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Clinic as the Crucible for Theorised Practice and the Practice of Theory in Legal Education

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I INTRODUCTION

The origins of this chapter run deep, drawing on our experience as practitioners, educators and researchers, the creative joys of fostering professional learning, and the bitter frustration of this work being dismissed as ‘secondary’ to foundational and disciplinary knowledge. This conflict within the academy is not obvious from the outside,¹ though we argue that it continues to shape unconscious hierarchies in our culture that impact on, inter alia, access and employability.² We therefore responded strongly to the provocation, ‘to what extent can CLE incorporate legal theory as well as legal practice?’³ to challenge the assumption of a separation. Our Reimagining of Clinical Legal Education is one in which practice and theory are recognised as being organically intertwined in complex⁴ and realistic⁵ experiential learning,⁶ producing an Aristotelian *phronesis*⁷ (practical wisdom, see later, section III). By adopting such a framework, we argue that it is possible to make the undefined and tacit theory of the pedagogy of Clinical Legal Education explicit in order to inform curriculum design and student learning objectives. By ‘the practice of law’ we mean the work carried out in courts and law practices (in the UK, by solicitors and barristers, judges and clerks, legal executives and specialist lawyers working within large organisations) and more

¹ Linden Thomas, ‘Re-Imagining Clinical Legal Education’, CEPLER Working Paper Series No 4 (2015) <http://epapers.bham.ac.uk/1973/1/cepler_working_paper_4_2015.pdf> accessed 8 December 2017.

² Andrew M Francis, ‘Legal Education, Social Mobility and Employability: Possible Selves, Curriculum Intervention, and the Role of Legal Work Experience’ (2015) 42(2) *Journal of Law and Society* 173.

³ Thomas (n 1) 4.

⁴ Roberto Poli, ‘A Note on the Difference Between Complicated and Complex Social Systems’ (2013) 2(1) *Cadmus* 142–47 <<http://www.cadmusjournal.org/files/pdfreprints/vol2issue1/reprint-cj-v2-i1-complex-vs-complicated-systems-rpoli.pdf>> accessed 20 September 2017.

⁵ Rachel Ann Dunn, ‘The Taxonomy of Clinics: The Realities and Risks of All Forms of Clinical Legal Education’ (2016) 3(2) *The Asian Journal of Legal Education* 129.

⁶ John Dewey, *Experience and Education* (Simon and Shuster, 1938).

⁷ John Lloyd Ackrill, ‘Aristotle, The Politics’ in John Lloyd Ackrill (ed), *A New Aristotle Reader* (Princeton University Press, 1987).

broadly the work conducted by those seeking to understand the law as ‘black letter’ scholars,⁸ as historians,⁹ as critical social scientists¹⁰ or as philosophers.¹¹ ‘Clinic’, which can encompass live client full representation, advice-only, pro-bono projects and community engagement, prepares students for the practice of law but it is not simply ‘qualifying work experience’,¹² bolted onto theoretical understanding. The Carnegie Report¹³ posited that ‘Educational experiences orientated toward preparation for practice can provide students with a much-needed bridge between the formal skills of legal analysis and the more fluid expertise needed in much professional work’,¹⁴ but we argue that this is to underestimate the educative potential of clinic. Clinic is not a bridging experience through which students pass with their existing knowledge; it is significantly more catalytic.¹⁵ In clinic, the engagement with live problems requires the student to work with and to question their existing knowledge, transforming their understanding. Therefore, reimagined clinical education demands a reflexive turn¹⁶ in which the experience and the theory are consciously brought into dissonant¹⁷ contact so that the nature of these practices and practice communities¹⁸ can emerge. An outsider to Higher Education might wonder why this is in any way problematic, so we offer a brief diversion into the conceptualisation of knowledge to shed light on where the theory/practice split is located.

A. How is Knowledge Conceptualised in Higher Education?

⁸ Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17 *Deakin Law Review* 83.

⁹ Fiona Cownie, ‘Twining, Teachers of Law and Law Teaching’ (2011) 18(1) *International Journal of the Legal Profession* 121.

¹⁰ Jessica Guth and Chris Ashford, ‘The Legal Education and Training Review: Regulating Socio-Legal and Liberal Legal Education?’ (2014) 48(1) *The Law Teacher* 5.

¹¹ eg, Michael Freeman and Ross Harrison (eds), *Law and Philosophy: Current Legal Issues Volume 10* (Oxford University Press, 2007).

¹² Solicitors Regulation Authority, ‘A New Route to Qualification: The Solicitors Qualifying Examination (SQE). Summary of Responses and our Decision on Next Steps’ (April 2017) p 9 <<http://www.sra.org.uk/sra/consultations/solicitors-qualifying-examination.page#download>> accessed 20 September 2017.

¹³ William M Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond and Lee S Shulman, *Educating Lawyers: Preparation for the Profession of Law* (The Carnegie Foundation for the Advancement of Teaching, Preparation for Practice Program, Jossey-Bass, 2007).

¹⁴ *ibid* 88.

¹⁵ Karin Knorr Cetina, ‘Objectual Practice’ in Theodore R Schatzki, Karin Knorr Cetina and Eike von Savigny (eds), *The Practice Turn in Contemporary Theory* (Routledge, 2001).

¹⁶ *ibid*.

¹⁷ Jack Mezirow, *Transformative Dimensions of Adult Learning* (Jossey-Bass, 1991).

¹⁸ Etienne Wenger-Trayner, Mark Fenton-O’Creevy, Steven Hutchinson, Chris Kubiak and Beverly Wenger-Trayner, *Learning in Landscapes of Practice: Boundaries, Identity, and Knowledgeability in Practice-Based Learning* (Routledge, 2014).

We want to challenge what we consider to be artificial distinctions between Mode 1 and Mode 2 knowledge (Table 1 below) in higher educational practice. Modes 1 and 2 are often used as shorthand for the theory/practice or conceptual/applied debates; debates that we consider to be artificially constructed around battles for limited resources. However, because in these battles there are winners and losers, we need to acknowledge that each side is drawn to denigrate the other, and this ‘othering’ enters the culture as memes – out of touch, so-called experts and technician, skills-focused practitioners – which serve to polarise the debate, to provoke ‘boundary disputes’¹⁹ and to limit the potential of individuals to expand their personal and professional identities.

Table 1: Attributes of Mode 1 and Mode 2 Knowledge Production

TABLE 1 NEAR HERE

Source: Laurens K Hessels and Harro van Lente (2008) 741. The characteristics listed in the original text²⁰ are rarely referenced, so we include them here in order to make the analysis less polarised. Hessels and van Lente suggest that they are ‘two discrete ideal types that probably never exist in their pure form in the real world’;²¹ instead they represent elements of the construction of knowledge that can and arguably should be in productive dialogue. In UK universities current policy²² and discourse²³ appear to require of ‘traditional’ subjects more characteristics (or aspirations to demonstrate the characteristics) of Mode 2, often in the pursuit of ‘relevance’.²⁴ Simultaneously, vocational and professional subjects are under pressure to demonstrate – in the pursuit

¹⁹ *ibid.*

²⁰ Michael Gibbons, Camille Limoges, Helga Nowotny, Simon Schwartzman, Peter Scott and Martin Trow, *The New Production of Knowledge: The Dynamics of Science and Research in Contemporary Societies* (SAGE, 1994).

²¹ Laurens K Hessels and Harro van Lente, ‘Re-Thinking New Knowledge Production: A Literature Review and a Research Agenda’ (2008) 37 *Research Policy* 759.

²² Higher Education Funding Council for England, ‘Memorandum of Assurance and Accountability between HEFCE and Institutions’ (2016/12) <<http://www.hefce.ac.uk/reg/MAA>> accessed 20 September 2017 [superseded by HEFCE 2017/08].

²³ Stefan Collini, *What are Universities For?* (Penguin, 2012).

²⁴ Geoff Mason, Gareth Williams and Sue Cranmer. ‘Employability Skills Initiatives in Higher Education: What Effects Do They Have on Graduate Labour Market Outcomes?’ (2009) 17(1) *Education Economics* 1–30.

of 'rigour'²⁵ – their adherence to Mode 1 practices, particularly in regard to homogeneity and quality control in assessment.²⁶

There are a number of important distinctions and areas of ambiguity when we begin to discuss what it is to know something and to be able to claim expertise: 'knowing' can contain both 'knowing about' and 'knowing how', and indeed there is a 'knowing how' element to 'knowing about', since learning is itself a practice requiring metacognitive skilfulness.²⁷ The nature of knowledge, once acquired, is problematic. Expertise that is held unreflectively becomes crystallised, while keeping expertise fluid requires an investment of time and uncertainty.²⁸ There is a natural development from mastery of information, to use of knowledge and criticality²⁹ about the frame of reference that we associate with professional knowledge and expertise.³⁰ All of this is part of the development of practitioner reflexivity,³¹ a cornerstone of practical wisdom.³²

As we implied above, the knowledge and skills discourse is intimately bound up with questions of identity. Michael Eraut³³ notes that theory/practice debates and the creation of academic/practitioner divisions are particularly prevalent in contexts where 'professionalism' is a factor (such as, for example, education or law) and he suggests that these divisions apparently serve to soothe anxieties about the legitimacy of the discipline in academic/practice constituencies. Having a professional label (barrister/solicitor) legitimises and protects a practice community and having a scientific status (academic/scholar) to that practice places the person/group more advantageously in the hierarchy. It is important to recognise the complexity and

²⁵ Martyn Hammersley, 'Can and Should Educational Research be Educative?' (2003) 29(1) *Oxford Review of Education* 3.

²⁶ Katheryn Ecclestone, *Learning Autonomy in Post-16 Education: The Politics and Practice of Formative Assessment* (Routledge Falmer, 2002).

²⁷ Anastasia Efklides, 'Metacognition: Defining its Facets and Levels of Functioning in Relation to Self-Regulation and Co-regulation' (2008) 13(4) *European Psychologist* 277–87.

²⁸ David C Berliner, 'Learning About and Learning From Expert Teachers' (2001) 35 *International Journal of Educational Research* 463.

²⁹ Katheryn Ecclestone, 'Assessment and Critical Autonomy in Post-Compulsory Education in the UK' (2000) 13(2) *Journal of Education and Work* 141.

³⁰ Anne Mc Kee and Michael Eraut (eds), *Learning Trajectories, Innovation and Identity for Professional Development* (Springer, 2012).

³¹ Sandra Corlett and Sharon Mavin, 'Reflexivity and Researcher Positionality' in Cathy Cassell, Ann L Cunliffe and Gina Grandy (eds), *The SAGE Handbook of Qualitative Business and Management Research Methods* (SAGE, 2017).

³² Sarah Armstrong, Jarrett Blaustein and Alistair Henry (eds), *Reflexivity and Criminal Justice: Intersections of Policy, Practice and Research* (Palgrave Macmillan, 2017).

³³ Michael Eraut, *Developing Professional Knowledge and Competence* (Falmer Press, 1994).

heterogeneity of the actors in our practice community of lawyers: those who draft and decide on the law in parliament and the courts; those who interpret and contest the law on behalf of clients; those who advise and inform individuals and companies to keep within the law; those who agitate for changes to the law; and those who prepare and educate those entering the profession. Following Aristotle, we borrow his metaphysical distinction between essence and accidents:³⁴ all of these actors, we argue, engage in versions of the hermeneutic scholarly practice of understanding the law and thus are *essentially* similar, but the *accidental* boundaries of operation that shape both their actions and how they view those actions are contextually driven. These give rise to locally-framed and potentially competing ‘landscapes of practice’³⁵ in which the big disciplinary questions³⁶ become obscured; for example, debates about curriculum devolve into territory disputes about ‘coverage’ and how far universities are ‘constrained’ by the requirements of professional bodies.³⁷ This distracts us from engaging with canonical foundationalist debates about: what the law is and how it can be known through that lens; how this ‘way of knowing’ can be in dialogue with socio-legal debates about how the law is experienced; and how it can be known through that and other lenses.

III. HOW DOES THIS CONNECT TO DEBATES ABOUT THE PURPOSE AND CONTENT OF LEGAL EDUCATION?

The debate around the purpose of the law degree has traditionally centred on a binary distinction of the ‘liberal arts degree versus vocational training’, in which we can hear the echoes of Mode 1 and 2 knowledge debates. Whilst Law Schools have adopted an ‘outcomes orthodoxy’³⁸ in respect of their qualifying law degrees, these have largely been orientated around a body of disciplinary knowledge seen as essential by the

³⁴ Ackrill (n 7).

³⁵ Wenger-Trayner, Fenton-O’ Creevy, Hutchinson, Kubiak and Wenger-Trayner (n 18).

³⁶ Rachel Lofthouse and David Wright, ‘Teacher Education Lesson Observation as Boundary Crossing’ (2012) 1(2) *International Journal of Mentoring and Coaching in Education* 89–103.

³⁷ Julian Webb, Jane Ching, Paul Maharg and Avrom Sherr, *Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales* (SRA, Bar Standards Board and ILEX, 2013) <<http://letr.org.uk/the-report/index.html>> accessed 20 September 2017.

³⁸ Caroline Maughan, Mike Maughan and Julian Webb, ‘Sharpening the Mind or Narrowing it? The Limitations of Outcome and Performance Measures in Legal Education’ (1995) 29(3) *Law Teacher* 255.

profession and the professional bodies.³⁹ The current Joint Statement for the Qualifying Law Degree (QLD) does little more than name the seven foundation subjects.⁴⁰ However, the content and delivery of the QLD has, for the most part, focused on doctrinal knowledge. The processes of validation, monitoring and review conducted by the professional bodies have encouraged providers to ‘play safe’ and follow successful formulas that demonstrably meet real or perceived professional requirements for content, delivery and assessment,⁴¹ and have led to an emphasis on doctrinal content. The term liberal arts degree typically refers to the context of the subject-matter and the context in which analytical skills are developed. Ashford and Guth define liberal arts education as focusing ‘on education for itself and not for a purpose and is not concerned with employability’; they state that ‘critical thinking is at its core, it must be pervasive throughout.’⁴²

The position taken by some law teachers is that a liberal arts legal education requires critical thinking skills to be developed outside, or in advance, of the context of solving practice-orientated problems.⁴³ There are reminders here of Christopher Langdell’s approach to legal education as being a discoverable truth and that ‘everything you would wish to know can be obtained from printed books’.⁴⁴

This approach is not very different from the processes used in the social sciences and humanities, a fact acknowledged by the current law Subject Benchmark. However, the Benchmark goes onto to identify skills ‘specific to the study of law’, the common denominator being ‘the requirement on the student to apply their understanding of legal principles, rules, doctrine, skills and values’.⁴⁵ This implies a particular and distinctive framework and set of rules for the process of applying and

³⁹ Webb, Ching, Maharg and Sherr (n 37) 28.

⁴⁰ Bar Standards Board and Solicitors Regulation Authority, ‘Academic Stage Handbook’ (Appendix 1, July 2014) <<https://www.sra.org.uk/documents/students/academic-stage/academic-stage-handbook.pdf>> accessed 20 September 2017 and ‘Statement of Legal Knowledge’ (March 2015) <http://www.sra.org.uk/solicitors/competence-statement/statement-legal-knowledge.page#heading_toc_j_1> accessed 20 September 2017.

⁴¹ Cath Sylvester, ‘Through a Glass Darkly: Assessment of a Real Client, Compulsory Clinic in an Undergraduate Law Programme’ (2016) 23 *International Journal of Clinical Legal Education* 1.

⁴² Guth and Ashford (n 10) 5.

⁴³ Anthony Bradney, *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century* (Bloomsbury Publishing, 2003).

⁴⁴ David R Barnhizer, ‘The University Ideal and Clinical Legal Education’ (1990) 35(1) *New York Law School Law Review* 87, quoting Christopher Langdell, ‘Harvard Celebration Speech’ (1887) 3 *Law Quarterly Review* 123–25).

⁴⁵ Subject Benchmark Statement: Law 2015, Quality Assurance Agency 6, 1.1 <<http://www.qaa.ac.uk/en/Publications/Documents/SBS-Law-15.pdf>> accessed 20 September 2017.

synthesising legal principles, frequently referred to broadly as legal method. This framework is taught in the Law School classroom, illustrated by case law and statutory interpretation and practised through the use of the problem question. However, it derives from the practice of law and provides a foundation for practitioners and judiciary involved in the daily task of administering big and small cases, each one with unique facts. Twining talks of ‘hard cases’ being those with no solution by reference to authoritative sources that have gone before. In these cases, problems of interpretation must be solved by reference to underlying principles which justify the practice of law.⁴⁶ It is therefore surprising that the vocational context for legal education provided by clinical legal education has regularly been portrayed as being in conflict with the development of refined critical thinking skills and more akin to training, a viewpoint that denies the importance of adapting legal method skills to inform real-case analysis.

Twining goes on to identify the key intellectual skills of the good lawyer.⁴⁷ These include the ability to express oneself in writing and orally, to construct and present valid, cogent and appropriate arguments, to identify issues and to ask questions in a sequence, problem-solving skills, research skills and identifying ethical dilemmas. None of these skills are unique to law and could be learned in other contexts, but crucially, Twining identifies them as being a key element of legal practice. By implication the law clinic, as a version of legal practice, provides an ecological validity for learning both general and law-specific intellectual skills within a powerful pedagogical methodology. Nevertheless, it remains the case that the majority of law clinics in undergraduate law programmes remain voluntary and unassessed,⁴⁸ and are frequently described as providing students with practical experience to boost their CVs. Moreover, this opportunity is often only available to academically strong students, through a process of selection.⁴⁹

⁴⁶ William Twining, *Blackstone's Tower: The English Law School* (Hamlyn Lectures, Sweet and Maxwell, 1994) 160.

⁴⁷ *ibid* 180.

⁴⁸ Damian Carney, Frank Dignan, Richard Hamilton Grimes, Grace Kelly and Rebecca Parker, *The LawWorks Law School Pro Bono and Clinic Report 2014* (LawWorks, 2014) <www.lawworks.org.uk> accessed 20 September 2017.

⁴⁹ Elaine Hall, Johnny Hall, Cath Sylvester and Carol Boothby, “‘To Him that Hath More Shall be Given’: The Ethical Implications of Selection for Clinical Programmes’ (International Legal Ethics Conference, Fordham University School of Law, New York, 14–16 July 2016).

This reluctance to incorporate clinic into the curriculum, either as a pervasive or capstone experience, reflects the ingrained division between the academic and vocational stages of study perpetuated by the Professional Bodies and some academic lawyers. Twining criticised the concept of the core academic subjects as being both arbitrary and ‘defined solely in terms of coverage of subject matter’.⁵⁰ The law degree has not traditionally been the place where students are prepared for ‘Day 1’ of practice, and the concept of the academic core has dominated. This division was referred to as ‘an unnecessary compartmentalisation of the vocational and the academic aspects of legal education’⁵¹ in the Report of the Advisory Committee on Legal Education and Conduct, which encouraged a move away from a knowledge-based core but – with the exception of a small number of integrated masters programmes – this remains the position in England and Wales. In other jurisdictions, for a variety of reasons, the pedagogy surrounding integration has been more widely adopted. In Australia, Klift refers to ‘almost all Law Schools’ engaging in a process of ‘careful mapping of desired knowledge, skills and attitude development within and across appropriate subjects and years of the core curriculum.’⁵²

In the United States the postgraduate nature of legal education and the lack of any equivalent of the training contract or period of work-based training resulted in law schools being required to take measures to move away from the purely academic. The MacCrate Report recommended the integration of lawyer’s skills and values into law school curricula and led to the introduction of a new Skills and Values Statement for Law Schools.⁵³ The Carnegie Report⁵⁴ on legal education in America proposed a new apprenticeship model of legal education which directs ‘educators towards providing for their students clear notions of what professional expertise entails, along with carefully worked approaches to acquiring it’.⁵⁵ It identified three apprenticeships of professional legal education: the intellectual apprenticeship focusing on students’

⁵⁰ Twining (n 46) 165.

⁵¹ Lord Chancellor’s Advisory Committee on Legal Education and Conduct (ACLEC), ‘First Report on Legal Education and Training’ (Legal Education and Training Review, 1996) para 2.11 <<http://letr.org.uk/references/item/1506.html>> accessed 8 December 2017.

⁵² Susanne Owen and Gary Davis, ‘Learning and Teaching in the Discipline of Law: Achieving and Sustaining Excellence in a Changed and Changing Environment’ (Brisbane, Council of Australian Law Deans Discipline Based Initiative in Law Regional Round Table Consultative Forums, 2009).

⁵³ Eugene Clark, ‘Legal Education and Professional Development – An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap’ (The MacCrate Report) (American Bar Association, 1992).

⁵⁴ Sullivan, Colby, Welch Wegner, Bond and Shulman (n 13).

⁵⁵ *ibid* 27.

knowledge and the ways of thinking within the profession; the apprenticeship of expert practice shared by competent practitioners; and finally the apprenticeship of identity and purpose which draws on the values of the profession.⁵⁶ Whilst these proposals emerged from criticism of the US system of legal education, they give an indication of how an integrated approach could be framed. A law curriculum written in these terms, with an emphasis on professional and practical values and ways of thinking, would be a step in the direction of a curriculum for praxis. Whilst the UK system of legal education is very different from that in the US, the concept of the three apprenticeships is a useful perspective on the entrenched ‘liberal arts versus vocational’ debate at a time of upheaval and change in legal education and training in England and Wales. In March 2015, the Solicitors Regulation Authority approved a new competence statement for solicitors consisting of a threshold statement specifying the Day 1 competencies required, including ‘ethics and professionalism and judgement; technical legal practice; managing yourself and your work; and working with other people’.⁵⁷ In addition, a comprehensive statement of underpinning legal knowledge was included. The qualifying law degree for the purpose of solicitor training will be removed and entry to the profession controlled by centralised entry examinations in the form of Solicitors Qualifying Examinations (SQE). The rationale for this approach was in the main to ‘improve consistency in the standards of entry to the profession’.⁵⁸ Strong criticism has been made of the SQE as an appropriate measure of competence: the Association of Law Teachers expressed ‘grave reservations’ in respect of the adequacy of the capacity of the SQE to assess skills, knowledge and understanding effectively.⁵⁹ The demise of the Qualifying Law Degree will result in a major review of law curricula, with the potential for the traditional academic/vocational division to be significantly diminished.

Meanwhile, legal education operates in a very different context to that of teacher or medical education:⁶⁰ in those disciplines places are offered to students

⁵⁶ *ibid* 97.

⁵⁷ Bar Standards Board and Solicitors Regulation Authority, ‘Statement of Solicitor Competence’ (March 2015) <http://www.sra.org.uk/solicitors/competence-statement.page#heading_toc_j_1> accessed 20 September 2017.

⁵⁸ Solicitors Regulation Authority (n 12).

⁵⁹ John Hodgson, ‘ALT response to the SRA Consultation: “A New Route to Qualification: The SQE”’ (Association of Law Teachers, January 2017) <http://www.lawteacher.ac.uk/docs/ALT_SRA_SQE_Jan_17.pdf> accessed 20 September 2017.

⁶⁰ Vivienne Baumfield, Karen Mattick, Elaine Hall and Steven Higgins, ‘Understanding Cost, Value and Quality in Professional Learning: What Can Teacher Educators, Medical Educators and Legal

based on a forecast of how many teachers of physics or General Practitioners will be needed; while law schools can recruit as many law students as we like, regardless of the number of legal jobs that will be available to them. Some from the ‘liberal arts’ camp would argue that this is a strong argument in favour of less practice orientation in curriculum design. This does not take into account the movement for creating ‘public good professionals’⁶¹ which is gaining currency across academic disciplines, as universities position themselves as having enhanced impact in terms of engaging with and enriching their communities. The educational content of degrees is understood as extending beyond disciplinary knowledge and generic ‘graduate transferable skills’ to encompass a critical awareness of the impact of that knowledge and skills have on the world. In recent years in the UK this debate about purpose has become much less ‘academic’: as funding structures change and the justification for universities’ traditional status is challenged,⁶² claims about what universities offer to their students are required to be backed by evidence.

Graduates are required to have much more than disciplinary knowledge and academic skills (Table 2 below): these remain the core of their experience, but increasingly students are explicitly directed towards ‘generic graduate’ attributes and given guidance on how to develop and how to evidence the acquisition of these. Commentators on graduate employability point to the rapidly changing nature of workplaces and argue that self-management and in particular demonstrating flexibility and creativity are the most crucial attributes for universities to foster.⁶³

Table 2: Graduate Attributes at Three Levels.

TABLE 2 NEAR HERE

Meanwhile, broader citizenship attributes are beginning to appear in university guidance documents for students, but they have not yet been expressed as explicit

Educators Learn Through Co-Enquiry?’ (Leeds, Symposium on the BERA Research Commission presented at the British Educational Research Association Conference 2016).

⁶¹ Melanie Walker and Monica McLean, *Professional Education, Capabilities and the Public Good* (Routledge, 2013).

⁶² Jon Nixon, *Higher Education and the Public Good* (Continuum, 2011) and Collini (n 23).

⁶³ Ruth Bridgstock, ‘The Graduate Attributes We’ve Overlooked: Enhancing Graduate Employability Through Career Management Skills’ (2009) 28(1) *Higher Education Research and Development* 31.

competences.⁶⁴ Universities both define themselves by and exhort themselves towards a series of concrete outcomes and transcendent ideals that are grounded in pedagogy and research but also include ‘Third Mission’ goals related to social contribution. There is now a move to make the Third Mission goals both more explicit and more measurable,⁶⁵ so that these activities can be subject to measures and metric in the same way that teaching quality (by degree outcomes, student surveys and employability) and research quality (by external funding, journals and citations and research assessment exercises) currently are. While definitions of both activities and outcomes remain relatively murky, the Observatory of the European University PRIME project provided eight areas of activity where societal impact could be attempted, with a particularly pertinent reference (for us as clinical legal educators) in element 7: ‘Involvement into social and cultural life’:

a number of universities have lasting ‘facilities’ that participate to the social and cultural life of the city (museums, orchestra, sport facilities, facilities like libraries open to schools or citizens...). Some involve themselves opening ‘social services’ (like law shops).⁶⁶

The provision of a law clinic *as a social service* by a university can therefore be seen as fulfilling certain Third Mission objectives; simply by existing it improves local resources in terms of knowledge and skills being accessible to individuals and groups as well as by providing an environment within which certain socially beneficial graduate attributes can be developed.

Thus, for a range of reasons, law schools are increasingly engaging with the clinical movement. In 2014 the LawWorks Law School Pro Bono and Clinic Report concluded that 70 per cent of law schools were involved in pro bono or clinical activity, an increase from 46 per cent in their 2006 report.⁶⁷ However, only 25 per cent of these experiences were integrated into the curriculum through assessment.⁶⁸ Other practice-orientated learning is also evident in the law curriculum in mooting programmes or integrated CILEx qualifications. A general move towards problem-based, student-centred approaches in Higher Education also lends itself to using

⁶⁴ Jill Alexander and Carol Boothby, ‘Framing Clinical Legal Education at Northumbria Law School: Challenges Old and New’ (2018 forthcoming) 5 *German Journal of Legal Education* [Zeitschrift Für Praktische Rechtswissenschaft].

⁶⁵ Marko Marhl and Attila Pausits, ‘Third Mission Indicators for New Ranking Methodologies’ (2011) 5(1) *Evaluation in Higher Education* 43.

⁶⁶ Adrian Curaj *et al* (2015) *The European Higher Education Area: Between Critical Reflections and Future Practice* Heidelberg: Springer, p280

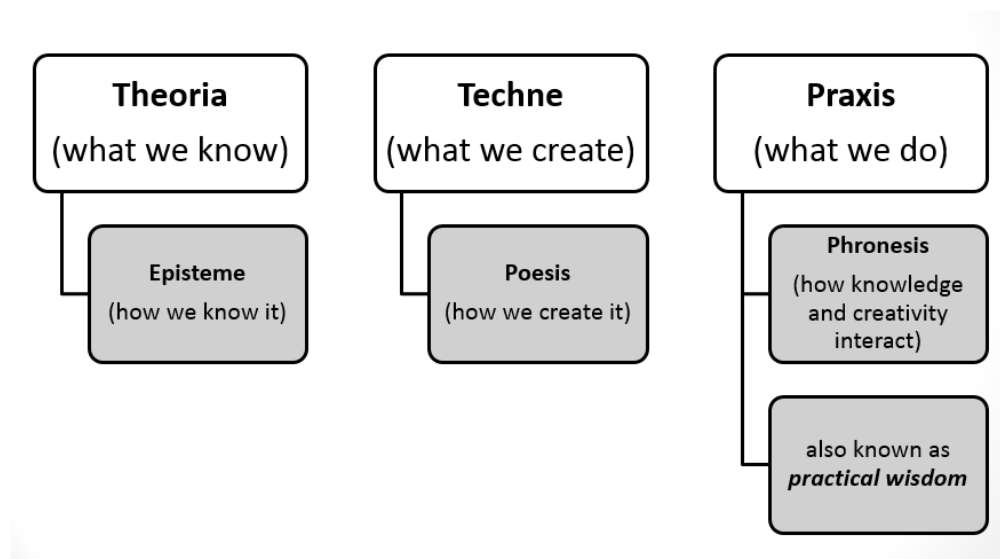
⁶⁷ Carney, Dignan, Hamilton Grimes, Kelly and Parker (n 48) 4.

⁶⁸ *ibid* 5.

practical legal problems. It seems that whilst the knowledge-based core remains, law schools are increasingly addressing the skills agenda not in terms of ‘Day 1’ competencies but by beginning to ask questions about ‘what every lawyer should be able to do’ and not just asking ‘what every lawyer should know’.⁶⁹

IV. CONCEPTUALISING THE RELATIONSHIP OF THEORY AND PRACTICE

We acknowledge that our use of the Aristotelian framework to explain the limitations of the theory/practice split is problematic from the perspective of philosophers and of educational theorists, since we do not engage with Aristotle’s intent or with the limitations of his discussion of means and ends.⁷⁰ However, as an epistemic framing device for a community of legal educators who, on the whole, privilege their legal identity over their educator identity,⁷¹ there is something very satisfying about it, not least because of the apparent simplicity which coexists with potential for nuance and complexity.⁷²



⁶⁹ Twining (n 46) 169.

⁷⁰ Robert S Brumbaugh, ‘Plato’s Ideal Curriculum and Contemporary Philosophy of Education’ (1987) 37(2) *Educational Theory* 169–77.

⁷¹ Christine N Coughlin, Lisa T McElroy and Sandy C Patrick, ‘See One, Do One, Teach One: Dissecting the Use of Medical Education’s Signature Pedagogy in the Law School Curriculum’ (2009) 26 *Georgia State University Law Review* 361.

⁷² Poli (n 4).

Figure 1: Aristotle's Framework (drawn from JL Ackrill, 'Aristotle, The Politics' in Ackrill (ed), *A New Aristotle Reader* (Princeton University Press, 1987).

Basic Mode 1/ Mode 2 knowledge explanations of Aristotle ascribe these activities (almost) exclusively to different parts of a practice community, where *theoria* belongs to scholars and *techne* to practitioners and these explanations leave a mysterious and uninhabited space in which *praxis* could occur though it is not clear when, how and with whom. Theory/practice divides could be attributed to *theoria* and *techne* having different frames of reference and language, which are then expressed (*episteme*, *poesis*) in ways that can easily be construed as unrelated. It's our impression that *praxis* is sometimes (through a simple anglicised homophone error as 'practice'?) misinterpreted as *poesis* and so the catalytic quality of *phronesis* is lost. In educational research, where these ideas have been more thoroughly explored, there is still a tendency to fragment and focus on discrete aspects of the model:

- *episteme*: eg critical realist researchers make claims for the primacy of some ways of knowing (for example Randomised Controlled Trials of phonics over phenomenological accounts of learning to read) drawing fire from philosophers opposed to the dominance of empiricism.⁷³
- *poesis*: eg the ecological validity debate about where or when students should experience and integrate theoretical and practical elements of the law, which draws critical attention away from other key questions: Can we create meaningful legal artefacts in a theory-free space? Does practice have a theory and vice versa?

However, Carr argues that in this fragmentation we may be fundamentally hampered by a lack of understanding of what we are actually about. He offers instead this holistic framing:

an educational practice is a discursively formed and socially situated practice that can only be learned by acquiring the largely unarticulated and usually tacit body of practical knowledge and understanding endemic to the social context with which educational practices are conducted.⁷⁴

⁷³ Gert Biesta, 'Why "What Works" Still Won't Work. Evidence-Based Practice and the Democratic Deficit of Educational Research' (2007) 57(1) *Educational Research* 1 and Gert Biesta, 'Why "What Works" Still Won't Work. From Evidence-Based Education to Value-Based Education' (2010) 29(5) *Studies in Philosophy and Education* 491.

⁷⁴ Wilfred Carr, 'Educational Research as a Practical Science' (2007) 30(3) *International Journal of Research and Method in Education* 276.

This is, in essence, a form of Aristotelian *praxis*: skills and knowledge reflexively guided by ethical standards,⁷⁵ which builds up through the iterative focus on means and ends (*poesis/theoria*) to become *phronesis* – *practical wisdom*.

Theoria, for lawyers, is the law as encapsulated in statute and case law, one of our principal *epistemes* is the critical analysis of legal texts.⁷⁶ Our *technes* are the opinions, letters, arguments and bundles that we produce for our clients and causes using the *poeses* of legal analysis, argumentation and the use of evidence. Lawyers' *praxis* represents the conscious and unconscious mediation of *theoria* and *techne*, the application of legal knowledge to the present problem not in a simple 'rule-book' way but with an awareness of the complexity by which law moves from one temporary state of certainty to another. *Phronesis* in a legal context, for us, aligns with the aspect of 'professional judgement' described by Grundy: 'looking back at the theory and while trying to make meaning of it, critically examines its value for practice'.⁷⁷ This simultaneous *criticality of* and *respect for* the text means that lawyers (whether or not they are conscious of it) can be categorised as hermeneutic practitioners.⁷⁸

In the broad practice of law, we could all be essentially engaged in the same hermeneutic endeavour. In conceptualising our work in this way and moving beyond the borders in 'landscapes of practice',⁷⁹ could *theoria* and *techne* – rather than engaging in territory disputes – come together to create *praxis*? Eraut asks 'what happens if we move the academic researcher from the centre of the universe?', referring to professions where 'nearly all new practice is both invented and developed in the field, with the role of academics being confined to that of dissemination, evaluation and *post hoc* construction of theoretical rationales'.⁸⁰ The 'legal academic' as an actor rather than the centre of the universe would need to consider curriculum in relation to the Aristotelian model. Table 3 represents our attempt to do this in relation to one area of law – these are *our* questions, not *the* questions.

⁷⁵ Bent Flyvbjerg, 'Phronetic Planning Research: Theoretical and Methodological Reflections' (2004) 5(3) *Planning Theory & Practice* 283–306.

⁷⁶ Statutes or judgements, known in academic shorthand as 'black letter' study (n 8).

⁷⁷ Shirley Grundy, 'Curriculum: Product or Praxis?' (Falmer, 2002) Colin Coles, 'Developing professional judgement' (2002) 22(1) *Journal of Continuing Education in the Health Professions* 3–10, at 6.

⁷⁸ Stig Jorgensen, 'Lawyers and Hermeneutics' (2000) 40 *Scandinavian Studies in Law* 181; Francis J Mootz, 'Law in Flux: Philosophical Hermeneutics, Legal Argumentation and the Natural Law Tradition' (1999) 11(2) *Yale Journal of Law and the Humanities* 3.

⁷⁹ Wenger-Trayner, Fenton-O'Creevy, Hutchinson, Kubiak and Wenger-Trayner (n 18).

⁸⁰ Eraut (n 33) 54.

Table 3: Interplay of Aristotle and Curriculum

TABLE 3 NEAR HERE

This exercise is a provocative one, forcing us to contemplate and critique our ideas about essential and foundational knowledge, skills and experiences. Unfortunately, it's even more complicated than this. Curriculum is not a simple, bounded entity⁸¹ and there is a considerable debate throughout education about the gaps between the written curriculum (as centrally designed), the taught curriculum (as locally enacted), and the experienced curriculum (as individually encountered). The legal academic has limited agency over how curriculum is experienced – though this does not mean it is not an area of vital interest – so for the purposes of this chapter we have excluded this element in order to direct attention to a relatively under-explored area, the curriculum as imagined. If we begin with the curriculum as written, with the documents and artefacts, we miss out on the early stages of design, where the beliefs and desires of the academic have yet to meet the pragmatics of semesters, departmental teams and external bodies. Exploring this aspirational stage enables us to question how much of our core values are evident in our written documents, whether there are unconscious hierarchies amongst all the good things we want for our students and whether these preferences are evident in the opportunities that are eventually offered to students. This unpacking of ideas from Table 3 above into Table 4 below prompts a number of challenging questions – firstly, can we just paste the curriculum questions above directly into one of the new rows? Did those questions stem directly from our imaginations, from the module specifications or from our direct experience of teaching? Again, the way in which we have disaggregated this is *ours* and not intended to be definitive.

Table 4: Interplay of Aristotle and evolution of Curriculum Design – what questions might we ask?

TABLE 4 NEAR HERE

⁸¹ See eg, Stephen Billett, 'Constituting the Workplace Curriculum' (2006) 38(1) *Journal of Curriculum Studies* 31.

Therefore, we would encourage readers, particularly colleagues involved in the design of legal curricula to consider where they might understand their practice to be within this framework and whether their students could recognise their learning experience here.

V. WHAT WE GAIN FROM HEALING THE SPLIT: CLINIC'S ADDITIONS TO THE 'TRADITIONAL' LEGAL EDUCATION EXPERIENCE

Clinic, as we define it in the curriculum, offers new perspectives on the big disciplinary questions and discourses in law. It not only provides real-life context and complexity but also requires the student to explore and interpret the law from the unique perspectives of the client and the legal professional. It deals with the processes of constructing and seeking knowledge outside of the law library in the location of practice and from multiple perspectives, requiring judgement and decision-making. In this context entirely theoretical and historical approaches to legal study have their limitations in the same way that an entirely practice-skills-orientated approach limits the learning potential of clinic. This is not to deny that there are other crucibles in the form of other experiential and catalytic pedagogies. Adimoto reviewed the range and objectives of non-clinical Inquiry Based Learning identified by 224 university lecturers in Australian universities.⁸² Some of these approaches used real-world unstructured problems and engaged students in the research processes of the discipline, aligning with Jenkins and Healy's research-based learning,⁸³ whilst others focus on the problem-solving methodology, applying it to multi-dimensional but constructed problems.⁸⁴ Spronken-Smith identified that such modules most commonly claimed to encourage a spirit of enquiry or to introduce students to the

⁸² Anindito Aditomo, Peter Goodyear, Ana-Maria Bliuc and Robert A Ellis, 'Inquiry-based Learning in Higher Education: Principal Forms, Educational Objectives, and Disciplinary Variations' (2013) 38(9) *Studies in Higher Education* 1239.

⁸³ Mick Healey and Alan Jenkins, 'Developing Undergraduate Research and Inquiry' (Higher Education Authority, 2009) <<https://www.heacademy.ac.uk/knowledge-hub/developing-undergraduate-research-and-inquiry>> accessed 20th September 2017.

⁸⁴ Henk G Schmidt, 'Problem-based learning: Rationale and Description' (1983) 17 *Medical Education* 11.

process of knowledge creation.⁸⁵ We would argue that the real case, real client, real time aspects of clinic bring a dynamic that sets clinic apart as a form of Inquiry Based Learning. The clinic exposes students to the complex practice rather than merely complicated practice. Poli refers to complex problems as those which ‘must be addressed as entire systems, that is they cannot be addressed in a piecemeal way; they are such that small inputs may result in disproportionate effects’.⁸⁶ Such problems have an unpredictable dynamic which must be managed or controlled creatively; ‘the best one can do is to influence them, learn to “dance with them”’.⁸⁷

This complexity cannot be delivered through even the most complicated of constructed ‘problem questions’. Millemann explored methods of incorporating clinical legal education into large-group sessions.⁸⁸ They analysed the limitations of the traditional problem question or ‘canned questions’, which they described as being reverse engineered so that students ‘found arguments but did not construct them’. Even when attempts had been made to add authentic detail, the questions remained ‘sanitised’ and ‘realistic but not real’.

Amsterdam considered the difference between analytical thinking skills typically present in the traditional non-clinical law school and those acquired through practice. He referred to traditional legal education as being too narrow because

it failed to develop in students the ways of thinking within and about the role of lawyers – methods of critical analysis, planning and decision making which are not themselves practical skills but rather the conceptual foundations for practical skills and for much else.⁸⁹

Amsterdam identified some key professional analytical skills which would be hard to replicate outside of a true practice setting. For example, he refers to ‘ends–means thinking’ (the process of identifying the range of possible goals in a legal case and charting routes to achieve those goals). In clinic, even the most straight-forward case is likely to have legal content which crosses subject specialisms and draws on authorities for a range of peripheral issues which are not included in the key cases in the subject area. Students will need to ‘construct the case’, not only by applying their

⁸⁵ Rachel Spronken-Smith and Rebecca Walker, ‘Can Inquiry-Based Learning Strengthen the Links Between Teaching and Disciplinary Research?’ (2010) 35(6) *Studies in Higher Education* 723.

⁸⁶ Poli (n 4).

⁸⁷ *ibid.*

⁸⁸ Michael A Milleman, ‘Using Actual Legal Work to Teach Legal Research and Writing’ (2007) 4 *Journal of the Association of Legal Writing Directors* 10.

⁸⁹ Anthony G Amsterdam, ‘Clinical Legal Education – a 21st Century Perspective’ (1984) 34 *Journal of Legal Education* 614.

understanding of the facts to the legal requirements of the claim but also by taking into account and anticipating procedural, evidential, practical and ethical considerations many of which will be uncertain or unknown at the start of the case.

Amsterdam also refers to ‘hypotheses formulation and testing in information acquisition’ being the iterative process of aligning case hypotheses with case information and ‘decision making in situations where options involve risks and uncertainty’. Students need to understand the complex uncertainties of practice which are not restricted to manipulation of previous court decisions. They must understand that they will have to make, evaluate and justify choices throughout the process and, crucially, that there is normally no ‘right’ answer. They will have to know how to reframe and review arguments as the evidence is subjected to greater scrutiny and experience the nuances of factual interpretation, and understand that they have to ‘learn to dance’ with this sort of uncertainty. In this way students are exposed more realistically to how these decisions are reached. Students will need to anticipate possible responses and non-legal consequences as far as they can whilst understanding that the unexpected may still occur.

It is difficult to see how these sorts of intellectual skills could be developed outside the clinical setting and without the sort of complex problem identified by Poli.

Whilst Amsterdam does not explicitly refer to the pedagogy surrounding experiential learning, it is clear that many of the processes involved in clinical problem solving align with the stages of John Dewey’s model of experiential learning. For Dewey, the link between experience and education was both necessary and intimate. Dewey’s experience was heavily dependent on an environment which generated a disturbance or ‘fork in the road’ moment for students, something that those involved in clinical legal education are very familiar with. The experience is a moving force driving a cycle of enquiry, hypotheses formulation, testing, re-formulation and learning which will be ‘taken forward and used in the future, not just compartmentalised’,⁹⁰ as a model for the lifelong development of professional expertise.

For the students in clinic the fork in the road is less about content than about the immediacy of the client in front of them. It is likely to be the first piece of work

⁹⁰ Dewey (n 6) 50.

they have done in the university which is of value to someone external to themselves and, whatever their emotional response to the client's case, they have a professional responsibility to their client and to their supervisor. In defining the clinical method, Barnhizer states that it begins with the 'tension of client representation' and requires students to assume "primary" professional responsibility for the process and outcome' of the case.⁹¹ Not only will students make judgements and develop case strategies, but they must also learn to organise time and resources, find ways of working with others, and rationalise their beliefs and values with their professional obligations. The Carnegie Report refers to it as the experience of 'lived responsibility'⁹² and it is the basis on which students may start to build their own professional identity. Solbrette and Sugrue note that the complexity of practitioner understandings of professionalism is mainly tied up in complex webs of responsibility: to clients, to colleagues, to employers, to society. Dealing with the conflicts that emerge from these webs leads, they argue to a personal professional identity located in 'legitimate compromise'.⁹³ We can see these in play in the final worked example in Table 5 below:

Table 5: Interplay of Aristotle and Curriculum in Clinic

TABLE 5 NEAR HERE

The role of the supervisor in clinic is therefore complex and of primary importance. Barnhizer identifies the individualised student-supervisor relationship as one of the defining elements of clinical legal education. He observes that clinic is likely to be the place where students' individual work is 'subjected to intensive and rigorous post-mortem critical review both by student and tutor'.⁹⁴ However, the role of the supervisor goes beyond critical review. It is inevitable that the supervisor will be a role model for students. Clinic may well be the first time students have

⁹¹ David R Barnhizer, 'The Clinical Method of Legal Instruction: Its Theory and Implementation' (1979) 30 *Journal of Legal Education* 72.

⁹² Sullivan, Colby, Welch Wegner, Bond and Shulman (n 13) 45.

⁹³ Tone Dyrdal Solbrette and Ciaran Sugrue, 'Learning from the Conceptions of Professional Responsibility and Graduates' Experiences in Becoming Novice Practitioners' in Anne Mc Kee and Michael Eraut (eds), *Learning Trajectories, Innovations and Identity for Professional Development* (Springer, 2014).

⁹⁴ Barnhizer (n 91) 73.

encountered a practising lawyer and seen how lawyers interact with each other as colleagues and as opponents and with clients. The clinical setting puts the supervisor under intense scrutiny. Barnhizer observes that ‘everything the clinical tutor does is part of the total teaching experience’.⁹⁵ The supervisor’s professional values and motivations are on display and their decision-making processes and dilemmas model their own version of *praxis*. The role of the supervisor in clinical work is likely to have significant impact for students in terms of the experienced curriculum. Whilst the subject knowledge content of the clinical curriculum is largely determined by the clients and their cases, the experienced curriculum is likely to be formed by the interactions and working relationships formed and observed in the clinic. In other words, *praxis* is modelled and expressed by the supervisor and if we as supervisors are aware of our own version of *phronesis*, we can offer students not just *an* approach to follow but the opportunity to explore, critique and customise.

Our reimagined Clinical Legal Education does not compartmentalise theory and practice in the clinic. Whilst our designed and written clinical curricula may be framed in this terminology we argue that the distinctive and disruptive nature of clinic and its context as a functioning legal practice in the university and in the legal community have the power to deliver an experienced curriculum which goes beyond this binary approach. By moving the conversation on to the integrated concept of ‘practical wisdom’, we can start reflecting on the complex contributions clinic can make to legal knowledge and expertise, and professional identity and the wider critical discourses of the discipline.

⁹⁵ *ibid* 74.