) 13 *Clinical L Rev* 605.

⁸ Keri K Gould & Michael L Perlin, ““Johnny’s in the Basement/Mixing Up His Medicine”: Therapeutic Jurisprudence and Clinical Teaching” (2000) 24 *Seattle UL Rev* 339.

⁹ Bruce J Winick & David B Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Durham, North Carolina: Carolina Academic Press, 2003) at xvii; David B Wexler, “From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part” (2011) 37 *Monash UL Rev* 33 at 34.

¹⁰ David B Wexler, “Therapeutic Jurisprudence: An Overview” (Public Lecture delivered at the Thomas Cooley Law Review Disabilities Law Symposium, 29 October 1999), (2000) 17 *TM Cooley L Rev* 125 at para 41.

applicable to many stakeholders (for example, victims, offenders, practitioners and family members).¹¹ TJ is complex in the sense that it holds both a law reform agenda whilst also aiming to assign therapeutic goals to current legal systems within the practical limits of due process and justice.¹²

It is certainly not the case that judges and those involved in the justice system have been unaware of the effects the law has on the welfare of individuals involved. What has occurred in the past has been a piecemeal approach to determining the wellbeing of individual participants in the legal system, the effects of the system as a whole on the individual, and the mechanisms that can aid wellbeing or alleviate the more negative effects of an adversarial, complex, and at times perplexing and Byzantine system of justice. TJ offers an underpinning philosophy through which to address these effects.

Abel identified “the gap”¹³ between ideals and practice and “image and reality”¹⁴ within socio-legal research. He proposed a shift away from an instrumentalist model of law, stating “we should ask instead: what are its inadvertent consequences or symbolic meanings? What are its costs? For whom does it work? What are the fundamental structural reasons why it does not work?”¹⁵ Similarly, Daly discusses the gaps in theory and practice, within the RJ discourse, where she contends “the spaces between older and newer understandings of justice produce gaps of an entirely different order, gaps that will be difficult to traverse.”¹⁶ Indeed, as research continues to demonstrate the “gap” between theory and practice, educational measures helping to traverse the fissure become increasingly essential. In the legal field, law clinics act as ample arenas in which the “theory” and “practice” spheres come together. Cruz has noted that “clinical programs at schools have achieved great success in reconnecting students to practical aspects of the legal profession.”¹⁷ This is particularly crucial for newer “up and coming” areas (such as comprehensive law approaches), which are less understood, and thus more likely to be poorly practiced as demonstrated in Daly’s work.¹⁸

TJ has a strong practical dimension,¹⁹ with a longstanding history of developing principles to help, for example, develop mental health law and to advance Drug Court

¹¹ Tali Gal & David B Wexler, “Synergizing Therapeutic jurisprudence and Positive Criminology” in Natti Ronel & Dana Segev, eds, *Positive Criminology* (Abingdon: Routledge Frontiers of Criminal Justice, 2015) 85 at ch 6; David B Wexler, “Getting and Giving: What Therapeutic Jurisprudence Can Get from and Give to Positive Criminology” (2013) 6 *Phoenix L Rev* 907.

¹² Mark W Patry *et al.*, “Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies” (1998) 34 *Cal WL Rev* 439; Wexler & Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*, *supra* note 7; Wexler, “Therapeutic Jurisprudence: An Overview”, *supra* note 10.

¹³ Richard L Abel, “Redirecting Social Studies of Law” (1980) 14:3 *Law & Soc’y Rev* 805 at 821.

¹⁴ *Ibid* at 810.

¹⁵ *Ibid* at 828.

¹⁶ Kathleen Daly, “Mind the Gap: Restorative Justice in Theory and Practice” in Andrew Von Hirsch *et al.*, eds, *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Portland: Hart Publishing, 2003) 219.

¹⁷ Cruz, *supra* note 2.

¹⁸ Daly, *supra* note 16.

¹⁹ David Wexler, “New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence ‘Code’ of Proposed Criminal Processes and Practices” (2014) 7 *Arizona Summit L Rev* 463.

practice.²⁰ Importantly, the TJ literature has noted the strong relationship between TJ and legal education, influencing professional development, curricula, and, notably, law clinics.²¹ There are many examples of how TJ can be used in these arenas. However, we focus on the behaviour, language and emotion components of TJ (and their effects on the recovery of refugee clients) in this paper. By bringing insights from the behavioural science literature, TJ develops ways of adopting a more emotionally sensitive,²² or psychologically aware, and holistic legal system. As TJ encourages participants to think creatively²³ about how the behavioural science literature can help infuse therapeutic law, we believe we are doing just this in the context of our refugee clinic. Moreover to date, there is little literature broadly around TJ in the UK, and, more significantly, around TJ in law clinics outside of the US, and those clinics that offer advice and guidance to the refugee population. We hope our paper offers some insight into the use of a TJ philosophy in a UK law clinic setting to identify its successes.

A. The TJ Wine/Bottle Analogy

Much of the TJ literature is based around Wexler's "wine" and "bottle" metaphor,²⁴ best understood as an examination tool for the TJ potential or efficiency of a legal setting. A combination of both components (and their strength) determines the extent to which the context may and/or does operate therapeutically.²⁵ Whilst the latter part of the analogy refers to the therapeutic design of the law, the former refers to its therapeutic (or otherwise) application, but the relationship between the two components is intimate.²⁶

B. "Bottles"

The TJ friendliness of the "bottle"—or legal landscape—largely depends upon structural components.²⁷ "Bottles" typically refer to laws, provisions, rules, procedures,

²⁰ Australia, Department of Justice, *Evaluation of the Drug Court of Victoria: Final Report Magistrates' Court of Victoria*, by KPMG (2014); Peggy F Hora, *A Dozen Years of Drug Court Treatment Courts: Uncovering our Theoretical Foundation and the Construction of a Mainstream Paradigm* (2002) 37 Substance Use & Misuse 1469; Peggy F Hora, William G Schma & John T A Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America* (1999) 74 Notre Dame L Rev 439; Wexler & Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*, *supra* note 7.

²¹ Wexler, "From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part", *supra* note 9.

²² Also referred to as "emotional lawyering." Here there is a moving away from the traditional lawyerly "rational-analytical problem solving and an adversarial approach to conflict." Susan Douglas, "Incorporating Emotional Intelligence in Legal Education: A Theoretical Perspective" (2015) 9 e-Journal of Business Education & Scholarship of Teaching 56 at 56. Also, on the topic of emotional intelligence see Marjorie A Silver, "Emotional Intelligence and Legal Education" (1999) 5:4 Psychol Pub Pol'y & L 1173.

²³ Wexler, "Therapeutic Jurisprudence: An Overview", *supra* note 10.

²⁴ Wexler, "New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence 'Code' of Proposed Criminal Processes and Practices", *supra* note 19.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

and/or the rule of law that govern legal settings. These are factors that cannot easily be changed, developed or manipulated.²⁸ Thus, wider structural influences impact the therapeutic quality/potential of legal contexts (the procedural justice component within the “wine” part).²⁹

Wexler illustrates the bottle analogy numerous times throughout the TJ literature, when referring to the criminal justice system, by making a comparison between the US federal supervised release system (a “TJ unfriendly bottle”) and the Spanish JVP³⁰ (a “TJ friendly bottle”).³¹ In the former case, the length of incarceration and the period of supervised release are unchangeable and individuals are not (legally) encouraged to put forward relapse prevention plans that facilitate rehabilitation.³² Offenders are therefore “sapped of motivational strength” to perform well for early release and are not incentivised towards making positive life/character changes that help activate reformation.³³ The therapeutic value of this legal setting is therefore minimal, individuals leave the system unchanged, most likely worse off than before.³⁴ In this instance, the rigidity of the “black-letter law” leaves little room for the attainment of positive therapeutic outcomes.³⁵ The UK legal system, a “bottle” with TJ friendly value, has historically been dominated by an adversarial paradigm with its associated “culture of conflict”³⁶ and rejection of cooperative, inquisitorial methods as used by other Western practices (although this is arguably changing with the growth of comprehensive law approaches).

For Wexler, the JVP system is a “TJ friendly bottle” because, for example, a statute exists that allows conditional release to be granted depending on both length of time served and behavioural record.³⁷ This can be applied positively, to enhance therapeutic wellbeing; to motivate rehabilitation, reintegration, and to help to identify/build strengths that encourage pro-social behaviours.³⁸ The refugee family reunion system

²⁸ *Ibid.*

²⁹ Vicki Lens, Colleen C Katz & Kimberley S Suarez, “Case Workers in Family Court: A Therapeutic Jurisprudence Analysis” (2016) 68 *Children & Youth Services Rev* 107.

³⁰ Juez de Vigilancia Penitenciaria.

³¹ David B Wexler, “Moving Forward on Mainstreaming Therapeutic Jurisprudence: An Ongoing Process to Facilitate the Therapeutic Design and Application of the Law” (2015) *Arizona Legal Studies Discussion Paper No 15-10*, online: Social Science Research Network <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564613>.

³² Wexler, “New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence ‘Code’ of Proposed Criminal Processes and Practices”, *supra* note 19.

³³ Wexler, “New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence ‘Code’ of Proposed Criminal Processes and Practices”, *supra* note 19, also cited in David Wexler, “Therapeutic Jurisprudence, Legal Landscapes, and Form Reform: The Case of Diversion” (2009) 22:1 *Federal Sentencing Reporter* 17.

³⁴ William Cloud & Robert Granfield, “Conceptualizing Recovery Capital: Expansion of a Theoretical Construct” (2008) 43 *Substance Use & Misuse* 1971.

³⁵ Wexler, “New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence ‘Code’ of Proposed Criminal Processes and Practices”, *supra* note 19.

³⁶ Michael Karlberg, *Beyond the Culture of Contest: From Adversarialism To Mutualism in an Age of Interdependence* (Welwyn: George Ronald, 2004) cited in Nigel Stobbs, “The Nature of Justice Paradigms Exploring the Theoretical and Conceptual Relationship Between Adversarialism and Therapeutic Jurisprudence” (2011) 4:1 *Washington U Jurisprudence Rev* 97, online: Washington University Jurisprudence Review <http://openscholarship.wustl.edu/law_jurisprudence/vol4/iss1/4>.

³⁷ Wexler, “New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence ‘Code’ of Proposed Criminal Processes and Practices”, *supra* note 19.

³⁸ *Ibid.*

in the UK, whilst not fulfilling the caricature of an adversarial system completely, cannot be said to have altered the existing legal order and adopted the lens of therapeutic jurisprudence through a rejection of adversarialism.

C. “Wine”

The “wine” aspect of the analogy represents the way in which legal contexts are animated by practitioners’ techniques, skills or approaches, which also have TJ “friendly” or “unfriendly” value, depending upon correspondence to TJ coding.³⁹ The wine has been referred to as “interstitial”; it fills those discretionary and unrestricted spaces left for practice within legal structures.⁴⁰ Therefore, “wine” refers to the manner in which the law is applied on a micro level, for example, the style of judging used by judges/magistrates.⁴¹

Wexler notes that the wine analogy is discussed most in the literature due to its easier application to TJ principles and because it refers to techniques that can be more easily shaped and manipulated by the TJ literature.⁴² TJ friendly wine often comprises techniques borrowed from evidence-based practice from the broad behavioural science literature.⁴³ In discussing the link between TJ and Positive Criminology specifically, Wexler describes Positive Criminology as a “bank of insights from which TJ can withdraw.”⁴⁴ However, this can be taken more broadly. Most commonly, TJ draws upon the literature of Criminology, Psychiatry, Psychology, Psychology of Procedural Justice, Social Work for governance, and Sociology.⁴⁵ Insights made by these disciplines act as “guidance,” helping to enrich TJ literature/practice.⁴⁶

How effectively legal actors, including advisors, advocates and judges apply the available TJ friendly wine (if at all) affects the therapeutic quality of the legal setting.⁴⁷ Therefore, if such individuals are highly trained, skilful and knowledgeable about TJ techniques, the wine is potentially TJ friendly, but whether or not they apply therapeutic liquid (and how effectively) impacts the settings’ overall therapeutic quality/impact.

³⁹ *Ibid.*

⁴⁰ Statement, made by a Victoria Supreme Court Justice and former President of the Victoria Civil and Administrative Tribunal (“VCAT”) cited in Wexler, “From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part”, *supra* note 9 at 38.

⁴¹ Canada, National Judicial Institute, “Problem-solving in Canada’s Courtrooms: A Guide to Therapeutic Justice”, by Susan Goldberg (Ottawa: National Judicial Institute, September 2011), online: Justice Programs Office School of Public Affairs <<https://jpo.wrlc.org/handle/11204/4217>>

⁴² Wexler, “New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence ‘Code’ of Proposed Criminal Processes and Practices”, *supra* note 19.

⁴³ Wexler, “Getting and Giving: What Therapeutic Jurisprudence Can Get from and Give to Positive Criminology”, *supra* note 11 at 908.

⁴⁴ *Ibid* at 910.

⁴⁵ Wexler, “New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence ‘Code’ of Proposed Criminal Processes and Practices”, *supra* note 19; Wexler, “Therapeutic Jurisprudence: An Overview”, *supra* note 10 at para 50; Bruce J Winick, *Civil Commitment: A Therapeutic Jurisprudence Model* (North Carolina, Durham: Carolina Academic Press, 2005) at 119-38.

⁴⁶ Wexler, “Getting and Giving: What Therapeutic Jurisprudence Can Get from and Give to Positive Criminology”, *supra* note 11.

⁴⁷ Wexler, “New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence ‘Code’ of Proposed Criminal Processes and Practices”, *supra* note 19.

In theory, TJ friendly wine could be applied to a TJ unfriendly bottle; for example, in mainstream court proceedings, a judge could use TJ techniques when interacting with defendants.⁴⁸ However, the TJ potential would likely be thwarted by the TJ unfriendly bottle; the rule of law, legislation, and procedural norms/values would likely limit the ability for the judge to behave therapeutically. Similarly, a TJ friendly legal structure, or “bottle,” could exist without TJ friendly wine to animate it; TJ friendly structures, laws, and statutes might be in place. However, if practitioners lack the correct TJ “know-how” (wine), the setting would lack therapeutic impact. Thus, to maximise the therapeutic potential of any setting, both the bottle and the liquid should be TJ friendly. A TJ friendly bottle (such as a Drug Court), animated by TJ friendly wine (such as TJ skilful advocates and judges), is when TJ principles most prominently thrive. Whether the refugee family reunion system is a TJ friendly bottle is highly questionable (and ultimately beyond the control of our students). The students, their emotional sensitivity and their interaction (behaviour and language) with refugee clients was, however, within our control and our role was to build TJ techniques into our training strategies to enable its principles to ferment and make TJ friendly wine. Further, as we are producing the policy and law-makers of the future, by instilling a TJ focus to their education, prospective asylum and immigration “bottles” will be manufactured by individuals receptive to TJ principles. Thus its friendliness, we hope, will be markedly improved by this next generation of politicians, lawyers, judges and caseworkers.

III. REFUGEE FAMILY REUNION

Throughout this paper we refer to refugees. However, the protection and right to refugee family reunion apply both to refugees and to individuals granted humanitarian protection status.⁴⁹ Refugee family reunion enables individuals who have arrived in the UK and are granted⁵⁰ the status of refugee to be reunited, via an application process, with their nuclear and pre-flight family members. This typically refers to applications made by spouses and civil partners,⁵¹ unmarried/same sex partners,⁵² and the (biological, adopted and de facto adopted) children of the

⁴⁸ Goldberg, *supra* note 41.

⁴⁹ Paras 352 FA, 352 FD and 352 FG of the United Kingdom, Home Office, *Immigration Rules* (25 February 2016) [*“Immigration Rules”*] provide parallel provisions of family reunion for individuals granted humanitarian protection (on or after 30 August 2005). Individuals with humanitarian protection status are considered as refugees by the UNHCR.

⁵⁰ An individual may arrive in the UK with refugee status through the Gateway or Protection programmes. Typically, the individual arrives in the UK, claims asylum and may or may not be granted refugee status or humanitarian protection for 5 years. This may be granted on the basis of first tier decision making or granted post a tribunal hearing.

⁵¹ This right is enshrined in para 352A of the *Immigration Rules*. The applicant must be married to or be the civil partner of the refugee; the marriage or civil partnership must have occurred prior to the refugee leaving their country of origin; and both the applicant and their partner must intend to live permanently with each other (the marriage is subsisting).

⁵² The right is contained in para 352AA of the *Immigration Rules*. The requirements are similar to those to be reunited with a spouse/civil partner but include: The applicant must have been granted the status of refugee on or after 9 October 2006; the parties must have been living together in a relationship akin to either a marriage or a civil partnership which has subsisted for two years or more; the relationship must

refugee.⁵³ These applications apply where the family resides abroad.⁵⁴ The submission of the application is cost free although it has been widely acknowledged that the process is complicated, subject to change without notification, often will require the applicant to be assisted (by a person who understands the system) to complete the form correctly, and does not attract legal aid in England and Wales.⁵⁵ This latter point is particularly important as collating the required documentation, understanding the nuances and variances of the language used within the application process, and to give the applicant and their sponsor “a voice” through their supporting statement, requires some form of assistance, navigation and support. On completion of the application—which involves both an online submission and the presentation of a bundle of supporting evidence—it is assessed and verified by a member of the UK civil service. This individual is called an Entry Clearance Officer (“ECO”) and it is their job to assess and determine whether the application for refugee family reunion should be approved or refused. Where refused, the decision is reviewed by an Entry Clearance Manager and, where unsuccessful, the ECO or Visa Application Centre staff will issue the “reasons for refusal” letter to the refugee’s applicant family members. Significantly, there is little transparency in this process⁵⁶ and it is not uncommon for little feedback to be provided to the applicant where they are unsuccessful.⁵⁷

A symptom of the refugee crisis, with individuals entering the UK having been separated from their families, is the necessity for interaction with, and the ability

have pre-existed the applicant leaving their country of origin; the parties intend to live permanently with each other under a subsisting relationship; and the relationship must not be consanguineous.

⁵³ The right for an individual with refugee status to be reunited with their child is outlined in para 352D of the *Immigration Rules*. A key distinction between the application to be reunited with children compared with a spouse or partner is the requirement to demonstrate the ability to provide maintenance and accommodation without recourse to public funds. The mandatory requirements are that the child must be under the age of 18 at the date of application; they must not be leading an independent life; they must not be married or in a civil partnership; they must not have formed an independent family unit; and they must have been part of the family unit at the time the refugee left the country of origin.

⁵⁴ In country applications are also possible (where the family members already reside in the UK, although these applications are subject to different applications (and is a paid, rather than free as per refugee family reunion, route)).

⁵⁵ See British Red Cross, *Not So Straightforward: The Need For Qualified Legal Support In Refugee Family Reunion*, by Jacob Beswick (2015), and Anne Staver, “Family Reunification: A Right for Forced Migrants?” (2008) Refugee Studies Centre Working Paper No 51. The commencement of the *Legal Aid Sentencing and Punishment of Offenders Act 2012* (UK) on 1 April 2013 removed the legal aid available for refugee family reunion claims in England and Wales.

⁵⁶ For instance, there is relatively little information regarding published or consistent time scales for the application process and overcomplexity in the use of the online visa application system (the TLS contact website—a Teleperformance company) and ancillary online registration services.

⁵⁷ The use of DNA evidence is such an example. On the basis that the refugee cannot prove to the ECO’s satisfaction that they are the father of the applicant DNA evidence is required. However, detailed instruction as to when, where, how, and who should pay are not provided to the refugee. Without support from an experienced advisor it may be difficult for the refugee to know where to gather this evidence. See Beswick, *supra* note 55, and Scottish Refugee Council, *‘One Day We Will Be Reunited’: Experiences of Refugee Family Reunion in the UK*, by Judith Connell *et al* (Glasgow: Scottish Refugee Council, 2010) where the costs of acquiring DNA evidence, along with the costs of submitting appeals hearings in court (not to mention the emotional cost to family) are considered.

to successfully traverse, national and international⁵⁸ rules and guidance to facilitate the reunion. A legal right to refugee family reunion derives from the 1951 Refugee Convention⁵⁹ and is provided to recognised refugees who have been granted refugee status or, since October 2006, five-years' limited leave to remain under the Humanitarian Protection scheme. The right to family reunion is written into Part 8 and the FM section (Family Dependents) of the *Immigration Rules*. Significantly, refugee family reunion is a matter contained in the *Immigration Rules* rather than as an asylum issue where it would seem a more natural fit.⁶⁰ Currently, refugee family reunion finds itself between "regular" permitted immigration, a system of managed migration, and asylum, where individuals are forced to flee and often enter the UK clandestinely (including, perhaps, being trafficked or smuggled into the country) and face the vagaries of the complex, dynamic, underfunded and often degrading asylum system.

Having arrived in the UK and being successfully⁶¹ granted refugee status, the individual seeking to be reunited with their family (who becomes the sponsor) completes an application, to the Home Office's satisfaction, to have prescribed members of their family join them in the UK. This is where the HKC Law Clinic provides its service to refugees from the local community.

IV. REFUGEE LAW CLINICS AND THE NEED FOR A TJ APPROACH

The clients to the HKC Law Clinic are those with refugee or humanitarian protection status.⁶² They have typically sustained a level of psychological distress⁶³ when coming to the UK to live, they have been separated from their pre-flight family, and they face an administrative (and possibly legal) hurdle to be reunited with these immediate members of their family. To begin the administrative application stage, the clients⁶⁴ are required to complete an on-line application form detailing their

⁵⁸ Such as the United Nations High Commissioner for Refugees ("UNHCR"), the United Nations Convention on the Rights of the Child ("UNCRC") and the Geneva Convention which, to further add to already existing complexity, do not dovetail neatly.

⁵⁹ See *R (Gudanaviciene & Others) v Director of Legal Aid Casework, The Lord Chancellor* [2014] EWHC 1840 (Admin) (QB).

⁶⁰ This is, however, a politically contentious perspective as there are positive and negative implications to such a proposition. For instance, if it only sat in asylum there is an argument that the family members should also be tested under the Geneva Convention principles and could be detained *etc.*

⁶¹ Although granting an individual the status of refugee is not certain. "The percentage of asylum applicants refused at initial decision reached its highest point at 88% in 2004. Since then the percentage of applicants refused at initial decision has fallen to 60%." See United Kingdom, House of Commons Library, *Asylum Statistics*, by Oliver Hawkins, Briefing Paper Number SN01403 (23 Jan 2018).

⁶² As such the students need awareness of the specific cultural and emotional needs of this category of client. See Christine Zuni Cruz, "[On the] Road Back in: Community Lawyering in Indigenous Communities" (1999) 5 *Clinical L Rev* 557.

⁶³ For a TJ perspective see Dennis P Stolle *et al.*, "Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering" (1997) 34:1 *Cal WL Rev* 15; Dennis P Stolle & David B Wexler, "Therapeutic Jurisprudence and Preventive Law: A Combined Concentration to Invigorate the Everyday Practice of Law" (1997) 39 *Ariz L Rev* 25; Dennis P Stolle, David B Wexler & Bruce J Winick, *Practicing Therapeutic Jurisprudence* (Durham, North Carolina: Carolina Academic Press, 2000).

⁶⁴ Leading to an oft raised question between our team—who is our client, the refugee (sponsor) or their family (applicants)?

personal circumstances, family members and the history of the family unit, and information about their housing,⁶⁵ where they and their family intend to reside following reunion and so on. This application is supplemented by a submission of a “bundle” of documentary evidence. Beyond the complexity of the form, especially for non-English speaking individuals,⁶⁶ a significant issue exists in the assessment of the application. There are very few opportunities for the client to speak with the ECO, make oral submissions or to explain issues where the ECO may query the content of the application or the veracity of the documentary evidence included. It is not uncommon for an application to be rejected because the ECO does not believe the documents included to be genuine, to assert that the copies of documents are of too poor quality to be relied upon, or to claim that evidence supplied is non-contemporaneous in nature and will therefore be rejected. The credibility of the individual and their application is brought into question and the client is denied the right⁶⁷ to be reunited in the UK with their family. The details provided by the ECO frequently read as though from a template and do not provide significant details of where the client can remedy any defects in their submission. This is very similar to the anti-therapeutic judgments on which Wexler remarks, in which the ECO’s response to the application, writing “opinions as congratulatory ‘letters to the winner’” can produce very negative and demoralising effects.⁶⁸ Transparency is the cost and clients typically react very badly to news that they and their family are not to be reunited through this application. The level of discretion available to the ECO is broad and they may not be well versed in the procedures of other countries⁶⁹ in relation to, for example, marriage certificates or proof of parentage. The latter example may be avoided by submission of DNA evidence. In theory, a submission of such proof may appear reasonable until the costs, and from which (limited) sources the government will accept evidence, are considered.

Individuals who are subject to rejected applications for reunion have the right of a legal appeal, although this is not cost-free unless the client makes a further (and successful) application under the Exceptional Case Funding scheme⁷⁰ or they secure pro bono assistance and representation in the First-tier Tribunal (Immigration and Asylum Chamber (“IAC”). They may also request a review of the decision or make another application for refugee family reunion in an attempt to address

⁶⁵ This is a symptom of a system which uses a general document for a specific issue with specific needs. Refugee family reunion does not require satisfaction of the “adequate maintenance and accommodation” tests but as there is no bespoke form or indeed system they are forced to comply with completing the appendix forms which ask for this information. It is possible that this aspect of the form is not tested and if it were it would probably be subject to a judicial review.

⁶⁶ For commentary on this point see Beswick, *supra* note 55.

⁶⁷ The right to family reunion arises from the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954), and is only a right given to recognised refugees who have been granted refugee status or, since October 2006, five-years limited leave to remain under the Humanitarian Protection mechanism. The right to family reunion is written into Part 8 and the relatively new FM section (Family Dependents) of the *Immigration Rules* (not under the Part 11 Asylum section).

⁶⁸ Wexler, “New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence ‘Code’ of Proposed Criminal Processes and Practices”, *supra* note 19. Indeed, Wexler continues that a more sensitively crafted “letter to the loser” approach, may establish a more positive long-term outcome.

⁶⁹ Although they should, of course, because they are based in the country where the applicants make their submission and the ECOs have access at all times to the Country Information and Policy Unit reports.

⁷⁰ Essentially a legal aid route.

the issues raised by the ECO. Where clients may find success, is by having their application heard by a judge in the IAC/Upper Tribunal, but this appeal process will be several months (if not closer to one calendar year) to be heard following the initial rejection. It is evident that once an ECO has rejected an application, further applications may be similarly (almost systematically) rejected. However, by appearing before a judge and being allowed to have their situation and circumstances explained by a competent and compassionate advocate, the client's application may be accepted.⁷¹ The current application system does appear to have anti-therapeutic features. It can negatively impact on the mental health and psychological wellbeing of the client due to its inherent complexity, opacity and inflexibility. Coupled with the problems that clients already experience including survivor guilt⁷² and being resident in a new environment and thereby subject to new challenges (post-arrival issues including poverty), the necessity of a law clinic that operates in a therapeutic way becomes even more significant.

The research literature does not lack for commentary and discourse regarding the effects on participants entering the legal system. How participants are treated by judges, caseworkers and other members of the legal system can determine the therapeutic or anti-therapeutic effects of the contact. Where the judge, for instance, manoeuvres from the adversarial system (and the negative consequences this places on the participants) to a more positive interaction (that encourages the sharing of information, reaching solutions rather than coercing individuals and/or issuing threats, and not simply passing judgement), positive results are evident for all participants (including practitioners). Where voices are heard, respect for all contributors is required. Conflict resolution includes the application of teamwork rather than the winning of legal arguments, and ultimately available sanctions are applied where necessary and as part of an educational and reflective tool as opposed to being used in a punitive sense.⁷³ This extends from simply how a defendant is perceived and addressed in the court to the interactions with all members of the court system. The exchanges between the parties, including the client, caseworkers and the judge, the underlying rationale for the use of sanctions and their explanation and justification, and the activism and leadership of the judge can all establish a quality that promotes positivity, cooperation, empathy and may even be seen as inspirational. It is not uncommon, at least from anecdotal evidence from practitioners and clients of anti-TJ practices in immigration cases, of child applicants being subject to practices which could be perceived as bullying from state-representatives. Ineffective control of courtroom procedures by the judge, members of the judiciary with a dismissive attitude, those who often fail to make or maintain eye-contact with individuals in

⁷¹ This may also call into question the power held by the ECO, the transparency of the decision-making, the efficacy of the system of administrative review available, and the usefulness in attempting to address reasons for rejections that are often lacking in detail.

⁷² Which may include symptoms including hypervigilance, emotional numbing, emotional detachment, nightmares and flashbacks or re-experiencing the trauma. In relation to its effects on adults see Judith L Herman, *Trauma and Recovery: The Aftermath of Violence—From Domestic Abuse to Political Terror* (New York: Basic Books, 1992). For research into its effects on adolescents see Sabrina J Stotz *et al.*, "The Relationship between Trauma, Shame, and Guilt: Findings from a Community-Based Study of Refugee Minors in Germany" (2015) 6:1 *European J Psychotraumatol* 1.

⁷³ See Lens Katz & Suarez, *supra* note 29.

the courtroom, judges with a passive aggressive / disapproving attitude to caseworkers and claimants, and ineffective legal representation of the client lead to a very negative experience and poor perception of access to justice.

To compound matters, the IAC hears many of these cases. These can include closed hearings with no reporting or public gallery. Scrutiny of such practices and accountability are placed in jeopardy and therefore the quality of a refugee family reunion application that can avoid recourse to court is in the interests of the client and their family. The IAC hears all cases relating to immigration and asylum matters, including deportation cases. Interestingly, it hears cases where children and young people are appealing a negative asylum decision, a component of which may be a contentious age assessment. Unfortunately at these hearings children may, unusually in the UK judicial system, appear unsupported or may even represent themselves in front of judge(s) who are not specially trained to handle children's cases. The IAC is arguably behind the times when handling these cases and though there are some sympathetic judges who instinctively moderate their behaviour and practice, by, for example, coming off the bench to put the child at ease, there is widespread poor practice, with young people flailing, unsupported, through a highly complex and unique process alone.⁷⁴

V. THE ROLE OF STUDENTS AND DEVELOPING A TJ EXPERIENCE

Wexler sees TJ "as a perspective that regards the law as a social force" and, having this regard, asks "whether the law can be made or applied in a more therapeutic way so long as other values, such as justice and due process, can be fully respected."⁷⁵ Law clinics operate with students who may wish to practice as lawyers following the completion of the academic and practical stages of their education.⁷⁶ The HKC Law Clinic specifically operates with student volunteers who are reading Law, Criminology, Sociology, Psychology and Politics degrees. These students are afforded the opportunity to work with refugees, providing guidance on immigration issues. They have, also, the opportunity to undertake examinations, the successful completion of which provides accreditation by the professional body⁷⁷ and permits them to provide immigration advice.

⁷⁴ See Owen Bowcott, "Children in Immigration Tribunals' may have to represent themselves", *The Guardian* (17 July 2015), online: The Guardian <<https://www.theguardian.com/uk-news/2015/jul/17/children-in-immigration-tribunals-may-have-to-represent-themselves>>. This was an extreme case but found to be genuine Jerry Markon, "Can a 3-year old Represent Gerself in Immigration Court? This Judge Thinks So", *The Washington Post* (5 March 2016), online: The Washington Post <https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d_story.html?utm_term=.69e101af1468>.

⁷⁵ Wexler, "Therapeutic Jurisprudence: An Overview", *supra* note 10 at 125.

⁷⁶ This is also an apt time in which to develop key skills in our future lawyers/advisors. As noted by Cooney, "Since Millennials prefer to learn by doing rather than being told what to do, clinical education will have a particular appeal to them. We need to recognize these are students who have an exploratory style which causes them not only to retain information better but it enables them to use it in creative and innovative ways." Leslie Larkin Cooney, "Giving Millennials a Leg-Up: How to Avoid the 'If I Know Then What I Know Now' Syndrome" (2008) 96 Ky LJ 505 at 506.

⁷⁷ The Office of the Immigration Services Commissioner ("OISC").

The selection of students from different educational backgrounds was important. The HKC Law Clinic was founded on the basis of providing help for a specific vulnerable group that was in need of assistance and guidance to enable them to access a basic human right. Legal skills were not of paramount concern and that the students could obtain a qualification⁷⁸ which would allow them to continue providing guidance in this area following the completion of their studies lent itself to recruiting students with a strong sense of social justice. We did not believe such a philosophy was singularly grounded in law students.⁷⁹ Because of the range of students' backgrounds, skills, motivations to help refugees and their ability to assimilate information quickly, it appeared pertinent to recruit students who would provide a broad skills set. The Clinic also benefited from the nature of a large university which comprises students from a variety of backgrounds who possess language skills to help in the communication with clients and who can appreciate the cultural issues present in certain demographics. The HKC Law Clinic staff also recognised the potential for students in the linguistics department to act as interpreters for the interviews with clients (a much needed source of assistance). This aided the students in giving them valuable experience in communicating between languages whilst also allowing them to be involved in the work of helping refugees.

Having sourced the students to help with the work of the Clinic, the process of training them to be ready to provide the necessary help and guidance began. From the outset the students were told of the need for the clients to have their voices heard and the importance of listening.⁸⁰ Listening and hearing the client's story is key for various therapeutic reasons but it is also important to provide accurate assistance to the client at an early stage.⁸¹ One previous client to the HKC Law Clinic had proceeded quite far with two students—his application was to be reunited with his son (residing in Iraq). Everything was progressing well until the details of the relationship were gathered. Here, it transpires, the client had not corresponded with his son for approximately ten years, his son was living with his mother in their country of origin whilst the client had fled to the UK. The client and his wife had separated and then divorced, and the client only wished to be reunited because the son did not like his stepfather. The son was not in danger, was not suffering any exceptional hardship, and there was no subsisting relationship between the client and his son. Had this information been obtained through effective interviewing and listening, the client could have been advised more quickly, directed to more suitable sources of help and advice, or had his expectations and the reality of the situation managed from the outset.

⁷⁸ We are the first University in England and Wales to obtain accreditation by the OISC. As part of the training, the students are invited to undertake training and to complete examinations to qualify as regulated immigration advisors.

⁷⁹ Indeed, Winick and Wexler famously identify how the bringing of "insights from psychology and social work into our understanding of the role of counsel, also brings a much needed interdisciplinary perspective to clinical legal education." We followed that approach in the recruitment of advisors to our clinic. Wexler & Winick, "The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law", *supra* note 7 at 606.

⁸⁰ Linda G Mills, "On the Other Side of Silence: Affective Lawyering for Intimate Abuse" (1996) 81 *Cornell L Rev* 1225.

⁸¹ See Binny Miller, "Give Them Back Their Lives: Recognizing Client Narrative in Case Theory" (1994) 93 *Mich L Rev* 485.

The training delivered to the students was not the same as is provided to people undertaking study in one of the other “work-based learning” clinics the University offered. Traditional training and skill-development for lawyers and law students were avoided as these tended to focus on a mechanistic approach to interviewing, research and negotiating.⁸² These skills are, of course, essential to a lawyer, but our clinic had a different focus. When helping particularly vulnerable people who were often victims of abuse by their State or who may have negative experiences of interactions with government agencies,⁸³ one of the first roles of the training we provided was the context and background of refugees and what happens to them on their journey from their home country to the UK. International conflicts and the circumstances that can lead to an individual becoming a refugee, the immigration system and the concerns surrounding the processing of these individuals both lend themselves to a need to address the resultant “psycho-legal soft spots”⁸⁴ present in the clients. TJ has expanded the preventative law ideas. Where preventative law is concerned with anticipating legal soft spots, TJ is concerned with anticipating “psycholegal soft spots,” in terms of “the psychological baggage that often accompanies legal moves and measures”⁸⁵ or those areas where “... legal intervention or procedures... may lead to anxiety, distress, depression, hard and hurt feelings, etc.”⁸⁶ This means considering the psychological/emotional risk that legal actions might pose and which has led to ideas around legal counselling being developed.⁸⁷

Our philosophy was to cultivate the immigration lawyers and professionals of the future, and that we wished to instil in the students a knowledge of the vulnerabilities of refugee clients and for them to develop empathy and understanding; this is why we decided to create the Clinic with a TJ focus.⁸⁸ Regardless of whether the student advisors continued into a legal career in immigration following completion of their studies or not, we believed that exhibiting a TJ philosophy as a central tenet of their professional skills would be a valuable asset wherever their careers took them.

⁸² Further, as noted by Berkeiser, “Therapeutic jurisprudence would add another context—the psychological aspects of the relationship ... My concern is that this perspective may overwhelm many law students, who have spent the previous 2 years of their lives learning not only to think like a lawyer, but also to feel like a lawyer—cool and dispassionate.” Mary Berkheiser, “Frasier Meets CLEA: Therapeutic Jurisprudence and Law School Clinics” (1999) 5 Psychol Pub Pol’y & L 1147 at 1165.

⁸³ We have anecdotal evidence from some clients, in order to obtain an appointment at a local embassy for their family to submit their application to join the client in the UK and to be interviewed have to bribe local embassy staff (who may then use their discretion to ‘queue-jump’ other applicants) to obtain an appointment slot. Corruption appears to be present in the operation of some immigration agencies.

⁸⁴ Which may lead to ‘strongly negative emotional reactions that diminish the client’s psychological wellbeing.’ Bruce J Winick, “Therapeutic Jurisprudence and the Role of Counsel in Litigation” (2000) 37 Cal WL Rev 105 at 108.

⁸⁵ Wexler, “From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part”, *supra* note 9 at 34.

⁸⁶ Mark W Patry *et al*, “Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies”, *supra* note 12 at 441.

⁸⁷ Mark W Patry *et al*, “Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies”, *supra* note 12.

⁸⁸ Developing what Berkheiser identified when commenting “Law school clinics could bring to therapeutic jurisprudence what that field may be lacking the ability to reach and educate future members of the bar and bench and to apply therapeutic jurisprudence principles in ways that can improve the lives of their clients.” Berkheiser, *supra* note 82 at 1148.

A. Training

Our students were exposed to practical and theoretical approaches for offering advice and guidance in a refugee-based clinical setting. To begin, the students were provided with background information on the immigration issues that were occurring nationally and internationally. The extent of the refugee crisis, the common problems experienced by refugees upon entering the UK and the UK's immigration process were raised. Further, practical examples were used so students gained an appreciation of the experience of refugees prior to leaving their homes, the extent and the impact of the journey to get to the UK, and their treatment and experience of the immigration system when they arrived. In each of these aspects rarely has the experience been positive. The purpose was not to be unduly negative or to discourage the students, rather it was to instil a real-world, holistic and human appreciation of the perspective from which the refugees may approach the clinic and the student advisors. This began with the clients themselves. As noted by Capulong,⁸⁹ frequently the client is missing in both the legal curriculum and, to extend, clinical instruction. The effect is for legal study and clinical legal education to dehumanise the study of law and the impact that both the legal system and the student advisers may have upon the experiences of the client.⁹⁰ This is unsurprising insofar as, beyond clinical legal education and work-based learning at universities, students have little, if any, practical interaction with clients. We purposefully included students from various (non-legal) disciplines to assist at the HKC Law Clinic as this eased the focus of the training of the students away from the "traditional" doctrine-based perspective adopted by lawyers.⁹¹ Rather, a needs-based approach, concerned with the interests of refugees as subordinated human beings in need of empowerment and opportunities to assert rights enshrined in law, was adopted. The students could appreciate the importance of not seeing the client as "vulnerable" in terms of a perceived helplessness. Instead, the client can be empowered through control over their destiny by participating actively in the management of their application (case). The client's previous negative experience and the embedded frustration that many exhibit can be eased through the students' being culturally aware of the client's background, by providing the client with options from which to choose, and discouraging a paternalistic approach where the student takes over and completes the application (and ancillary matters) in the absence of the client. At all stages, the client is aware of who is in the room with them, their role and responsibilities, and that it is for the client (through appropriate advice and information sharing) to decide how and when to proceed. This process removes many of the problems that the patriarchal system, of which the client has been engrained, creates.

⁸⁹ Eduardo RC Capulong, "Client as Subject: Humanizing the Legal Curriculum" (2016) 23 *Clinical L Rev* 37.

⁹⁰ See Gerald P Lopez, "An Aversion to Clients: Loving Humanity and Hating Human Beings" (1996) 31 *Harv CR-CLL Rev* 315 at 315.

⁹¹ Such an approach can prove counter-productive. "If a lawyer has only legal solutions, everything begins to resemble a legal problem. As therapeutic jurisprudence teaches, however, legal solutions can at times be counterproductive. Therapeutic jurisprudence can assist clinical legal education by broadening the view of what a lawyer is and does." Berkheiser, *supra* note 82 at 1155, 1156.

Moving beyond the study and application of doctrine and jurisprudence⁹² was particularly important as such analysis rarely exposes the students to the effects of legal principle on particular groups. The reality of law may often be affected by sex, race, disability, sexual orientation and so on. This is difficult to identify, acknowledge and fully take into consideration when students are asked to apply laws to problem/scenario-based questions or the hypothetical study in a classroom setting.⁹³ Of course, this is not to ignore doctrine and the legal system through which the refugees must make their applications. Simply that such an understanding must be contextualised and supplemented through analysis of both the human and legal realities of the system to which they are exposed. Issues of legal costs, access to advice and information, the effects of the legal system on the wellbeing of the client, the concerns of the client on submitting a claim and appearing in court, and their experiences generally of the legal system (both civil and criminal)⁹⁴ are each aspects of a myriad factors to be considered when identifying the client as a member of a subordinated class, a legal actor,⁹⁵ and a social actor.

The students need to be aware of the special circumstances that affect many of the refugee clients. They have usually faced oppression or political discordance leading to the flight from their country of origin. Or they may have experienced warfare that has made their continued residence in their home country untenable.⁹⁶ These, along with other social factors, be they religious, cultural, and political not only define and create the individual, but they also are manifested in the networks and communities in which they are based. Thus, it was especially important that the students could meet with persons from those backgrounds to gain the knowledge and understanding required if they were to help clients in a TJ compliant way. Our students experienced training sessions and continued contact with recent migrants to the UK from Syria and Eritrea. From these individuals, the students received first-hand accounts of the differences between life in the UK and that in other countries. These interactions provided an appreciation of the nature of the communities from where many of our clients would come, the significance of trust and how it can be developed between the students, the clinic and the members of communities who would be our clients. It was also valuable to dispel myths about the role of women, of education, and the

⁹² For instance, applicants (and/or their advisors) to the refugee family reunion system need to be familiar with the United Kingdom, Home Office, *Immigration Directorate Instructions*, online: Visas and immigration operational guidance <<https://www.gov.uk/topic/immigration-operational-guidance/immigration-directorate-instructions>> published instructions written for UK Visas and Immigration (UKVI) decision makers, particularly ss 1, 1a, 6, 8, 9, 19, and 22. Understanding of the scope and effect of arts 3 and 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Eur TS No 5 (entered into force 3 September 1953) ["ECHR"] are also important to preserve rights of appeal and to ensure relevant statutes are interpreted purposively. Student volunteers (essentially the caseworkers) must be familiar with specific international instruments including art 3 of the *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), and domestic instruments including the *Borders, Citizenship and Immigration Act 2009*, c 11, s 5 (the duty the Home Office placed itself under safeguarding and promoting the welfare of children in the UK).

⁹³ Katherine R Kruse, "Beyond Cardboard Clients in Legal Ethics" (2010) 23 *George J Leg Ethics* 103.

⁹⁴ Jonathan D Casper, "Having Their Day in Court: Defendant Evaluations of the Fairness of Their Treatment" (1978) 12:2 *Law & Soc'y Rev* 237.

⁹⁵ Capulong, *supra* note 89.

⁹⁶ For example through detention and torture, exploitation, *etc.*

nature of the conflict in the communities from where clients resided prior to their entry to the UK.

Identifying the clients as individuals, and recognising their individual-self was also an important aspect at the training stage. Supporting refugees who are seeking to be reunited with their families can be emotionally draining⁹⁷ given the consequences of failure and the likelihood that the client's circumstances may simply mean they are not eligible to pursue their application through the family reunion system. We are all products of our genetics, but also of our experiences.⁹⁸ Refugees who arrive in the UK are typically the patriarch of the family and may experience "survivor guilt." This makes their integration into a new community without their family members particularly difficult. Such emotions manifest themselves in many ways but the client may present as anxious, withdrawn, hostile and/or tearful. The client may also have manifest mental as well as physical health issues. Refugees can be traumatised and a period of continued separation from their families, compounded with the uncertainty of the length of time the process may take prior to a decision on reunion being made, may exacerbate their anxiety.

Our training raised the import for those individuals supporting refugees to recognise their own stress levels and to self-identify when they were being adversely affected by exposure to the clients.⁹⁹ It is imperative that students, many of whom were new to this field of work, understand appropriate parameters, safeguarding and protection issues and how to manage their clients' and indeed their own expectations. Caseworkers and other advisors can be in danger of absorbing clients' stress and this may provoke detrimental effects¹⁰⁰ on their colleagues, themselves and their clients.

VI. A TRANSITION TO A RELATIONAL APPROACH TO LAWYERING

Whilst legal education has had a long-standing history of incorporating practical methods into its schooling, developing emotional skills as part of law education has received less attention both in the US¹⁰¹ and, in particular, the UK. However, in both jurisdictions the human aspect of the law—or its "non-legal consequences"¹⁰²—is something that is becoming increasingly important, along with the "bigger picture"

⁹⁷ Such strong negative emotions can interfere in the relationship between the student/client—the details presented by the client may be distorted, the ability for the student to convey important information in an understandable form may be adversely affected, and the solution to the client's issue may be more difficult to reach. This may also manifest itself in psychological resistance and in each of the aforementioned circumstances the student needs to be taught preventative and coping strategies to avoid them.

⁹⁸ David Eagleman, "The Brain on Trial", *The Atlantic* (July 2011), online: The Atlantic <<https://www.theatlantic.com/magazine/archive/2011/07/the-brain-on-trial/308520/>>.

⁹⁹ There is a growing body of work relating to vicarious trauma and its effects on those involved in the legal system. See for example David B Wexler, "Lawyer-Assistance-Program Attorneys and the Practice of Therapeutic Jurisprudence" (2011) 47 *Court Rev* 64, and David B Wexler, "That's What Friends Are For: Mentors, LAP Lawyers, Therapeutic Jurisprudence, and Clients with Mental Illness" (2013) Arizona Legal Studies Discussion Paper No 11-33, online: Social Science Research Network <<http://dx.doi.org/10.2139/ssrn.1962725>>.

¹⁰⁰ Including their own mental wellbeing, the capacity to continue and to cope with handling these cases, *etc.*

¹⁰¹ In discussions around the US, in Cruz, *supra* note 2.

¹⁰² Patry, *supra* note 12.

issues of an individual's interaction with the legal process.¹⁰³ In the UK, this is against a backdrop of recent political drives towards non-adversarial domains.

According to some, both the public perception about lawyering and lawyering itself is not practiced with an "ethic of care." In other words, lawyers fail to pay sufficient attention to the emotional consequences that accompany their practice.¹⁰⁴ "[L]earning to 'think like a lawyer' involved legal analysis, a legal diagnosis, and a legal solution for particular issues at hand;"¹⁰⁵ however, the emotional/psychological consequences of these processes have largely been ignored. This is not to say that this area has not been the subject of commentary.¹⁰⁶ Indeed, many scholars have argued for law school curricula to integrate emotional skill development. Here the training of lawyers moves on from the position of seeing lawyering as being about categorising and resolving legal problems.¹⁰⁷ There exists an establishing body of thought where the need to think about other effects, such as the movement from legal to psycho-legal consequences, prevails and the resultant clinical experience producing psychologically sensitive lawyers. This client-centred approach is of significance to clinics where the clients are particularly vulnerable. Clinics supporting children, those specialising in immigration and clinics which may evoke strong emotional reactions (such as a refugee family reunion clinic) seem especially apt. As identified by Maroney,¹⁰⁸ law has typically separated the notion of reason from emotion, yet the legal relevance of emotion is both significant and deserving of examination.

Developing trust between the client and their advisor is especially important when adopting a TJ approach within a law clinic setting, particularly in relation to refugees, their history and present circumstances. Many of the clients at our clinic are hesitant to trust their application with individuals outside of their immediate communities. It is not uncommon for refugees seeking family reunion to obtain help, for which they often incur a charge or provide payment, from unregulated individuals within their communities. Given many of our clients are men, the patriarch of the family, they may be unwilling to seek help from others. They may also be distrustful of individuals or organisations with which they have no prior relationship. Trust, as a

¹⁰³ See David B Wexler, "Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer" (2005) 17:3 St Thomas L Rev 743; David B Wexler, *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* (Durham, North Carolina: Carolina Academic Press, 2008); David B Wexler, "Therapeutic Jurisprudence, Criminal Law Practice, and Relation-Centered Lawyering" (2011) 2:1 Chapman J Criminal Justice 93.

¹⁰⁴ Patry, *supra* note 12.

¹⁰⁵ Cruz, *supra* note 2.

¹⁰⁶ Robin Boyle, "Applying Learning-Styles Theory in the Workplace: How to Maximize Learning-Styles Strengths to Improve Work Performance in Law Practice" (2005) 79:1 St John's L Rev 97; Susan S Daicoff, "Expanding the Lawyer's Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law" (2012) 52 Santa Clara L Rev 795; Douglas, *supra* note 22; Ann Juergens, "Practicing What We Teach: The Importance of Emotion and Community Connection in Law Work and Law Teaching" (2005) 11 Clinical L Rev 413; Christine C Kelton, "Clients Want Results, Lawyers Need Emotional Intelligence" (2015) 63 Cleveland St L Rev 459; Randall Kiser, "The Emotionally Attentive Lawyer: Balancing the Rule of Law with the Realities of Human Behavior" (2015) 15 Nevada LJ 442; Nathalie Martin, "Think Like a (Mindful) Lawyer: Incorporating Mindfulness, Professional Identity, and Emotional Intelligence into the First Year Law Curriculum" (2014) 36 U Ark Little Rock L Rev 413;

¹⁰⁷ Cruz, *supra* note 2.

¹⁰⁸ Terry A Maroney, "Law and Emotion: A Proposed Taxonomy of an Emerging Field" (2006) 30 Law & Human Behavior 119.

concept, has received significant attention and commentary in the social sciences. It is often examined from sociological, psychological, and economic perspectives,¹⁰⁹ although it must be noted that trust is a dynamic concept and develops continually between individuals and the organisation/institution and communities from where our clients derive.

Our students observe others at the training phase to understand the relationship building that occurs between the client and the student advisor, and to appreciate how the trust developed occurs in these interactions over a period of time. As our clinic has grown, and its successes have been noted by established institutions in the community, it has developed a level of credibility and trust which is recognised by many members of those communities. The “word of mouth” advertising that occurs is so important in developing trust and being recognised as an organisation which puts the needs of the client prominently within an education facility. The students recognise that our advisors guide clients through the application process, empowering them to be in control of their application, to place responsibility on them to gather appropriate materials, present documentary proof of the relationship, and work on a key aspect of the application process—the statement of evidence. Through this relationship the client is exposed to the legal and non-legal aspects of their situation,¹¹⁰ they have the application process explained to them that not only provides a level of certainty at an uncertain time but also manages their expectations.

The creation of procedures to facilitate the development of identification-based trust¹¹¹ have also been a feature of the HKC Law Clinic. Our logo (the Helena Kennedy Centre for International Justice) creates a collective identity. We are located in Sheffield and invite clients who reside within this local community to apply for help by the clinical team which helps create colocation. We established common goals and we as a team of staff and students made a pledge to commonly shared values relating to social justice, internationalisation, and working with and within the community. This was underpinned by a commitment to impact positively on the betterment of the lives of individuals and those people in the wider community.

A further, crucial, aspect of developing trust has been in the students undertaking sessions, discussions in, and the practise of, empathy. It is recognised that empathy is a human trait,¹¹² yet it also appears in the professional values required of those entering the legal profession. The advisor who has the ability to develop empathy with their client “can more effectively exercise her other skills on the client’s behalf”¹¹³

¹⁰⁹ The study of trust is generally aggregated into these three groups—personality theorists, sociological and economist views, and the views of social psychologists. See Stephen Worchel, “A Developmental View of the Search for Group Identity” in Stephen Worchel *et al.*, eds, *Social Identity: International Perspectives* (London: Sage Publishing, 1998).

¹¹⁰ Assisting in the creation of a legally capable individual as identified by Sharon Collard *et al.*, “Public Legal Education Evaluation Framework” (2011) University of Bristol Personal Finance Research Centre.

¹¹¹ Debra L Shapiro, Blair H Sheppard & Lisa Charaskin, “Business on a Handshake” (1992) 8:4 *Negotiation J* 365.

¹¹² A lawyer is a “professional with a wide range of particular skills but also a human being who exercises judgement, [who] cares for her fellow human beings, both clients and larger society and who has a vision of what professional work should be that goes beyond litigation.” Carrie J Menkel-Meadow, “Narrowing the Gap by Narrowing the Field: What’s Missing from the MacCrate Report—of Skills, Legal Science and Being a Human Being” (1994) 69 *Wash L Rev* 593 at 595.

¹¹³ Kristin B Gerdy, “Clients, Empathy, and Compassion: Introducing First-Year Students to the “Heart” of Lawyering” (2008) 87:1 *Neb L Rev* 1 at 18.

through feeling as the other person does and understanding the speaker's words.¹¹⁴ In the UK, the Legal Education and Training Review report¹¹⁵ defines¹¹⁶ professionalism through competencies that include ethical awareness.¹¹⁷ Whilst Montgomery argues of a lack of an agreed definition of professionalism,¹¹⁸ the Carnegie Report highlighted indicative features including integrity, initiative and emotional resistance; knowing, doing and being; knowledge; and skills, attitudes / head, hand and heart.¹¹⁹ Further, Noone and Dickson identify professionalism as including the following traits in the lawyer/advisor: they undertake the duties attached to a fiduciary relationship; are competent; communicate often, openly and clearly with their client; they do not encourage use of law to achieve inappropriate ends (for example in creating or facilitating injustice, oppression, discrimination); they identify, raise and discuss ethical issues with clients. Finally, and of particular significance to refugee clients (although this was not the focus of their list of characteristics) the advisor seeks to enhance the administration of justice and actively engages in serving the community.¹²⁰

However, professionalism and empathy may not seem natural bedfellows. Empathy has been defined as incorporating "(1) feeling the emotion of another; (2) understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other; and (3) action brought about by experiencing the distress of another (hence the confusion of empathy with sympathy and compassion)."¹²¹ The second definition, embodying a concept of non-judgmentalism, appears to fit with the role of advisors in a clinical legal education setting. Professionalism, of course, invokes a philosophy of discipline, of detachment and the suppression of emotion to facilitate the adherence to professional codes, *etc.* Fletcher and Weinstein discuss this when posing "... the dilemma for the lawyer is how to reconcile the maintenance of a professional boundary with empathic understanding."¹²² However, ultimately, they hold a lawyer experiencing the emotional state of their client provides "... a far richer understanding of the client and the client's legal needs than if the lawyer were limited to analysing communication based on verbal content and body language alone."¹²³ This

¹¹⁴ Laurel E Fletcher & Harvey M Wienstein, "When Students Lose Perspective: Clinical Supervision and the Management of Empathy" (2002) 9 *Clinical L Rev* 135.

¹¹⁵ Which offers a fundamental, evidence-based review of education and training requirements across regulated and non-regulated legal services in England and Wales.

¹¹⁶ "The importance of ethics is signalled, to a high degree, throughout the qualitative data. Professional ethics, and its regulation, are seen as a critical defining feature of professional service." United Kingdom, Legal Education and Training Review, *Setting Standards: The future of legal services education and training regulation in England and Wales* (June 2013) at 34, online: Legal Education and Training Review <<http://letr.org.uk/wp-content/uploads/LETR-Report.pdf>>.

¹¹⁷ Peter Coe & Egle Dagilyte, "Professionalism in Higher Education: Important Not Only for Lawyers" (2014) 48:1 *The Law Teacher* 33 at 36.

¹¹⁸ John E Montgomery, "Incorporating Emotional Intelligence Concepts into Legal Education: Strengthening the Professionalism of Law Students" (2008) 39 *U Tol L Rev* 323 at 327.

¹¹⁹ Carnegie Foundation for the Advancement of Teaching, online: Carnegie Foundation for the Advancement of Teaching <<https://www.carnegiefoundation.org>>.

¹²⁰ Mary Anne Noone & Judith Dickson, "Teaching Towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers" (2001) 4:2 *Leg Ethics* 127 at 144.

¹²¹ Lynne Henderson, "Legality and Empathy" (1987) 85 *Mich L Rev* 1574 at 1579.

¹²² Fletcher & Wienstein, *supra* note 114.

¹²³ *Ibid.*

is true, they continue, unless the emotion is so great as to cloud the lawyer/advisor's professional judgement.

An aspect of our training involves following what Margulies¹²⁴ has deemed a micro-version of empathy, where interpersonal relationships are paramount, and a macro-version of empathy. Here distributive issues in society are the focus. Importantly for Margulies, these personal and political dimensions are not, as others argue, mutually exclusive, rather some progressives, sociologists and feminists maintain these spheres to be "porous, not hermetically sealed."¹²⁵ Using Margulies' model, our training presents clinical legal education empathy as empathic engagement. The students gain empathy for the refugee client as a person who wishes to be reunited with their family, trapped as they often are in non-ideal circumstances. The training on societal and political¹²⁶ issues relating to the countries of origin of these clients, the experience gained from sessions with refugees and interpreters/members of the refugees' community, along with the national immigration system and its limitations promote engagement with, and hopefully an understanding of, the "social world" of the clients and their perceptions of the legal world.¹²⁷ Beyond building the students' self-awareness,¹²⁸ empathy training has increased our students' effectiveness.

Specifically empathy can aid the lawyer in building a rapport with her client and thus foster a more beneficial relationship; foster open and complete communication; lead to more thorough legal analysis; improve the image of the legal profession; and satisfy client expectations.¹²⁹

The feedback provided by our clients, their caseworkers and the professional bodies who refer/signpost a proportion of our clients provide ample evidence of the effectiveness and import of our empathy training¹³⁰ and the need for its continued development. At the HKC Law Clinic, the students are taught the principles of empathy, reflect on these and incorporate them in their interactions with clients (including debriefing sessions), but it is in their use and experience of empathy where the true value and reinforcement of it as a taxonomy is presented.

VII. CONCLUSIONS

As a philosophical approach, TJ is applicable across jurisdictions and disciplines. The research we have presented in this paper is largely informed through literature and

¹²⁴ Peter Margulies, "Re-Framing Empathy in Clinical Legal Education" (1999) 5 *Clinical L Rev* 605 at 606.

¹²⁵ *Ibid.*

¹²⁶ Martha F Davis, "Access and Justice: The Transformative Potential of Pro Bono Work" (2004) 73:3 *Fordham L Rev* 903 who discuss the political commitments dimension to empathy.

¹²⁷ Philip M Genty, "Clients Don't Take Sabbaticals: The Indispensable In-House Clinic and the Teaching of Empathy" (2000) 7 *Clinical L Rev* 273 at 276.

¹²⁸ See Nancy S Elman & Linda Forrest, "From Trainee Impairment to Professional Competence Problems: Seeking New Terminology that Facilitates Effective Action" (2007) 38:5 *Professional Psychology: Research And Practice* 501.

¹²⁹ Gerdy, *supra* note 113.

¹³⁰ "... the ability to empathize is a behavioral skill, rather than a cognitive process... developing that capacity requires the same kinds of training and practice required to develop any other behavioral skill." Joshua Rosenberg, "Teaching Empathy in Law School" (2002) 36 *UFS L Rev* 621 at 637.

practices from the US, where TJ has an established history, albeit applied to a UK-based Law Clinic. However, we would strongly argue that its components would benefit any jurisdiction. By its nature, TJ has an inclusive and positive message for all legal systems and those involved therein, and it assists in developing in students an approach to look towards alternative legal systems for inspiration and guidance. Obviously, law students have to be familiar with the laws, procedures and systems in the jurisdiction where they will practice, but through being amenable to different perspectives and mechanisms for resolving disputes, students can enhance their critical understanding and intellectual reasoning. An ambitious approach to the global practice of law,¹³¹ and for students to be taught how to critically examine laws in their own jurisdiction in relation to international standards is an important aspect of legal pedagogy. However, it is often neglected.¹³² We purposively selected students to work at the HKC Law Clinic who were law and non-law students (such as students studying psychology, sociology, politics, criminology and so on). Further, these were students from a variety of international backgrounds. This assembly facilitated an environment where the students could learn from each other, where they could understand how different disciplines approach issues and they could be exposed to different theoretical constructs. Thus, we had confidence that TJ as a philosophy was apt for consideration by a global audience of legal scholars.

The values underpinning the comprehensive law movement are applicable to all students involved in clinical legal education, and this is being developed with the students involved in delivering advice in each of the clinics within the HKC. The HKC Law Clinic is still in its (relative) infancy. Over one hundred applications have been submitted and many successes, along with rejected applications, have resulted. We have learned many lessons and are continuously attempting to improve our service for the community, to develop our students' awareness of important legal and non-legal issues, and to ensure they follow fundamental TJ principles. These, we hope, will improve them as the next generation of lawyers (ensuring they possess a therapeutic and socially aware approach to advice and lawyering).¹³³

¹³¹ Simon Chesterman, "The Fall and Rise of Legal Education in Singapore" [2017] *Sing JLS* 201.

¹³² James Marson & Katy Ferris, "Delaney and the Motor Vehicle Insurance Directives: lessons for the teaching of EU law" (2017) 51:4 *The Law Teacher* 411.

¹³³ See Jon C Dubin, "Clinical Design for Social Justice Imperatives" (1998) 51:5 *SMU L Rev* 1461.