“WE DON’T NEED NO THOUGHT CONTROL” WHAT IS THE INTENT AND IMPACT OF TEACHING VALUES IN CLINICAL LEGAL EDUCATION?

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Declaration

I declare that no outputs submitted for this degree have been submitted for a research degree of any other institution.

I declare that the Word Count of this Commentary is 14,666 words (excluding title pages, contents pages, acknowledgements, bibliography, and referencing)

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List of Publications

1.	Macfarlane A and McKeown P, '10 Lessons for New Clinicians ' (2008) 13 Int'l J Clinical Legal Educ 65
2.	McKeown, P, 'Client Funding' in Kevin Kerrigan and Victoria Murray (eds) *A Student Guide to Clinical Legal Education and Pro Bono* (Palgrave Macmillan 2011)
3.	McKeown, P, 'Interviewing and Advising' in Kevin Kerrigan and Victoria Murray (eds) A Student Guide to Clinical Legal Education and Pro Bono (Palgrave Macmillan 2011)
4.	McKeown P, 'Law Student Attitudes towards Pro Bono and Voluntary Work: The Experience at Northumbria University' (2015) 22 Int'l J Clinical Legal Educ [vi]
5.	McKeown P and Morse S, 'Litigants in Person: Is there a role for Higher Education' (2015) 49(1) Law Tchr 122
6.	Dunn, R & McKeown, P, 'The European Network of Clinical Legal Education: The Spring Workshop 2015' (2015) 22(3) Int'l J Clinical Legal Educ 312
7.	McKeown P and Morse S, 'Further Developing Street Law' in Chris Ashford and Jess Guth (eds) The Legal Academic's Handbook (Palgrave 2016)
8.	McKeown, P. (2017) 'Pro Bono: What's in it for Law Students? The Students Perspective' (2017) 24(2) Int'l J Clinical Legal Educ 43
9.	McKeown P, 'Can Social Justice Values be Taught Through Clinical Legal Education?' in Chris Ashford and Paul McKeown (eds) Social Justice and Legal Education (Cambridge Scholars Publishing 2018)
10.	McKeown P and Hall E, 'If We Could Instil Social Justice Values through Clinical Legal Education, Should We' (2018) 5 J Int'l & Comp L 143

Abstract

A traditional legal education in England and Wales has seen the separation of theory and practice. Undergraduate law students did not study ethics nor did they consider the relationship between the law and wider society. However, recent years have seen the integration of practice within many undergraduate degree programmes, often through clinical legal education programmes. There has also been recognition that law graduates should understand their ethical obligations and the impact of law on society. Reforms to legal education, most notably the forthcoming implementation of the Solicitors Qualifying Exam, mean that universities may take a more liberal approach to the curriculum and are encouraged to innovate in their teaching.

The history of clinical legal education has shown two streams of intent; 'social justice' including the provision of legal services to the indigent and the inculcation of social justice values in law students and 'education' of knowledge and skills. This thesis commentary, together with the supporting publications, considers what is, or should be, the intent of clinical legal education. Further, this thesis commentary critically examines the evidence of the impact of clinical legal education upon law students.

This thesis commentary will conclude by proposing a re-imagining of clinical legal education, namely an intent to educate students in not only substantive legal knowledge and skills but also to critically examine the law in society. Drawing upon educational theory, the thesis commentary will propose how clinical legal education programmes can be designed to enhance reflective practice and allow students critically evaluate their own intrinsic values and beliefs.

1. Introduction

> '…it is of the highest importance that in the election of judges, persons should be selected who have not only a knowledge of the law, sound judgment and vigorous intellect, but a keen, correct and cultivated moral sense, and a healthy conscience, and who are fully up to the intellectual and moral progress of the people and the spirit of the age.'[1]

Traditional approaches to legal education have students sitting dutifully in a lecture theatre listening to their professor followed by hours in a library with textbooks learning the theory of law based upon rules and definitions that have evolved over hundreds of years.[2] In England and Wales, little, if any regard was paid to the practical aspects of law as such matters were left to vocational programmes[3] and the training stages of professional qualification.[4] A traditional undergraduate law degree did not therefore address professional skills or values. **[9]**

There has been a long tradition of separation between the academic and vocational study of law. Historically, the regulation of qualification into the legal profession can be traced to the Attorneys and Solicitors Act 1728 that specified no man[5] could practise as a solicitor unless his name was on the Roll, and he had undertaken Articled Clerkship for a minimum of 5 years. By 1843, graduates of the Universities of Oxford, Cambridge, Dublin, Durham or London were only required to undertake a 3-year Articled Clerkship. Subsequently, entrants to the legal profession were required to pass an exam set by the Law Society of England and Wales following the enactment of the Solicitors Act 1877. Following the Solicitors Act 1956, qualification as a solicitor required: service under "articles"; attendance at a course of legal education; and passing examinations as prescribed by the Law Society. The Law Society's Training Regulations 1970 specified that the longest period of service under Articles was 4

[1] Charles B Waite, 'A Definition of Law' (1887) 1 CHI L TIMES 35, 37

[2] For example, Magna Carta 1215 is still often cited today

[3] For example, the Legal Practice Course or the Bar Practice Training Course

[4] Similar issues arise in other jurisdictions. For example, see Richard J Wilson, 'Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education' (2009) 10 German LJ 823

[5] It should be noted that women could not be admitted as a solicitor until the enactment of the Sex Disqualification Act 1919. In Bebb v. the Law Society (1914) 34(7) Can L Times 620, the Court of Appeal held that a woman was not a 'person' within the meaning of the Solicitors Act 1843. The first female solicitors were admitted on 18 December 1922 (BBC News, 75 years of women solicitors (19 December 1997) <www.news.bbc.co.uk/1/hi/uk/40448.stm> accessed 13 June 2018).

years, although graduates of law commonly served 2 years. The Solicitors Act 1974 permitted the Law Society to create Training Regulations, although this function has been transferred to the Solicitors Regulation Authority (SRA).

At present, the SRA Training Regulation 2014 governs qualification as a solicitor. Pursuant to Regulation 2, an individual seeking admission as a solicitor must usually have completed the academic[6] and vocational[7] stages of qualification or an apprenticeship.[8] The SRA must also be satisfied as to the character and suitability of the prospective solicitor before admitting them to the Roll.[9] There are other routes to qualification as a solicitor although these are beyond the scope of this thesis commentary.

A Qualifying Law Degree (QLD) is one recognised under the Joint Statement issued by the Law Society and the General Council of the Bar. A QLD must have at least 240 credits in the study of legal subjects in a 360 or 480 credit degree programme. Further, the Foundations of Legal Knowledge[10] must together account for a minimum of 180 credits. Students must also undertake research and study legal subjects in the final year of the programme. A conversion course, such as the Graduate Diploma in Law, for non-law graduates provides the equivalent of the Foundations of Legal Knowledge within a one-year period of study.

The Joint Statement is not prescriptive as to how subjects are taught and, as Sylvester observes, these areas are 'traditionally covered by a lecture/seminar approach'.[11] The academic stage of qualification is not required to encompass professional skills and knowledge and may well be regarded as a liberal education. There has been much discussion as to the dichotomy between the liberal and the professional perspectives of a law degree.[12] **[9]**

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[6] The academic stage of training means a Qualifying Law Degree, Common Profession Exam (also known as Graduate Diploma in Law) or an Exempting Law Degree

[7] The vocational stage of training means the Legal Practice Course, a period of recognised training and the Professional Skills Course

[8] SRA Training Regulations 2014 – Qualification and Provider Regulations, reg. 2

[9] ibid., reg. 2.1(c)

[10] Public law, including Constitutional law, Administrative law and Human Rights; Law of the European Union; Criminal law; Obligations including Contract, Restitution and Tort; Property law and Equity and the Law of Trusts

[11] Cath Sylvester, 'Bridging the Gap - The Effect of Pro Bono Initiatives on Clinical Legal Education in the UK' (2003) 3 Int'l J Clinical Legal Educ 29, 31

[12] For example Anthony Bradney, Conversations, Choices and Chances: The Liberal Law School in the Twenty-first Century (Bloomsbury Publishing 2003); Jess Guth and Chris Ashford, "The Legal Education and Training Review: Regulating Socio-Legal and Liberal Legal Education?" (2014) 48(1) Law Tchr 519

The SRA have set out proposals to introduce a new common assessment that all aspiring solicitors will need to pass, known as the Solicitors Qualifying Examination (SQE). From autumn 2021, those wishing to enter the solicitors' profession will be required to pass stages 1 and 2 of the SQE. Stage 1 focuses on legal knowledge and stage 2 focuses on practical legal skills.[13] Individuals seeking admission will be required to hold an undergraduate degree (in any subject) or an equivalent qualification and undertake a substantial period of work experience.[14] Finally, they must also pass the character and suitability requirements.[15]

One cannot help having a sense of déjà vu when considering the SQE proposals. These proposals appear to be taking us back to the days of Articles and Law Society Finals. Martin Coleman, Chair of the SRA Education and Training Committee, stated the objectives of the reforms are:

- To focus the education and training system on ensuring that those who deliver legal services meet our standards with less emphasis on the process by which high quality outcomes are achieved.
- In doing this to increase flexibility for higher education institutions, vocational training providers and employers to come up with innovative and efficient ways of achieving the necessary outcomes.
- To ensure that the education and training system can adapt over time to take account of changes in legal services markets.
- To target our activities as a regulator on protecting the public interest, including consumer interests, in a proportionate manner.[16]

The history of legal education and qualification as either a solicitor or a barrister in England and Wales illustrates the separation of academic, vocational and training stages of qualification. The structure was criticised in the ACLEC Report that stated, 'the division has encouraged the separation between theory and practice, between "academic" knowledge and "professional"

[13] SRA Training Regulations 2014 – Qualification and Provider Regulations, reg. 2.1(a)(ii) ; See also Solicitors Regulation Authority 'A new route to qualification: the Solicitors Qualifying Examination' (2016) 5
[14] ibid.
[15] ibid.
[16] Martin Coleman, 'Policy statement: Training for Tomorrow' (2013) <www.sra.org.uk/sra/policy/training-for-tomorrow/resources/policy-statement.page> accessed 14 June 2018

expertise, and between the study of substantive and adjectival law.'[17] In essence, this means we teach students substantive law without reference to procedure or professional ethics: for example, teaching criminal law by reference to statute and case law without reference to criminal procedure and the professional code of conduct. The ACLEC Report goes on to state that the distinction between academic and vocational stages 'has deprived the legal profession of the contribution of a wider range of academic lawyers to the development of subjects which are thought to be appropriate only for the vocational stage.'[18] This highlights the tension between "academics" who believe the law degree is about teaching the theory of the law and "skills trainers" who wish to equip the students for professional practice.[19] Such tensions still persist as highlighted in the LETR Report with one academic respondent stating, 'the more you start getting these skills in, the less room you have to teach philosophy, theory, rights, justice, the liberal arts kind of side of it' in relation to the content of the undergraduate degree.[20] **[9]**

If we teach substantive law in isolation, there is a risk that context is lost and thus students will not understand how the law operates in practice. The law is a 'system of rules which a particular country recognizes as regulating the actions of its members and which it may enforce by the imposition of penalties.'[21] As such, the law is a human construct effecting everyone within the community regulated by the law. However, there are also other rules that govern society which are not laws 'but merely social conventions'.[22] The law is not static but changes 'to conform to the advanced intellectual and moral condition of the people.'[23] To understand and critically analyse the law, one is required to go beyond rote learning and consider why the law is set out as it is and applied in practice. For example, it is meaningless to know that discrimination on the grounds of gender is unlawful if there is no effective mechanism in which to challenge such unlawful behaviour. It is also important to understand the rationale behind law. Dror sums this up stating:

[17] The Lord Chancellor's Advisory Committee on Legal Education and Conduct, 'First Report on Legal Education and Training' (April 1996) 28
[18] ibid.
[19] ibid.
[20] Legal Education and Training Review, 'Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales' June 2013
[21] https://www.lexico.com/en/definition/law
[22] James A. Holland and Julian S. Webb, *Learning Legal Rules* (4th edn, Blackstone Press 2001) 2
[23] Waite (n 1), 36

> 'By its very nature, law consists of a number of norms which constitute obligatory rules of behavior for the members of the society. These legal norms are closely related to various social values, being either a direct expression of them or servicing them in a more indirect way.'[24]

As well as the law and societal values, professions such as the legal profession, are governed by their own professional rules or ethical codes. Legal professionals deem legal ethics and procedure as the most important area of professional knowledge.[25] Legal ethics is perceived as a critical defining feature of professional service.[26] Whilst the LETR Report indicates 'support for more and earlier emphasis on legal values and ethics', there was not strong support for it to be listed as a separate Foundation subject.[27] Thus, the LETR Report recommended that:

> 'LSET [Legal Services Education and Training] schemes should include appropriate learning outcomes in respect of professional ethics'[28] and '[t]he learning outcomes at initial stages of LSET should include reference (as appropriate to the individual practitioner's role) to an understanding of the relationship between morality and law, the values underpinning the legal system, and the role of lawyers in relation to those values.'[29]

As a consequence of the tensions highlighted above, the characterisation of an undergraduate law degree has been the subject of significant debate. Is a law degree a liberal arts degree, a liberal arts degree enabling some students to become legal professionals or a professional degree directed at solely becoming a legal professional? Guth and Ashford defined a liberal education as 'education for education's sake, equipping students for life and helping them to "call their minds their own"'.[30] This '*nuanced*' definition 'does not oppose the teaching or exploration of practice relevant subjects or the learning of professional knowledge and

[24] Yehezkel Dror, 'Values and the Law' (1957) 17(4) Antioch Rev 440
[25] LETR 33
[26] LETR 34
[27] LETR 35
[28] LETR Recommendation 6
[29] LETR Recommendation 7
[30] Guth and Ashford (n 12)

skills…because they facilitate or come with the wider learning that constitutes a liberal education.'[31] **[9]**

The Quality Assurance Agency for Higher Education (QAA) recognised that a law graduate was 'far more than a sum of their knowledge and understanding, and is a well skilled graduate with considerable transferable generic and subject-specific knowledge, skills and attributes.'[32] Further clarification is provided by the QAA in their contextual statement that states:

> 'At undergraduate level students are aware of the consequences of law as a human creation and that it is subject to the ethics and values of those that make and apply it. The implications of this in the context of securing justice and the public interest is considered as part of legal study. Law schools will determine for themselves how ethics are addressed in the curriculum, but it is expected that students will have opportunities to discuss ethical questions and dilemmas that arise in law and to consider the features of ethical decision making.'[33]

Clinical legal education is often cited as a method to address the gap between legal theory and practice and numerous reviews and reports into legal education from various jurisdictions have recommended the introduction of clinical programmes to address the gap.[34] Clinical legal education initially developed within the mainstream legal education system of the United States during the 1950s and 1960s gradually spreading throughout the globe.[35] **[10]** Clinical

[31] ibid.
[32] Quality Assurance Agency for Higher Education, 'Subject Benchmark Statement: Law' (July 2015), 4
[33] ibid.
[34] See American Bar Association Section of Legal Education and Admissions to the Bar, 'Legal Education and Professional Development – An Educational Continuum: Report of The Task Force on Law Schools and the Profession: Narrowing the Gap' (1992)('The MacCrate Report'); The Lord Chancellor's Advisory Committee on Legal Education and Conduct, (1996) 'First Report on Legal Education and Training' (The ACLEC Report); Gov't. of India, Ministry of Law, Justice and Company Affairs, 'Report of Expert Committee on Legal Aid: Processual Justice to the People' (1973); Gov't. of India, Ministry of Law, Justice and Company Affairs, Report on National Juridicare and Equal Justice–Social Justice (1977); Dennis Pearce, Enid Campbell and Don Harding, 'Australian Law Schools: A discipline assessment for the Commonwealth Tertiary Education Commission' (1987) ('Pearce Report'); The Canadian Bar Association, 'CBA legal futures initiative Futures: Transforming the Delivery of Legal Services in Canada' (August 2014); Winkler Institute for Dispute Resolution, 'Justice Innovation and Access to Justice Reform: Report' (2016)
[35] For a summary of the global spread of clinical legal education, see Paul McKeown and Elaine Hall, 'If We Could Instil Social Justice Values through Clinical Legal Education, Should We' (2018) 5 J Int'l & Comp L 143

programmes are now common within the legal education system of many jurisdictions.[36] However, the extent to which an educational intent drives such programmes is unclear. **[10]**

Clinical legal education is intertwined with notions of social justice and public service, so much so that for many these notions form part of the definition of clinical legal education. As a consequence, an epistemic system belief[37] has been established that students' experiences within clinical legal education have a transformative effect on their values, thereby creating a body of graduates who will engage in public service work and uphold social justice values. **[10]**

Drawing upon my body of published work, this thesis commentary will consider whether clinical legal education can make any claims in relation to the transformative effect on students' values. The thesis commentary will critically analyse the conceptual and empirical literature to firstly, establish the intent of clinical legal education and secondly, to address the impact of teaching values in clinical legal education. As outlined above, clinical legal education and social justice have become intertwined with scholarship suggesting that participation instils a social justice ethos in students, although there is little empirical evidence to support this.[38] **[10]** The body of literature upon which this thesis commentary relies will consider various clinical models and practices to address the intent and impact of clinical legal education. By reframing or re-imagining the intent and impact of clinical legal education on values, this work makes a significant and original contribution to knowledge.

2. Morality, values and ethics

> 'The Mayors of Bordeaux and Montaigne have ever been two by very manifest separation. Because one is an advocate or a financier, he must not ignore the knavery there is in such callings; an honest man is not accountable for the vice or

[36] See generally Frank S. Bloch (ed), The Global Clinical Movement: Educating Lawyers for Social Justice (Oxford University Press 2011)
[37] Peter Achinstein, The Book of Evidence (Oxford University Press 2001); Tone Kvernbekk, 'The Concept of Evidence in Evidence-Based Practice' (2011) 5 Educational Theory 515
[38] McKeown and Hall (n 35)

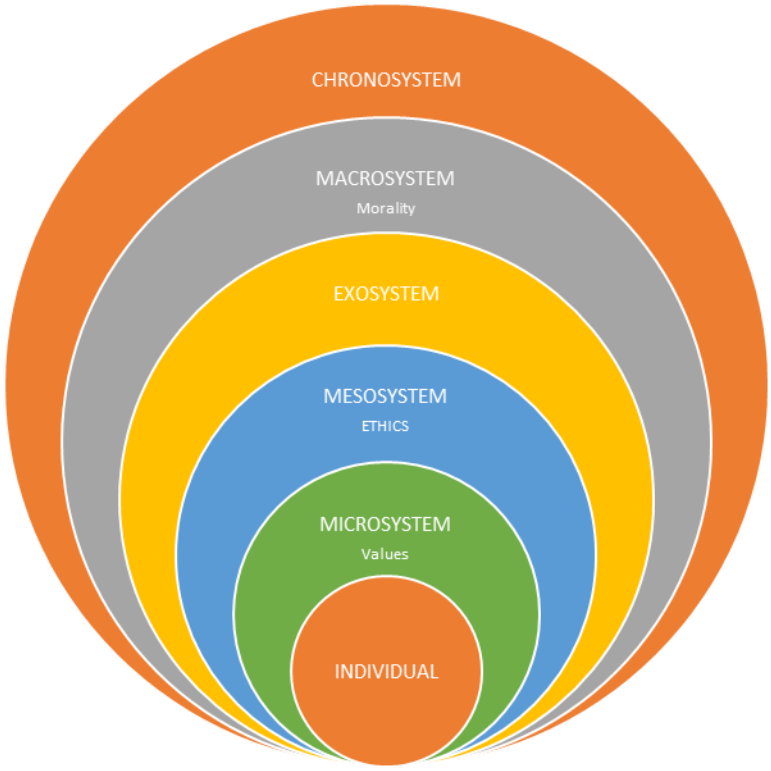
> absurdity of his employment, and ought not on that account refuse to take the calling upon him'[39]

As this thesis commentary will explore issues around morality, ethics and values in clinical legal education, it is fundamental that we give meaning to such words. Often used interchangeably, there may be subtle differences between these concepts. 'Ethics' are defined as 'moral principles that govern a person's behaviour or the conducting of an activity.'[40] Rooted in the Greek word 'ethos', it means 'the characteristic spirit or attitudes of a community, and how we behave and function in society.'[41] 'Morals' are defined as 'standards of behaviour; principles of right and wrong'.[42] Stemming from the Latin equivalent of the Greek word 'ethics', it also refers 'to social customs and etiquette regarding what is 'right' and 'wrong' in theory and social practice.'[43] These definitions are very similar and therefore it is easy to understand how these terms are conflated, given that 'morals' and 'ethics' have the same meaning in their origin. However, in reality, the locus distinguishes the concepts. A distinction has grown between 'morals' (and 'morality') and 'ethics' (and 'ethical').[44] Morality is a societally imposed belief system, or standards of behaviour, for determining what is good and bad or right and wrong.[45] Ethics and ethical behaviour tends to refer to the moral standpoint of certain groups.[46] For example, ethical behaviour is a generally accepted set of moral principles such as a code of conduct governing how an individual must act in certain professions such as the legal profession. 'Values' are defined as 'principles or standards of behaviour; *one's judgement* of what is important in life' {emphasis added}.[47] Values are therefore a personal belief system intrinsic to the person. Whilst an individual's values may be shaped by society in general, or groups in which the individual socialises, their values are their own beliefs as to what is right and wrong. Moral philosophy also illustrates the complexity of determining what is right and wrong. Depending upon perspective, an individual

[39] Michel de Montaigne, Essays of Montaigne, vol. 9, (Charles Cotton tr, William Carew Hazlett ed, Edwin C. Hill 1910) 157
[40] 'Definition of ethics' <www.en.oxforddictionaries.com/definition/ethics> (LEXICO) accessed 6 August 2019
[41] Ian E Thompson, Kath M Melia, Kenneth M Boyd and Dorothy Horsburgh, Nursing Ethics (5th edn, Elsevier Limited 2006), 36
[42] 'Definition of moral' <www.en.oxforddictionaries.com/definition/moral> (LEXICO) accessed 6 August 2019
[43] Thompson et al (n 41), 42
[44] ibid.
[45] ibid.
[46] ibid.
[47] 'Definition of value' <www.en.oxforddictionaries.com/definition/value> (LEXICO) accessed 6 August 2019

may adopt a Utilitarian approach, a Kantian approach or a Virtue Ethical perspective and draw different conclusions as to the rights and wrongs of an event.[48] **[9][10]**

Figure 1



In terms of moral development, we can draw upon Bronfenbrenner's Ecological Systems theory[49] to help understand how morality, ethics and values interact explaining why individuals behave differently in different contexts. Individuals encounter different environments including the microsystem, mesosystem and macrosystem as visualised at *figure 1* above. The microsystem is the direct environment in an individual's life and this can be equated to an individual's personal values and beliefs. The mesosystem involves the relationships between microsystems, and thus professional ethics and the principles governing how one acts, may form the mesosystem. The macrosystem is the cultural setting of the individual including socioeconomic status. Therefore, morality forms part of the macrosystem. Ecological systems theory also encompasses the exosystem, or the indirect influences on an individual's

[48] See McKeown and Hall (n 35), 35-36; Paul McKeown, 'Can Social Justice Values be Taught Through Clinical Legal Education?' in Social Justice and Legal Education (Ashford, C. & McKeown, P. eds) (Cambridge Scholars Publishing 2018)

[49] Urie Bronfenbrenner, The Ecology Of Human Development (Harvard University Press 1979)

development, and the chronosystem, or transitions throughout an individual's life. Exosystems are likely to have a significant impact upon character development. For example within the context of public service and pro bono work, the Corporate Social Responsibility policy of a law firm is likely to impact upon lawyers' attitude towards pro bono and public service.

The distinction is important as conflicts can arise between professional ethics, morality and/or personal values. An example in the legal profession relates to client confidentiality. Whilst I will approach this from the perspective of a solicitor in England and Wales, confidentiality is internationally recognised as a core value of the legal profession.[50] In England and Wales, the Solicitors Regulation Authority (SRA) state that solicitors must 'keep the affairs of clients confidential unless disclosure is required or permitted by law or the client consents'.[51] The duty of confidentiality is absolute and leaves, on the face of it, no margin for personal judgement. In certain circumstances, however, society is likely to believe it is morally acceptable to disclose confidential information. Further, an individual may also believe they should disclose information. Examples may include situations where the solicitor believes there is a risk of serious harm to the client or others. The law does not require such disclosures and therefore, if a solicitor gains knowledge whereby he or she reasonably believes a child or a vulnerable adult is suffering sexual, physical or mental abuse, they must decide whether to breach confidentiality.

If you know someone is abusing children, the morally correct approach would be to disclose this information to the relevant authorities. Ethically, for a solicitor, the disclosure should not be made. The SRA has recognised this point and have published guidance stating:

> 'We would not want concerns about possible regulatory action to prevent solicitors raising concerns when it is in the public interest to do so in order to protect their client or other'[52]

[50] For example, International Bar Association, 'IBA International Principles on Conduct for the Legal Profession' (2011), 21-24

[51] Solicitors Regulation Authority, SRA Handbook version 19 (2017), 'Confidentiality and disclosure', O(4.1); an example of a disclosure required or permitted by law would be in relation to money laundering under Part 7 of the Proceeds of Crime Act 2002.

[52] Solicitors Regulation Authority, 'Ethics guidance: Disclosure of client's confidential information' (2016); *cf.* The Law Society, The Guide to Professional Conduct of Solicitors (8th edn, The Law Society 1999), 16.02 – The Law Society set out a prescribed list of circumstances whereby the duty of confidentiality could be overridden

The guidance clearly states that any disclosure 'will be a breach of [the solicitor's] duty'[53] and therefore any disclosure would be ethically wrong. However, 'the justification will be taken into account and is likely to mitigate against regulatory action.'[54] In essence, it is for the individual to determine 'whether *the threat* to the person's life or health is sufficiently serious to justify a breach of the duty of confidentiality'{emphasis added}.[55] If the breach were investigated, the solicitor would need to hope that they were not sanctioned, although each case is likely to turn on its facts.

Whilst a breach of confidentiality may be mitigated if the rationale for the breach was to prevent serious harm, the SRA guidance makes it clear that disclosure is not allowed after the event. Unlike the prior scenario, where the breach may be mitigated, this scenario draws a stark conflict between morality and professional ethics. An example of this conflict can be seen in the case of Stephen Victor Chittenden.[56] Mr Chittenden was rebuked for disclosing confidential information that led to a murder conviction. It should be noted that Mr Chittenden's client was not the individual convicted of the murder, indeed Mr Chittenden successfully represented his client in defending the prosecution. Mr Chittenden was motivated to disclose the documents 'not for personal gain but in the greater interests of justice which were ultimately served by the conviction…'[57] It would seem morally permissible to have made the disclosure in question and certainly it appears that Mr Chittenden's own values motivated the conduct. However, ethically the conduct was 'completely unacceptable on the part of a solicitor' and had Mr Chittenden not removed himself from the roll, he may have been struck off reflecting 'the gravity of his misconduct'.[58]

The paragraphs above outline the importance of morality, values and ethics within the legal profession and illustrate these concepts do not always align, and indeed may be in conflict with one another. Mr Chittenden stated:

> "I was in my 20s, at the start of my career and I risked that because I knew who had killed [the victim].

[53] Solicitors Regulation Authority (n 51)
[54] ibid.
[55] ibid.
[56] SRA decision TRI/1193822-2017
[57] ibid., para. 17
[58] ibid, para. 12

> Had he killed someone else, I would have been criticised as the lawyer who stuck to his guns and allowed someone else to die."[59]

It is apparent that the conflict between an individual's values and professional ethics impact upon not only their professional life but also their mental well-being. The quote above illustrates Mr Chittenden's awareness that his actions threaten his professional reputation and indeed his career. Despite this, his own intrinsic values compelled him to disclose information in breach of his professional obligations. This case illustrates the consequences where the microsystem (values) and the mesosystem (ethics) are misaligned. This emphasises the need for education in relation to not only professional ethics (the Code of Conduct), but also to allow students the opportunity to examine themselves and their own perceptions of the world and the legal system. Students need to be alive to the issues so they are prepared to address them in their professional lives.[60] **[9]** Clinical legal education provides an appropriate pedagogical approach to assist students with aligning there ecological system, reconciling their individual values with their professional responsibilities. How this is achieved will be addressed below.

3. Lawyer Identity: Saint or Sinner?

The patron saint of lawyers is Saint Ivo (or Yves). It is said that he 'slept only on a pallet of straw; he wore the humblest garments; he gave away the moneys that came to him; and often he shared his meals with the poor.'[61] As an individual, Saint Ivo possessed many positive character traits such as humility and charity. It was reported that Ivo 'took only the cases of the poor, the widows, and the orphans. Every applicant for his help he required first to make oath that his cause was in conscience a just one; then Ivo would say '"Pro Deo te adjuvabo," ("For the sake of God, I will help you").'[62] Within this depiction of St Ivo, we can see that he required alignment of the microsystem, mesosystem and macrosystem. However, it is arguable as to whether such alignment is always possible for a legal practitioner.

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[59] Martin Naylor, 'Retired Derby solicitor Stephen Chittenden fined for helping snare Lynn Siddons' killer' (*DerbyshireLive*, 4 July 2017) <https://www.derbytelegraph.co.uk/news/derby-news/retired-derby-solicitor-stephen-chittenden-163550> accessed 6 August 2019

[60] See Nigel Duncan, 'Ethical Practice and Clinical Legal Education' (2005) 7 Int'l J Clinical Legal Educ 7

[61] John H Wigmore, 'St. Ives, Patron Saint of Lawyers' (1932) 18 ABA J 157, 402

[62] ibid., 403

The portrayal of Saint Ivo as a lawyer has been criticised. Goldsmith states that it is not just 'the poor, widows and orphan who deserve justice.'[63] Highlighting the role of religion, which at the time would have been highly influential in questions of morality, Goldsmith asks about those who can afford legal assistance but cannot find representation due to their unpopularity and 'morally questionable or even wicked' behaviour.[64] Goldsmith states that the requirement for clients to take an oath is meaningless as most believe their case to be just.[65] Even those clients who think their case is bad, still deserve a lawyer.[66] Finally, Goldsmith suggests that 'For the sake of democracy and the rule of law' clients should receive assistance.[67] Goldsmith therefore positions the lawyer as an actor with professional obligations, such as their duty to their client and the administration of justice at the fore. **[9]**

Scholars have identified four different types of lawyer: the adversarial advocate; the responsible lawyer; the moral activist; and the [practitioner of the] ethic of care.[68] The traditional notion of lawyering is that of an adversarial advocate, someone who will advance their clients' interests within the bounds of the law. The responsible lawyer is an officer of the court and a trustee of the legal system and therefore their overriding duty is towards the institutions of law and justice. Moral activists follow their own ethical standards and accept moral culpability for their actions. In particular, moral activists are closely intertwined with concepts of 'cause lawyering'. Cause lawyering has been defined 'as the set of social, professional, political, and cultural practices engaged in by lawyers and other social actors to mobilize the law to promote or resist social change.'[69] It is important to highlight that cause lawyering encompasses a broad range of activities, and activists who have no formal legal training or qualification may be engaged in cause lawyering.[70] However, the focus of this thesis commentary is on lawyers. Practitioners of ethics of care are concerned with preserving or restoring relationships and avoiding harm. **[9]**

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[63] Jonathan Goldsmith, The Perfect Lawyer (The Law Society Gazette, 27 January 2014) <www.lawgazette.co.uk/practice/the-perfect-lawyer/5039558.article> accessed 13 June 2018
[64] ibid.
[65] ibid.
[66] ibid.
[67] ibid.
[68] Christine Parker and Adrian Evans, Inside Lawyers' Ethics (2nd edn, Cambridge University Press 2014); see also Ross Hyams, 'On Teaching Students to Act Like a Lawyer': What Sort of Lawyer' (2008) 13 Int'l J Clinical Legal Educ 21
[69] Anna-Maria Marshall and Daniel Crocker Hale, 'Cause Lawyering' (2014) 10 Annual Review of Law and Social Science 301, 303
[70] ibid., 306

Labelling lawyers into particular groups as identified above suggests that membership of a particular group is mutually exclusive. However, the role of a lawyer is multifaceted. Within England and Wales, lawyers are required to be adversarial advocates acting in the best interests of their clients[71] and providing them with proper standard of service.[72] Lawyers are also responsible lawyers with a duty to the court and in the administration of justice.[73] These principles as to the role of a lawyer are recognised internationally. For example, the International Bar Association state:

> 'Lawyers throughout the world are specialised professionals who place the interests of their client above their own, and strive to obtain respect for the Rule of Law'[74]

The United Nations also recognise the basic principles governing the role of a lawyer stating:

> '12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.
> 13. The duties of lawyers towards their clients shall include:
> (a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;
> (b) Assisting clients in every appropriate way, and taking legal action to protect their interests;
> (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.
> 14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

[71] Solicitors Regulation Authority, (n 51), SRA Principles 2011, principle 4; Bar Standards Board, The Bar Standards Board Handbook version 4.2, The Code of Conduct (9th edn), Section B The Core Duties, CD2
[72] SRA Principles 2011 (n 71), principle 5; Bar Standards Board (n 71), CD7
[73] SRA Principles 2011 (n 71), principle 1; Bar Standards Board (n 71), CD1
[74] International Bar Association (n 50)

15. Lawyers shall always loyally respect the interests of their clients.'[75]

The minimum requirement for any lawyer must therefore be both an Adversarial Advocate and a Responsible Lawyer. Hyams identifies the problem with a Responsible Lawyer as the potential for conflict between duties to the client and duties to the court.[76] Such a situation may arise where a lawyer is instructed, or knowingly allows a client, to 'mislead' the court. Typically, if a lawyer is unable to resolve such a conflict, they are required to cease acting.[77] **[9]**

However, it is important not to discount the Moral Activist or the Practitioner of Ethics of Care, even if these roles do not form the core of a lawyer's identity. In relation to the Moral Activist, a starting point is to redefine the role. Parker and Evans state that the lawyer places their own individual value system and commitment to justice above the duty to their client. They also state that no particular duty is prescribed to the law or the legal system. If an individual fails to abide by the principles of their profession, then that individual is not part of the profession. However, the basic tenant of the moral activist is that the lawyer will follow their own ethical standard about what it means to do justice. In principle, any lawyer is free to do that. At the outset, any lawyer seeking employment may wish to consider the ethos and values of prospective employers thus aligning their work with their own ethos and values. Most lawyers are at liberty to decline instructions provided that the reason for declining those instructions is not discriminatory. One notable exception to this is the 'cab-rank rule' requiring barristers in England and Wales to accept instructions that are appropriate irrespective of, inter alia, any 'belief or opinion which [the barrister] may have formed as to the character, reputation, cause, conduct, guilt or innocence of the client.'[78] There are also pragmatic implications to consider such as the need for paid employment and the commercial reality that most legal undertakings are businesses and would therefore be reluctant to decline fee-paying work. The moral activist may also strive to challenge and change the law through case selection. **[9]**

As to the Practitioner of Ethics of Care, again, this role needs to be redefined. The principle trait of preserving or restoring relationships and avoiding harm is however a positive

[75] United Nations Office of the High Commissioner Human Rights, Basic Principles on the Role of Lawyers (1990) <www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx> accessed 13 June 2018
[76] Hyams, (n.68), 23
[77] Solicitors Regulation Authority, (n 51), IB 5.4 and 5.5
[78] Bar Standards Board, (no 71), rC29.d

component of any lawyer. Over recent years, Alternative Dispute Resolution (ADR) has become increasingly important. In particular, mediation is a form of ADR in which a neutral third party facilitates the parties in reaching a negotiated settlement. The benefits of mediation are recognised nationally and internationally. At a European level, the Mediation Directive[79] states:

> 'Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties.'[80]

In England and Wales, parties in civil proceedings are encouraged to participate in ADR at various stages before and during litigation[81] whilst in family proceedings it is a legal requirement in most cases to attend a Mediation Information and Assessment Meeting (MIAM)[82]. The legal system therefore recognises, and indeed encourages, the amicable resolution of disputes.

In light of the importance of mediation in the legal system, a lawyer must have an awareness of their value and the ability to resolve disputes without recourse to litigation. However, lawyers must also respect their clients' wishes and should a client not wish to mediate, that is their decision.

In determining a type of lawyer, all lawyers must be an adversarial advocate and a responsible lawyer as these attributes are core values of the legal profession. However, lawyers should also be mindful of moral activism and ethics of care from a personal and client perspective. Lawyers should have the ability to recognise when these roles are appropriate in any given case and how they interact with other roles. These roles can be visualised at *Figure 2.*

[79] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters
[80] ibid., Preamble
[81] Civil Procedure Rules, Practice Direction – Pre-action Conduct and Protocols, paras 8-11
[82] Children and Families Act 2014, s 10(1); Family Procedure Rules, Practice Direction 3A – Family Mediation Information and Assessment Meetings (MIAM)

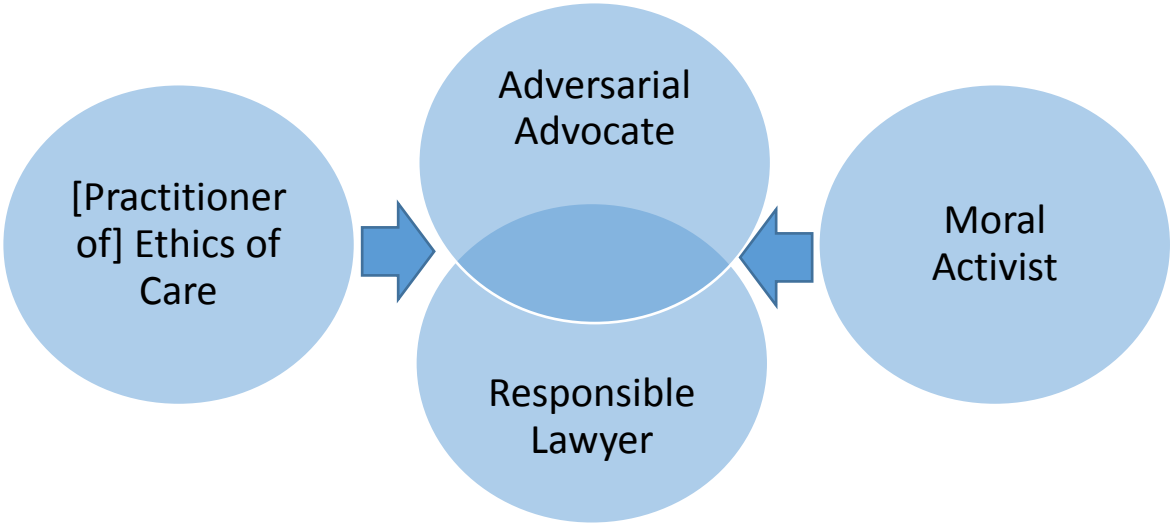

Figure 2

4. Introspection

'Knowing yourself is the beginning of all wisdom'[83]

As stated above, an individual's moral compass is constructed over the course of their lives, shaped by their experiences, their family, their socio-economic status, their education on so on. **[4][9][10]** If one is going to analyse values, one must reflect upon their own values.

I am not from a privileged background. My father worked in factories whilst I recall my mother had numerous jobs including bar work, school secretary and child minding. Her most important job was raising five children, particularly after the death of my father in 1993 when I was 13 years old. This is also important as it played a significant role in my own identity. I was baptised a Catholic and as a child I believe it would be fair to say that I was devout. I attended church most days and followed all the rules. However, following the death of my father, I became, and remain, an atheist. I include this not to evoke sympathy and wish to make it clear that I do not believe I had a deprived upbringing. In fact, I believe I had a very good upbringing. Whilst I did not appreciate it at the time, I now know how difficult it would have been for my mother to raise five children.

[83] Attributed to Aristotle

I followed a 'traditional' route into the legal profession obtaining an undergraduate law degree, completing the Legal Practice Course and then a two-year training contract. I did not participate in any experiential learning throughout my undergraduate studies, undertaking numerous theoretical modules. The Legal Practice Course provided some simulated exercises during which I learnt and was assessed on the basic skills such as legal writing, practical legal research, interviewing and advocacy. I was also required to learn solicitors' ethics which were assessed throughout the programme. At this time, ethics were governed by the Solicitors Code of Conduct which set out the rules that must be followed and therefore any aspiring solicitor was required to learn the 'rule book'.[84]

Before joining Northumbria University as a lecturer, I had trained, qualified and worked as a solicitor in law centres. Specialising in social welfare law, law centres were established in the 1970s and 'work within their communities to defend the legal rights of local people.'[85] Above all, Law Centres 'exist to improve the daily lives of the communities they work in.'[86] My professional background was therefore within organisations seeking to promote social justice. I specialised in housing and employment law, occasionally working on some social security cases as well. I enjoyed, for the most part, the work that I did. I dealt with real people, many of whom were vulnerable and disadvantaged, often with significant social and legal problems. The vast majority of my clients were eligible for public funding. Those who were not eligible received some *limited* assistance, usually advice. For reasons of confidentiality, I cannot provide the details of specific cases. Suffice it to say that some cases I felt passionate about due to a sense of injustice suffered by the client whilst others, I provided with the best service I could.

When asked, "What do you do?", I respond by saying that I am a solicitor. The job title 'solicitor' is not on my contract of employment. Indeed, my contract states that I am an 'Associate Professor' yet that is not what I publicly identify as. I tell people that I am a solicitor; because I am a solicitor, continuing in practice in the Student Law Office.[87] However, I have worked in academia longer than I worked as a solicitor in practice. Alternatively,

[84] The Law Society, (n 52)
[85] Law Centres Network 'About Law Centres' (2012) <www.lawcentres.org.uk/about-law-centres> accessed 26 July 2018
[86] ibid.
[87] SRA Number: 357069

perhaps it is easier for people to understand what I do if I say I am a solicitor. If I informed people that I am an academic[88] in law, they imagine an individual who stands at the front of a lecture theatre espousing various legal principles that have been established over the course of hundreds of years. Many of these principles are from appellant cases. However, this is far from what I do.

At the outset of my academic career I had no experience in teaching nor did I have much knowledge of clinical legal education. As highlighted above, my own legal education did not encompass such a pedagogical approach. My understanding of my role was to train law students to be lawyers through the teaching of legal skills and the supervision of their work on real cases. Whilst the students embarked upon their learning journey, I also set out on my own. The lessons I learnt throughout my early career are set out in a co-authored article[89] **[1]** and illustrate the belief that I was training future lawyers. In hindsight, the article does not directly reference the role of clinic in the moral development of law students, merely addressing the need for a student to act as a 'professional', that is to say abide by the professional conduct rules. However, many of the lessons are crucial in the moral development of students that I will address shortly.

5. The Clinical Legal Education Belief System

> "No one believes more firmly than Comrade Napoleon that all animals are equal. He would be only too happy to let you make your decisions for yourselves. But sometimes you might make the wrong decisions, comrades, and then where should we be?"[90]

5.1 What is the Belief System in Clinical Legal Education?

Scholars have extensively written about the history of clinical legal education.[91] Suffice it to say, clinical programmes have taken root and thrived in areas of political and social upheaval.[92] The origins of the modern clinical movement can be traced to the social turmoil of the United

[88] Lecturer, Senior Lecturer or Associate Professor as my grade has changed over the years
[89] Angela Macfarlane and Paul McKeown, '10 Lessons for New Clinicians ' (2008) 13 Int'l J Clinical Legal Educ 65
[90] George Orwell, *Animal Farm* (first published 1944, eBooks@Adelaide 2016) chapter 5
[91] For example see Bloch (n 36); McKeown and Hall (n 35)
[92] McKeown and Hall (n 35)

States in the 1960s. Further, much of the literature surrounding clinical legal education emanated from the United States and thus reflected their ideology of clinical legal education. Whilst recognising the educational benefits of clinical activity, the early clinical literature espoused community service as the primary purpose.[93] As the clinical legal education movement has spread, clinicians from the United States have often been at the forefront whilst clinical programmes have received significant financial backing from funders in the United States.[94] **[10]**

There is little empirical evidence supporting assertions as to the transformational impact of clinical legal education. **[10]** I have undertaken and published empirical research adding to the evidence of the impact of clinical legal education that will be addressed below supporting this thesis commentary.[95] **[4][8]**

Quantitative studies have concluded there is no correlation between clinical legal education and an ongoing commitment to public service.[96] **[4][6]** Whilst other studies have indicated that students undertaking a clinical programme were more likely to have an on-going commitment to pro bono, it is noted that these were voluntary clinical programmes.[97] With such programmes, it is arguable that students volunteering already had a public service ethos and therefore it is unclear as to the impact of the programme. **[6]**

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[93] William Woodruff and Andreas Bucker, "The Bologna Process and German Legal Education: Developing Professional Competence through Clinical Experiences" (2008) 9 German LJ 575

[94] For example see Leah Wortham, 'Aiding Clinical Education Abroad: What Can Be Gained and the Learning Curve on How to Do So Effectively' (2006) 12 Clinical L Rev 615; Lee Dexter Schinasi, 'Globalizing: Clinical Legal Education: Successful Under-Developed Country Experiences' (2003) 6 TM Cooley J Prac & Clinical L 129; Jane M Picker and Sidney Jr Picker, 'Educating Russia's Future Lawyers--Any Role for the United States' (2000) 33 Vand J Transnat'l L 17

[95] Paul McKeown, 'Law Student Attitudes towards Pro Bono and Voluntary Work: The Experience at Northumbria University' (2015) 22 Int'l J Clinical Legal Educ [vi]; Paul McKeown, 'Pro Bono: What's in It for Law Students: The Students' Perspective' (2017) 24 Int'l J Clinical Legal Educ 43

[96] For example see McKeown, 'Law Student Attitudes towards Pro Bono and Voluntary Work: The Experience at Northumbria University' (n 95); Robert Granfield, 'Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs' (2007) 54 Buff L Rev 1355; Deborah L Rhode, 'Pro Bono in Principle and in Practice' (2003) 53 J Legal Educ 413

[97] For example see Bharat Malkani and Linden Thomas, 'The Birmingham Pro Bono Group: A Case Study of Social Justice in Legal Education' in Chris Ashford and Paul McKeown (eds) Social Justice and Legal Education (Cambridge Scholars 2018); Deborah A. Schmedemann, 'Priming for pro bono: The impact of Law School on Pro Bono Participation in Practice' in Robert Granfield and Lynn Mather (eds) Private Lawyers in the Public Interest (Oxford University Press 2009); Sally Maresh, "The Impact of Clinical Legal Education on Decisions of Law Students to Practice Public Interest Law" in Jeremy Cooper and Louise Trubek (eds), Educating for Justice: Social Values and Legal Education (Ashgate 1997)

There is no singularly accepted definition of clinical legal education although one broad definition is 'learning through participation in real or realistic legal interactions coupled with reflection on this experience'.[98] Clinical legal education can therefore encompass 'live-client' experiences **[4]** as well as public legal education programmes such as StreetLaw. **[7]** This definition incorporates simulated experiences although it is not universally accepted that such experiences are clinical.[99]

Live-client clinical programmes usually involve the provision of legal advice and/or representation to members of the public. In essence, the student is placed in the role of the lawyer. In recent years, there has been a development of clinical programmes aimed at assisting litigants in person.[100]**[5]** These programmes do not always permit the students to provide legal advice nor do they permit the student to represent the client. The role of the student is to provide emotional support and assist the litigant in pursuing their claim. For example, whilst the student may help a litigant complete a court form, they will not advise the litigant what to write on the form. **[5]** Public legal education programmes will usually involve students delivering a presentation to community groups or schoolchildren to educate on their legal rights and/or responsibilities. **[7]**

From an educational perspective, participation in such programmes benefit the students' skills development such a legal writing, research and communication, as found in my own research.[101] **[4][6][8]** The range of skills and the extent of impact upon development will depend upon the nature of the clinical programme. For example, an advice-only live client programme is unlikely to have the same impact on a students' case management ability as a full representation model.

From a social justice, and therefore moral development perspective, it is argued that students are exposed to social and cultural situations that they would not otherwise have experienced.

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[98] Kevin Kerrigan, 'What is clinical legal education and pro bono' in Kevin Kerrigan and Victoria Murray (eds) A Student Guide to Clinical Legal Education and Pro Bono (Palgrave Macmillan 2011) 5

[99] There was a significant level of discussion as to what activities should be included within the definition of clinical legal education in the General Assembly of the European Network for Clinical Legal Education at the annual conference at Comenius University, Bratislava, 3-5 July 2019. There was a view that simulated work should not be included within the definition.

[100] Paul McKeown and Sarah Morse, 'Litigants in Person: Is there a role for Higher Education' (2015) 49(1) Law Tchr 122

[101] McKeown, 'Law Student Attitudes towards Pro Bono and Voluntary Work: The Experience at Northumbria University' (n 95); Paul McKeown, 'Pro Bono: What's in It for Law Students: The Students' Perspective' (n 95)

[6][9] Clinical legal education is therefore a chronosystem where an individual transitions from law student to lawyer. Students are exposed to the practice of law, which has the potential to be a disorientating experience. Unlike the classroom and learning the theory, students are required to consider how the law and legal practice effect individuals in society, and whether the law is just. Students, as lawyers, must also consider their professional responsibilities embedding a mesosystem within their ecological system. Students therefore learn within clinical legal education to regulate their environment to bring alignment to their ecological systems.

5.2 Student motivation for participating in clinical legal education

Whilst educators may set out their objectives for delivering a programme,**[6]** it is worth considering whether these objectives align with the student motivations for wanting to participate in the programme. Perhaps unsurprisingly, students have reported a range of motivations for wanting to participate in a clinical legal education programme. The reasons cited by students can be characterised as practical, tactical and ethical.[102] Specifically clinical legal education can enhance legal skills, knowledge and employability, which are the practical motivations for participation in such programmes.[103] Tactical reasons would include the positive promotion of the individual's image, which again may assist their employability.[104] Practical and tactical motivations can be categorised as extrinsic motivations. Finally, ethical reasons include the intrinsic motivation of a student to use their knowledge and skills to benefit society.[105] This appears to be aligned with the perceived intent of clinical legal education. **[6][8]**

[102] Stephen Parker, 'Why Lawyers Should Do Pro Bono Work' (2001) 19 Law Context: A Socio-Legal J 5; *cf.* Rachel Dunn and Paul McKeown, 'The European Network of Clinical Legal Education: The Spring Workshop 2015' (2015) 22(3) Int'l J Clinical Legal Educ 312 highlighting multitude of reasons why academics participate in clinical legal education

[103] See Paul McKeown, 'Pro Bono: What's in It for Law Students: The Students' Perspective' (n 95); Paul McKeown, 'Law Student Attitudes towards Pro Bono and Voluntary Work: The Experience at Northumbria University' (n 95); Parker (n 102)

[104] See McKeown 'Pro Bono: What's in It for Law Students: The Students' Perspective' (n 95); Parker (n 102)

[105] See McKeown, 'Pro Bono: What's in It for Law Students: The Students' Perspective' (n 95); McKeown, 'Law Student Attitudes towards Pro Bono and Voluntary Work: The Experience at Northumbria University' (n 95); Parker (n 102)

Whilst some scholars are critical of the educational intent of some clinical legal education programmes, preferring a social justice orientated intent,[106] it is important not to overlook how there is a social benefit in assisting students motivated by practical and/or tactical reasons. Students from less privileged backgrounds are disadvantaged in gaining work experience and therefore gaining employment in the legal profession, which is particularly seen in the post-92 universities.[107] Clinical legal education can provide students with the necessary experience, skills and knowledge they require in securing employment thus promoting social mobility. **[9]**

There is little empirical research on the motivations of students for participating in clinical legal education and pro bono programme. However, studies by Nicolson[108] and Coombe[109] both reported extrinsic reasons as the primary motivation for students wanting to participate in their clinical programmes. Coombe further reports that students responding to his study 'would have been slightly more likely to have participated' if the clinical activity was tied to an academic course.[110]

The reported studies above related to voluntary clinical programmes. In 2015, I published the results of a quantitative study looking at the impact of a mandatory clinical programme at Northumbria University.[111] The study compared the perceptions of students who had yet to undertake the clinical legal education module with those who were undertaking the module. Again, the study concurred with the Nicolson and Coombe in that the extrinsic value of clinical legal education was more valued than an intrinsic interest in social issues. **[4]**

The 2015 study also considered the impact of a clinical programme on students. In accordance with student expectations, they reported that the clinical experience improved their legal skills and assisted them in obtaining employment. Students who had undertaken clinical work also reported an increased awareness of social and economic issues, and to a lesser extent, that their perception of social and economic issues had changed. However, the clinical programme did

[106] For example Donald Nicolson, 'Education, Education, Education: Legal, Moral and Clinical' (2008) 42 Law Tchr 145; Stephen Wizner, 'Beyond Skills Training' (2001) 7 Clinical L Rev 327
[107] Andrew Francis, 'Legal Education, Social Mobility, and Employability: Possible Selves, Curriculum Intervention, and the Role of Legal Work Experience' (2015) 42(2) J. Law Soc. 173
[108] Donald Nicolson, 'Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice' (2013) 16 Legal Ethics 36
[109] Malcolm Coombe, 'Selling Intra-Curricular Clinical Legal Education' (2014) 48 Law Tchr. 281
[110] ibid. 291
[111] McKeown, 'Law Student Attitudes towards Pro Bono and Voluntary Work: The Experience at Northumbria University' (n 95)

not impact upon the likelihood of respondent students undertaking pro bono work after graduation.[112] **[4]** Subsequent similar studies, citing my work, have found students expressing an intention to continue with pro bono work following graduation.[113] However, unlike my study exploring the impact of a mandatory clinical programme, these studies have considered voluntary clinical programmes. It is therefore possible that students undertaking such voluntary programmes are already inclined to participate in pro bono activity.

The quantitative studies outlined above highlight a general perception that extrinsic factors are the primary motivation for students. A perception has pervaded the literature that extrinsic motivation is unsatisfactory in education. This is epitomised by Kohn who states:

> '…the more we reward people for doing something, the more likely they are to lose interest in whatever they had to do to get the reward. Extrinsic motivation, in other words, is not only quite different from intrinsic motivation but actually tends to erode it.'[114]

However, there is a more nuanced position, as illustrated in my qualitative study published in 2017.[115] Unlike other reported studies, this study did not pre-suppose or limit what motivated student involvement in pro bono work. As such, this study provided student participants with the opportunity to articulate their motivation without encumbrance associated with either a quantitative study or structured interview. The participants in this study provided mixed motivations for undertaking pro bono work. The participants recognised the extrinsic value of participation in pro bono activity, but they also recognised the wider social benefit of such work.[116] Students undertake clinical legal education and pro bono work for a variety of reasons, and their reasons may change over time.[117] **[8]** It is therefore a misconceived notion to consider intrinsic and extrinsic motivation as purely exclusive concepts. Organismic Integration Theory (OIT), a sub-theory of Self Determination Theory, helps explain this more

[112] ibid.
[113] Claudia Man-yiu Tam, 'Measuring Law Students' Attitudes Towards and Experiences of Clinical Legal Education at The University of Hong Kong' (2020) 27 Int'l J Clinical Legal Educ 47; Malkani and Thomas (n 97)
[114] Alfie Kohn, 'How Not to Teach Values: A Critical Look at Character Education' (1997) 78(6) The Phi Delta Kappan 428, 430
[115] McKeown 'Pro Bono: What's in It for Law Students: The Students' Perspective' (n 95)
[116] ibid.
[117] ibid.

nuanced approach through the internalisation of an extrinsically motivated activity[118] . Although students may initially undertake an activity for extrinsic reasons, the value of the work can be brought into congruence with their other values and needs, and therefore extrinsically motivated actions become autonomous and self-determined.[119] **[8]** The participation in the work allows students the opportunity to recognise the intrinsic benefits. In applying this to the student's ecological system, there may be a disconnect between the student's internal values and their appreciation of the role of a lawyer. Until they are placed within a legal environment, they cannot align microsystem and mesosystem as the they may have no understanding of the different environments. Conversely, there may be a value shift in the microsystem. For example, if a student wishes to pursue a corporate/commercial career, perhaps due the financial rewards, they may not appreciate the innate satisfaction that can be gained in social welfare law. The alignment shift may cause the student to consider an alternative career path, or increase the desire to participate in pro bono activity whilst pursuing a corporate/commercial career.

There are a number of factors within clinical legal education which can aid or influence the assimilation of values such as exposure to clients; the role of the supervisor; and the role of other students.

5.3 Exposure to clients

Whilst it would be wrong to suggest the initial motivation for clinical legal education programme was born out of a need to help the poor, at least in the UK, clinical legal education has become intertwined with the concept of assisting the indigent and underrepresented.

It is at this juncture that a number of assumptions must be unpacked, namely the belief that the indigent have no access to legal advice and representation and that law students are from a privileged background.

[118] Ryan and Deci, as cited in McKeown, 'Pro Bono: What's in It for Law Students: The Students' Perspective (n 95)
[119] McKeown, 'Pro Bono: What's in It for Law Students: The Students' Perspective (n 95)

Legal advice and assistance can be funded in various ways.[120] Whilst a client may be able to pay for legal advice and representation through agreement of an hourly rate or fixed fee, other options are available to fund a case. For example, contingency fee arrangements, legal aid, before-the-event insurance, and third-party funders. Although legal clinics will usually offer their services on a pro bono basis, this does not necessarily mean that the clinic is the best option for the client.[121] For example, whilst the provision of pro bono assistance means that clients are not required to pay their own legal fees, they are not afforded any protection against their opponent's legal costs in the event that they are unsuccessful. Historically, the poorest in society were likely to be eligible for public funding and therefore, those who could not afford legal advice and assistance were those who had an income just above the threshold for legal aid eligibility. It should also be remembered that there are clients who are still eligible for public funding despite the reduction in the availability of legal aid.[122] Typical examples of the types of case that present in a legal clinic would be a family matter where the client is the victim, or is at risk of domestic violence[123] or a housing matter where the client is at risk of losing their home.[124] **[2]**

As to the second assumption, it is not disputed that there continues to be issues around socio-economic status and participation in Higher Education. However, neither can it be assumed that all students are from privileged backgrounds. Within the UK, clinical legal education programmes gained traction within the 'new' universities.[125] Students at these universities tend to be from less privileged backgrounds[126] and as such may be more familiar with the issues faced by clients presenting in the clinic. **[9][10]**

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[120] Paul McKeown, 'Funding' in Kevin Kerrigan and Victoria Murray (eds) A Student Guide to Clinical Legal Education and Pro Bono (Palgrave Macmillan 2011) – this chapter was published prior to the Legal Aid, Sentencing and Punishment of Offenders Act 2012. At the time of publication, the scope of legal aid was significantly wider with all areas of law within scope unless specifically excluded under Schedule 2 of the Access to Justice Act 1999. The history of legal aid in England and Wales is summarised in McKeown and Hall (n 35)

[121] The Code of Conduct requires solicitors to 'only enter into fee agreements with [their] clients that are legal, and which [they] consider are suitable for the client's needs and take account of the client's best interests' (Solicitors Regulation Authority, (n 51), O(1.6))

[122] Areas within the scope of civil legal aid are set out in Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

[123] Legal Aid, Sentencing and Punishment of Offenders Act 2012, Sch. 1, para. 12

[124] ibid, para. 33

[125] Richard Grimes and Joel Klaff and Colleen Smith, 'Legal Skills and Clinical Legal Education - A Survey of Undergraduate Law School Practice' (1996) 30 Law Tchr 44

[126] See Francis (n 107)

Through live client work, students gain exposure to real world problems. Suddenly, the law that they have studied has practical meaning, more than mere words on a page. The client's story may cause the student to feel uncomfortable, creating the 'disorientating moment'.[127] **[3][9]** In capturing this moment it is important that students reflect upon the experiences they have encountered. **[1][9]**

Reflection has been defined in different ways. Boud, Keogh and Walker state that '[r]eflection is an important human activity in which people recapture their experience, think about it, mull it over and evaluate it'.[128] Dewey defines reflection as the '[r]econstruction and reorganisation of experience which adds to the meaning of experience.'[129] Moon states that 'reflection is … applied to relatively complicated or unstructured ideas in learning or to problems for which there is not an obvious solution.'[130] Whilst scholars have defined reflection in various ways, there are commonalities. Reflection should be centred around an experience upon which the learner can analyse and evaluate. The learner then uses the product of their synthesised knowledge to enhance their learning and future performance. We must therefore question how clinical legal education can aid the reflective process through provoking, focusing upon and capturing the disorientation. This is through the process of assessment. **[1]**

It is important to distinguish between institutional assessment (certifying the student's level of knowledge) and assessment for learning (determining whether the student actually learns).[131] A student learning is improved when there is alignment between the learning outcomes, teaching activities and assessment, which Biggs refers to as the *theory of constructive alignment*.[132] To achieve constructive alignment the intended learning outcomes must specify the activity that students should engage in to achieve the intended outcome.[133] The teacher's

[127] Fran Quigley, 'Seizing the Disorientating Moment: Adult Learning Theory and Teaching Social Justice in Law School Clinics' (1995) 2 Clinical L. Rev. 37; see also Lawrence Donnelly, 'Putting Disorienting Moments at the Centre of Legal Education' (2017) 24 Int'l J Clinical Legal Educ 80

[128] David Boud, Rosemary Keogh and David Walker, 'Promoting Reflection in Learning: a Model' in David Boud, Rosemary Keogh and David Walker (eds) Reflection: Turning Experience into Learning (RoutledgeFalmer 1994)

[129] John Dewey, *Democracy and Education* (first published 1916, Free Press 1944) (as cited in Carol Rodgers, Defining Reflection: Another Look at John Dewey and Reflective Thinking' (2002) 104(4) Teachers College Record 842, 845)

[130] Jennifer A. Moon, *Reflection in Learning and Professional Development: Theory and Practice* (first published 1999, RoutledgeFalmer 2013), 152

[131] Jose Garcia Anon, 'How Do We Assess in Clinical Legal Education: A Reflection about Reflective Learning' (2016) 23 Int'l J Clinical Legal Educ 48

[132] ibid., 52

[133] John Biggs and Catherine Tang, Teaching for Quality Learning at University (Open University Press 2011), 108

role is to establish a learning environment aimed at encouraging the learning activities, and to assess the students' performance against the intended learning outcomes.[134]

If clinical legal education programmes intend to educate students, not merely in the knowledge and skills required of legal practice, but also instil or challenge a student's perspective of their role as actor in the legal system, the relationship between their intrinsic values, morality and professional ethics, then the programme must be designed in such a way as to achieve this. Clinical legal education programmes take many forms such as live client clinics[135] such as the Student Law Office at Northumbria University[136]**[4]** StreetLaw (or other forms of public legal education),[137]**[7]** as well as the emergence of programmes to assist litigants in person.[138]**[5]** Live client programmes expose students to the practical reality of the law. Lundy articulates how the use of reflective learning journals during a clinical placement at a welfare rights organisation assisted the students learning by focusing on the new skills and knowledge acquired whilst using previous learning.[139] Similarly, with clinical programmes designed to assist litigants in person, students are faced with the reality of a justice system in which those who are not skilled or experienced may struggle.[140] StreetLaw programmes place the students within the community exposing them to legal issues experienced by certain groups and communities, often the most disadvantaged in society. **[7]** Which type of programme, or model adopted, the learning environment has the potential to create the 'disorientating' moment upon which to elicit reflection allowing the student to analyse and evaluate their experience and their perception of the law in practice. We can therefore see that reflection is an important aspect of students finding alignment between their ecological systems. Where a student's microsystem is misaligned with the mesosystem, this is likely to make the student uncomfortable, thus creating the disorientating moment. For example, a student may be asked

[134] ibid.
[135] See generally Hugh Brayne, Nigel Duncan and Richard Grimes, Clinical Legal Education, Active Learning in Your Law School (Blackstone Press, 1998)
[136] McKeown, 'Law Student Attitudes towards Pro Bono and Voluntary Work: The Experience at Northumbria University' (n 95)
[137] For example, Paul McKeown and Sarah Morse 'Further Developing Street Law' in Chris Ashford and Jess Guth (eds) The Legal Academic's Handbook (Palgrave 2016); David McQuoid-Mason, 'Street Law as a Clinical Program - The South African Experience with Particular Reference to the University of KwaZulu-Natal' (2008) 17 Griffith L Rev 27;
[138] For example, Ben Waters and Jeanette Ashton, 'A Study into Situated Learning through Community Legal Companionship' (2018) 25 Int'l J Clinical Legal Educ 4; McKeown and Morse (n 100)
[139] Laura Lundy, 'The Assessment of Clinical Legal Education: An Illustration' (1995) 29 Law Tchr 311, 318
[140] Liz Trinder, Rosemary Hunter, Emma Hitchings, Joanna Miles, Richard Moorhead, Leanne Smith, Mark Sefton, Victoria Hinchly, Kay Bader and Julia Pearce, 'Litigants in person in private family law cases' Ministry of Justice Analytical Series 2014

to represent a client who they find to be morally repugnant. Within a clinic specialising in criminal appeals, students may be required to represent murderers and sex offenders. Whilst each student will form their own view of the client, many students may feel uncomfortable given the nature of the offences. Students must therefore reconcile their professional obligations to the client with their personal values regarding the offence and their judgement of the client.

However, students will often require more than the experience, they will often require guidance on structuring the reflection.

5.4 Supervision

Giddings highlights that the 'literature relating to supervision indicates that the capacity and inclination of supervisors to foster student awareness of social justice has been taken for granted and warrants further scrutiny.'[141] In considering the relationship between the clinical supervisor and the student, it must be recognised that the clinical supervisor has a multifaceted role including role model; colleague; teacher; assessor; manager and counsellor.[142] Clinical supervisors may come from different backgrounds. Within in-house clinics, many clinical supervisors may have been practising lawyers whilst others have always been in academia. **[1]** If the clinical model is an externship programme, the day-to-day supervision is likely to be left to a practising lawyer. Whatever the background of the clinical supervisor, the multifaceted role means that they must manage a complex, and sometimes conflicting relationship with their students.

In examining the various aspects of the role, McLeod et al state that role modelling 'is the most powerful teaching strategy available to clinical educators' as '[s]tudents learn most from observing the actions and understanding the reasoning processes of their role models.'[143] Wear and Zarconi, drawing upon the work of Coulehan, posit that such role models should be 'full-time faculty members who exemplify personal virtue in their interactions with patients

[141] Jeff Giddings, 'It's More Than the Site: Supporting Social Justice Through Student Supervision Practices' in Chris Ashford and Paul McKeown (eds) Social Justice and Legal Education (Cambridge Scholars Publishing 2018)
[142] Sharynne McLeod, Judith Romanini, Ellen S. Cohen, and Joy Higgs, 'Models and roles in clinical education' in Lindy McAllister, Michelle Lincoln, Sharynne McLeod and Diana Maloney (eds) Facilitating Learning in Clinical Settings (Stanley Thornes 1997), 53-60; See also Giddings (n 141)
[143] McLeod et al, (n 142), 54

[clients], staff and trainees; who have a broad, humanistic perspective; and who are devoted to teaching and willing to forego high income in order to teach.'[144] However, the 'overall…context in which students thrive or stagnate is more important than the efforts (however noble) of any one individual.'[145] **[4]**

Clinical teaching subscribes to a constructivist theory of education where teaching 'is not a matter of transmitting but of engaging students in active learning, building their knowledge in terms of what they already understand'.[146] Wilson sums this up referring to the clinical supervisor as 'not the "sage on the stage" but the "guide on the side."'[147] This is due to the differences between traditional and clinical methodology in teaching law. Students cease to be passive and become active learners.**[9]** This thesis commentary started by painting a picture of the traditional law student, sitting in a lecture theatre absorbing knowledge like a sponge which would subsequently be regurgitated in some future piece of assessment or '*education banking*'.[148]

The clinical supervisor is an important factor when considering the inculcation of values within students. However, it is not purely the individual who is responsible for the inculcation but the whole environment in which the clinical supervisor and the students are working. **[9]** Clinical supervisors should lean towards Theory Y in which the aim of teaching is to support student learning.[149] Theory X and Theory Y emanate from the work of Douglas McGregor and are based upon assumptions about trustworthiness. Theory X assumes workers cannot be trusted whereas Theory Y assumes they can and that you achieve better results when you do. As such, clinical supervisors should allow students the 'freedom and space to use their own judgement'.[150] If the clinical supervisor handles the matter himself or herself, minimising the role of the students, this is likely to retard the students' development as practitioners and limit the potential for transformative experiences.[151] **[1]** In such circumstances, student will lack

[144] Delese Wear and Joseph Zarconi, 'Can Compassion be Taught? Let's Ask Our Students' (2008) 23(7) J Gen Intern Med 948
[145] Gregory E Pence, 'Can compassion be taught' (1983) 9(4) J Med Ethics. 189
[146] Biggs and Tang, (n 133)
[147] Richard J Wilson, (n 4), 829
[148] Paulo Freire, 'The "Banking" Concept of Education' <www.puente2014.pbworks.com/w/file/fetch/87465079/freire_banking_concept.pdf> accessed 8 October 2019
[149] Biggs and Tang, (n 133), 41
[150] ibid.
[151] Jon C Dubin, 'Clinical Design for Social Justice Imperatives' (1998) 51 SMU L REV 1461, 1480

responsibility for the case and therefore, it is likely their microsystem will remain undisturbed. In essence, the students may wash their hands of responsibility.

It is at this stage where there is potential conflict between the roles of the clinical supervisor. As a manager, and particularly if the supervisor is a lawyer, the clinical supervisor is responsible is ensuring the clients receive a high standard of client care.**[1][9]** From an organisational perspective, the clinical supervisor is responsible for maintaining the professional reputation of the university. As such, the student's learning may be the second priority.[152] Within a live client clinic for example, a client may present with a problem requiring urgent action. This will curtail the ability of the student spend time researching and advising the client. The clinical supervisor may need to adopt a more directional with the student to ensure appropriate advice is provided to the client and the necessary steps are taken. However, it is useful for students to be aware and understand the legal, ethical and professional priority.[153] **[1]**

Hall illustrates the clinical supervisor/student relationship at *Figure 3* drawing upon the work of Bernstein. In the constructivist tradition, students should learn through having a high degree of autonomy whilst adopting a holistic approach. If the clinical curriculum was designed as such students could explore the cases, examining many aspects of the case and therefore enhance their learning. However, where students are perhaps new, they may require more support and guidance. Alternatively, the nature of the case may mean it is urgent or so specialised, the clinical supervisor is required to adopt a more directional/interventionist approach. Where students do have a high level of autonomy but the problem is tightly defined, this may also limit the learning opportunities. Therefore, clinical legal education programmes should strive to keep the curriculum and experience within the lower left quadrant. **[1]**

[152] McLeod et al, (n 142), 57
[153] ibid.

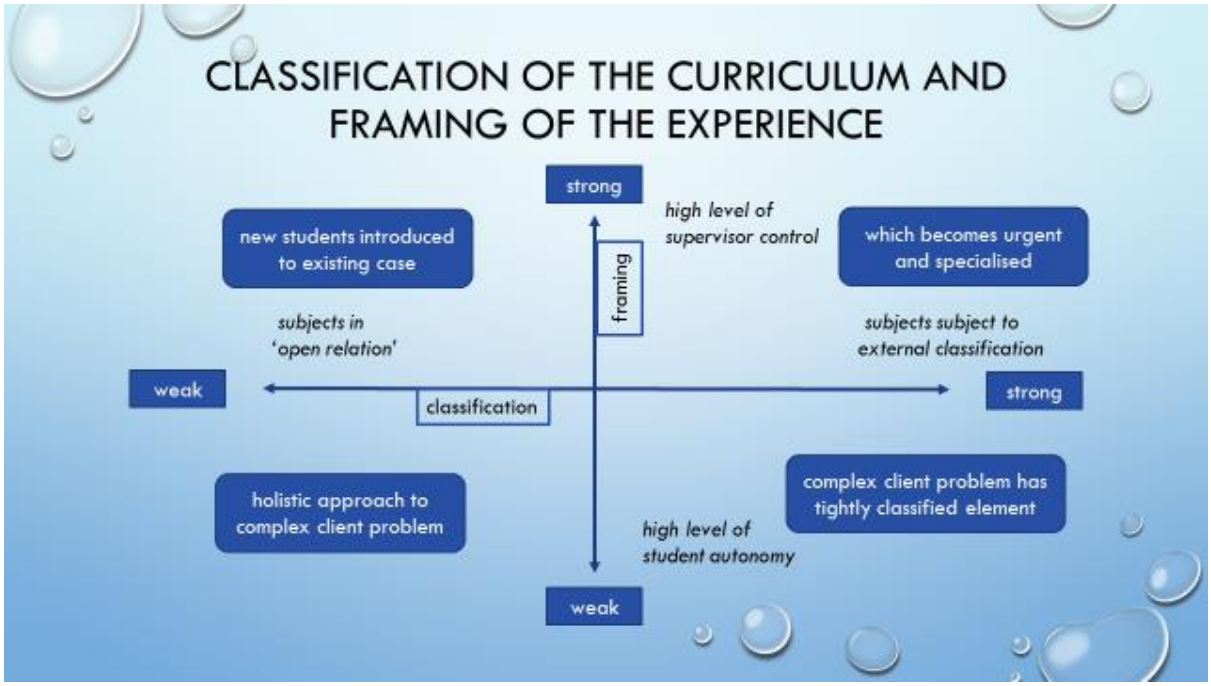

Figure 3: Using Bernstein to understand the supervision relationship in clinic[154]

As an assessor, the clinical supervisor moves out of the supportive teaching/coaching role and is required to evaluate the student's performance.[155] **[1]** This evaluation can be both formative and summative with the former assisting students develop their learning experience to improve skills.[156] In doing so, this will serve to assist the student in the summative assessment through a higher level of performance. If the clinical curriculum is constructively aligned, as an assessor, the clinical supervisor should act as a conduit for assessment for learning rather than merely adopting the institutional assessment. **[1][9]**

As discussed above, clinical legal education should provide students with experiences which may provoke complex emotions and thus engage the role of counsellor.[157] Within this role, clinical supervisors should recognise the stress a student may be experiencing and they may explore their personal responses to the situation, thus the disorientating moment upon which to reflect.[158] Where a student's intrinsic values are challenged, they may feel uncomfortable, particularly if this is due to a misalignment of their professional ethics and/or societal norms

[154] Taken from Elaine Hall, 'Adding Value? Values as demonstrated in the 'curriculum as experienced'' (International Journal of Clinical Legal Education Conference, Melbourne, November 2018)
[155] McLeod et al, (n 142), 57
[156] ibid.
[157] ibid., 58-59
[158] ibid.

of morality. Through discussion with the student, the clinical supervisor can assist in bringing harmony to the student's ecological system. Returning to the example of a criminal appeals clinic, the supervisor can facilitate a discussion around the students personal values and opinions of the client who has been convicted of murder or sex offences. This permits the student to articulate their opinion in a safe environment. The supervisor can also elicit the student's opinion or viewpoint regarding their professional obligations. This discussion can help the student harmonise their internal values with their professional responsibilities. A student may conclude that their role is not to determine the guilt or innocence of an individual. Alternatively, a student may find there is no resolution with which they are comfortable. In such circumstance, the student may learn that criminal law is not an area in which they will practice. Whilst there are no right and wrong answers, there is still a learning experience,

As outlined above, if performing the role correctly, the supervisor plays an influential role in student development. It is therefore necessary to emphasise a word of caution as to the extent of this influence. Students may subsume the moral positioning of their supervisor. This presents a particular risk where the clinical activity is assessed as students may deem their supervisor's position as the 'right' answer. Traditionally, legal academics teach from a 'neutral and value-free perspective' and express no opinion where moral issues arise, merely educating on the complexities of the various arguments.[159] **[9]** The adoption of such a neutral position absolves law teacher from the moral responsibility in their teaching. An analogy can be drawn with a lawyer separating their individual values with their professional responsibilities as discussed above. However, it is necessary within clinical supervision to adopt a position where moral or ethical dilemmas arise. From a practical perspective, if there is a case, it is necessary to resolve the dilemma to progress the case. From an educational perspective, a supervisor may wish to share their experience to aid the student. Alternatively, the supervisor may wish to guide the student with the options available to stimulate the discussion. However, it is crucial within the discussion that the supervisor's role is to inculcate the student's ability to think, not what to think.[160] In doing so, we must challenge the traditional hierarchical teacher/student relationship as the supervisor must be prepared to have their own beliefs called into question.[161] **[10]** The supervisor should articulate a rationale for their beliefs or their decisions on how to resolve ethical dilemmas. At the same time, they must also be prepared to listen and consider

[159] Fiona Cownie, 'Alternative Values in Legal Education' (2003) 6 Legal Ethics 159
[160] McKeown and Hall (n 35)
[161] David Barnhizer, 'The University Ideal and Clinical Legal Education' (1990) 35 N Y L Sch L Rev 87, 111

other viewpoints. A symbiotic relationship is therefore established between supervisor and student, each learning from one another. Encouraging expression of views promotes deeper learning by highlighting differences of opinion and engaging students in a critical analysis of the various opinions, as highlighted in my own research.[162] **[1]**

5.5 Working with other students

Unlike many areas of academic study where students are required to work alone, particularly in relation to assessed work, for fear of collusion or some other form of academic misconduct, clinical legal education positively encourages teamwork.[163] One of the benefits of this close working relationship with other students is the ability to debate issues amongst peers.[164] Often these discussions will take place in small group sessions teaching sessions and include topics such as justice and morality.[165] These small group discussions allow students to express their own thoughts and opinions upon a topic and then listen to what others have to say. Students can then reflect upon their original thoughts, having listened to other perspectives, and consider whether their views still stand or whether their ideas have changed or evolved.[166] **[1][9]**

As identified earlier in this thesis commentary, everyone's moral compass will be unique based upon their own life experiences. Students will focus upon different aspects of the debate based upon their own perspective or may be able to offer a fresh perspective based upon their own life experience. As Kosuri highlights, '[m]ore varied perspectives, greater interaction, and more discussion, will only lead to profounder understanding of issues, people, and values.'[167] For example, students may have had personal experience of a moral dilemma and therefore be able to speak from experience rather than based upon a hypothetical notions. Abercrombie, in her study of medical students, found that students taught in this way made better diagnoses, based more firmly on evidence, and they were less dogmatic, being more open to consider alternative possibilities.[168] **[1][9]**

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[162] Macfarlane and McKeown, (n 89), 69
[163] Judith Gowland and Paul McKeown, 'Working with Your Supervisor and Others' in Kevin Kerrigan and Victoria Murry (eds) A Student Guide to Clinical Legal Education and Prop Bono (Palgrave Macmillan 2011), 88
[164] ibid., 98
[165] ibid., 92
[166] ibid.
[167] Praveen Kosuri, 'Losing My Religion: The Place of Social Justice in Clinical Legal Education' (2012) 32 BC J L & SOC JUST 331, 358
[168] MJL Abercrombie, The Anatomy of Judgement: An Investigation into the Processes of Perception and Reasoning (Free Association Books 1989), 125-129

Clinical legal education provides an environment for students to learn not only legal skills but also learn about themselves and their role within the legal system and the wider world. As I state above, clinics are a chronosystem transitioning students from theoretical study to practical application (and consequences). Clinical legal education is therefore a transition from student to lawyer. Throughout this transition, students are exposed to various ecological systems that interact with one another and may even misalign causing disorientation and internal disharmony. Through exposure to clients and the legal system, students have experiences upon which they can reflect. It is then the role of the supervisor and other students to facilitate the analysis and evaluation of the experience. Through deep reflection, the students not only learn about their own role within the legal system, but also about themselves and alignment of their ecological systems.

6. Conclusion

The law and the legal system is a complex world, more nuanced than a set of rules that must be obeyed. The law is a system founded and evolved from a numerous societal norms. Lawyers, as custodians of the legal system, must comply with their professional obligations. However, as humans, lawyers will have constructed their own moral compass throughout the course of their life. As such, lawyers have a complex ecological system that may result in a conflict between personal values and professional duties.

A traditional legal education in England and Wales has often failed to prepare law students in addressing this conflict due to the separation of the academic and vocational learning. It is recognised that a legal education is more than merely teaching substantive legal knowledge and universities have a responsibility to teach law students ethics and values enabling them to discuss ethical dilemmas and make ethical decisions.

Throughout this thesis commentary and the supporting published work, I have shown that clinical legal education can address the teaching of values to law students and the impact of utilising such a pedagogy. It is important that in teaching values, the clinical programme is designed to provide a rich learning environment in which students can experience the law in practice, encounter different perspectives and feel supported by their clinical supervisor. This

will facilitate reflective practice thus enhancing future learning. The publications I rely upon in this submission have contributed significantly to our understanding of the intent and impact of clinical legal education as academics and as practitioners, by contributing more, and much needed, empirical evidence.

Clinical legal education has two intents: education of legal skills and social justice. In relation to which of these is the primary intent is very much a question of where the clinical legal education programme has been established due to the historical context in which the movement was born. However, even if social justice is the primary intent of the clinical programme, I suggest that a more nuanced perspective is required. Whilst traditionally social justice has been defined within the clinical movement as assisting indigent and under-represented communities, social justice has a plurality of meaning and therefore the 'social justice mission' can be achieved in a variety of ways. In particular, I suggest that the educational mission and social justice mission are not mutually exclusive concepts, as some scholars would suggest.

My empirical research suggests that clinical legal education has an impact upon students. In particular, clinical legal education has clear benefits in enhancing student skills, and consequentially, student employment prospects. However, there is also evidence to suggest that students have an increased awareness of social and economic issues within society. The structure of an individual's moral compass has evolved over the course of their life and will continue to evolve throughout their professional career. It is shaped by their experiences and the environment in which they exist, including the clinic environment.

This thesis commentary, together with the published work, reimagines and reframes the intent of clinical legal education. The discussion around the different streams of intent, social justice and education, is tired.[169] Further, it is also necessary to look beyond the motivation of the students participating in clinical legal education. Broadly speaking, the intent of clinical legal education is *education* as after all; it states that in the name. However, applying a more nuanced perspective, the focus of the discussion should focus around the educational intent.

With educational intent, there are multiple sub-streams such a legal knowledge, legal skills, values and ethics. As such, there is an alignment between the aims of a law degree as set out

[169] For discussion see McKeown (n 48); Nicolson, (n 106); Wizner, (n 106)

by the QAA and the intent of clinical legal education. Through clinical legal education, students learn about legal practice and therefore become 'aware of the consequences of law as a human creation.'[170] Students are exposed to clients with legal problems and are therefore able to appreciate the practical implications of the law and the legal system upon people's lives. Further, students also subsume the role of the lawyer, including the professional responsibilities of the role, within clinical legal education. As such, they are 'subject to the ethics and values of those that make and apply' the law.[171] Students must therefore appreciate what it means to act ethically within the legal profession. Further, students may also need to address situations where their own values are challenged by their professional responsibilities and obligations.

The role of the supervisor should not be under-estimated, particularly as they play a multifaceted role in the learning process. It is important that supervisors provide students with a high level of autonomy within the learning process, enabling the exploration of issues which may arise and facilitating students forming their own judgement. Supervisors can therefore guide the student through the learning process adopting an appropriate role for the situations such as role model, coach or counsellor.

It is also important within clinical legal education that students from a variety of backgrounds are taught together. Students can learn from each other's experiences which may challenge their own perceptions and values. The exchange of ideas enhances the learning process as students evaluate their own perceptions and values which may strengthen their beliefs, or re-evaluate their own values and sense of morality. The student learns about their ecological systems and the interaction between systems, particularly the microsystem and mesosystem. Through reflective process, student can learn to align systems, perhaps even shifting their personal values based upon the experience.

The educational intent of clinical legal education is broad, my body of work suggests that the impact achieves that intent. Though there is evidence that students enhance their legal knowledge, skills and employment prospects, the body of evidence supporting the continuing impact upon values has been less strong. Even studies reporting that students intend to continue in pro bono work have not determined whether those students have followed through on their

[170] Quality Assurance Agency for Higher Education (n 32)
[171] ibid.

intention. Whilst I would stop short of claiming clinical legal education transforms students into 'social justice warriors', my body of work provides evidence that students become more aware of societal issues through clinical legal education, thus learning about and evaluating the law in context. How much this extends into their practice, however, needs further research and exploration. In order to achieve this, students must have experience provided through exposure to the legal system and the stakeholders within that system. However, this is not sufficient on its own and students must also have the means to reflect upon and evaluate their experience. As such, the role of the supervisor and other students plays a significant role within that reflective process. Students can discover that legal practice can create conflict between an individual's internal values and their professional obligations. Students can learn to reconcile conflict, or at least forge an armistice, between internal values, societally imposed morals and professionally imposed ethics.

If clinical legal education is reimagined or reframed around educational intent, specifically including education of values, ethics and morality, then my published work suggests that law students and therefore future legal professional are more socially aware. Whilst I would argue the focus of the clinic is on the student rather than the client, which some scholars would disagree with, the result is that we educate future lawyers to critically evaluate the role they play within the legal system and to resolve their own moral dilemmas in a reasoned way. As such, future lawyers will accept moral responsibility for their actions.

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(International Journal of Clinical Legal Education Conference, Melbourne, November 2018)

APPENDIX A

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1. Macfarlane A and McKeown P, '10 Lessons for New Clinicians ' (2008) 13 Int'l J Clinical Legal Educ 65

2. McKeown, P, 'Client Funding' in Kevin Kerrigan and Victoria Murray (eds) A Student Guide to Clinical Legal Education and Pro Bono (Palgrave Macmillan 2011)

3. McKeown, P, 'Interviewing and Advising' in Kevin Kerrigan and Victoria Murray (eds) A Student Guide to Clinical Legal Education and Pro Bono (Palgrave Macmillan 2011)

4. McKeown P, 'Law Student Attitudes towards Pro Bono and Voluntary Work: The Experience at Northumbria University' (2015) 22 Int'l J Clinical Legal Educ [vi]

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6. Dunn, R & McKeown, P, 'The European Network of Clinical Legal Education: The Spring Workshop 2015' (2015) 22(3) Int'l J Clinical Legal Educ 312

7. McKeown P and Morse S, 'Further Developing Street Law' in Chris Ashford and Jess Guth (eds) The Legal Academic's Handbook (Palgrave 2016)

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9. McKeown P, 'Can Social Justice Values be Taught Through Clinical Legal Education?' in Chris Ashford and Paul McKeown (eds) Social Justice and Legal Education (Cambridge Scholars Publishing 2018)

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"10 lessons for new clinicians"

Angela Macfarlane and Paul McKeown[1]

As a new clinician, if you have trained as a lawyer via a traditional legal education route you inevitably have very little experience of clinical education to bring to the role, although you of course have your professional and practical experience to draw on. Although many readers are experienced clinicians, this is a timely opportunity to go back to the beginning and re-assess the potential problems or risk areas that clinicians face at the beginning of a new academic year, with a new intake of students. Society changes continually so each year will bring new issues as well as those well known to all clinicians.

In clinic at Northumbria University final year students are placed in to groups of up to six students known as firms and each firm is allocated an area of law such as employment or housing. Each firm is supervised by a qualified solicitor who allocates cases to the students. Students can work individually or in pairs, depending on the complexity of the case. At the end of the academic year, students are assessed on their practical performance using grade descriptors. They also submit reflective pieces about their experiences in clinic.

These "lessons" have emerged from our own first year of transition from practising lawyer to clinical educator. We hope some of them ring true with other new clinicians.

1. Do not pre-judge the students

Clinic is about the student experience and therefore it should be the student who conducts a case, not the clinician. This causes concern for the new clinician as they will be ultimately responsible for the case. It would therefore be an easy option for the new clinician to vet the students to ensure the more academically gifted students work on the complex and more demanding cases. However, can this be justified; could or should a clinician pick and choose the cases each student receives?

The simple answer to this question is no. It cannot be justified as every student must have an equal opportunity to perform. What would be worse than being approached by a student after they have received their results and being told, "You didn't give me the chance!"

Furthermore, if you vet the students and do not allow them an opportunity to perform, they may perform below expectation. Expectancy-value theory says that if anyone is to engage in an activity, they need to both value the outcome and to expect success in achieving it.[2] This theory supports

1 Angela Macfarlane is a senior lecturer in law at Northumbria University. Paul McKeown is a lecturer in law at Northumbria University. Both authors are clinicians in Northumbria University Student Law Office.

2 Feather (1982) as per Biggs J, (2003), Teaching for Quality Learning at University, 2nd ed, Maidenhead, SRHE & Open University Press, p.58.

the proposition that we should challenge our students and expect success. If we do not, then the student will be less motivated to perform, and consequently the outcome will be below expectation.

2. Patience!

It can be frustrating how slowly the students progress in clinic which may be due to pre-suppositions about the students' motivation. If you subscribe to McGregor's (1960) theory Y about human trustworthiness which according to Biggs[3] is "…students do their best work when given freedom and space to use their own judgement … allowing students freedom to make their own decisions…" you might expect quicker progress. However, whilst this is congruent with deeper levels of learning, the students may not yet have the confidence or learning experience to deal with the freedom.

Furthermore, expectations of a lawyer from private practice could be unrealistically high as the students' exposure to files is limited, whereas a trainee lawyer would have full time exposure to files. This freedom inevitably increases confidence and enhances progress, which is of course why clinical education is so valuable. As progress is generally slower in clinic to begin with, patience together with the clinician being able to guide the student to deep engagement by subscribing to McGregor's theory Y is required because "theory Y climate does not necessarily mean a disorganised teaching/learning environment. An organised setting, with clear goals and feedback on progress, is important for motivating students, and to the development of deep approaches.[4] Knowing where you are going, and feedback telling you how well you are progressing, heightens expectations of success. Driving in a thick fog is highly unpleasant and so is learning in one."[5] Getting to where you are going takes time, even without the predicament of thick fog which is why a clinician needs to have patience.

3. "The transition from student to professional does not always run smoothly"

The purpose of clinic is to enhance students' motivation from being just to attain a reward, such as a good grade (assessment motivated) or achievement motivated which Biggs describes as when "Students (may) learn in order to enhance their egos by competing against other students and beating them"[6] to intrinsic motivation where "there are no outside trappings necessary to make students feel good. They learn because they are interested in the task or activity itself."[7] Achieving this will lead to deeper learning, as opposed to surface learning. However, there could be problems when a student is not intrinsically motivated, who does not have commitment to their clients or respect for the rules and policies in clinic, essentially a student who does not have the ability to make appropriate judgements. If it was private practice, there is the option to dismiss the trainee, which is a strong motivation for compliance. In clinic at what point do you consider suspension or

3 Biggs.J. (2003) *Teaching for quality learning at university*, 2nd ed. Maidenhead, SRHE & Open University Press, p.64.

4 Hattie and Watkins 1988; Entwistle *et al*. 1989, as per Biggs.J. (2003) *Teaching for quality learning at university*, 2nd ed. Maidenhead, SRHE & Open University Press, p.67.

5 Biggs.J. (2003) *Teaching for quality learning at university*, 2nd ed. Maidenhead, SRHE & Open University Press., p.67.

6 *Ibid*., p.62.

7 *Ibid*., p.62.

expulsion, or can you consider these at all? This is extremely tricky as you have to balance the needs of the student, the needs of the clients, the professional conduct rules, the clinician's practising certificate and of course the reputation of the clinic. If you do not take direct action these competing needs could all come crashing down like a pack of cards. In clinic at Northumbria University in the academic year 2007–2008 direct action was taken as 2 students were suspended for a period of time for serious breaches of policy and procedure. Once the students returned to clinic it was necessary to engage teaching practices more attuned to McGregor's (1960) theory X which Biggs describes as "operating to produce low trust, low risk, but low value;"[8] as compared to theory Y mentioned above " which produces high trust, high risk and high value – if it works".[9]

When these students do go into private practice they must adhere to a professional code of conduct. Whilst it was a harsh lesson to learn so early in their time in clinic, it had to be so even though it tipped the balance towards a more restrictive theory X learning environment. This was necessary due to the serious consequences of professional misconduct and to maintain clinic's professional reputation.

Do not forget that not all students are the same or have the ability to make judgments and validly evaluate situations so sadly the transition from student to professional may not always run smoothly.

4. Whose file is it anyway?

As a practitioner, you are responsible for your own files and unfortunately old habits die hard! Ultimately, if a student makes a mistake on the file, then you are responsible as if it were your own mistake. Consequently, this may have the effect of the clinician running the case with assistance from the student.

To answer the question whose file it is, we must first understand the concept of what clinic actually is. This is summed up by Stephen Wizner when he states:

> *"On the most basic level, the law school clinic is a teaching office where students can engage in faculty-supervised law practice in a setting where they are called upon to achieve excellence in practice and to reflect upon the nature of that practice and its relationship to the law as taught in the class room and studied in the library. It is a method of teaching law students to represent clients effectively in the legal system, and at the same time to develop a critical view of that system. Law students in the clinic learn that legal doctrine, rules and procedure; legal theory; the planning and execution of legal representation of clients; ethical considerations; and social, economic and political implications of legal advocacy, are all fundamentally interrelated."*[10]

It is essential that the file therefore belongs to the student as it is a teaching tool. To understand the legal system which we teach, the student must do the work, not observe it being done. As such, the file belongs to the student, and we as clinicians will assist!

8 *Ibid.*, p.65.

9 *Ibid.*, p.65.

10 Stephen Wizner "The Law School Clinic: Legal Education in the Interests of Justice" 70 Fordham L. Rev. (2001–2002).

5. Answer a question with a question

If we are therefore assisting the students with the files, how do we respond to a question; should the clinician answer that question?

The clinical experience is about teaching the students to be a professional. If we always give the students the answer, then they have not learnt and will not learn.

With acknowledgement to an experienced clinician, Professor Jay Pottenger,[11] he advised that you should answer a question with a question. The purpose of questioning the student is to guide and assist them in finding the right answer for themselves. If a student continues to struggle, then still don't give them the answer, sit down with them and look for the answer. If we are teaching students to be lawyers, we must therefore teach them the skills they will need in practice, not just the law. Once we have taught them the skills to find the answer themselves, they can apply those skills to future problems. It becomes noticeable that students will become less reliant on the clinician over the course of time.

Perkins (1991)[12] characterises the difference between the study skills of 'going beyond the information given' (BIG) and 'without the information given' (WIG). Conventional teaching, or BIG teaching, usually involves direct instruction to the students followed by thought orientated activities that challenge students so that they come to apply, generalise and refine their understanding.

In clinic however, we adopt the WIG approach to learning. Our students are encouraged to find their own solution to a problem through questioning and support. In the early years of their education, BIG teaching forms the foundation of knowledge of the subject and the skills. The students can then reconceptualise that knowledge and address the problems which arise in clinic (WIG). In other words, our students have already been taught the skills that they need to utilise and the legal principles which apply. They now have to apply those skills to the problem which has been presented.

6. Start at the end and work backwards

In private practice, in contentious matters particularly, everything that you do on the file you have in mind how it will impact on a final hearing so you always think about the end right from the beginning. It should also be the same as a clinician because the students are there to gain skills and a qualification so for them to perform effectively you have to make them aware of what is expected of them. Be familiar with the learning outcomes and grade descriptors or other tools that you use to assess your students and make it clear to the students what is expected of them. Then remind them again and again! As for the practical work, sometimes experience is the only answer, which is why clinic is so valuable and effective as a teaching tool. It is difficult to front load the students at the beginning of the year, which is why clinicians in Northumbria University are experienced practitioners. However, when you think about the end, share your experiences with the students and consider making a visit to the final court or tribunal mandatory for the students because as a learning tool it is hugely effective and making it compulsory is a good balance of McGregor's theory X and Y.

11 During visit to Northumbria University May 2008. 12 As per Biggs, J Op.cit. p.95.

7. Encourage expression of views

A criticism of traditional academic teaching is that students are taught how to think …well almost! Clinic gives students much more freedom to think and encourages discussion of their own social views, this of course helps with reflection, see lesson 8 below. If freedom of expression in a learning environment is promoted, students learn to differentiate their role as a legal advisor and their role in society with their own morals and views which leads to deeper learning. Clinicians will often agree with Jarvis[13] who supports Levinas' (1991) argument that learning is achieved through conversation. Students teaching each other is applicable to clinic because it points to the: "all-embracing social and cultural system which we take for granted; …significance of the other (students) as persons (faces); importance of the interaction; mode of the interaction; intentions of the participants…"

For example within an Employment law clinic meeting, it is also great fun to listen to the students healthily debating issues such as whether the law was biased too much in favour of the employer or alternatively towards the employee. One Northumbria student was confident enough to express her own well thought out view that employees who are dismissed should spend more time and energy finding a new job rather than pursuing their claim, even though she knew that other members of the firm would be horrified at such views. However, all these students recognised that they had put aside their own views and acted professionally when dealing with their clients. So in summary the lesson here is that students do come from different backgrounds, are individuals and are all part of society where any view they hold can be expressed and can enhance their learning. You should ensure that it does not necessarily dictate their actions with clients or other professionals and that they appreciate there may well be differences between their own views and their obligations as professional legal advisors.

8. Do not expect the students to understand reflection!

Reflection is an effective learning tool as it allows the students to identify any problems and identify how they can improve. As Biggs[14] says "Reflection… is rather like the mirror in Snow White: it tells you what you might be. This mirror uses theory to enable the transformation from the unsatisfactory what-is to the more effective what-might-be." However, students really struggle with reflection, one student asked, just a few weeks before hand in date, whether you "are allowed to put down what you think." But this lesson is a bit of a misnomer as in fact, despite their regularly voiced concerns of not understanding reflection, most students were able to demonstrate deep learning in their reflection papers, showing maturity and insight. With persistent supervisor support students will also be able to take their reflective practice with them in their future careers so clinic is also instrumental in engaging the students in lifelong learning so that the students have the best opportunity possible to achieve their career goals. Reflective practice is designed, amongst other things, to move away from assessment being just an end of course assessment but being incorporated into learning methods as it is done so successfully in clinic.

13 Jarvis P. (2006) The Theory & Practice of Teaching 2nd edition , London and New York: Routledge Taylor & Francis Group pp.49–50.

14 Biggs J, Op.cit p.7.

9. Do not be afraid of assessment

The idea of assessment in clinical legal education is a debate within itself. Northumbria University assesses its clinical students and therefore we have had to address the problems which it presents.

Clinical assessment is very difficult, particularly due to the inevitable subjectivity notwithstanding the assessment tools to be utilised. A clinician is likely to assess work over a period of time when a student may have performed very well but made one very big mistake. The work produced may be to a very high standard but the student needs to be chased for work. Alternatively a student may not produce high quality work but try very hard and produce work in a timely fashion. There are so many variables to take into account such as what weight should we attach to the various elements that we are likely to look at in assessing students.

The use of grade descriptors helped us to identify what makes a good student and what makes a poor student. The students were provided with the grade descriptors at the beginning of their clinical experience and therefore knew what was required of them. The use of grade descriptors assists in objectively justifying students' performance rather than entirely relying upon the clinician's view of the student. However, this does not resolve the problem of a differentiating between students who try but do not produce work of the quality that may be produced by students who needs to be chased.

10. ENJOY

Our final lesson is to enjoy life as a clinician. Whilst at times being a clinician can be a very demanding job, it also very rewarding. Witnessing a student develop and grow in confidence is the reward for the hard work which has been invested. Throughout a clinical career, there will be numerous issues that arise. However, there is also an international clinical community out there willing to share its thoughts and ideas through conferences and informal discussions. After all, many of the issues we face are universal.

4 Client funding

> 'There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.'
>
> Justice Hugo Black, US Supreme Court, *Griffin v Illinois, 373 U.S. 12 (1964)*

4.1 Introduction

Whilst clinical work is generally undertaken on a pro bono basis, it is important to understand the different forms of funding that are available to clients. Although this sounds counterintuitive, despite being 'free', pro bono assistance might not necessarily be in the client's best interests financially. In some cases, your institution may not be able to assist the client, and you may need to refer him or her to another organisation which offers a better method of funding the client's case.

It is therefore important to remember that, whilst pro bono means that the client will not be required to pay your legal fees, there may be other expenses that the client is liable to pay and therefore other forms of funding may assist. You should also remember that some forms of litigation involve a costs risk for clients. This chapter will explore the main funding options available to clients and offer advice as to when each option may be appropriate. It also highlights the consequences of not investigating funding options for both your organisation and the client.

4.2 The importance of funding

Providing your client with funding information is one of the key obligations imposed under Rule 2.03 of the Solicitors' Code of Conduct 2007. It is your duty to provide the best possible information about the likely total cost at the outset and as the matter progresses. Amongst other matters, this involves informing your client of any likely disbursements, considering your client's eligibility for public funding and whether they have legal expenses insurance. All costs information should be confirmed in writing and updated regularly (Rule 2.03(5)). Whilst it is good practice to provide your clients with relevant funding information, Rule 2.03(7) recognises that in some circumstances it will not be appropriate to inform them of some or all of the matters stipulated under 2.03.

Example

Just because your clinic or pro bono project does not charge the client for your services does not mean that you can ignore funding options. If a client is eligible for external funding but you fail to ascertain this, he may incur significant additional expense and may be deprived of available expertise. For example, if you conducted a disability discrimination claim for a client, you may not charge him, but he may have to pay for expert reports, counsel's opinion, postage and copying costs, travel costs etc. If you failed to spot that he was a member of a trade union with a good members' legal service, he may be significantly out of pocket. Moreover, his union may have been willing to pay for an experienced solicitor or barrister to represent him at the tribunal hearing. The failure to assess his eligibility for financial assistance could have prejudiced his interests considerably.

Funding can seem complicated at first, so when you begin advising on financing cases, you may find it helpful to use the checklist below to ensure you have considered all of the possibilities. An explanation of the methods mentioned in the checklist is set out later in the chapter.

Funding Information Checklist

Client Name: **File Reference No:**

- Does the client have before the event (BTE) insurance? This is often contained within household insurance policies but also in other types of insurance policy. If the client is unsure, explain that you can check the policy.
  - ○ Yes ○ No ○ Client to confirm
- Is the client a member of a trade union?
  - ○ Yes ○ No
- Might the client be eligible for public funding? To assess eligibility, detailed financial information is required and the case must be of the type covered by public funding.
  - ○ Yes ○ No ○ Need to check financial information
- Will the case involve disbursements (eg expert report or court fees)?
  - ○ Yes ○ No
- Is the matter contentious with the possibility of litigation and therefore cost risks?
  - ○ Yes ○ No

Possible methods of funding are:

- ○ BTE insurance
- ○ trade union
- ○ public funding (CLS/CDS)
- ○ CFA
- ○ contingency fee arrangement
- ○ pro bono
- ○ private

The *most appropriate* method of funding is:

- ○ BTE insurance
- ○ trade union
- ○ public funding (CLS/CDS)
- ○ CFA
- ○ contingency fee arrangement
- ○ pro bono

Signature of student(s):

Date:

4.3 Pro bono

Working on a pro bono basis means that your clients will not pay for the legal work that you undertake on their behalf. However, whilst *your* services may be free, there may still be costs that you need to bring to your client's attention.

Disbursements

Disbursements are fees payable to third parties and you may be required to incur these expenses in order to progress your client's case. For example, if you are representing a client in a claim for disability discrimination, you may be required to obtain a medical report to help establish whether your client is disabled. Similarly, if you are required to issue proceedings at court, there will usually be a court fee to pay. Most clinics and pro bono institutions do not have the means to cover the costs of these disbursements, and therefore clients will be required to pay these expenses out of their own pocket. If your client has a low income then he or she may not be able to afford to pay these costs.

Avoiding disbursement costs

You may not be able to avoid the disbursement, but in some circumstances you may be able to circumvent or reduce the fee.

- Expert reports – some experts may provide a report free of charge, although it has to be said this is the exception rather than the rule. It is always worthwhile enquiring whether the person in question is amenable to waiving or reducing his or her normal fee. Where you do this, it is a good idea to explain that you are assisting the client pro bono as this is more likely to persuade the expert also to contribute some pro bono time. A useful source of pro bono expert advice is, of course, universities. Academics are often leading experts in their field, and if they know that students from other departments of the university or from other institutions are working on a case pro bono, they are often willing to assist.

Suggested wording for letter seeking expert assistance

We act for Mr Brown in respect of an appeal to withdraw his Disability Living Allowance. We need to present evidence to the Tribunal which sets out his medical condition and how it impacts on his day to day living. Mr Brown requires a report based upon any clinical examinations which you may have performed and any consultations you have had with our client.

We understand that preparing this report may involve a fee. However, it would be much appreciated, given Mr Brown's financial circumstances, if the report could be provided free of charge. Kindly note that we are not charging Mr Brown for the legal work which we are carrying out on his behalf, and therefore it would be particularly appreciated if you could provide a medical report either free of charge or at a reduced rate.

Should a fee be payable, please contact us to confirm the proposed charge *in advance* so that we are able to check our client's financial position and, if appropriate, obtain his consent *prior* to this fee being incurred.

- Court fees – if your client is in receipt of means-tested benefits or his or her income falls below the prescribed threshold, the client should be exempt from paying civil court fees. Alternatively, if by paying the fee your client would suffer financial hardship, the court may agree to a reduced rate. If you think the above applies to your client, you should apply for a fee remission using Form EX160, and guidance is provided in leaflet EX160A, available at www.hmcourts-service.gov.uk.
- Counsel's opinion – **Chapter 15** includes the contact details for the Bar Pro Bono Unit. It may be possible for you to secure pro bono assistance from a barrister via this scheme if your client is eligible. In addition, you should develop links with local sets of chambers. Clerks are often willing to check whether barristers would be willing to take instructions pro bono. If you do this, please ensure that you clearly mark your instructions 'pro bono' and mention this prominently in your covering letter so as to avoid any misunderstanding about the financial arrangements.

Cost risks

A further matter to consider when acting pro bono is the cost risk associated with litigation.

If your client's opponent has retained the services of a solicitor, it is almost certain that the solicitor will be charging for the work that he or she carries out on the case. In many areas of litigation, the usual rule is that the loser pays the winner's legal costs. There may also be cost consequences if a party is deemed to have acted unreasonably within the course of the litigation, even if that party is ultimately successful. This means that there will often be a risk that your client may have to pay the opponent's legal costs. It is therefore important that your client is warned of this risk before commencing any form of litigation.

Rule 2.03(6) of the Code of Conduct requires you to consider and discuss with your client whether the risk and expense justifies any benefit which might be obtained from the outcome of the case. You must therefore weigh up the cost and risk on one hand against the benefit to be obtained on the other. You need to think carefully about the implications of this for your work. It certainly means that you need to be cautious about the types of case you take on. Some clinics have taken a policy decision to refrain from representing clients involved in litigation or to offer advice only as they do not wish to expose their clients to the risk of extensive legal costs.

Protective Costs Orders (PCOs)

Courts have the jurisdiction to award costs under s 51 of the Senior Courts Act 1981 and Part 44 of the Civil Procedure Rules. Although the general rule is that the losing party must pay the winning party's costs, the courts have developed the practice of making Protective Costs Orders (PCOs) or Costs Capping Orders (CCOs) in certain circumstances. Although the conditions for the granting of such orders are quite restrictive (they apply only in public law litigation where there is some exceptional

public interest reason to protect the claimant from the normal cost consequences – see *R (Corner House Research) v Secretary of State for Trade & Industry* [2005] 1 WLR 2600), they can be extremely helpful in enabling challenges to decisions that affect broad community interests but where otherwise the cost risk would make a claim untenable. A Protective Costs Order can be made at any stage of the proceedings and may include an order preventing the defendant claiming costs if it wins, or an order restricting the amount of costs the defendant is able to claim if it wins (a Costs Capping Order). Such orders can provide sufficient security regarding likely costs liability so as to make it viable to conduct the litigation. Normally a litigant must have no private interest in the outcome of the case, so the orders tend to be applicable to NGOs, charities or pressure groups which are seeking to challenge the conduct of public bodies. Of particular relevance for this book, the courts have taken the view that if the claimant is being represented pro bono, this is likely to enhance the prospects of securing a PCO.

Pro bono cost orders

For many years, a party that was being represented on a pro bono basis was at a disadvantage. As the pro bono party did not incur any legal costs, courts and tribunals could not make a costs order in his or her favour. This meant that the opponent was in the more luxurious position of being able to fight the litigation knowing that he or she would not be at risk of paying further costs if he or she lost. In essence, the only cost risk the opponent faced was his or her own legal costs.

It is arguable that this placed the pro bono party at a tactical disadvantage, as costs are an important factor in negotiating any settlement. Where a party is faced with the risk of not only paying compensation but also a large legal bill, he or she may be more inclined to reach an agreement.

Section 194 of the Legal Services Act 2007 (which came into force on 1 October 2008) allows the courts to make costs orders in favour of a party who has been assisted on a pro bono basis. However, the costs are paid to the Access to Justice Foundation rather than the organisation that acted for the client. Pro bono cost orders are available in the county court, High Court and Court of Appeal. They are also available where settlements or orders have been agreed.

However, pro bono cost orders are not available where the *opponent* has been in receipt of Legal Services Commission funding or has also been represented on a pro bono basis (Legal Services Act 2007, s 194(5) and (6)).

The procedure for claiming these costs is similar to that for claiming costs where the representation was not free and is set out in Rule 44.3C of the Civil Procedure Rules. The pro bono assisted party is entitled to claim the same costs that he or she would have been entitled to claim had the representation not been free. You should therefore file and serve a summary statement of costs (Form N260) in advance of the hearing. The court can assess your costs either by summary assessment or detailed assessment, if deemed appropriate to do so.

The Bar Pro Bono Unit has suggested wording for a draft order, which can be found at www.barprobono.org.uk.

Note, however, that this is merely suggested wording and may be subject to change in each particular case. A copy of the court order should be sent to the Access to Justice Foundation within seven days of receipt.

An important difference between pro bono cost orders and normal cost orders is that normal costs cannot be set off against sums ordered under s 194 of the Legal Services Act 2007, and any payments made to the Access to Justice Foundation cannot be returned. You must therefore be careful if the case is likely to have subsequent stages, such as a final hearing (if costs are determined at an earlier stage) or an appeal. You may therefore want to ask the court to reserve any decision on costs at an interim stage so a single decision can be made on costs. The court can then consider who should be awarded what level of costs reflecting any earlier decisions that have been made.

4.4 Public funding

Public funding, or legal aid as it is more commonly known, is available to members of the public who are financially eligible and where their case has sufficient merit to justify public expense. Public funding is available for both civil and criminal matters. The rules which govern eligibility for public funding, and the application procedures, are quite complex. However, that does not mean this method of funding can be ignored. It is important that you are familiar with public funding as solicitors have a professional obligation to advise clients where public funding may be available (Rule 2.03(1)(d)).

Civil cases

Public funding for civil matters is known as Community Legal Service (CLS) funding and is administered by the Legal Services Commission (LSC). Not all civil cases attract public funding and therefore it is important to consider the type of case and the area of law involved. For example, most personal injury cases will not attract public funding.

Applicants for CLS funding must pass both a merits test and a financial test. In determining whether a case has sufficient merit, regard must be had to the prospects of success and outcome to be achieved. A simple method of determining whether a case has merit is to ask whether a client of reasonable means would pay to fund the case. It is not as straightforward as querying whether your client is likely to be successful as a case could have high prospects of success but be worth very little. In this scenario, it is unlikely the case would pass the sufficient merit test. Alternatively, a case may have low prospects of success but the client may be at risk of losing his or her home. In this example, the case may pass the sufficient merit test as the outcome has an overwhelming importance to the client in maintaining a roof over his or her head.

The financial limits which determine eligibility change on an annual basis. The test considers the client's capital assets, such as savings or valuable property, as well as his or her disposable income to determine eligibility. The LSC publishes a Keycard which sets out the financial limits together with step-by-step guidance on assessing

eligibility. If an applicant is in receipt of certain benefits, he or she will automatically pass the financial test. This is known as being in receipt of a passporting benefit.

There are two forms of public funding available, Legal Help and Legal Representation.

Legal Help

The LSC contracts with various solicitors' firms and advice agencies to provide Legal Help in specific areas of law. Some clinics may have a CLS franchise to provide advice and assistance and therefore you should check whether your clinic is able to offer this form of funding.

Legal Help is a lower level of funding that provides clients with legal advice and assistance. However, it will not usually cover the costs of representation at a court or tribunal hearing unless the LSC allows it as Help at Court.

Organisations will contract with the LSC to provide an agreed number of matter starts (number of cases) within a particular area of law. You must therefore locate an appropriate organisation if you are considering referring a client elsewhere. You can find suitable organisations on the Community Legal Advice website at www.communitylegaladvice.org.uk/en/directory/directorysearch.jsp.

It is important to note that, under Legal Help, you will not usually be named as formally representing the client within the proceedings.

The individual organisation is responsible for the administration of Legal Help and will be required to correctly complete a Legal Help form (usually a CW1 form). It will also be responsible for ensuring that the client is financially eligible and obtain appropriate evidence such as bank statements and pay slips.

Whilst Legal Help means that the LSC will pay for many disbursements, including expert reports, the organisation is responsible for ensuring that the disbursement was reasonably incurred. This means that disbursements should not be paid at an excessive level and must be reasonably necessary for the conduct of the case. You should also note that, under Legal Help, court fees cannot be paid as a disbursement as you are not formally representing your client.

Legal Representation

Legal Representation is a higher level of funding where, if granted, you will formally be representing your client within the legal proceedings to undertake all work that is necessary within the litigation and advocate on the client's behalf if necessary. You must complete an application and means assessment form, and send them to the LSC, to obtain Legal Representation. If granted, the LSC will send the organisation and the client a Legal Representation Certificate which sets out the limits on the funding. For example, the LSC may limit the stage of proceedings or the costs which may be incurred under the certificate. You can apply to extend these limitations if it is appropriate within the proceedings.

The LSC will pay disbursements, including court fees, although you must ensure that they are reasonably incurred to progress the case. However, in some

circumstances, you may be required to obtain prior authority before incurring a significant expense.

It is important to note that whilst the client will not have to pay for his or her legal advice under Legal Help, he or she may be required to make a contribution for Legal Representation. This may be the case if your client is in employment. The contributions are a set monthly sum calculated on the basis of the client's disposable income. If he or she fails to make this payment, the client will lose the funding and may be liable for some or all of your legal costs.

As with pro bono assistance, your client may be liable for his or her opponent's legal costs in the event that your client loses or has acted unreasonably. However, clients in receipt of Legal Representation are afforded a significant degree of protection by s 11 of the Access to Justice Act 1999. If a cost order is made against such a client, the order shall not exceed a level that is reasonable for him or her to pay having regard to all the circumstances, including the financial resources of the parties and their conduct in connection with the dispute. This means that clients on relatively low incomes may be protected from adverse cost orders in the event that they lose their case.

However, where a client, with the benefit of Legal Representation, wins and preserves some money or property, he or she may be susceptible to the Statutory Charge. This allows the LSC to recover any legal costs to which it was liable from any money or property the client has gained or preserved. It is therefore important to try to recover all your legal costs from the opponent. However, if no order is made in respect of costs, or the opponent is unable to pay, the client may lose some of his or her winnings.

Criminal cases

Criminal legal aid, otherwise known as Criminal Defence Service (CDS) funding, is also administered by the LSC. It is available to clients who are facing criminal charges or are under police investigation. Given that a person's liberty may be at stake, the assistance offered under CDS is quite extensive. For example, it provides free legal advice at the police station by a duty solicitor and representation for criminal defendants at all court levels.

Following some controversial cases involving highly paid sports stars receiving public funding, the decision was made to apply means testing to CDS funding for magistrates' court cases. This move ensures that public funding is only available to those individuals who would not otherwise be in a position to pay for legal advice and representation. As well as being financially eligible, applicants must pass the Interests of Justice test, which, like CLS funding, ensures the case has sufficient merit to justify public funding being granted.

In order to apply for criminal legal aid, Form CDS 14 must be submitted to the magistrates' court. If the applicant is not in receipt of a passporting benefit, Form CDS 15 must also be completed with supporting evidence of finances. Full guidance and the relevant forms can be obtained on the LSC website.

In order to conduct CDS work, your firm must be contracted with the CDS. Given the high volume of work that must be undertaken, it is unlikely that this will apply to a clinical or pro bono organisation. You should still be aware of this scheme, however, as if your client is eligible for CDS representation, it is almost certainly in his or her interests for you to refer him or her to a firm that can offer such assistance.

Note that in criminal cases, where a defendant is convicted, it is normal for the court, in addition to any fine, compensation or other order it makes, to make an order requiring the defendant to pay some or all of the prosecution costs. Clients should be advised about these consequences if they are facing a criminal trial.

4.5 Trade union funding

You should check whether your client is a member of a trade union as the union may pay all of his or her legal costs. Many people think that a union will only support employment law claims although, in practice, the support may be significantly wider and include such matters as consumer disputes.

If your client is a trade union member, he or she should be advised to check whether it is a matter that the union will support. There is significant benefit for clients with trade union support as they are likely to get all their legal costs and disbursements paid. The union is also likely to provide representation at any hearing that may occur, something that often pro bono organisations are unable to guarantee.

In the event that the union will fund a particular matter, it will usually offer the client an initial interview with an approved solicitor. The solicitor will determine whether the case has reasonable prospects of success, usually over 50%. If the case does have reasonable prospects, the union will usually support the client through to the conclusion of his or her case.

4.6 Before the event insurance

Many clients will have legal expenses insurance, often without realising it. Legal expenses insurance is often contained within policies such as those for household insurance and car insurance. You should therefore ask whether the client has relevant insurance. If your client is not sure, you could check the insurance policy on his or her behalf and advise your client accordingly.

It is important that your client contacts the insurance company promptly, as many policies contain a clause requiring it to be notified of a claim within a specified time limit.

If your client's claim is covered, the insurance company may refer your client to a solicitor on its own panel to determine whether the claim has prospects of succeeding; usually this means at least 51%. If the claim does have sufficient prospects of success, the insurance company is likely to pay all the necessary costs in pursuing the claim.

4.7 Conditional fee agreements

Commonly referred to as 'no win, no fee', these funding arrangements are often used in fast track and multi-track litigation. Over recent years, conditional fee agreements have become particularly prevalent within the area of personal injury.

Under this arrangement, your client will sign an agreement whereby he or she will not be liable for your costs in the event that the case is unsuccessful. However, if the client is successful, the solicitor will charge his or her fees plus a success fee determined upon the difficulty of the case. In some types of claim there are fixed percentage uplifts, for example in employers' liability claims. Clients will usually not be liable for their solicitor's costs, as these will normally be recovered from the opponent.

It should be noted that clients may be liable for their opponent's legal costs in the event that they lose their claim. It is therefore standard practice to insure the claim in the event that any adverse cost orders are made. This insurance is known as 'after the event (ATE) insurance'. The premium payable on the insurance can be recovered in the event that the claim is successful under s 29 of the Access to Justice Act 1999.

It is important to check for BTE insurance, considered above, as failure to use BTE insurance might prevent the successful party's solicitor recovering the cost of the ATE insurance premium (see *Sarwar v Alam* [2001] EWCA Civ 1401).

4.8 Contingency fee agreements

Contingency fee agreements are an alternative form of no win, no fee funding available in non-contentious matters. However, under this form of arrangement, the costs are determined as an agreed percentage of any compensation awarded. These have become common in employment and criminal injury compensation matters, which, due to the limited circumstances in which costs can be recovered, render conditional fee agreements unsuitable.

All costs of representation and pursuing the claim are likely to be met under the contingency fee, although the client is likely to pay a significant proportion of his or her compensation, up to a maximum of 35%, if the client is successful. For this reason, only high value claims tend to benefit from contingency fee agreements as a funding option. Contingency fee agreements are not always an appropriate source of funding due to the proportion of their compensation which the client may ultimately be required to pay in respect of his or her legal fees. However, they do offer an alternative if the client is unable to secure pro bono representation or is unable to pay for assistance.

Contingency fee agreements are regulated by the Damages-Based Agreements Regulations 2010 which prescribe the maximum percentage fee which can be charged and the information which must be given to clients prior to entering such an agreement. Failure to adhere to these Regulations renders the agreement unenforceable.

4.9 Private payment

Finally, another option available to clients is to pay for their solicitor or legal advisor to carry out work on their case. It is important to remember that not all legal work is litigious, and in such cases clients will not be able to recover their legal costs or compensation. Indeed, not all litigation will lead to costs orders being made (eg small claims track cases in the county court). Transactional cases, such as conveyancing and wills, usually require clients to pay an agreed rate for the work carried out.

Clients will be liable for the costs of all the legal work undertaken and any disbursements that may be incurred. If the matter is litigious, they may also be liable for their opponent's legal costs if they lose, and after the event insurance may be taken out.

Clients should be advised as to the level of costs which may be incurred in any particular case so they can make a decision whether or not they wish to pursue the case.

Summary table

	Client's legal costs	Disbursements	Opponent's legal costs
Pro bono	Free	Client usually liable	Client may be liable
Public funding – Legal Help	Paid by LSC	Most reasonable disbursements paid by LSC. Client may be liable for court fees	Client may be liable
Public funding – Legal Representation	Paid in full by LSC or client may pay contribution based on disposable income	Reasonable disbursements paid by LSC	Court must consider client's means of paying any cost order having regard to all the circumstances
Before the event insurance	Covered by insurance	Covered by insurance	Usually insured
Trade union	Paid by union	Paid by union	Trade union usually liable, not client
Conditional fee agreement	No win, no fee	Dependent on firm of solicitors – client might be liable or firm might pay	Usually insured
Contingency fee agreement	Percentage of damages recovered	Client may be liable	Usually used in non-cost jurisdiction although client potentially liable
Privately paying	Client liable	Client liable	Client liable

4.10 Summary

How a case will be funded is a primary concern of every client. Even though acting on a pro bono basis means your client does not have to pay any legal costs, this is not always the best method of running a client's case. It is a complex but necessary consideration and there can be serious consequences if you fail to act in your client's

best interests in respect of costs and funding. To aid your understanding of the variety of funding methods, refer to the funding checklist and table above.

Further reading

Introductory

Solicitors' Code of Conduct 2007 (Law Society)
Rule 2.03 and the accompanying guidance is essential reading to ensure you are aware of the funding information with which a client should be provided.

Intermediate

***Blackstone's Criminal Practice/Blackstone's Civil Practice* (Oxford University Press)**
Both of these texts cover funding and are regularly updated.

Advanced

Legal Services Commission
The LSC website (www.legalservices.gov.uk) is not the easiest to navigate, but it contains all you need to know about public funding. You can access the relevant forms, guidance and the rules governing legal aid (contained within the Legal Services Commission Manual).

Activities

Activity 1: To fund or not to fund?

Consider the scenarios below and determine which funding methods are available, and which appears to be the preferred method:

1. Lucy, 20, has been dismissed from her employment and wants to lodge a claim for unfair dismissal at the employment tribunal. She lives at home with her parents. She is not a member of a trade union and she has no insurance policies in her name.
2. Mr Hughes has an ongoing dispute with his neighbour, Mrs Johnson, in respect of the position of her hedge which runs along the boundary to their properties. After trying to resolve the matter informally, Mr Hughes has decided to litigate. Both Mr Hughes and Mrs Johnson are retired with a state pension as their only source of income.
3. James has recently been involved in a car accident in which he sustained several injuries. His motor insurance has declined to cover his legal expenses and he has no other insurance available. His injuries are likely to attract damages in the region of £5,000 to £7,000.

Activity 2: Do you qualify?

To practise determining eligibility for CLS funding, input your own financial details into the eligibility calculator (www.legalservices.gov.uk/civil/guidance/eligibility_calculator.asp) to determine whether you qualify for Legal Representation and Legal Help. Remember any student loan (despite the fact it is a loan, which is repayable, it counts as income).

6 Interviewing and advising

> 'I always pass on good advice.
> It's the only thing to do with it. It
> is never any use to oneself.'
>
> Oscar Wilde, *An Ideal Husband* (1895),
> Lord Goring to Mabel Chiltern

6.1 Introduction

One of the most important skills in clinic and pro bono is interviewing, as it tends to be the main forum for obtaining instructions and information about your client's case. The information gathered during your interviews will be used when performing every other subsequent legal skill, be it research or case planning. Therefore, developing effective interviewing skills will help you to understand your client's instructions and objectives and allow you to perform effectively.

The interview is also the point at which you will truly engage your client in the legal process and therefore the stage when your relationship with your client will be formed. The success of your student–client relationship can turn on your first interaction, and it is for this reason that interviewing skills are so important. There is much more to an effective interview than simply turning up and asking questions. This chapter considers how to conduct an effective interview and examines some common problems that can arise.

This chapter assumes that you will be the person conducting the interview. Several clinics and pro bono schemes involve students observing their supervisor or lawyer interviewing the client. If you are part of such a scheme you may still find this chapter informative, and when you next watch an interview you can see whether the principles below are followed. If your clinic or pro bono activities do not involve interviewing, you may want to consider entering one of several interviewing competitions which are held annually. A list of these competitions can be found on the Companion Website.

6.2 Practical preparation

It is important that you prepare thoroughly for any interview you undertake. Your interview preparation begins even before you first make contact with your client.

Arranging interviews

If your institution does not have set interview blocks or drop-in sessions, you will need to consider how to arrange your interview.

Interviews can be conducted both face-to-face and by telephone, so you will need first to consider the most appropriate method. If you are conducting your interview by telephone, you will need to ensure that your client has time to speak and that he or she is in an appropriate setting. For example, a client is unlikely to want to discuss a delicate legal matter whilst he or she is in a busy shopping centre. It is therefore advisable to call your client in advance to arrange a telephone interview at a mutually convenient time.

When contacting your client to arrange the interview, you need to have your (and your partner's) availability to hand together with a proposed interview time. Make sure you leave enough time between arranging the interview and the interview itself to allow you to prepare properly and to have work checked, where applicable.

Location

Most interviews will probably be conducted in the office where you carry out your clinical and pro bono work. If this is the case, you should ensure that your client knows the location of the office and how to get there. It is usually a good idea to send your client a map showing your location. If your client does not know where your office is located, he or she may be late for the interview or, worse still, may fail to turn up. You should also specify where and to whom your client should report on arrival.

Some clients may be unable to travel to your office; therefore it may be necessary to conduct the interview elsewhere. For example, if your client is in custody, the interview will need to be conducted at the prison. Alternatively, your client may have mobility problems. Before arranging interviews out of the office, you should speak to your supervisor and ensure that you have authority to visit your client. This is important as your institution may need to carry out a risk assessment to make certain your visit is conducted as safely as possible. Common precautions include the following:

- considering any particular risks, if any, posed by an individual client;
- not conducting a visit alone;
- letting someone know where you are going and what time you expect to be back;
- notifying someone when you have safely left the premises you are visiting.

Once you have complied with your institution's risk assessment procedure, you should then ensure you know exactly where you are going and how you are going to get there.

Timing and duration

You should advise your client how long you expect the interview to last and therefore be able to work out a suitable time to conduct it. If your institution has

a room-booking procedure, ensure that you reserve the interview room for the appropriate length of time. This will avoid the risk of having to end the interview prematurely because your time is up and someone else is waiting to use the room immediately after you. As a precaution, you may want to book the room for an additional half an hour in case of any unforeseen problems, such as your client arriving late.

As soon as you have agreed the practical arrangements with your client, it is sensible to confirm them in writing.

Template appointment letter

[Client name]
[Address]
[Date]

Dear [name],

Appointment confirmation

Following our telephone conversation, I am writing to confirm your appointment on [day and date] at [time]. The interview will take place at [venue] and is expected to last [timescale]. Please report to the ground floor reception on entering the building. A map is attached for your convenience.

[As discussed, this interview is to obtain further details about your enquiry. Unfortunately, I will not be able to give you any advice at this interview as further research will need to be undertaken before I am in a position to offer advice.]

If you have any queries, or cannot attend the appointment, please contact me on [contact details] as soon as possible.

I look forward to meeting you.

Yours sincerely,

[Your name]
[Your organisation]

6.3 Types of interview

Before you can begin planning for the interview itself, you need to ascertain the type of interview you are about to conduct. There are two broad categories: initial interviews and advice interviews. Their purpose differs substantially and you need to be aware of the objectives of each so you can conduct the interview effectively. Many clinic and pro bono projects adopt a pattern whereby you will gather the factual account in the first interview and give advice only after you have been able to conduct research. You will not normally have sufficient expertise to be able to offer advice in the first interview and, in any event, will need to check your proposed advice with your supervisor.

6.4 Initial interviews

These tend to be fact-finding interviews designed to obtain detailed information about your client's legal problem. However, because they are likely to be your first major interaction with your client, they have the additional objective of establishing a good working relationship which will last for the duration of the case. There are several stages to an initial interview, which are considered below:

Welcome

You should remember that, whilst you may be nervous, it is likely that your client will also be nervous. After all, many people do not encounter the legal profession very often. It is therefore sensible to greet your client warmly and engage in some form of small talk or icebreaker. It is not essential to shake hands, but this can add a sense of professionalism. This type of introduction should put you and your client at ease. First impressions are important, so make sure your welcome has the desired impact.

Introduction

You should then briefly (re)introduce yourself (you may have spoken previously on the telephone) and confirm your status as a student adviser. If the interview is to be recorded, ask your client's permission to tape it. At this stage you should explain the structure of the interview. This sets out the parameters and ensures your client knows how the interview will progress. Clients are often desperate to get their problem off their chest, which means that, until they have done so, they will not really be listening to you. You should therefore keep your introduction brief.

Eliciting information

This is perhaps the most important part of the initial interview. You must ensure that you obtain sufficient information for several reasons. The information you acquire will help determine the following:

- The area(s) of law – on the face of it, the problem may seem like an employment matter, but is it really concerned with personal injury, or both? Does your organisation advise on these areas?

- The urgency and complexity – it is not always apparent from any information you are given prior to the interview whether a case is too urgent or complex for you to deal with.
- The limitation date – has it passed, is it quickly approaching, have you got some breathing space?
- How far advanced the matter is – are there any deadlines looming, or has the case not yet commenced?
- The merits of your client's case – whether the case has good or poor prospects of success.

Your client should be allowed to explain the problem in his or her own words. Clients need to feel relaxed and comfortable in order to be as open as you require them to be to obtain full and frank instructions. Hopefully your welcome will have reassured your client and created the right environment in order for him or her to do this.

Questioning techniques

Obtaining detailed and accurate information can be achieved through effective questioning. Proficient questioning relies on understanding the different sorts of questions and when to use them. Regardless of the type of question asked, it should:

- be clear and concise;
- deal with one thing at a time; and
- be worded in a way which your client will understand.

Open questions invite a broad or long answer. Such questions are generally used at the beginning of an interview when the full extent of the problem is not yet clear.

Examples of open questions

- Can you tell me in general terms about your problem?
- What happened next?
- When did you first notice there was a problem?
- Why do you think your employer responded in this way?

If you have been given some basic details prior to the interview, you can invite your client to start speaking with an open question or statement such as, 'So, I understand you are having problems at work. Can you please tell me a little bit more about that ...' If you have no information at all, you might want to begin by saying, 'Could you please briefly tell us about the matter you want our help with ...' You will note the wording uses the terms 'a little' and 'briefly.' You want to allow your client the opportunity to tell his or her story, but at the same time you do not want to give your client free rein to recount every single detail, as not everything will be factually or legally relevant. At the beginning of the interview, it is good to allow your client some room to tell his or her story, so you should avoid interjecting with lots of questions – this will only disrupt your client's flow. If you think of a question to ask when your client is speaking, note it down and ask it at an appropriate juncture.

When allowing your client to explain his or her problem, you should be prepared for an account which is not necessarily ordered or chronological. Take a look at the account below from an initial interview:

Nicola Ridley's problem

Excerpt from initial interview

Nicola: 'I've got a problem with my landlord. I live in this really nice area of the city and the rent's very cheap. To be honest I'm really worried about him evicting me. He's been really abusive. The next-door neighbour is like something out of a soap opera, a real drunk, and she's leaving such mess about that rats are in the yard and I've even seen one in my kitchen. I've asked her to tidy up but she just starts swearing at me and tells me her boyfriend is "into martial arts". Also, one of my windows is rotten and the flat's damp and draughty in winter, my sofa's wrecked by mould. I went round to the landlord but he was really nasty and told me I could leave. I do not want to have to go and live in the West End where the rent's cheaper but there's a lot of crime. I've got no written tenancy agreement but I've been living there and paying rent monthly since April 1996. He can't just throw me out can he?'

It is your job to work with clients to help them provide a coherent account of their problem. This is likely to require more focused questions and may require you to take more control over the type of information sought and the way it is presented. Thus you may adopt closed questions which encourage a brief and specific answer. These are best used when you want to focus on a particular point or clarify an issue. In interviews they can be used once you have identified the relevant points or narrowed the issues.

Examples of closed questions

- How much rent do you pay per month?
- What is your neighbour called?
- What is your full address?
- What exactly did she say to you?
- Can you provide an example of your landlord's abusive behaviour?

To avoid your client providing information in a disorganised manner, once you have a fair understanding of the nature of the problem, you may want to guide your client with focused questions. You may be able to plan many of these questions in advance if you have been provided with some basic information prior to your interview. If not, you will need to listen carefully and plan your questions as you go.

Once you have finished asking your questions, take a moment to review your interview plan to check whether your client has answered all the questions you had previously considered relevant. If there is anything missing then you can go through this with your client.

Clients will often refer to people or places, not realising that you do not know who or where they are. Do not be afraid or embarrassed to ask, as these details could be important to the case.

Clarification

It is important to summarise your understanding of your client's problem at appropriate points during the interview. Alternatively, you may wish to do this once you have finished asking your questions.

'So, as I understand it, the facts of your case are ...'

It is important at this stage to clarify any inconsistencies in your client's instructions or resolve anything you are not sure about. Do not be afraid to query any inconsistencies. You may not feel comfortable doing this in your early initial interviews, but it is better you do this from the outset rather than waiting until a later date. Whatever you do, do not let inconsistencies go unchallenged as you can guarantee that your opponent or a judge will spot them. If you are aware of the problems in your case at an early stage then these can be addressed to minimise any adverse impact. Often, inconsistencies are due to confusion on your client's part and, therefore, when your client is forced to focus on the facts, he or she will remember what happened.

If your client is unclear about any facts, it is important that you do not lead him or her. Some clients' instructions may be influenced by the impact of your advice on their case. For example, in a criminal case, a client may ask whether it is better if he or she were already holding the knife, or went to get the knife, when the victim was stabbed following an argument. In this scenario, the facts may have a huge impact on potential defences available to your client. It is therefore important that the client provides you with his or her version of the facts, and that you do not suggest a version of the facts for your client to adopt.

You should ensure that you know your client's objectives by the end of the interview, as this will be the focus of your subsequent work. If your client has not made this clear during the course of the interview, ask your client what he or she wants to achieve. Some clients present you with a long factual background to a case but do not know what they actually want. Some clients may just want an apology, whilst others want compensation. If you know what your client wants, you may be able to save yourself hours of needless work.

Explaining procedure and client care

Once you have obtained all the factual information from your client, you should then discuss any important procedural matters and deal with issues such as client care. You may choose to do this at the start of the interview, but clients are often keen to discuss their problem, which is why it is advisable to leave this information to this stage.

Your client should be given basic information about how your service works. You should also explain the limits of your involvement with the case, and funding options available to the client. Clients are more likely to retain the information that you provide at this stage, as they are no longer concerned about getting the problem off their chest.

Remember that this may be the first time your client has sought legal assistance, so you should explain matters in an accessible way. Do not feel that this is just a formality and can therefore be rushed. Client care is very important and you are

required to explain certain matters for good reason. See 7.5 for further details on client care information.

Closing

You should close the interview by giving a clear indication of what will happen next so your client is not left in limbo. Remind your client what you have said you will do (if anything), what is expected of the client (for example, he or she may need to provide certain documents) and give a timescale for your next contact.

Dealing with documents

Before your client leaves, you may wish to copy any relevant documents he or she has brought in so you can return the originals there and then. Ideally this should only be done if the amount of documentation is manageable, otherwise your client may be waiting for an unduly long time. If your client has brought in copious documentation, you may want to arrange a further appointment when your client can return to collect the paperwork once you have finished copying it.

6.5 Advice interviews

As the title suggests, the objective of this type of interview is to advise clients of their legal rights and the options available to them. As with initial interviews, there are distinct stages:

Welcome

Even though you have already met your client at the initial interview, you should build on the rapport that has already been established. It is also possible, of course, that you are picking a case up from a fellow student and that the advice interview is your first contact with the client, in which case all that was said above about first contact will be relevant.

Introduction

You should outline the proposed structure of the interview and what you intend to cover. As part of the interview, it can also be useful to explain what action you have taken since your last contact with your client.

Given that you are providing advice tailored to your client's situation, you should be confident that the facts on which your advice is based are correct, having confirmed them with your client after the initial interview. Before explaining your advice, it can be useful to recap the facts on which you have based your advice.

At this stage, it is not unusual for clients to provide new information or modify their initial instructions. If this happens, you may need to speak to your supervisor. Alternatively, you may decide to continue with the interview but make it clear that the advice is based on your initial understanding of the facts. If you opt for the latter option, you should revise your advice as necessary when confirming it in writing.

Providing information

This is perhaps the section of the interview about which you will be most nervous. It will involve you doing most of the talking and you may be required to explain complex points at length.

What should you advise on?

Your client will want you to explain his or her legal position and so you should avoid providing statements of the law in general. Having set out his or her legal rights, your client will then want to know what options are available and the pros and cons of each. When advising your client of the courses of action, you should also explain the potential consequences of the alternatives, including the likely benefits, prospects of success, costs and risks. Without this information, your client will not be in a position to make an informed decision as to how he or she wishes to proceed.

Providing complex advice

Explaining complex legal issues can be difficult. If the advice or area of law is very complex, you may want to set out the advice in a letter and send this to your client prior to your meeting. You can then use the interview to discuss and clarify the finer points.

Giving clients advice that they do not want to hear

Every legal advisor at some point must tell a client that he or she does not have a case or is unlikely to succeed. Whilst this may not be what the client wants to hear, he or she must be appropriately advised to avoid wasting time and incurring considerable expense in pursuing a case which has no realistic prospects of success.

However, you must also balance this against the fact that you are providing an opinion, not an absolute statement of fact. Many people have been told that they are unlikely to be successful and have gone on to succeed at court or tribunal. You must therefore exercise caution in your advice. Solicitors will therefore usually adopt phrases such as 'reasonable prospects of success' or 'low prospects of success'. These phrases provide your client with your opinion as to the likely outcome of your case, whilst leaving room for you to be wrong. Ultimately it is up to your client whether to pursue a case, even if it is hopeless. However, your client will at least pursue the matter with his or her eyes open. There is also a great sense of satisfaction if you achieve a result for a client who had limited prospects of success.

When providing your advice to your client, you should ensure that you explain the rationale for your opinion. For example, if there is adverse case law or legislation, you should explain the law and why it may have a negative impact on your client's case.

You can temper unfavourable advice by carefully managing the tone with which it is conveyed. See the section on empathy at 6.7 below.

A note on language

If you are providing your client with advice during the interview, you should remember that your client may not understand legal terminology and therefore you

will need to use appropriate language. It is important to gauge your client's level of understanding and to use tailored language, as you do not want to patronise your client at one level and you do not want to appear pompous at another level. You should also ask your client whether he or she understands what you have told him or her. However, you may want to exercise some caution as clients may tell you that they understand, when in fact they do not.

Whilst you should avoid using legalisms as much as possible, sometimes it is unavoidable. If you use any legal terminology, you should explain the meaning to your client.

Clarification

Allow time for your client to digest, question and clarify any of the information you have provided.

Obtaining instructions

Having listened to the information, your client may or may not be in a position to confirm what he or she wants to happen next or the preferred course of action. This stage of the interview may feel more like a conversation where you discuss and weigh up the legal and practical aspects.

You should not force your client into making a decision at this point. Many clients will need time to consider their options and may wish to discuss matters with family or friends. If your client is unable to provide instructions, you should indicate a timescale by which they should contact you with instructions. Sometimes clients will make a snap decision and you may wish to encourage them to go away and think about the matter where you feel they have reacted hastily.

Once you have provided your client with advice on his or her case, the decision as to how to proceed must be your client's decision. It is not your role to tell clients what they must do; it is your role to advise them of their options. If your client chooses a particular course of action then you should comply with his or her instructions, even if you do not agree. The only circumstance in which you do not need to follow an instruction is where this would conflict with an overriding professional or legal obligation, or where the instructions are outside the scope of your retainer. In such cases, your client should be advised why you cannot take a particular course of conduct and be allowed to proceed on his or her own or with alternative representation.

Closing/next steps

When bringing the meeting to an end, you should confirm the next steps. This will usually involve explaining that you will confirm the advice in a letter. At other times, you may need to reassure your client that you will be in touch having conducted any further research required. Alternatively it may be case of waiting for further instructions before you can progress the case.

6.6 Planning your interview

Whilst it is perfectly natural to feel nervous prior to your first interview, planning and preparing properly can help you approach the interview with a certain degree of confidence.

Having established the purpose of the interview, you can begin to prepare a plan which will ensure that you know how to guide the interview and cover all of the necessary points. It is very easy, particularly during your early interviews, to miss out vital information or to forget to ask an important question. The plan is also useful for your supervisor as he or she can check what you will be saying throughout the course of the interview. A template interview plan can be found overleaf.

Your plan should set out the main points that must be addressed during the course of the interview. For example, during an initial interview, you are likely to provide your client with some basic information about your clinic or pro bono scheme and explain the basis upon which you will be acting. You should also note the appropriate questions you will need to ask your client. This assists in ensuring that you obtain all the relevant information during the interview. If you are providing your client with advice during the interview, you should outline the advice on the plan.

Many students who prepare interview plans fall into the trap of preparing a script which results in the interview sounding artificial. It can also give the impression that you lack confidence, which is not the best start to the relationship. If the interview is scripted, you may fall into difficulty if your client is unwilling to stick to the order of your script. Worse still, your client may just read the script from the other side of the table and not listen to you.

Your interview plan should therefore constitute a list of the important matters that need to be raised. This ensures that these points are mentioned, whilst allowing the interview to flow naturally. Where you are interviewing with another student, your plan should be clearly divided and you may wish to highlight who is to say what. You may want to conduct a practice interview to become adept at using your plan prior to the real thing. This is particularly advisable if you are conducting the interview with a fellow student, so that your handovers are seamless and you do not inadvertently cover each other's parts.

Interview plan

Client name: Date of Interview: Time:

1 Introductions/icebreaker

2 Purpose of the interview

- Explain the aim of the interview [find out the facts of the problem/provide advice/discuss the forthcoming court hearing]
- Set out any limitations [cannot provide advice/cannot confirm that you can take on the case at this stage, etc]

3 Structure of the interview

- Outline structure
- Obtain information about the problem
- Provide information about the clinic
- Go through any relevant documentation
- Answer any questions or queries

4 Obtain information about problem

- Ask client to outline the problem in his or her own words
- Questions:
  - [Insert specific questions relevant to your client's case]
  - Establish date of cause of action
  - Events leading up to the cause of action
  - Time, dates, places, names and addresses of parties and any third parties clearly recorded
  - What was said and by whom. Where and when?
  - Name and address of proposed defendant
  - Details of witnesses? Names, addresses, contact telephone numbers
  - What your client wants to achieve – refund, compensation, apology?
  - Has your client already instructed a solicitor?

5 Clinic information

- Basic information
  [Obtain client's basic details – name, address, contact details, etc]
- Clinic procedures and policies
  [Go through the information about your clinic and how it operates]
- Funding
  Explain funding, including disbursements
  [Go through funding information checklist]
- Complaints procedure
  Explain that you have a written complaints procedure available on request. Explain that, in first instance, the client should speak to [student or supervisor]. After that, any complaints should be directed to clinical director

6 Retainer

- This is the document that confirms that the clinic will act for the client and that the client agrees to it acting for him or her

- Highlight key terms of retainer

7 Evidential documents/ID

- Explain that you need to take a photocopy of the documents for file

8 Next steps

- Explain what will happen next
  [For example that you will discuss the matter with your supervisor/you will be in touch to confirm whether the case can be taken on/confirm you will write a letter of advice, etc]

9 Questions and clarification

- Invite client to ask any questions

10 Closing

- Thank client for attending and confirm the next steps to be taken and timescale for next contact

6.7 Rapport building, body language and other subtleties

Asking the right questions and following your plan are not the only ingredients to a successful interview. Your interviews should serve to build and maintain a professional relationship and establish a good rapport with your client. To this end, there are a range of other non-tangible aspects to master:

Listening skills

It is important that your client knows that you are listening to what he or she is saying. It is very difficult to open up to someone who looks disinterested, and therefore it is unlikely that you will receive full instructions if you are not seen as paying attention to your client. You can demonstrate this with gestures, such as nodding, and reassuring comments, such as 'yes' and 'I understand'. At the end of the interview, you should also clarify your understanding of the facts or instructions received.

Similarly, you need ensure your client is listening to you. It is a good idea to check your client has understood what you have said at appropriate intervals during the interview. On occasions, clients may state that they have understood the information or advice you have provided, but it is clear from their body language or tone of voice that this is not the case. If you find yourself in this position, you may wish to remind clients that it is important that they have understood so that they can make informed decisions, and you should provide a carefully worded summary at the end when wrapping up the interview.

Empathy

It is also an essential skill to empathise with your client. This should be distinguished from sympathy, as you must keep a professional relationship. Empathy is about understanding your client's issues and concerns, which will assist you in forming a good relationship. It is not necessary to like your client, or even to agree with his or her point of view, but you must be able to act in your client's best interests, and to do this you must understand your client. Be careful how you convey empathy – it should not sound patronising.

Eye contact and note taking

You may be anxious to ensure that you make a note of everything your client says. This can result in your head dropping down over your notes. This may give your client the impression, albeit wrong, that you are not listening. Therefore, whilst you obviously need to look down to make notes, you should still maintain a good level of eye contact throughout the meeting.

Top tip

If your client is speaking too fast, ask him or her to slow down; you may think you will be able to remember what was said, but in long interviews it is unlikely and risky.

Effective note taking is a skill in itself. However, it is necessary to accurately record the interview. It is useful to develop a form of shorthand so you can note down the key points that have been made. Remember that you are unlikely to be able to make verbatim notes and engage with your client. If interviewing as a pair, agree a note-taking procedure.

Top tip

A sensible arrangement when interviewing in pairs is to take turns at note taking. When not speaking, take notes so that your colleague can speak and maintain eye contact with your client. When it is your turn to speak, your colleague can assume note-taking duties.

Control

You must keep control of the interview as clients have a tendency to digress and spend time telling you irrelevant things. This can often be attributed to the client not knowing what is relevant. A common mistake of students is to allow clients to deviate from the relevant material due to a fear of appearing rude. This does not help either you or your client, and there are various techniques for steering the interview back in the right direction. For example, you could say to your client that you understand but would like more information about something he or she has already discussed. This demonstrates that you are interested in your client's problem and you have been listening to him or her. Alternatively, you could ask your client questions about relevant pieces of information that will hopefully bring him or her back on track.

Another tactic is to use a summarising intervention. If a client is rambling, you could intervene and say, 'so, just to summarise, your concern is about ... now can I

ask you to specifically deal with ...'. This stops your client talking for too long and focuses his or her mind on a particular matter.

It can be useful to state the duration of the interview at the outset and politely remind your client that the interview is time limited if he or she insists on deviating from the point.

It is quite rare, but sometimes you may have to explicitly ask a client to stop speaking and to answer specific questions. You need to deal with these situations sensitively, but you could say, 'Sorry, can I just stop you there for a moment?', 'I understand your overall concerns, but I have some specific questions I would like you to deal with so that my notes are complete ...', 'My first question is ...'

Using pauses

In a conversation it is natural to have pauses. For some reason, in an interview setting, these pauses can seem like an age. However, both you and your client may need thinking time, or a period to digest the question or information. If there is a short pause, do not feel tempted to speak to fill the gap. Longer pauses may be an indication that your client has not understood or is unable to answer your question, and you may need to rephrase it.

Managing client expectations

It is important that you are clear about what you can and cannot do for your client. This requires you to phrase your advice carefully and not raise your client's expectations. Whilst you may be eager to please, do not promise anything that you might not be able to deliver, or inadvertently mislead your client.

6.8 Interview dos and don'ts

Do

- ✓ Appear confident (even if you are not)
- ✓ Smile and put the client at ease
- ✓ Be empathetic
- ✓ Show interest in your client's problem
- ✓ Listen carefully
- ✓ Vary your questioning technique
- ✓ Control the direction of the interview
- ✓ Take careful notes
- ✓ Ask for clarification if required
- ✓ Summarise where appropriate

Don't

- ✗ Don't ever go into an interview unprepared
- ✗ Don't be late or let the interview overrun
- ✗ Don't become too familiar – retain a professional attitude
- ✗ Don't just sit there and write notes – be proactive
- ✗ Don't doodle on your pad while your client is speaking – this indicates that you are not listening to what he or she is saying
- ✗ Don't let your client take over the interview
- ✗ Don't be afraid to ask awkward questions
- ✗ Don't be tempted to fill in the silent gaps
- ✗ Don't patronise or otherwise offend your client
- ✗ Don't go beyond your remit – know your advice, state your limits and stick to them

6.9 After the interview

If you have made notes throughout the course of the interview, it is likely that they will be very rough. It is therefore important to draft an attendance note, accurately recording what happened in the interview. The purpose of the note is to ensure that anyone picking it up will know what your client has said and has been advised. It is therefore important that the note is comprehensive. Attendance notes should also be typed if possible so that they can be easily read without the need to decipher handwriting. Further guidance on attendance notes can be found at **7.3**.

It is also good practice to write a letter following the interview, confirming your instructions and the advice that has been given. This avoids the risk of a misunderstanding between yourself and your client. Again, this is covered in more detail in **Chapter 7**.

6.10 Reflecting on your interview

When you have completed the interview, you should reflect upon your performance.

Some clinics provide facilities to record the interview. It is useful, as a reflective process, to watch the interview and analyse your performance. You may pick up upon subconscious habits, such as playing with your pen or saying 'okay' after every sentence. People often have these habits, but it is only when you become aware of them that you can try to eradicate them from your performance. Equally, watching your interview could demonstrate that it was better than you thought it was.

Suggested starter questions for interview reflections

1. What was the best thing about this interview?
2. What was the worst thing about this interview?
3. What different types of questioning technique did you adopt and why?
4. What techniques did you adopt to establish a rapport with the client and how successful do you think these were?
5. What non-verbal forms of communication did you adopt and were you conscious of these at the time?
6. What comments do you have on the clarity of your questions and/or explanations?
7. Were there times when you felt your client took control? If so, why might this have happened and how can this be avoided in future?
8. Did you ramble on? If so, what was the cause of this?
9. Did you feel at ease; do you think your client did? What factors might have influenced how you and your client felt?
10. How do you think your client might have felt about his or her experience following the interview?

The skill of reflection is considered in detail in **Chapter 12**.

6.11 Common problems

Preparing for the unexpected should help you conduct your interview smoothly in the event of any unplanned questions or situations arising. You will find below some of the common issues that can occur.

Your client has asked a question and you do not know the answer

There is a public perception that legal advisors should know the answer to every question and, if they do not, that they are not very good. If you do not know the answer to a question, advise your client that this is a complex area of law, or that the law is often evolving and therefore you need to check and get back to them. Your client is likely to appreciate the right answer after some research rather than the wrong answer immediately. You should never guess the answer and, in any event, you may not be permitted to discuss matters with your client which have not previously been approved by your supervisor.

Your client wants a definite answer on the prospects of success

Clients are often frustrated that legal advisors are unable to state whether their case will succeed. You should advise clients that it is your role to advise them on the strengths and weaknesses of their case so that they can make an informed decision as to how they should proceed. As such, you can only advise on whether they have a strong case or a weak case. You must always frame your advice on prospects of success carefully. You may choose to use language such as 'reasonable' to convey the possible chances of success. For example, 'we think your case has reasonable prospects of success'. If your client pushes you for a definitive answer, you should gently point out that you simply do not know what the outcome of the case will be as you do not make the decision – that is the function of a judge.

Your client is aggressive with you

Some clients can become aggressive, which can lead to you feeling intimidated. In most instances, this is due to frustration borne out of their problem and dissatisfaction with the legal system. Clients may view you as part of that system and therefore direct the frustration at you.

If you are faced with such frustration, you should attempt to pacify your client. Empathise and acknowledge that you understand his or her concerns or frustration. A useful technique is to remind your client that you are on his or her side and, whilst you understand the frustration, the legal system has procedures in place which must be followed. In advising your client of this, you should detach yourself from the system and be seen to be working on your client's behalf.

If your client becomes threatening, or you are worried that matters may escalate, you may need to leave the room and seek assistance from your supervisor.

Your client uses inappropriate language

In the course of an interview, your client may use inappropriate language or make remarks that you find offensive. It is important that this behaviour is not tolerated, as you should not have to work in an uncomfortable environment. It may be a one-off, in which case you may let the matter go on the first occasion. If it continues, you may choose to discuss the matter with your supervisor or raise the issue with your client direct.

If the situation does not improve, you can advise your client that you may have to stop working on his or her case. This is usually sufficient to stop this conduct occurring in future.

Your client becomes very upset

Legal problems can be very sensitive and frustrating. Clients inevitably become emotionally attached to their cases, as the outcome may have a significant impact on their lives. For example, in a family case, the result could deprive a parent of access to his or her child, or, in a criminal matter, the outcome may mean a period of imprisonment and loss of reputation. It is therefore understandable that clients at times become upset when discussing their cases. In some instances, this emotion can turn into tears. In an interview situation, you may find this awkward, unnerving and/or disconcerting.

If your client becomes emotional, there are several ways to handle the situation. You could decide to carry on regardless, glossing over the fact that your client is distressed. This is not necessarily the best course of action as your client is unlikely to listen fully to whatever you proceed to say. A preferable option would be to pause and allow your client time to compose him- or herself. If your client is too upset to continue, you may have to halt the interview and rearrange it for a later date. It is always useful to have some tissues with you in an interview.

6.12 Summary

Interviewing is a crucially important skill, with many components to balance. The interview sets the scene for the professional relationship to follow and is the basis of the client's version of events and his or her instructions to you. In a relatively short period of time, you need to ascertain and record a coherent factual account and (in advice interviews) give clear and accessible legal advice based on these facts. This is no easy task and is further complicated by the emotional impact of the case on the client and the intensity of having to explain often sensitive personal matters to a stranger. You need to deploy a wide range of technical skills and personal sensitivities in order successfully to conduct an interview. You may never become a perfect interviewer but, if you continually reflect on your performance and on how you interact with your client, you will always improve.

Further reading

Introductory

Boyle, F et al, *A Practical Guide to Lawyering Skills*, 3rd edn (Cavendish Publishing, 2005)

Chapter 8 deals with interviewing and includes sample interview plans and self-assessment checklists. There is a useful self-assessment checklist at p 250 and sample interview plans relating to a personal injury matter and a plea before venue hearing.

Webb, J et al, *Lawyers' Skills* 2010–11 (Oxford University Press, 2010)

A Legal Practice Course text that provides guidance on various legal skills including interviewing and advising in Chapter 2.

Intermediate

Maughan, C and Webb, J, *Lawyering Skills and the Legal Process (Law in Context)* (Cambridge University Press, 2005)

Chapter 3 covers all aspects of communication including barriers to effective communication. Chapter 5 addresses interviewing in some detail.

Advanced

Law Society's Initial Interviews Practice Note

In force from 20 May 2009, this Practice Note sets out good practice and the areas to be covered in an initial interview. Whilst aimed at practising solicitors, it is a useful guide to expected standards and content.

See www.lawsociety.org.uk/productsandservices/practicenotes/initialinterviews/2816.article.

Solicitors Regulation Authority Legal Practice Course Outcomes

Page 19 sets out the interviewing and advising standards expected on completion of the Legal Practice Course. These are a good benchmark even if you are not yet at the stage of postgraduate vocational study.

See www.sra.org.uk/documents/students/lpc/outcomes.pdf.

Activities

Activity 1: Fact-finding flair

The purpose of this exercise is to develop the skill of finding accurate information. As a group you should pick a general topic, such as holidays or films.

Pair up and spend 5 minutes obtaining as much relevant information about the topic from your partner as possible. You should then switch, so that the interviewer becomes the interviewee. At the conclusion of the interviews, the interviewer must present the findings of their interview to the rest of the group, who will be permitted to ask questions of the interviewer. The interviewee must then report on accuracy of the presentation.

Activity 2: Advice acumen

Read **Chapters 7** and **8** and the practical legal research report on Nicola Ridley's housing dispute (available on the Companion Website). Prepare an advice interview plan for Nicola's case. Consider how you can effectively deal with the various aspects of her case and the pros and cons of the various courses of action available to her.

Reviewed Article: Clinic, the University and Society

Law student attitudes towards pro bono and voluntary work: The experience at Northumbria University

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Abstract

This study considers whether participation in pro bono legal work during a programme of academic study at Northumbria University increases the likelihood of future participation in pro bono activity amongst law students.

This was a quantitative study in which an online survey, measuring altruistic attitudes, was sent to students enrolled on the M Law Exempting degree programme at Northumbria University. The author analysed the data by comparing the attitudes of those students who had engaged in pro bono activity during the fourth year of the programme against those students who had yet to engage in pro bono activity, being those students in Years 1, 2 and 3 of the programme.

The data suggests that whilst the students value engagement in pro bono activity, this is principally due to the personal benefits which they gain. In particular, respondents reported improvement in legal skills and enhanced employability as a consequence of participation in pro bono work. The data indicates that there is an increased awareness of social and economic issues whilst engaged in pro bono work but this does not translate into a desire to continue pro bono work after graduation.

It was therefore concluded that participation in pro bono work during the course of academic study does not increase the likelihood of future participation in pro bono activity following graduation.

INTRODUCTION

The availability of public funding in the UK in relation to legal disputes has significantly reduced following the changes to the scope of legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 coming into force on 1 April 2013.[1] As many areas of law have been taken out of the scope of legal aid, individuals who previously qualified for legal aid will either be required to represent themselves or seek an alternative source of funding in relation to their case.

It has been reported that the number of UK-based universities engaging in pro bono work has increased. 53% of respondent law schools stated they ran a pro bono programme in 2006[2] increasing to 91% of respondent law schools

[1] The scope of legal aid was limited by the Access to Justice Act 1999. Areas such as personal injury (other than clinical negligence), business cases, boundary disputes, company and trust law were removed from the scope of legal aid. Despite this most areas of law remained within scope although funding for representation at most tribunals was not available. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 reduced the scope of legal aid further with the default position that all areas were excluded from scope with only a limited number remaining within scope.

[2] Grimes, R. and Musgrove, J. (2006) LawWorks Students Project Pro Bono – The Next Generation. [Online] Available at: http://www.probonogroup.org.uk/lawworks/docs/Student%20report%20Final.pdf (last accessed: 28 January 2015) p.6

in 2010[3], and 96% of respondent law schools in 2014.[4] The 2014 report suggests that 70% of law schools of pro bono opportunities, assuming those that did not respond do not offer any opportunities.[5]

As more universities develop pro bono work programmes, and more law students have the opportunity to engage in pro bono work, it is plausible to suggest that future participation in pro bono activity might increase in the profession.

This study will consider whether participation in pro bono activity whilst at law school influences future participation in pro bono activity following graduation and in their future careers. The study will be in the context of the M Law Exempting degree programme at Northumbria University.

ALTRUISM AND PRO BONO

To understand the concept of pro bono and the motivations for individuals to undertake pro bono activities, it is necessary to understand the concept of altruism as pro bono work is a manifestation of altruism in the legal

[3] Grimes, Richard and Curtis, Martin, *LawWorks Student Pro Bono Report 2011*, LawWorks [online] Available at: http://lawworks.org.uk/tmp_downloads/x63c118c111s132z58f116a76p34d16m64y22v10i24l80g83/lawworks-student-pro-bono-report-2011.pdf (last accessed: 28 January 2015) p.10

[4] Carney, D. Dignan, F, Grimes, R. Kelly, G and Parker, R (2014) The LawWorks Law School Pro Bono and Clinic Report 2014 [online] Available at: http://lawworks.org.uk/tmp_downloads/k150c69y95y80r23d40x93s30c57g25v44t110q78i113t5/1014-033-lawworks-student-pro-bono-report-web.pdf (last accessed: 28 January 2015) p.10

[5] Ibid.

profession. Pro bono, or 'pro bono publico', literally means 'for the public good'. However, beyond the literal translation there are many definitions. One definition of pro bono comes from the Pro Bono Protocol:

> 'Legal advice or representation provided by lawyers in the public interest including to individuals, charities and community groups who cannot afford to pay for that advice or representation and where public funding and alternative means of funding is not available.
>
> Legal work is Pro Bono Legal Work only if it is free to the client, without payment to the lawyer or law firm (regardless of the outcome) and provided voluntarily either by the lawyer or his or her firm.'[6]

If we consider this definition, pro bono work requires lawyers to act without charge or expectation of charging their clients. As such, it is arguable that in the provision of pro bono work, lawyers are displaying altruistic behaviour that is 'generally understood to be behaviour that benefits others at a personal cost to the behaving individual.'[7] Gleitman et al state that '[o]ne of our great sources of pride as a species is our ability to exhibit *prosocial* behaviors [sic], behaviors [sic] that help others – assisting them in their various activities, supporting and aiding them in their time of need. But, of course,

[6] LawWorks. (2013). Protocol text. [Online] Available at: http://www.lawworks.org.uk/protocol_text (Last accessed: 18 January 2015)
[7] Kerr, B. Godfrey-Smith, P. Feldman, M.W. (2004). 'What is altruism'. TRENDS in Ecology and Evolution. 19(3): 135-140 [Online] DOI:10.1016/j.tree.2003.10.004 (Last accessed: 18 January 2015)

we don't always help.'[8] When we do help, it is often based on some 'expectation of later reciprocation.'[9]

Gleitman et al are of the opinion that true acts of altruism, those acts where there is no personal benefit at all, are fairly rare.[10] When people are asked why they engage in such activities, most state that 'altruistic actions make them better people'.[11] It could be argued that this, in itself, could be seen as a benefit to the individual concerned.

Bateson and Shaw have written that understanding altruism from a psychological point of view has been dominated by the 'universal egoism hypothesis', that is, persons act altruistically primarily for egotistical reasons. Their work suggests a complementary hypothesis, the 'empathy-altruism hypothesis' that suggests the notion that both egoism and altruism operate simultaneously. It is also suggested that people can act for personal benefit, the benefit of others or, indeed, a combination of both.[12]

It must therefore be considered whether it is possible to teach or instil a sense of altruism through education.

[8] Gleitman, H. Gross, J. and Reisberg, D. (2011). *Psychology*. 8th edn. London: W.W.Norton & Company Ltd p.532
[9] Ibid. p.534
[10] Ibid.
[11] Piliavin & Callero, 1991; M. Snyder & Omoto, 1992 as cited in Gleitman et al, 2011 (See note 6)
[12] Ibid, pp.341-342

> 'Where Socrates appeared to argue that *no one* teaches virtues, Protagoras argues that *everyone* teaches them'[13]

Aristotle drew a distinction 'between self-control and virtue applied primarily to moral dispositions as honesty, temperance, courage, justice, liberality and so on.'[14] Values as principled commitments are rules which are followed although not wholeheartedly committed. Values as virtues are exhibited and embodied as at least a matter of second nature.[15] This is an important distinction within the context of this study. We can teach students the rules, such as the professional code of conduct, but can we teach or instil a moral commitment to pro bono work, meaning that it becomes second nature to our students.

It has been a matter of some debate as to the role of higher education in teaching students not just knowledge but also social virtues. Heuser argues that 'when moral and ethical considerations are built into every aspect of the primary activities of higher education-research, teaching and public service-the ability of colleges and universities to create academic social cohesion is greatly amplified, as is their propensity to generate social cohesion in

[13] Pence, G.E. (1983) 'Can compassion be taught'. J Med Ethics. 9(4):189-91 [Online] Available at: http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1059297/pdf/jmedeth00011-0005.pdf (Last accessed: 18 January 2015) p.189

[14] Carr, D. (2011), 'Values, virtues and professional development in education and teaching', International Journal of Educational Research, 50(3), pp.171-176, [Online] DOI:10.1016/j.ijer.2011.07.004 (Last accessed: 18 January 2015), p.172

[15] Ibid. p.173

society.'[16] Lewis observes that 'universities have forgotten their larger educational role… that the fundamental job of undergraduate education is to turn eighteen- and nineteen-year-olds into twenty-one- and twenty two-year-olds, to help them grow up, to learn who they are, to search for a larger purpose for their lives, and to leave college as better human beings.'[17]

CLINICAL LEGAL EDUCATION AND PRO BONO

There are many academic articles considering Clinical Legal Education and Pro Bono. McCrimmon states that 'while clinical courses and pro bono projects share common attributes, they are separate and distinct entities.'[18] McCrimmon draws upon the Association of American Law Schools Pro Bono Project Report, *Learning to Serve*, to illustrate his point. In particular, the Report states:

> 'Both clinics and pro bono programs serve important educational values. They each provide students an opportunity to learn about the legal needs of people who are poor. They each provide an opportunity to learn about the satisfactions of serving a client. But the principal goal of most clinics is to teach students lawyering skills and sensitivity

[16] Heuser, B. L. (2007) 'Academic social cohesion within higher education', Prospects 37, pp.293-303. [Online] DOI 10.1007/s11125-008-9036-3 (Last accessed: 18 January 2015)
[17] Lewis, H. R. (2007) *Excellence without a Soul: Does Liberal Education Have a Future?* United States: PublicAffairs p. xiv
[18] McCrimmon, L. A. (2003) 'Mandating a Culture of Service: Pro Bono in the Law School Curriculum', LegEdRev 4 [Online] Available at: http://www.austlii.edu.au/au/journals/LegEdRev/2003/4.html (Last accessed: 18 January 2015)

> to ethical issues through structured practice experiences and opportunities to think about and analyze those experiences. By contrast, the most important single function of pro bono projects is to open students' eyes to the ethical responsibility of lawyers to contribute their services.'[19]

Whilst the Report states there are similarities between clinical legal education and pro bono, it states that they are different in their objectives. However, Bloch identifies that the 'original "subject matter" of clinical legal education was essentially legal aid and public interest practice'[20] whilst Ellman et al state that 'one goal of clinical teaching is to foster, and to carry on, legal practice in the public interest. But our understanding of this goal is changing, and so is our understanding of the means by which it might be achieved.'[21] It appears the objective of clinical legal education has historically been public interest practice and therefore clinical legal education is a form of pro bono practice. However, Bloch goes on to identify that '[s]ome have felt recently that a more deliberate skills orientation is needed in clinical scholarship.'[22] It appears that it is this focus on skills development that differentiates clinic from pro bono. However, it is also arguable that

[19] Association of American Law Schools Commission on Pro Bono and Public Service Opportunities, (undated), 'Learning to Serve: The Commission's Findings and Proposed Actions', [Online] Available at http://aalsfar.com/probono/report2.html#findings (Last accessed 18 January 2015)
[20] Bloch, F.S. (2004) 'The case for clinical scholarship' 4 Int'l J. Clinical Legal Educ. pp.7-21. HeinOnline [Online] Available at http://heinonline.org (Last accessed: 18 January 2015) p.12
[21] Ellmann, S. Gunning, I.R. and Hertz, R (1994), 'Why not a clinical lawyer-journal?', 1 Clinical L. Rev. pp.1-7, HeinOnline [Online] Available at: http://heinonline.org (Last accessed: 18 January 2015)
[22] Op.cit. note 18, p.13

individuals conduct pro bono work for reasons other than altruistic reasons of benefiting society.

Setting aside the definition of clinical legal education and pro bono, clinical legal education has the potential to be used as a tool to increase a student's sense of social awareness. Grose identifies clinical education as having 'three broad goals: providing learning for transfer; exposing students to issues of social jus-tice; [sic] and offering opportunities to practice lawyering skills.'[23] For the purposes of this study, it is the second goal, namely the exposure to social justice, which the author was interested in exploring and the extent to which this goal is being achieved. However, it will be necessary to include the other goals in order to consider whether there is more than one motivating factor.

It is suggested that 'encouraging law students to become involved in pro bono work is likely to develop their commitment to, and understanding of, professional values, which should in turn lead to their active involvement in pro bono work later in their professional lives.'[24]

Giddings comments that clinics 'are often identified as important in enhancing the commitment of students to professional ideals and values,

[23] Grose, C. (2013) 'Beyond Skills Training, Revisited: The Clinical Education Spiral' Clinical L. Rev. 19, pp. 489-515 HeinOnline [Online]. Available at: http://heinonline.org (Last accessed: 18 January 2015) p. 493
[24] Op.cit. note 2

fostering the values that promote pro bono contributions.'[25] However, Giddings goes on to recognise that these claims are difficult to support with empirical data.[26]

In considering whether clinical programmes influence students' sense of ethical and social awareness, Schrag and Meltsner recognise that there are no empirical studies that compare law graduates who took clinic with those who did not.[27] However, they go on to state that 'many thousands of lawyers have begun their careers much better able to take responsibility for helping clients, with much greater understanding of how social institutions really work, and with greatly heightened awareness of ethical issues and how to address them.'[28] Palermo and Evans recognised this issue and stated 'a central motive for undertaking [their] study was the need for empirical information about lawyers' responses to ethical challenge over time'.[29] Interestingly, and contrary to the stated aims of clinical legal education, Palermo and Evans study suggests that students who had a clinical experience were less interested in pro bono work over time.[30]

[25] Giddings, J. (2013) *Promoting Justice Through Clinical Legal Education* Melbourne: Justice Press, p. 64
[26] ibid
[27] Schrag, P.G and Meltsner, M. (1998) *Reflections on Clinical Legal Education* Boston: Northeastern University Press, p.9
[28] ibid
[29] Palermo, J. and Evans, A. (2008), 'Almost There: Empirical Insights into Clinical Method and Ethics Courses in Climbing the Hill towards Lawyers' Professionalism', 17 Griffith L. Rev., pp.252-284, HeinOnline [Online] Available at http://heinonline.org (Last accessed 18 January 2015) p.253
[30] Ibid. p272

There have also been a number of studies, conducted in the United States, regarding the impact of pro bono programmes at law schools.

Granfield states that:

> 'While there has been anecdotal evidence supporting the value of law school pro bono, no institution has taken an empirical examination of the impact of pro bono participation on law school graduates. This seems to suggest that many proponents of law school pro bono view such policies as an unqualified public good that is consistent with the service ideals of the legal profession.'[31]

Rhode undertook what may be considered the first empirical analysis of lawyers and their attitudes towards pro bono work.[32] Rhode reports that 59% of the lawyers surveyed cited a desire for a financially rewarding and secure career as the reason for choosing a legal career. The next most common motivations were finding intellectual challenges (52%) and keeping options open (41%). Only 31% of the respondents indicated a desire to promote social justice whilst 29% stated that they wanted to prepare for public service.[33]

Rhode goes on to state that fewer than a third of the respondents had changed their objective during law school. Of the respondents who did

[31] Granfield, R. (2007). 'Institutionalizing Public Service in Law School: Results on Impact of Mandatory Pro Bono Programs' Buff. L. Rev. 54: 1355-1412 Heinonline [Online] Available at: http://heinonline.org (Last accessed: 18 January 2015), p.1372

[32] Rhode, D L. (2003) 'Pro Bono in Principle and in Practice'. J. Legal Educ. 53:413-464 HeinOnline [Online]. Available at: http://heinonline.org (Last accessed: 18 January 2015)

[33] Ibid p. 454

report a shift in attitude, a 'significant number' reported a change in attitude concerning pro bono and public interest work. A fifth (22%) of these respondents reported that a positive law school experience had encouraged involvement in pro bono activity, whilst about a fifth (19%) reported a negative law school experience had 'dampened' their desire to do pro bono work. Other factors steering lawyers away from public interest work included student loans and differential salary levels.[34] Rhode states that her study fails to confirm the belief that a law school pro bono experience increases the likelihood of continued pro bono contributions. A positive experience with 'public interest work' can have a significant impact, but such an experience need not come from a 'pro bono placement' nor does a pro bono placement ensure a positive experience.[35]

Granfield reports that 58% of respondents to his survey believed they had acquired valuable legal skills from their participation in pro bono activity at law school whilst 28% report that their pro bono experience helped them acquire their initial job after graduation.[36] Further, Granfield also comments that, 'contrary to anecdotal evidence, half the respondents did not believe

[34] Ibid p. 455
[35] Ibid p. 457
[36] Op.cit. note 29 p.1379

their law school pro bono experiences made them more committed to doing pro bono work as a practicing attorney.'[37]

Both Granfield[38] and Rhode[39] cite commitment to public service and a sense of personal satisfaction as the principle motivations for conducting pro bono work whilst factors such as enhancement of legal skills were of secondary importance.

The data from the studies carried out by both Granfield and Rhode produce very similar conclusions, both casting doubt on the notion that you can promote pro bono work in the legal profession by exposing law students to pro bono during law school. However, in Granfield's opinion it is 'still too early to perform a post-mortem on the law school pro bono movement.'[40] He goes on to state that '[m]any respondents… reported that their law school pro bono experiences were not well integrated into their overall education… For the law school pro bono movement to have an impact, the pro bono experiences of law students must be better integrated into the general law school curriculum.'[41]

Whilst the studies of Granfield and Rhode provide substantial evidence for the proposition that law school pro bono programmes do not influence the

[37] ibid
[38] Ibid p. 1399
[39] Op.cit. note 30 pp. 446-447
[40] Op.cit note 29 p. 1412
[41] ibid

attitudes of students in relation to their future career, it is noted that both studies consider data drawn from practising lawyers rather than current students. It is arguable that in both studies, respondents' answers may have varied had they taken the survey whilst at law school or shortly after leaving law school. It is plausible to consider that their attitudes have been shaped by their experiences since leaving law school.

Additionally, as Granfield recognises himself, the respondents' attitudes could be shaped by their experience at law school.[42] In particular, Granfield refers to better integrating the pro bono experience into legal education.[43] Schmedemann has also considered whether a pro bono participation in law schools encourages future participation whilst in practice. This study, which considered a voluntary pro bono programme, found a significant correlation between participation in a law school pro bono programme and participation in practice. A further correlation was shown between attitudinal dispositions related to pro social values and pro bono involvement in practice.[44]

The research indicates that there is no definitive answer to which clinical and pro bono programmes enhance students.

[42] ibid
[43] ibid
[44] Schmedemann, D. (2009), 'Priming for pro bono: The impact of Law School on Pro Bono Participation in Practice' in Granfield, R. and Mather, L. (eds) *Private Lawyers in the Public Interest,* New York: Oxford University Press, pp.73-94, p.79

ALTRUISM AND OTHER PROFESSIONS

It may also be useful to consider attitudes towards altruism in other professions as altruistic attitudes are often seen as 'a defining characteristic of professionalism.'[45] Of note is a study by Coulter et al that compared the altruistic attitudes of business, law and medical students.[46] Coulter et al report that 3% of business students and 17% of law students felt that working with the poor was important to their careers. However a significantly higher percentage (33% of business students and 40% of law students) 'felt that doctors should be required to provide medical care to the poor.'[47]

Cruess, states that altruism is thought to be a defining characteristic of professionalism and a key feature of medical practice.[48] However, Roche et al, drawing upon Coulehan and Williams, state that 'in medical education, students go through a maturational process that some claim undermines any idealism they may have had upon entering.'[49] They go on to state that 'some

[45] Cruess and Cruess, 1997 as cited in Coulter, I. D. Wilkes, M. Der-Martirosian, C. (2007). 'Altruism revisitied: a comparison of medical, law and business student' altruistic attitudes' Medical Education. 41: 341-345 [Online] DOI: 10.1111/j.1365-2929.2007.02716.x, (Last accessed: 18 January 2015) p.342
[46] Coulter, I. D. Wilkes, M. Der-Martirosian, C. (2007). 'Altruism revisitied: a comparison of medical, law and business student' altruistic attitudes' Medical Education. 41: 341-345 [Online] DOI: 10.1111/j.1365-2929.2007.02716.x (Last accessed: 18 January 2015)
[47] Ibid p. 345
[48] Ibid p. 342
[49] Roche III, W. P., Scheetz, A. P., Dane, F. C., Parish, D. C. and O'Shea, J. T. (2003). 'Medical Students' Attitudes in a PBL Curriculum: Trust, Altruism, and Cynicism' Academic Medicine 78(4):398-402. p. 398

educators note that some students who enter medical school with compassion and altruism become more cynical.'[50]

Problem based learning and an early introduction to clinical medicine were considered two possible changes that could address the cynicism observed in medical students.[51] It is reported that the effect of problem-based learning curriculum has been seen to prevent a more cynical or less altruistic attitude from developing in medical students and has in fact had a positive effect on their attitudes towards altruism.[52]

Wear and Zarconi highlight the effect of role modelling on the attitudes of students.[53] They draw upon the work of Coulehan that urges an environmental change via role modelling:

> 'The first requirement for a sea change in professionalism is to *increase dramatically* the number of role model physicians at every stage of medical education. By role model physicians I mean full-time faculty members who exemplify personal virtue in their interactions with patients, staff and trainees; who have a broad, humanistic perspective; and who are devoted to teaching and willing to forego high income in order to teach….[sic] Their presence would dilute and diminish the conflict between tacit and explicit values, especially in the hospital and the clinic. The teaching environment would contain fewer hidden

[50] ibid
[51] Ibid p. 399
[52] Ibid p. 402
[53] Wear, D and Zarconi, J. (2008) 'Can Compassion be Taught? Let's Ask Our Students' J Gen Intern Med 23(7):948-953. [Online] DOI: 10.1007/s11606-007-0501-0 (Last accessed: 21 August 2013)

> messages that say "Detach" while at the same time overt messages are saying "Engage." What trainees need is time and humanism'[54]

This argument puts forward the idea that students can learn virtue through role modelling and therefore if they are taught by individuals who themselves exhibit virtues, and as such are positive role models, then this will in turn have a positive effect on the students. However, Wear and Zarconi also recognise that having 'a few positive role models in a clinical setting will not do the trick.'[55] Pence states:

> 'Morality is not learned the way one learns to play a flute or to do a tracheotomy by observing a 'master' proficient in a certain craft or technique. Compassion similarly is not learned from a Master of Compassion (or the chief role-model thereof). Instead it is developed or not by the 'shape' of the medical environment in which students learn medicine. The overall medical context in which students thrive or stagnate is more important than the efforts (however noble) of any one individual.'[56]

The literature above suggests that one must look at the whole educational institution. Whilst the empirical evidence to date suggests that pro bono and clinical legal education does not instil a sense of public service, or altruism

[54] ibid
[55] ibid
[56] Op.cit note 11 p. 190

within law students, there is explicit criticism of the programmes that students perceive as 'not well integrated into their overall legal education.'[57]

It is clear from the literature that there is little empirical evidence regarding the participation in pro bono and clinical legal education programmes, or indeed other altruistic activities, and the influence this has on students' altruistic attitudes and their participation in altruistic activity during their career. The literature in relation to legal education, particularly with reference to clinical legal education and pro bono, suggests that altruism is considered a key aim. However, the empirical research by Rhode and Granfield does not support this assertion.

There have been small-scale studies within medicine suggesting that altruism can be instilled through role modelling and the environment in which students learn. The study carried out by Roche et al concludes that students were not any less altruistic than their junior counterparts as a consequence of problem-based learning.[58] This study relates to retaining altruistic attitudes rather than instilling them. This can therefore arguably be distinguished from the present study on the basis that it is about instilling altruism rather than retaining it. Further, despite the conclusions, the authors could not establish whether the results were as a consequence of more women

[57] Op.cit note 29 p. 1412
[58] Op.cit note 47 p. 402

attending medical school rather than the introduction of problem-based learning into the curriculum.

The study by Wear and Zarconi utilised a qualitative approach and as such it is difficult to generalise the findings. The authors identify a limitation in their own research that only 46% of potential respondents gave permission to participate in the study. Again, this limits the generalisation of the results.

METHODOLOGY

Whilst the above-mentioned studies each have their limitations, the data drawn from each is useful in designing the research for this study. The model of legal education at Northumbria University, and in particular the M Law Exempting degree is an integrated model with clinical legal education at its core. The programme is described as one where '[s]tudents are introduced to legal rules and concepts on both their theoretical and practical contexts from day one. They engage in clinical and experiential learning throughout the course culminating in full case work on behalf of real clients in the final year.'[59] As such, it is arguable that the M Law Exempting degree is the integrated model described by Granfield.

[59] Northumbria University. (2012) LLB (Hons)/M Law Exempting Full-time. Available at: http://www.northumbria.ac.uk/sd/academic/law/courses/ug/innovative/mlawexempting/ (Last accessed: 18 January 2015)

In the fourth year of the programme, students participate in the Student Law Office module. This is a credit-bearing module where student advise and represent real clients. Students can also participate in extra curricula activities such as StreetLaw throughout any year of the programme. The programme integrates problem-based learning and clinical elements in earlier years which, as identified above, have the potential to mean students are less cynical and have a positive effect on their altruistic attitudes.

The model of legal education adopted by Northumbria University also appears to align with the models discussed above in medical education. Northumbria University has arguably created an environment where students are taught by lawyers, from who they can model themselves. It is therefore to be seen whether the Northumbria University model, integrating legal education and pro bono work can instil a sense of altruism in students and encourage participation in future pro bono activity.

This study received ethical approval from Northumbria University.

A questionnaire (see Annex A) was sent electronically to all students studying on the M Law Exempting Degree programme at Northumbria University in the academic year 2012/13. Respondents to the survey were anonymous.

The survey was designed to elicit information regarding students attitudes to pro bono work at university, whether mandatory or voluntary. 'Pro bono' was defined in the survey as 'the provision of legal services without charge to the client'. This is a wide definition and encompasses the clinical legal education module carried out in the Student Law Office as no charge is made to the client. However, students were also asked about their volunteering outside of university. 'Voluntary work' was defined as 'work without reward other than expenses'. Voluntary work could be either legal or non-legal. This study considers the altruistic ethos of the students and therefore, it does not matter whether this is manifested by legal or non-legal work. Voluntary work is unlikely to fall within any definition of clinical legal education as it is not conducted through the university. However, it may fall within the definition of pro bono if the provision of legal service is not mandated. The survey utilised Likert scales, rankings and free text boxes to elicit to attitudinal responses.

The questionnaire was sent to a total of 1010 students. The breakdown of student numbers by year group:

Year 1 – 348 students

Year 2 – 288 students

Year 3 – 198 students

Year 4 – 176 students

A descriptive statistical analysis was used to provide a profile of the respondents, outlining their experiences and their attitudes towards pro bono and voluntary work. A Mann-Whitney U-Test[60] was conducted to determine statistical significance of the relationship between students' pro bono experience and their altruistic attitudes as well as their attitudes towards future participation in pro bono activity.

The survey had a low response rate with a total of 44 questionnaires returned. 7 questionnaires were returned from each of the Year 1, 2 and 3 groups whilst 23 questionnaires were returned from Year 4.

DISCUSSION

Data analysis suggests that the primary motivation behind both pro bono work and voluntary work is for personal benefit. Respondents also valued the skills development and enhanced employment prospects rather than the altruistic benefits of carrying out such work.

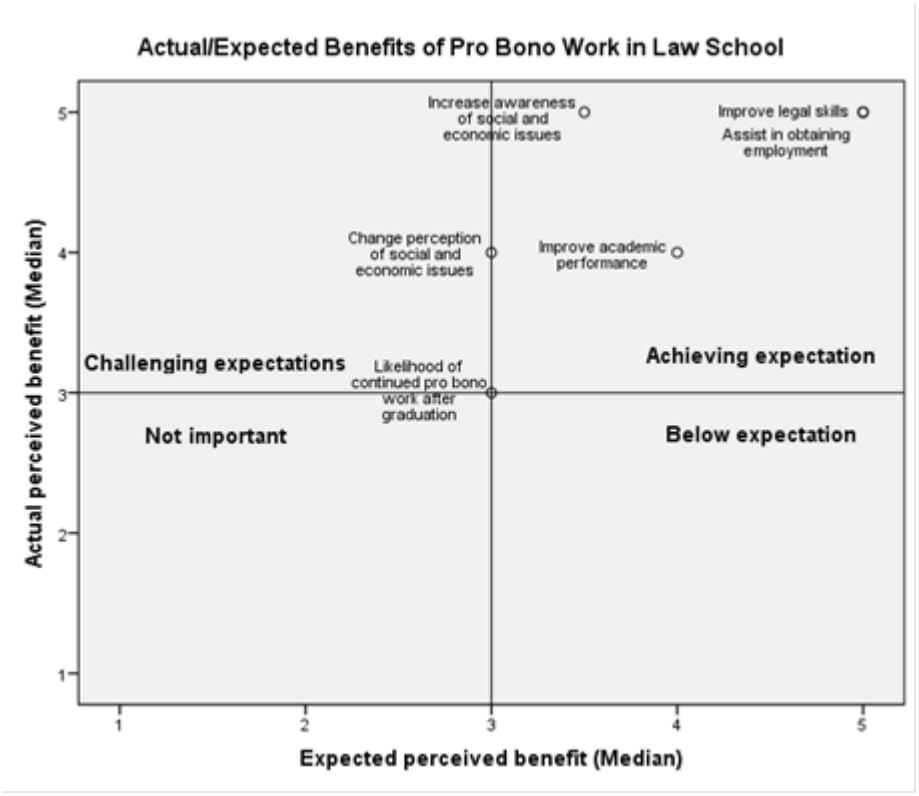
[60] There is debate as to whether parametric tests, such as t-tests, are appropriate for ordinal data. See Jamieson, S. (2004) 'Likert scale: how to (ab)use them' *Medical Education*. 38:1212-1218 [Online] DOI: 10.1111/j.1365-2929.2004.02012.x (Last accessed: 18 January 2015) and Norman, G. (2010) 'Likert scales, levels of measurement and the "laws" of statistics' Adv in Health Sci Educ 15:625-632 [Online] DOI: 10.1007//s10459-010-9222-y (Last accessed: 18 January 2015). As the data collected was ordinal, it was deemed a non-parametric test was deemed the appropriate statistical test for this study.

Generally, students in Year 1 (n=6), Year 2 (n=7) and Year 3 (n=5) stated that they did not currently undertake any pro bono work as part of their programme of study. One Year 1 (n=1) student stated that they did not know whether they undertook pro bono work as part of their programme of study whilst one Year 3 (n=1) student stated they did not know and one Year 3 (n=1) student stated they did undertake pro bono work as part of their programme of study. Nineteen Year 4 (n=19) students responded to the question, all of whom undertook pro bono work as part of their programme of study. Four Year 4 (n=4) students did not respond to this question.

Figure 1 below illustrates the perceptions of students who had undertaken pro bono work as part of their programme of study compared with those who had not. Students were asked whether they agreed or not with the following statements in relation to pro bono work as part of their programme of study:

- Pro bono improves legal skills;
- Pro bono assists in obtaining employment;
- Pro bono work improves academic performance;
- Pro bono work increases awareness of social and economic issues;
- Pro bono work changes perception of social and economic issues; and
- Pro bono work increases likelihood of continuing pro bono work after graduation.

Figure 1



It can been seen that the respondents expected pro bono work to provide a personal benefit to them; such as improved legal skills and enhanced employability, and further, the respondents who have engaged in pro bono work perceive that they have been rewarded with these benefits. This perhaps supports the educational imperative of pro bono work as part of a programme of study but does not assist in determining whether students are instilled with a sense of altruism.

Figure 1 also suggests that there was marginally more appreciation of social and economic issues. It is plausible that this is due to the fact that students are faced with real legal issues and therefore have a greater appreciation of

the problems society faces. However, further research of a qualitative nature would be required to investigate this.

Despite an apparent greater appreciation for social and economic issues, it is highlighted that respondents were neutral to the statement as to whether they would participate in future pro bono activity following graduation. This may indicate that participation in pro bono activity at law school may not encourage future participation in pro bono activity. Further research is required to establish why respondents are of this view.

89% (n=34) of respondents reported that they undertook, or had undertaken, voluntary work. Further, there appears to be no correlation between students participating in pro bono work at university and an undertaking of voluntary work outside their programme of study as 76% (n=16) of respondents from Years 1, 2 and 3 stated they undertook, or had undertaken, voluntary work whilst 78% (n=18) of respondents from Year 4 undertook voluntary work. This may suggest that the respondents had an altruistic ethos and supports the view that individuals with an interest in the subject matter of the survey are inclined to respond. This may highlight the problem of non-response bias, and in particular that because those responding are self-selecting, their views are unlikely to represent the views of the population as a whole. This is particularly so given the low response rate to the survey. As the independent variable in this study is whether or not

students have participated in pro bono work at law school, it is irrelevant that the survey is unlikely to represent the views of the whole student cohort on the M Law Exempting degree.

In any event, when the rationale behind the voluntary work is analysed, this suggests that respondents may not be so altruistic. Only 26% (n=8) of the respondents who provided a reason for undertaking voluntary work reported a reason without personal benefit to themselves such as helping people or 'giving something back'.

Whilst it is acknowledged that a higher percentage did provide some altruistic motive, many of these respondents also provided a reason encompassing some personal benefit such as enhanced employability. 36% (n=12) of respondents did not cite any altruistic motive for undertaking voluntary work.

The reasons for engaging in both pro bono and voluntary work appear to show that respondents generally have a desire to attain some personal gain from their altruistic actions, and results are therefore consistent with the empathy-altruism hypothesis espoused by Bateson and Shaw, as cited in Coulter et al.[61]

[61] Op.cit. note 44

This concept must therefore be borne in mind when considering whether conducting pro bono work at law school can instil an altruistic ethos in students.

If we first consider the perceived benefits of undertaking pro bono by those students yet to undertake pro bono work against the those students who had undertaken pro bono work, it is apparent that the common expected benefit is some form of personal gain. This includes improved legal skills, enhanced employability and improved academic performance. The respondents were in general agreement that they do or will benefit from the pro bono experience.

When considering the altruistic benefits, respondents who had not undertaken any pro bono work did not really consider these benefits to be an issue, providing neutral responses to the statements. However, respondents who had undertaken pro bono work at law school did report a change in attitude. They strongly agreed that pro bono work had increased their awareness of social and economic issues. They also agreed that pro bono work had changed their perception of social and economic issues. This is indicative that whilst students may not undertake pro bono work for altruistic reasons, the work they carry out can potentially influence their attitudes going forwards. Whilst the primary motivation for engaging in pro

bono activity is personal, it is plausible to conclude that students, through exposure to social issues, do gain a degree of altruistic appreciation.

Whilst many law schools engage primarily in clinical legal education and pro bono work due to the educational value, there are other benefits associated with the provision of pro bono work for society as a whole.

The data suggests that it is the personal benefits of clinical legal education and pro bono work that students value more than any social benefit. When asked to rank statements, respondents ranked enhanced employment[62] and enhanced legal skills[63] as the most important reasons to undertake pro bono work at law school. Statements reflecting altruistic motives, such as improving awareness of social issues[64] and encourage future involvement in pro bono activity[65] were ranked lower by both groups.

Whilst the work may increase a student's social awareness, it may not influence their future behaviour. Respondents, whether having carried out pro bono work or not at law school, were neutral when it came to the statement as to whether they would carry out pro bono work following graduation as shown in *figure 1* above. As such, this suggests that the benefit to society as a whole may be of limited value. The provision of pro bono and clinical programmes at law school is unlikely to result in a generation of

[62] Both groups, Years 1, 2 and 3 and Year 4 students, gave a median rank of 2
[63] Years 1,2 and 3 gave a median rank of 2 whilst Year 4 gave a median rank of 2.5
[64] Both groups gave a median rank of 4
[65] Both groups gave a media rank of 5

altruistic lawyers providing free legal advice in the future. However, by utilising the educational value of this activity, law schools can go some way towards meeting the needs of society themselves. In essence, if more law schools adopt a mandatory pro bono/clinical programme, this will create capacity for the public to obtain free legal advice from the law school itself and as such go some way towards filling the legal advice gap.

However, attitudes did differ in relation to whether law schools should offer mandatory or voluntary pro bono opportunities. Respondents who had not undertaken mandatory pro bono work as part of their programme were neutral as to whether law schools should offer mandatory pro bono programmes. Respondents who had undertaken pro bono work expressed a stronger opinion that students should undertake pro bono work as a mandatory part of their programme of study; the difference between the two groups of respondents was statistically significant.[66] Whilst the median suggested both groups agreed that there should be voluntary pro bono opportunities at law school, those respondents who had not undertaken a mandatory programme held a stronger opinion. However, this difference was not statistically significant[67]. The data suggests that whilst students do value pro bono work within their programme of study. Students who have not had the opportunity to undertake pro bono work want voluntary

[66] U=102.000, p=.022
[67] U=158.500 p=.534

opportunities to do so, whilst students who have done pro bono work state that students should do so. It is likely that this is due to the personal benefits that the students gain as a consequence of pro bono work rather than the social benefit of such work.

The data appears to be consistent with the earlier studies carried out by Granfield and Rhode. In particular, it is noted that the data suggests students are not more inclined to engage in future pro bono work if they have participated in pro bono activity whilst at law school.

LIMITATIONS

The low response rate is a clear limitation in relation to this study. The principle issue relates to external validity of the results as clearly it is difficult to generalise to results across all students enrolled on the M Law exempting degree. As Norman points out, '[i]t is difficult to argue that 2 physicians or 3 nursing students are representative of anything…'[68] However, this study does not purport to generalise the views of all students on the M Law Exempting degree. This study is principally concerned with establishing whether there is a link between pro bono engagement in law school and the likelihood of future pro bono activity. As this research has elicited a similar

[68] Norman, G. (2010) 'Likert scales, levels of measurement and the "laws" of statistics' Adv in Health Sci Educ 15:625-632 [Online] DOI: 10.1007//s10459-010-9222-y (Last accessed: 18 January 2015), p.628

number of responses from those students engaged in pro bono activity, and those students who are yet to engage in pro bono activity, a comparative descriptive analysis can still be made. Moreover, whilst it has been suggested that the response rate was linked to the attitudes of the student towards pro bono there are a number of alternate and non-exclusive explanations. For example, the students may have had other commitments such as exams or coursework. Alternatively there may have been survey fatigue as they are faced with numerous surveys at the end of the academic year.

A further limitation of this study is that it relates to students studying on the M Law Exempting degree at Northumbria University. The author makes no claims regarding the application of the data to other students or institutions and it is recognised that further research is required although the findings cannot be generalised.

Norman also highlights a further issue with small sample sizes, namely that there may be concern about normal distributions.[69] By utilising the Mann-Whitney U-test, there were no presumptions that the data was normally distributed in the performance of the statistical analysis. Likert scales often have skewed or polarised distribution[70] and this was considered at the

[69] Ibid.
[70] Jamieson, S. (2004) 'Likert scale: how to (ab)use them' Medical Education. 38:1212-1218 [Online] DOI: 10.1111/j.1365-2929.2004.02012.x (Last accessed: 18 January 2015) p.1218

design stage as outlined above. However, by utilising the Mann-Whitney U-test, it is acknowledged that it is not as sensitive to statistical significance and therefore it may be that the data has not been tested as robustly as it might otherwise have been. However, for the reasons outlined above, it was deemed inappropriate to use alternative tests such as the t-test.

There is a further issue relating to the internal validity of the research. In so far as any causal relationship between the independent and dependent variables are suggested, it is noted that correlation does not necessarily mean causation. This study merely aims to establish a potential relationship between pro bono activity at law school and the likelihood of future pro bono activity.

A further limitation of this study relates to the reliability of the data, and in particular, reference should be made to the stability. The author highlights above that identifies respondents answers can change over the course of time. This is seen as an inherent issue within social research concerning attitudes as individual attitudes can alter over the course of time. However, with this in mind, the data is consistent with the studies of Granfield (2007) and Rhode (2003) suggesting that it should be considered reliable.

CONCLUSION

Whilst acknowledging the limitations of this study and that there is scope for further research, it does suggest that participation in pro bono work whilst at Northumbria University is not likely to increase the likelihood of future participation in pro bono activity following graduation.

The study supports the limited literature currently available indicating that law school pro bono programmes do little, if anything, to instil a sense of altruism in law students. However, the data further suggests that students value pro bono programmes and it is perceived that they carry substantial personal benefits. In particular, students report improved legal skills and enhanced employability. It is suggested that for these reasons, pro bono programmes are worthwhile and it is plausible to conclude there is value to society in adopting such programmes through the provision of free legal advice.

Annex A

Student attitudes towards pro bono and voluntary work

I am researching student perceptions of pro bono and voluntary work whilst at Law School. The aim of this research is to better understand how pro bono work in law schools and other voluntary work influences student attitudes.

Please note that the definition of 'pro bono' for the purposes of this survey means the provision of legal services without charge to the client. The definition of voluntary work is to engage in work without reward other than expenses.

As a student at Northumbria University, your participation in a survey would be appreciated. You will not be asked to provide any personal information and your answers will remain anonymous. To assist in maintaining anonymity, please do not include any identifying information in your answers such as names and places of work. The survey should take no more than 10 minutes to complete. You can exit the survey at any time by clicking on the 'Exit' button.

The information will be used to complete my dissertation module for an MA in Academic Practice. The information may also be used for publication in journal articles and conference papers.

Further information about this research can be found in the leaflet entitled 'Information about Research' attached to the invitation e-mail.

This study has ethical approval by the ethics committee of Faculty of Health and Life Sciences at Northumbria University.

The study also complies with the Data Protection Act 1998.

If you are happy to continue, please click next.

1. Which year of the MLaw degree are you currently in?

- ◯ Year 1
- ◯ Year 2
- ◯ Year 3
- ◯ Year 4

2. Are you male or female?

- ◯ Male
- ◯ Female

3. Please state why you chose to study law?

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Student attitudes towards pro bono and voluntary work

4. Do you intend to pursue a legal career?

- ◯ Yes
- ◯ No
- ◯ Don't know

5. Please state why you wish to pursue a legal career?

6. If you known, please state your intended career aspirations and the reasons for these:

7. Do you currently undertake any pro bono work as part of your programme of study?

- ◯ Yes
- ◯ No
- ◯ Don't know

8. What pro bono work do you undertake as part of your programme of study?

- ☐ Student Law Office (live client)
- ☐ Street Law
- ☐ Other

Other (please specify)

Student attitudes towards pro bono and voluntary work

9. Approximately how many hours per week do you engage in pro bono as part of your programme?

- ◯ Less than 1 hour
- ◯ 1-3 hours
- ◯ 3-5 hours
- ◯ 5-7 hours
- ◯ more than 7 hours

10. Please state whether you agree or disagree with the following statements

	Strongly disagree	Disagree	Neither agree nor disagree	Agree	Strongly agree
Pro bono work will assist in improving my legal skills	◯	◯	◯	◯	◯
Pro bono work will improve my academic performance	◯	◯	◯	◯	◯
Pro bono work will assist me in obtaining employment	◯	◯	◯	◯	◯
Pro bono work has increased my awareness of social and economic issues	◯	◯	◯	◯	◯
Pro bono work has changed my perception of social and economic issues	◯	◯	◯	◯	◯
I am likely to continue undertaking pro bono work after I graduate	◯	◯	◯	◯	◯

11. Do you intend to undertake pro bono work in the future as part of your programme of study?

- ◯ Yes
- ◯ No
- ◯ Don't know

Student attitudes towards pro bono and voluntary work

12. What pro bono work do you intend to undertake as part of your programme of study?

- [ ] Student Law Office (live client)
- [ ] Street Law
- [ ] Other

Other (please specify)

13. Please state whether you agree or disagree with the following statements

	Strongly disagree	Disagree	Neither agree nor disagree	Agree	Strongly agree
Pro bono work will assist in improving my legal skills	◯	◯	◯	◯	◯
Pro bono work will improve my academic performance	◯	◯	◯	◯	◯
Pro bono work will assist me in obtaining employment	◯	◯	◯	◯	◯
Pro bono work has increased my awareness of social and economic issues	◯	◯	◯	◯	◯
Pro bono work has changed my perception of social and economic issues	◯	◯	◯	◯	◯
I am likely to continue undertaking pro bono work after I graduate	◯	◯	◯	◯	◯

14. Would you like to undertake pro bono work as part of your study programme?

- ◯ Yes
- ◯ No
- ◯ Don't know

Please specify a reason for you answer

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Student attitudes towards pro bono and voluntary work

15. Outside of your programme of study, do you undertake or have you previously undertaken any voluntary work?

- ◯ Yes
- ◯ No
- ◯ Don't know

16. What type of voluntary work do you undertake?

- ◯ Legal
- ◯ Non-legal
- ◯ Both

Please specify your voluntary work

17. Please state why you undertake voluntary work?

18. On average, how many hours per week do you engage in voluntary work?

- ◯ Less than 1 hour
- ◯ 1- 3 hours
- ◯ 3-5 hours
- ◯ 5-7 hours
- ◯ more than 7 hours

Student attitudes towards pro bono and voluntary work

19. Please state whether you agree or disagree with the following statements

	Strongly disagree	Disagree	Neither agree nor disagree	Agree	Stongly agree
Voluntary work is important to support the wider community	◯	◯	◯	◯	◯
Voluntary work improves my legal skills	◯	◯	◯	◯	◯
Voluntary work will assist me in obtaining employment	◯	◯	◯	◯	◯
Voluntary work has increased my awareness of social and economic issues	◯	◯	◯	◯	◯
Voluntary work has changes my perception of social and economic issues	◯	◯	◯	◯	◯
I am likely to continue with voluntary work after I graduate	◯	◯	◯	◯	◯

20. If you have not undertaken any voluntary work, would you like to in the future?

◯ Yes

◯ No

◯ Don't know

Please specify a reason for your answer

Student attitudes towards pro bono and voluntary work

21. Please rank the following statements in order of importance with 1 being the most important and 5 being the least important

☐	Pro bono in law schools improves access to justice
☐	Pro bono in law schools improves students' legal skills
☐	Pro bono in law schools improves students' employment prospects
☐	Pro bono in law schools improves students' awareness of social issues
☐	Pro bono in law schools encourages students to engage in pro bono following graduation

22. Please state whether you agree or disagree with the following statements

	Strongly disagree	Disagree	Neither agree nor disagree	Agree	Strongly agree
The legal profession has a duty to undertake pro bono work	◯	◯	◯	◯	◯
There should be a minimum number of pro bono hours for lawyers	◯	◯	◯	◯	◯
Pro bono work should be compulsory for all lawyers	◯	◯	◯	◯	◯
Lawyers should voluntarily undertake pro bono work	◯	◯	◯	◯	◯
Law schools should make pro bono work a compulsory part of their programmes	◯	◯	◯	◯	◯
Law schools should offer voluntary pro bono opportunities to their students	◯	◯	◯	◯	◯
Law students should undertake pro bono work at law school	◯	◯	◯	◯	◯

Thank you for completing this survey.

Please note that by clicking on the 'Submit' button, you consent to the data you have provided being used by the University of Northumbria at Newcastle in accordance with the information on the first page of this survey.

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POLICY AND EDUCATION DEVELOPMENTS

Edited by Richard Owen

Litigants in person: is there a role for higher education?

Introduction

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) does not require any introduction to most, if not all readers. As of 1 April 2013, many areas of law were taken out of the scope of legal aid, meaning it is more difficult for individuals to obtain public funding in relation to legal disputes.

There is no statistical data available demonstrating the direct effects of LASPO on the number of litigants in person (LiPs) within the court system. Further, it would be difficult to collect accurate data on overall effects as it is assumed many individuals may not commence legal proceedings due to the unavailability of advice and representation at the outset of the case. Conversely, some individuals may commence proceedings which they would not have done had they received advice. However, the consensus is that the number of LiPs within the court system has significantly increased.

There are several areas where the increasing number of LiPs has had an impact on the court system. Whilst there will be LiPs who are competent to represent themselves, the research indicates that LiPs will experience problems including understanding evidential requirements, difficulties with forms and identifying the facts relevant to their case.[1] As a consequence, there are also impacts on other parties and the court. Examples of these include the challenges faced by court staff and judges in dealing with cases effectively but without giving advice or the appearance of bias and representatives doing extra work to compensate for the lack of representation on the other side.[2]

The Ministry of Justice, recognising the problems faced by LiPs and the consequential problems faced by the court system, announced that it will provide £2 million to increase the level of court-based support for LiPs. It is anticipated that this support will enable LiPs to access practical support and information as well providing a route to free or affordable legal advice. The

[1]Kim Williams, "Litigants in Person: A Literature Review" (June 2011), p. 5, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217374/litigants-in-person-literature-review.pdf (accessed 1 December 2014).
[2]Ibid.

money will be divided amongst a number of organisations providing support to litigants including the Personal Support Unit (PSU), LawWorks, Law for Life and the RCJ Advice Bureau.[3]

Provision of court-based advice and support is therefore at the forefront of efforts to address the problems raised by LiPs. This is also recognised in the number of court-based schemes being set up across England and Wales to provide assistance. The Personal Support Unit and RCJ Advice are arguably the most well known of these schemes. However, other schemes have also been established by the legal profession and universities. This article will consider whether universities can, and perhaps more importantly should, play a role in supporting LiPs.

Assisting LiPs in England and Wales

LiPs are not a new phenomenon within the legal system of England and Wales. RCJ Advice Bureau was established in 1978 at the Royal Courts of Justice (RCJ) to help LiPs navigate the court system and comply with the civil procedure rules. Free legal advice and assistance are provided by qualified solicitors on the procedural aspects of the case, applications to the court and referrals to a free representation service.

The PSU was subsequently established in 2001 at the RCJ, and has extended its service to other courts, to help people facing civil court proceedings without legal representation. The assistance provided by the PSU can vary from practical help with tasks, such as filling in forms, to the emotional and moral support of being accompanied in hearings. It should be noted that the PSU does not provide legal advice or act on the individual's behalf in proceedings.

The Civil Justice Council published a report in November 2011 entitled *Access to Justice for Litigants in Person (or Self-Represented Litigants)*. The report addressed what steps could be taken to improve access to justice for LiPs and how to prepare for an increasing number.[4] The report made a series of recommendations considering the range of people and organisations involved in the legal system and the assistance they could offer. This included the judiciary, court staff, lawyers, advice agencies and McKenzie friends. The report also noted the assistance that could be provided by law students.

Law school participation in assisting individuals within the legal system is nothing new. A survey by LawWorks states that at least 70% of all law schools

[3]Ministry of Justice, "More Support for Separating Couples and Parents", 23 October 2014, available at https://www.gov.uk/government/news/more-support-for-separating-couples-and-parents (accessed 1 December 2014).

[4]Civil Justice Council, *Access to Justice for Litigants in Person (or Self-Represented Litigants)* (November 2011), p. 7, available at http://www.judiciary.gov.uk/wp-content/uploads/2014/05/report-on-access-to-justice-for-litigants-in-person-nov2011.pdf (accessed 1 December 2014).

are now involved in pro bono and/or clinical activity.[5] The range of activities includes public legal education programmes, advice only clinics and full representation clinics. It is apparent from the survey results that many law schools are actively involved in assisting individuals with legal advice and/or representation already.

However, recent years have seen a rise in the number of court-based schemes purporting to assist LiPs.

CLOCK (Community Legal Outreach Collaboration Keele) was publicly launched by Keele University in October 2012. By working with a number of partner organisations, law students provide help and support to disadvantaged communities through legal research, policy work and community legal education.[6] A particular aspect of the scheme to note is the Community Legal Companions where law students are trained to provide unrepresented litigants with practical assistance throughout the legal process such as filling in applications, sorting through paperwork and taking notes in proceedings.[7]

Sheffield Hallam University has established a helpdesk at Sheffield Combined Court to provide advice and assistance to LiPs in small claims matters.[8] Northumbria University is working in partnership with the PSU and has established a service at Newcastle Combined Court to assist litigants in civil and family proceedings.[9] Whilst the PSU has recruited student volunteers for a number of years, it is understood that this is the first time it has worked in partnership with a university to establish a service, with a memorandum of understanding and funding.

It is noted that the practical assistance provided by students under each of the schemes outlined above is limited. There is a potential danger in providing incomplete or generalised information. However students, and possibly qualified lawyers, would find it difficult to provide detailed legal advice at the court, often needed immediately before the hearing. Nevertheless, they are providing valuable emotional and moral support to LiPs, and potentially identifying cases where further advice and assistance would be available, such as those who are still eligible for legal aid.

[5]Damian Carney, Frank Dignan, Richard Grimes, Grace Kelly and Rebecca Parker, *The LawWorks Law School Pro Bono and Clinic Report 2014*, p. 4, available at http://lawworks.org.uk/tmp_downloads/u100y141k13t43h45h133a86w90e139w117b26f142z104g117t149/1014-033-lawworks-student-pro-bono-report-web.pdf (accessed 1 December 2014).

[6]Keele University, "Community Legal Outreach Collaboration Keele (CLOCK): Time for Justice", available at http://www.keele.ac.uk/law/legaloutreachcollaboration/ (accessed 1 December 2014).

[7]Keele University, "The Community Legal Companion: Assisting Access to Justice", available at http://www.keele.ac.uk/law/legaloutreachcollaboration/communitylegalcompanion/ (accessed 1 December 2014).

[8]Sheffield Hallam University, "Students Helping with Court Helpdesk", 10 November 2014, available at http://www.shu.ac.uk/mediacentre/students-helping-court-helpdesk (accessed 1 December 2014).

[9]Solicitors Journal, "News in Brief: Week Beginning 7 July 2014", available at http://www.solicitorsjournal.com/news/management/business-development/news-brief-week-beginning-7-july-2014 (accessed 1 December 2014).

Perspectives from Australia and the USA

The rising number of LiPs is not something which is unique to the UK. Other jurisdictions, notably Australia and the USA, have experienced similar issues for many years and have sought solutions including the development of court-based advice and support initiatives to alleviate the issues identified above.

In Australia, notable initiatives include the self-representation services which have been established to provide assistance to LiPs. In 2007 the Queensland Public Interest Law Clearing House Incorporated introduced such a service assisting litigants initially in the Queensland Supreme Court, District Court and Court of Appeal. This was later extended to the Queensland Civil and Administrative Tribunal and latterly the Federal Court and Federal Circuit Court.[10] Such is the strength of this scheme that it has been replicated in other states, notably in 2014 when Justice Connect received four years of Federal funding to offer such a service to litigants in the Federal Court and Federal Circuit Court in NSW, Victoria, Tasmania and the Australian Capital Territory (initially to assist in bankruptcy proceedings only with the aim of expanding assistance to fair work proceedings).[11]

Modelled on RCJ Advice[12] these services are designed to provide direct, task-based assistance to LiPs such as help in preparing court documentation, providing advice in relation to court procedure and advice regarding the legal issues of the particular case. The assistance offered may consist of a one-off appointment or multiple appointments for those unable to afford private legal representation but in all cases the LiP retains conduct and control of their case. Like the PSU above, the service does not purport to provide full representation or for the adviser to act as the lawyer "on record" but instead aims to support and assist a litigant to more efficiently pursue their case themselves. However unlike the PSU, the service offered includes the provision of legal advice either by legally qualified staff employed directly by the service or, more often, by lawyers from supporting legal firms who volunteer their time to provide this type of pro bono service.

It would appear that there is currently no formal involvement of universities within the self-representation services offered. It is arguable however that they could play a valuable role which would serve to further the education of law students as well as contributing to the much sought-after assistance being provided to litigants.

This has been demonstrated in the USA where various models of pro se clinics or self-help initiatives have been established to provide assistance to LiPs often in conjunction with law schools. The services offered by these

[10]QPILCH, "Self Representation Service", available at http://www.qpilch.org.au/cms/details.asp?ID=564 (accessed 1 December 2014).
[11]Justice Connect, "Self Representation Service", available at http://www.justiceconnect.org.au/get-help/referral-service/self-representation-service (accessed 1 December 2014).
[12]Tony Woodyatt, Allira Thompson and Elizabeth Pendlebury, "Queensland's Self-Representation Services: A Model for Other Courts and Tribunals" (2011) 20 *Journal of Judicial Administration* 225–239, p. 225.

clinics can be simply educational and seek to provide more generalised and less case-specific information to LiPs for example about court procedure (such as how to instigate or serve court proceedings) or guidance on how to complete court forms. This information might be distributed via information leaflets, group presentations, workshops or video/audio recordings. Whilst helpful, there are obvious limitations to providing generic information alone and it is noted that many courts already offer such a self-help service.

Other initiatives combine providing instructional and informational materials with offering more direct assistance to individuals similar to the self-representation services established in Australia. This can be seen in the self-help centres established in the Californian courts. Of particular note is the development of the JusticeCorps programme which trains 250 undergraduates and recent graduates each year to assist with the work conducted in these centres. Their role is similar to that of the PSU volunteers and includes providing vital access to language assistance. First launched in Los Angeles County in 2004 this initiative was extended to San Francisco Bay Area in 2006 and San Diego in 2007.[13] The Civil Justice Council noted this model for its ambition and litigant satisfaction, and also noted that the "personal and professional development of the students was marked".[14]

Should universities be involved?

It has been argued in some quarters that the provision of pro bono work is "replacing legal aid by the back door and giving the government a get-out-of-jail card".[15] Therefore, it is argued, any scheme purporting to assist LiPs is merely absolving the government of its responsibilities. Whilst there would be little, if any, dispute that the panacea would be a state funded legal aid system ensuring all were represented, the reality is that we will not see such a system, at least in the foreseeable future. Whilst the effects of LASPO have highlighted the issues experienced by LiPs, these are not new problems as there have always been LiPs within the legal system. On this basis, we should therefore consider whether schemes assisting LiPs are worthwhile. If not, why would any organisation, including universities, invest valuable resources in such schemes?

Trinder *et al*. highlighted four areas for intervention, where LiPs felt their case would have been assisted. These areas are more information about the court process and procedural information; practical help, particularly with paperwork; emotional/moral support; and tailored legal advice.[16]

[13]California Courts The Judicial Branch of California, "About JusticeCorps", available at http://www.courts.ca.gov/justicecorps-about.htm (accessed 1 December 2014).
[14]*Supra* n. 4, p. 56.
[15]John Hyde, "Is It Time to Refuse Pro Bono Work?", *Law Society Gazette*, 24 October 2014, available at http://www.lawgazette.co.uk/analysis/comment-and-opinion/is-it-time-to-refuse-pro-bono-work/5044648.fullarticle (accessed 1 December 2014).
[16]Liz Trinder, Rosemary Hunter, Emma Hitchings, Joanna Miles, Richard Moorhead, Leanne Smith, Mark Sefton, Victoria Hinchly, Kay Bader and Julie Pearce, *Litigants in Person in Private Family Law*

It appears that students can play an important role in assisting LiPs through court-based schemes. Whilst there is a limit on the legal advice students may be able to provide, Trinder *et al*. state that the "informal support from a friend, family member, a volunteer helper or McKenzie Friend was seen as invaluable".[17] These findings appear largely consistent with the findings of Williams in her literature review. In particular, Williams reports that users of services such as court-based advice services, self-help and hotlines reported high levels of satisfaction.[18] However, Williams further notes that most evidence indicated that the case outcomes were adversely affected by the lack of representation.[19]

The available literature indicates that there is a role for court-based schemes in assisting LiPs as there is general consensus that LiPs do benefit from the emotional and moral support they receive. It is therefore necessary to assess whether universities should be providing this service.

For students, becoming involved in a court-based advice scheme can be extremely rewarding. It is noted above that this type of activity can aid professional development and we would suggest that this is achieved by exposing students to the court environment and to individuals with real legal issues. To provide assistance students must understand court procedure and practice as well as communicating with litigants effectively. This requires knowledge, understanding and problem-solving skills. Students will encounter ethical issues and obtain insight into legal remedies and restrictions.

Some of the schemes we have referred to provide valuable assistance to litigants but do not sanction students providing legal advice. It is arguable that, in the absence of this, the activity does not fully reflect legal practice and therefore has more limited benefit. If this is the case, it is nonetheless undeniable that many skills can be advanced by the experience.

Also, few would dispute that lawyers have a duty to promote access to justice and it is suggested that engagement in such an activity whilst at university can only help to instil this public service ethos at an early stage.

There can also be a more tangible and personal reward for students who take part. For example, many clinical programmes are credit bearing whereas others can result in a financial award, such as JusticeCorps where volunteers completing the programme will receive an education award.[20] Not to be underestimated is also the personal satisfaction of making a difference to an individual.

Cases (November 2014), pp. 84–86, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf (accessed 1 December 2014).

[17] Ibid., p. 85.

[18] *Supra* n. 1, p. 7.

[19] Ibid., p. 6.

[20] *Supra* n. 13.

In the current climate, opportunities such as this can only enhance employability. Students will gain valuable first-hand experience of the court environment as well as the opportunity to improve their soft skills by engaging with real clients.

There are also several incentives for universities to become involved in these types of initiatives. In England and Wales, the Legal Education and Training Review[21] signals an increasing drive by regulators for legal education to include training in relation to practice-based skills. In our experience this is matched by student enthusiasm to engage in clinical activities and, in a competitive market, it is important that universities offer courses and extra-curricula activities which are appealing and relevant to prospective students. Indeed clinical legal education, in some form, is progressively becoming a more regular component of undergraduate legal studies in the UK.

That said, this type of activity can be expensive to resource and can be high risk. For example, an in-house clinic model often requires physical office space, administration, high levels of student supervision and indemnity insurance to name a few. However, the schemes outlined above offer students the opportunity to engage in an alternative model of clinical activity which is potentially less resource intensive (physical space and supervision often being provided by the court or service although the latter will depend upon whether student participation is credit bearing) and which carries a lower risk (in many models the students do not directly provide legal advice or they advise under the supervision of a qualified lawyer). As such they may increase the capacity for universities to undertake clinical work.

It is equally important that universities actively engage and sustain the communities in which they play a vital role. These types of initiatives provide much needed support and assistance to members of those communities as well as encouraging collaboration with other legal professionals, practices and the courts.

Conclusions

The provision of court-based advice schemes is not a replacement for a fully funded legal aid scheme. However, such schemes do provide a valuable service to LiPs particularly in relation to the emotional and moral support they provide. Volunteers can also assist LiPs with their paperwork and thus assist in court proceedings running more smoothly. A significant limitation of many schemes is the lack of legal advice although students may identify cases where legal advice and representation may be available from another source. Universities can play a role in supporting such schemes. These

[21] J. Webb, J. Ching, P. Maharg and A. Sherr, *Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales* (June 2013), available at http://www.letr.org.uk/wp-content/uploads/LETR-Report.pdf (accessed 1 December 2014).

schemes provide students with valuable learning opportunities whilst offering universities a valuable community engagement opportunity.

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From the Field

THE EUROPEAN NETWORK OF CLINICAL LEGAL EDUCATION: THE SPRING WORKSHOP 2015

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INTRODUCTION

The European Network for Clinical Legal Education (ENCLE) was established in 2013 with the aim of bringing individuals and organisations together to exchange ideas and work collaboratively to promote justice and increase the quality of law teaching through clinical legal education. According to its mission statement, 'ENCLE aims to support the growth and quality of [clinical legal education] programmes in Europe through facilitating transnational information sharing, fostering CLE scholarship and research, convening conferences, workshops and

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training session, establishing a website as an open resource for information sharing and promoting collaboration between CLE programmes and legal professionals.'[2]

In furtherance of the mission statement, ENCLE have organised several conferences and workshops.[3] In April 2015, a workshop was held at Northumbria University, Newcastle upon Tyne, UK entitled 'Preparing students for clinic'. The aim of the workshop was to generate discussion, through themed sessions, as to how clinicians can prepare their students for the clinical experience. Sessions were facilitated by experienced clinicians from around Europe who drew out ideas for best practice thus strengthening the abilities of attendees to prepare their students for the clinical experience.

The first session, which will be the predominant focus of this article, considered 'Why we do clinic'. It is important that as clinical educators we understand the rationale for what we do. If we do not know where we are going, we will never get there, which was highlighted at the start of the first session.

Other sessions included:

- Establishing a legal clinic
- Running and sustaining a legal clinic

[2] ENCLE, *Mission Statement* Available at: http://www.encle.org/about-encle/memorandum-of-understanding-statute-in-entirety (Accessed: 24 September 2015)

[3]For more information on other ENCLE events please see, http://encle.org/news-and-events/past-events

- Standardised clients
- Approaches to preparation: legal knowledge or problem based learning
- Developing ethical sensitivity in clinical students
- Ethical aspects of clinical design and management
- Strengthening the social justice mission of clinic
- Impact of clinic in Europe: What do we know so far and where do we go from here (and how)?

The sessions covered various forms of clinical legal education, not just those working with live clients. However, throughout the two days other sub-themes started to emerge and the need to justify why we do clinic as a form of legal education was underlying in all sessions.

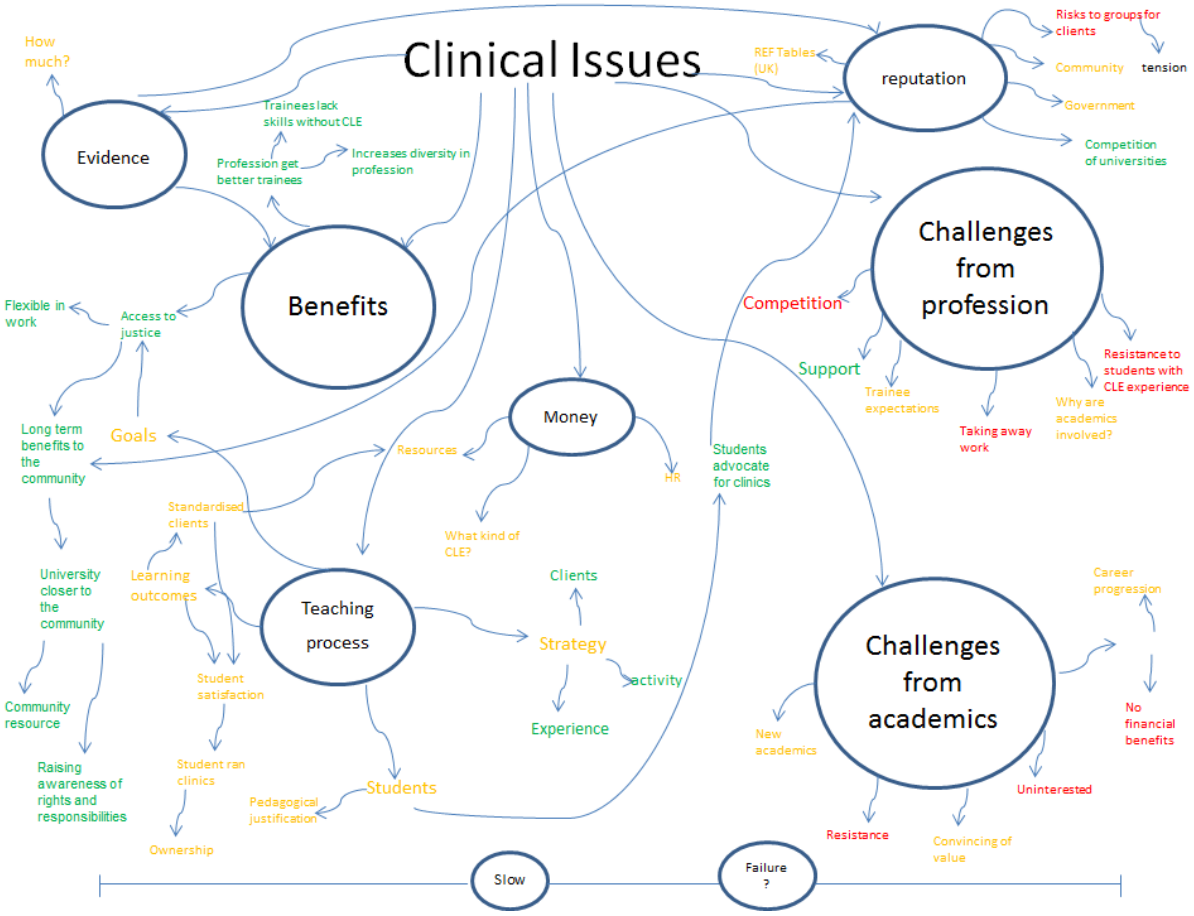
There were approximately 42 clinicians who attended the Workshop. The first session of the Workshop was recorded, lasting approximately one hour. Once we gained ethical approval to use this recording as data for an article and it was transcribed and analysed in order to highlight the main themes discussed during the Workshop. Attendees were notified of our intention to use the recording, provided with a username and password to access it securely on the ENCLE website and time was given for them to listen to it. They could then decide if they consented to their comments being used and were able to exclude any comments which they did not want to be used in this work. The comments discussed below are only those from attendees who agreed for their contributions to be used.

WHY WE DO CLINIC.

The first session of the Workshop, led by Professor Kevin Kerrigan and Carol Boothby, asked *'why do we do clinic'*. The purpose of this session, as Professor Kerrigan highlighted, was to justify why we, as educators, should have law clinics in universities. This justification is not just to Deans or Vice Chancellors, but also to the wider legal profession and community. This justification, or reason for doing clinic, is important for the sustainability of a clinic. However, an attendee also stated that it is important to know why we do clinic *'because this will then shape in what we need for it, how we do it, how we communicate with the students, what goals do we proceed, what we emphasise. So this is a really important thing to know in order to shape the teaching process in the right way.'* So, it is not just justifying to those outside of the clinic, but also for those working inside it, ensuring the clinic is pedagogically sound. As such, the purpose of the clinic needs to be clear in our own minds as to achieve anything, we need to know what it is we are trying to achieve.

There are various reasons why we establish clinics. Aksamovic and Genty highlight that it is important to distinguish between these reasons, and that two of the main goals of clinicians are '…creating social change by giving disadvantaged groups access to legal services; making experiential courses mandatory so that all students

are better prepared for the profession they will be entering…'[4] However, this session highlighted other reasons as to why we do clinic and how we can justify it, which surfaced when we discussed the advantages and disadvantages, or the rewards and risks, of clinics. These advantages and disadvantages were to various groups, including the university, the community and the legal profession. Discussing the advantages and disadvantages of clinics also brought up other areas of discussion. The themes of this session can be displayed visually, taken from the recording:



[4] Askamovic D and Genty P, 'An Examination of the Challenges, Successes and Setbacks for Clinical Legal Education in Eastern Europe' (2014) 20 The International Journal of Clinical Legal Education, p.437

The issues facing clinical programmes identified during the Workshop are represented above. The themes flowing from these issues are the main areas which were covered during the discussions, the bigger the circle the more weight placed on the discussion. We then have other comments flowing from these main areas, which attendees highlighted as advantages or disadvantages, or risks and rewards, of clinics. The bigger the comments the more it was discussed. Some of these issues link together, even though they were discussed during different themes. Looking at the data from the session in this way shows how certain issues can link together, even though they may seem very separate in practice. Furthermore, displaying the weighting of the conversations outlines what was most discussed, or was more of a concern to the attendees of the Workshop. The issues have also been colour coded. Comments in red represent issues which hinder the development of clinic whilst comments in green can be considered to advance the clinical mission, enhancing the education of our students and provide legal support to our community. Comments in orange could either advance or hinder the development of clinics depending upon their implementation in practice. At the bottom of the diagram is a comment made by an attendee that did not appear to fit with the other issues discussed, but is an important consideration none-the-less. This attendee wanted to highlight that when setting up a clinic you must be prepared to fail, as so many clinics do fail when they are first established. Also that establishing a clinic is a slow process and that you must be patient. This is a valid point to make to those who are considering setting up a clinic, and why it has been placed at the bottom of the diagram.

For example, one attendee talked of the educational benefits of law clinics and how there *'are certain things that a student can only learn in clinic.'* However, even though clinicians claim that this kind of pedagogy is beneficial to students, there is a lack of empirical evidence to help justify such a claim. To make such bold claims for clinics, which are logical to make, we must still be able to support them with evidence and research. These educational claims were then linked to reputation, the attendee advancing, *'students want to come to our university because we have an attractive clinical programme.'* These claims are connected to many of the issues. Reputation links back to students, and ultimately their satisfaction, to the community and their views of the university. In order to strengthen the reputation of clinic, we need more evidence. Should clinics be producing more research into their work to justify what they are doing?

Something which was highlighted during the discussion, and is apparent from the diagram, is the conflicting perception of clinic from the legal profession. There was a comment about how some law firms do not like their trainees to have prior clinical experience and like to *'mould'* them to their firm. This attendee stated that law firms can be resistant to taking on students who *'already have a professional identity.'* However, when looking at benefits there is a comment that clinic is beneficial to the profession as they are gaining trainees who are better prepared for practice and would otherwise lack the skills needed if it were not for a student's clinical experience. Thus, it appears that there can be confusion over the expectations of a

clinical programmes and what sort of position it can put students in when they have completed their degree. This difference of opinion is not surprising as all clinicians, and indeed the clinical programmes as a whole, have had different experiences with the legal profession and this will feed into their comments. Furthermore, different jurisdictions will have different experiences and relationships with the profession, resulting in this area of discussion not meeting a consensus.

It was highlighted that there are many reasons of why we do clinic, and these reasons will vary from clinic to clinic. Whatever the reason, we must be able to justify our clinics and be honest about the rewards and risks of them. This justification will help us with our teaching and shaping the clinical programme for the students. Getting the attendees to think about this from the start of the Workshop helped during the other sessions to think about what kinds of clinic is best for their institution and why.

ISSUES

Throughout the two day workshop there were issues highlighted which made sustaining a successful clinical programme difficult. As the diagram above illustrates, the issues faced by clinical programmes are complex. As attendees started to open up about this more people started to share and we realised that these issues are common throughout clinics in Europe. Knowing what issues there are assists with overcoming them and move forward with our European clinical movement. We will focus the discussion on two issues identified in the Workshop,

resistance from the legal profession and resistance from the university. As key stakeholders in any clinical programme, it appears useful to address these concerns.

Resistance/opposition from the profession

Resistance or opposition from the profession arises from a lack of understanding of a clinical programme's goals and how it operates. This opposition seems to stem from fear of a clinical programme taking away work from the profession. An attendee spoke about the opposition their programme faced when it was established, how local lawyers felt as though their livelihood was in trouble and they would face more competition for clients. The clinical programme had to *'justify why we're doing clinic and the type of clinic that we were running and ultimately, eventually, they came around and now they're many of our biggest supporters in the local legal profession.'*

If the resistance from the legal profession is broken down then the support they can provide for a clinical programme is invaluable. Clinical programmes are operating all over the world and many professionals can appreciate and encourage the work they do. This issue is one which most clinical programme have faced in many countries. Even countries which now have a well established clinical presence in their legal education have faced this problem when setting up clinical programmes. For example, Giddings brings to light resistance from the profession in the early

Australia movement.[5] Whilst this jurisdiction, and many others, have overcome resistance from the profession, this cannot be said of all jurisdictions, where it is still a major hurdle clinical programmes face. Wilson has discussed this issue in relation to Western Europe, in particular Germany. He states that clinical programmes, '…are seen as a threat to the earnings of those lawyers who have "paid their dues" by going through the rigorous process of admission to the bar.'[6]

This was addressed by another attendee, who stated that the work clinical programmes do does not really take work from the legal profession as *'we are doing something else.'* This something else is arguably providing legal services to those who struggle for access to justice. However, providing this service does not mean competition for clients, as this attendee concluded, *'but I believe there's no country in the world where the problems of access to justice would be solved in a way that we would really be competing to clients. We might be competing for clients in some segments, but not in a global way.'* This is an opinion which has been argued before, particularly by Wilson. From his research in Germany he provides two rebuttals to the opposition from the profession. Firstly, clinical programmes *usually* do not represent clients who could not otherwise afford legal services, nor would they be awarded legal aid. Secondly, students are limited in the extent they can represent clients, stating that

[5] Giddings J, 'Clinical Legal Education in Australia: A Historical Perspective' (2003) 2003 International Journal of Clinical Legal Education, pp. 9-10

[6] Wilson RJ, 'Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education' (2009) 10 German Law Journal, p.834

they focus instead on 'a narrow range of matters.' [7] A further rebuttal is the availability of legal services. For commercial reasons, the availability of legal services in a particular area of law may not be available. This may be due to the fact a case is not financially viable for law firms to pursue, or alternatively, it is not financially viable for a client to pay for the case regardless of their means. This would often be the case in low value disputes where the legal costs would outweigh the value of the claim.

There will always be a need for legal services for those who do not have access to it, making the competition with the legal professions low. Whilst some clinical programmes may be competitive with the legal profession, this is likely to be the exception rather than the rule.

An example of a potentially competitive clinical model would be the business clinic. It may be taking some work away from the profession as they are providing free services to those whose primary alternative option is to hire a lawyer. These clinical programmes will find it more difficult to rebut competition arguments and justify their programme as a need for the community. However, not all business clinics assist clients who can afford legal advice. There are clients in these programmes who cannot afford to pay heavy legal fees to help launch their business, and some programmes will establish this through a means test.

[7] *Ibid*

Further, some business or transactional clinics may only assist charities. Whilst it is arguable that a charity, especially larger charities would pay for legal services, there is an argument that the wider social benefit is served by retaining money for charitable purposes rather than paying legal fees. Even law firms often provide assistance to charities on a pro bono basis recognising these wider social benefits.

There is also a strong argument for the pedagogical benefits this kind of clinical programme can give to students, allowing them to work in an area of law whereby they may not otherwise get an opportunity. As Campbell states, *'It would be a shame if clinics focusing on transactional work had to continually fight for acceptance, as a consequence of a perceived detachment of that kind of work from a social justice ideology.'*[8] If a clinic is providing a sound education for students, we may ask whether we do *have* to use social justice as a justification for our clinics. Surely a good education and an introduction to practice can only benefit the profession, providing them with new lawyers who have some experience and equipped with the necessary skills.

It is important in growing the clinical movement to establish what resistance there is to clinical legal education from the profession across Europe, and the reasons for this resistance. We cannot address the problem unless we know the reason for it. However, the anecdotal evidence suggests that measures can be taken to lessen the resistance. Fundamentally, it is important to open a dialogue with the local legal

[8] Campbell E, 'A dangerous method? Defending the rise of business law clinics in the UK' (2015) 49 The Law Teacher, p.175

profession and be clear about what you are doing and why you are doing it. If clinical programmes are seen as a benefit and not a threat, it is likely that they will attract support, rather than resistance.

Resistance/opposition from the academy

This issue is one which has surfaced in many institutions across the globe. When clinical programmes began to evolve there could sometimes be opposition faced internally as well as externally.[9] This opposition seems to still be alive in some European clinical programmes, especially the newer programmes. One attendee stated that:

> *'…often academics within the faulty, within the school, can be resistant. Or, even if they're not resistant, uninterested. And I think that a clinic can work really well when everybody's convinced with its value, even if they don't work within it. And they know what the students are doing with it because it can affect their own teaching.'*

[9] For more information please see, Iya, P.F. 'Fostering a Better Interaction Between Academics and Practitioners to Promote Quality Clinical Legal Education with High Ethical Values', International Journal of Clinical Legal Education, Vol.3, 2003, pp.41-57.

Bloch characterises the tension in legal education as a 'conflict between theory and practice.' [10] Whilst theoretical scholarship has an established place within the academy, with a clear status and role for those who engage, practice or clinical scholarship has struggled to establish legitimacy. Perhaps this struggle goes to the core of clinical legal education, and in particular the background of many clinicians. Many clinicians are lawyers, not traditional academics, and see their role as teaching legal skills. As such, clinicians may sense their role is practiced based, and not focused on publishing the theory. Thus, it is arguable that it is clinicians who have established the barrier, or at least contributed to it.

However, there are also cultural barriers to overcome if clinicians are to become an accepted member of the academy. Some law schools, especially in countries such as Germany, prefer the traditional teaching methods and do not think there is a place for practical legal teaching within their schools. This is better left for after a student has finished their degree. [11]

It is necessary to consider that theory and practice are not mutually exclusive concepts. Whilst theory leads to practice, practice also leads to theory and teaching at its best shapes both research and practice. [12] Boyer posits that the term

[10] Bloch F S, 'The case for clinical scholarship', International Journal of Clinical Legal Education, Vol.4, 2004, pp.7-21

[11] For example see Bucker A and Woodruff A, 'The Bologna Process and German Legal Education: Developing Professional Competence through Clinical Experiences ' (2008) 9 German Law Journal, p. 609

[12] Boyer E L, 'Scholarship Reconsidered: Priorities of the Professoriate', The Carnegie Foundation for the Advancement of Teaching, 1990

'scholarship' should have 'a broader, more capacious meaning, one that brings legitimacy to the full scope of academic work.'[13] In doing so, he identifies that academic work has four separate but overlapping functions: the scholarship of discovery; the scholarship of integration; the scholarship of application; and the scholarship of teaching.[14]

The scholarship of discovery is the closest element to "research". Boyer states that the scholarship of discovery 'contributes not only to the stock of human knowledge but also the intellectual climate of a college or university.'[15] Scholarship of integration is connected to the scholarship of discovery but relates to the connections across disciplines and the knowledge is seen within a larger context.[16] He goes on to state that the difference between "discovery" and "integration" can be understood in the questions asked. Academics engaged in discovery ask, "What is to be known, what is yet to be found?" However, academics engaged in integration ask, "What do the findings mean?"[17] The third element, the scholarship of application, addresses how knowledge can be applied to consequential problems and help both individuals and institutions.[18] Boyer is careful to point out that application is not a one-way

[13] Ibid

[14] Ibid

[15] Ibid, p.17

[16] Ibid, pp.18-19

[17] Ibid, p.19

[18] Ibid, p.21

street; knowledge is not merely discovered then applied. Indeed, new intellectual understanding can arise from the application of the knowledge; theory and practice interact so that one will renew the other.[19] Finally, the scholarship of teaching is more than transmitting knowledge, it is "transforming" and "extending" it as well.[20] The scholarship of teaching is important as it not only educates but also entices future scholars.[21]

Hutchings and Shulman stated that the 'scholarship of teaching' has three 'central features of being public ("community property"), open to critique and evaluation and in a form that others can build on'. They go on to state that there is a fourth attribute, namely 'that it involves question-asking, inquiry and investigation, particularly around the issues of student learning.'[22]

In applying the notion of scholarship of teaching to clinical scholarship, clinicians are uniquely placed to study the legal profession from a different perspective to their academic colleagues. Indeed Bloch highlights that that a 'great strength of clinical legal education is that it embraces its ties to the "real world" of law practice. The clinical methodology gains much of its richness when student are immersed in

[19] Ibid, p.23

[20] Ibid, p.24

[21] Ibid, p.23

[22] Hutchings P and Shulman L, 'The Scholarship of Teaching: New Elaborations, New Developments', The Carnegie Foundation for the Advancement of Teaching, 1999

actual lawyer work, with all of its complexities and ambiguities."[23] It is thus important that clinical work is made public allowing others to scrutinise and build upon the work already undertaken. Whilst there has been an historic tendency for clinicians either not to engage in scholarship, or alternatively to talk over one another, this has hindered the development of clinical scholarship within the academy. By engaging in such scholarship, arguably clinical scholarship will become an accepted part of the academy and thus reduce internal friction.

However, there are also practical difficulties faced by clinicians if they are to be on equal footing to other academics. As well as running the clinic they may also have the same responsibilities and duties as the other academics within the institution, but will not get paid extra for this extra work or have their other workload lessened. This is an issue which could have an impact on the running and sustainability of clinical programmes. Clinical programmes are becoming an accepted form of legal education and the clinicians running them should be allowed the time and support to do so.

Whilst clinicians work extremely hard to make their programmes successful, there can be a lack of recognition. They may not be publishing as much as other members of academic staff or their achievements not as widely recognised. For example, Donnelly argues that, *'[i]t is grossly unrealistic to hold clinicians to the same boilerplate*

[23] Supra n.7

standard as our colleagues when seeking promotion, especially when there is still little recognition granted to clinical work.'[24]

The publishing element of a clinician's work provides another issue in the argument of scholarship. As lawyers, and not academics, some clinicians are not provided with, or encouraged, to undertake training in how to conduct research and publish it. This makes it difficult for clinicians to produce the work they would like to and push them further to this scholarship status.

Furthermore, even if this training is provided not every institution allows sufficient work allocation to conduct and write up research. If a clinician wishes to write research for publication this comes out of their own time, which they do not seem to have a lot of when running a clinic.

If clinicians are to have equal status within the academy, it is important that they undertake research or, clinical scholarship. As the clinical movement it growing it is imperative that we gather evidence as to the effectiveness of our practice and that we are sharing our experiences. By making our work public, we allow others to learn from our experience and build upon our work, thus improving the quality of the educational experience.

Considering these differences, clinicians have a choice as to whether they argue their work is different to that of traditional academics, or whether to argue it has the same

[24] Donnelly L, 'Clinical Legal Education in Ireland: Some Transatlantic Musings' (2010-2011) 4 Phoenix Law Review, p.15

status. Bloch states that if the distinction is rejected, this can result in 'a "blood bath" at the time of promotion or tenure.'[25] However, acceptance of the distinction creates 'an almost unavoidable second-class status for the clinical program and its faculty.'[26] It seems that if clinicians wish to establish their equal status within the academy, their work must be held as equivalent to that of traditional academics. If clinicians are engaged in scholarship, then this must surely have the same standing as others engaged in scholarship.

Further, it is only through engagement in clinical scholarship that clinicians can address the issues identified above. Examples include evidencing the benefits of clinical programmes, identifying and tackling the barriers to the clinical mission and enhancing the quality of the programme for the students. These are important issues when we ask why we do clinic.

As clinical programmes grow within Europe and with the knowledge that they can provide students with a rich legal education, we should consider whether there is a divide between academics and clinicians. There should be a mutual appreciation between academics and clinicians of the work done and the value it holds to a

[25] Supra n.7

[26] Ibid

university. Arguably with the recent educational reforms in Europe and the introduction of the Bologna Process[27] clinic will help with implementation of this.[28]

WHERE DO WE GO NEXT?

As the European clinical movement develops, it is clear that there are challenges ahead. In addressing these challenges, clinicians need to reflect upon their own practice and establish their own identity.

This article merely highlights issues raised throughout the two days of the Workshop. We must establish a clear vision of the next steps to take and to keep the European clinical movement pushing forward. However, during the discussion there was not a consensus reached on certain issues, different attendees haven different experiences in their clinics. This may suggest that it is not possible to establish a single identity for a European clinical movement with each jurisdiction facing its own challenges. We cannot treat all jurisdictions in the same way, but it may be possible to establish a common thread or adapt the model as and when necessary.

[27] For more information on the Bologna Process and its implementation please see http://www.ehea.info/Uploads/SubmitedFiles/5_2015/132824.pdf

[28] *Supra* n.6

Research in clinic should now be a leading agenda throughout Europe. We learnt during the last session of the Workshop that the amount of peer reviewed articles published in clinical legal education is vast. However, Europe does not produce as much as other continents. In order for our movement to keep growing we must share experiences, failures and successes. Publishing research is a great way to do this. Furthermore, the research we can produce will help to justify why we do clinic. As Tomoszek states:

> *'The positive contribution of clinical legal education towards the overall outcome of legal education system still has not been proven by a rigorous empirical evidence-based study – it is mostly based on belief of clinical teachers and clinical students.*[29]*'*

ENCLE provides the network to support and facilitate this agenda across Europe. Supporting the growth and quality of clinical legal education through, amongst other things, research and scholarship is at the core of the ENCLE mission.

Whilst this belief is strong and the claims of the benefits of clinical legal education are logical to make, there is still a need for the rigorous and empirical research to be conducted. This will help to make our argument and justifications even stronger.

[29] Tomoszek M, 'The Growth of Legal Clinics in Europe - Faith and Hope, or Evidence and Hard Work?' (2014) 21 International Journal of Clinical Legal Education, pp. 99-100

With sharing these experiences comes the opportunity to help develop clinical programmes throughout Europe. The opposition faced by clinical programmes is sometimes great and with help from other established programmes, and experienced clinicians, they can be overcome.

Chapter 24

Further Developing Street Law

Sarah Morse and Paul McKeown

Following the success of the law clinic, the institution is also keen to develop a street law programme.

Street Law began in 1972 at Georgetown University Law Center when a group of students developed an experiential curriculum to teach high school students about law and the legal system (Street Law INC no date). It has been described as 'a powerful tool for social change, promoting greater awareness of civic rights and encouraging participation in the democratic process' (Grimes et al. 2011). Street Law is a form of public legal education that aims to educate the public on their legal rights and responsibilities. It involves students going into the community to provide information about the law and how it affects particular groups or individuals. Street Law programmes can be delivered to a variety of groups, including schools, prisons, tenant federations and other community organisations.

Grimes et al. (2011) identifies various models of Street Law that include:

- The credit-bearing or integrated model
- The nonclinical or pro bono model
- The law student organisations model

The differences between these models of Street Law generally relate to whether students gain academic credit for their participation and who takes responsibility for the organisation of the Street Law programme. Academics are usually involved in the credit-bearing or integrated model although they may also be responsible for organising a Street Law programme on an extra curricula basis.

A Street Law programme can involve students engaging in a one-off activity (such as delivering a presentation on welfare rights to a homeless charity) or alternatively require a more regular, sustained contribution (such as preparing and running a mock trial with high school students). The activity developed by students ought to be engaging and relevant to the group and can take any form such as a debate, case study, mock trial or workshop. There is a great deal of flexibility within a Street Law programme to allow students to work in a self-directed way or instead for it to form part of a more supported learning activity with greater academic involvement.

As an academic responsible for a Street Law programme, you are likely to engage with a number of stakeholder groups including students, third party partners (such as lawyers) and community groups. The programme will provide a number of benefits to each of these groups and to you and your institution.

The benefit of Street Law for students is that it allows them to connect their academic understanding of the law to the practise of law. Numerous lawyering skills are utilised throughout the course of preparing and delivering a Street Law activity including research, problem solving, and communication. Students also have the opportunity to develop and demonstrate a real understanding and knowledge of legal issues through the requirement to explain these in layman's terms to the community groups. As part of the programme, students will often also work in a group thus encouraging teamwork and collaboration.

Street Law also connects law students to social issues and engages them in aspects of society that they may not have previously experienced thus providing a valuable encounter with political, social and economic issues. MacDowell (2008) states that

> The Street Law program appealed to [her] because [she] thought it would provide a powerful reality check in terms of connecting as a law student with a community far from the law school classroom. It also fit with [her] conception of one of the meaningful things [she] could do as a lawyer: obtain important, specialized knowledge, associated with power, and make it available to people who otherwise lacked access.

Activities such as this provide opportunities for students to develop practise-based skills and therefore arguably better prepare them to enter the legal profession. Street Law programmes may also enhance the employability of students and facilitate the development of transferable skills. The importance of Law Schools advancing both theoretical and practical knowledge is highlighted by the Carnegie Report (concerning teaching in American and Canadian law schools) and the Legal Education and Training Review (a review of education and training in England and Wales).

For the university, a Street Law programme presents a valuable clinical experience but is lower risk and far less resource intensive than other forms of clinical legal education. It does not require any form of professional indemnity insurance as legal advice is not being provided to an individual client. Nor does it require a physical space within the law school to store files and for students to carry out casework. The level of academic supervision required is also far lower than a casework clinical model and indeed some models are solely student-led. Offering practical, clinical opportunities to students can be a valuable marketing tool to assist in the recruitment of prospective students.

There is also potential for third parties, such as lawyers and non-governmental organisations, to become involved in Street Law programmes. These partners can support the students and add their own knowledge and experience to the programme. Pinder (1998) states that 'Street Law allows lawyers and judges to connect with law students and the community with a much more flexible time commitment than many other pro bono service.' Many lawyers and organisations want to engage in pro bono work and recognise they have a responsibility to society. However, many pro bono opportunities can be demanding and therefore dissuade participation. These issues can be addressed in a Street Law programme, allowing flexibility in the commitment they give.

Street Law also has the potential to provide a valuable service to the community. Universities sit at the heart of the community with many adopting this notion as part of their mission statement or ethos. Whilst it is recognised by McQuoid-Mason (2008) that most of the evidence concerning the impact of Street Law programmes is quantitative and anecdotal, groups are empowered by knowledge. Grimes et al. (2011) highlights the example of South Africa and how Street Law helped to break down the apartheid racial barriers by enabling black and white school children to share their experiences and debate important societal issues. In many jurisdictions, where access to justice is restricted, increasing knowledge about legal rights and responsibilities is vital.

For all of these reasons, academics may wish to become involved in developing a Street Law programme. These programmes can be both innovative and rewarding. A successful programme can afford you networking opportunities (in the wider community and with third party partners), enhance career prospects through forward-thinking teaching methods and enhanced student satisfaction. It can also be an enjoyable experience for you.

The key messages for Anton and other academics considering developing a Street Law programme:

1. It provides an opportunity to engage in innovative teaching.
2. It is a flexible and less resource-intensive clinical teaching method.
3. It affords opportunities and benefits to you, your students the community and the university.

FURTHER READING

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PRO BONO: WHAT'S IN IT FOR LAW STUDENTS? THE STUDENTS' PERSPECTIVE

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Abstract

In England and Wales, there is an increasing need for the provision of pro bono legal services. Law students may be a resource that can help fill the access to justice gap, whilst at university and onwards in their future careers. Whilst some students are intrinsically motivated towards altruistic behaviour, many are not. This article will consider what motivates students to undertake pro bono work whilst at law school.
The article will explore the range of intrinsic and extrinsic motivating factors for student participation in pro bono programmes and consider how students can be encouraged to engage in such activities. The article will also consider whether exposure to pro bono experience can instil a public service ethos in students.
In conclusion, the article will highlight experience as an influential factor in encouraging initial participation in pro bono work but also instilling a willingness to undertake pro bono work in the future.

Introduction

Many would argue that lawyers have a moral obligation to promote access to justice.[2]

It is also arguable that it is more than a moral obligation and is in fact a professional

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[2] For discussion on the role of lawyers in promoting access to justice, see Alice Woolley, '*Imperfect Duty: Lawyers' Obligation to Foster Access to Justice'* (2008) 45:5 Alberta Law Review 107

obligation. The International Bar Association states that a lawyer is 'an indispensable participant in the fair administration of justice.'[3] Further, the United Nations also recognise this duty stating that '[l]awyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.'[4] Pro bono work may be considered as one of the methods for fulfilling this obligation.[5] The Law Society of England and Wales reports that 63% of solicitors had conducted pro bono work (undefined[6]) at some point in their career.[7] In 2015, 37% of solicitors reported that they had undertaken at least one hour of pro bono work (as defined by

[3] International Bar Association, 'International Principles on Conduct for the Legal Profession' (2011) Available at file:///C:/Users/intel_000/Downloads/IBA_International_Principles_on_Conduct_for_the_legal_prof%20(4).pdf (accessed 10 October 2016)

[4] OHCHR, 'Basic Principles on the Role of Lawyers' (1990) Available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx (accessed 10 October 2016)

[5] See Debra D. Burke; George W. Mechling; James W. Pearce, '*Mandatory Pro Bono: Cui Bono*' (1996) 25:4 Stetson Law Review 983; Deborah L. Rhode, 'The Pro Bono Responsibilities of Lawyers and Law Students' (2000) 27:2 William Mitchell Law Review 1201; Douglas L. Colbert, 'Clinical Professors' Professional Responsibility: Preparing Law Students to Embrace Pro Bono' (2011) 18:3 Georgetown Journal on Poverty Law and Policy 309

[6] There is no universally accepted definition of 'pro bono'. Evans highlights that 'some lawyers consider work done for legal aid as pro bono because of the low level of remuneration, while other would also include matters in which that have substantially reduced, but not waived, their fees.' (Adrian Evans, 'Recognising the Conditional Nature of Pro Bono Motivation: Avoiding 'Aspirational' Compulsion and Developing an Appropriate Pro Bono Ethic in New Lawyers' Available at http://www.nationalprobono.org.au/conference/pdf/2003_papers/3a_evans.pdf (accessed 23 September 2016))

[7] The Law Society of England and Wales, 'The pro bono work of solicitors: PC Holder Survey 2015' Available at http://www.lawsociety.org.uk/support-services/research-trends/solicitors-pro-bono-work-2015/ (accessed 23 September 2016)

the Pro Bono Protocol[8]) in the preceding 12 months.[9] This is a statistically significant decline on the 42% reported in the 2014 survey.[10] Interestingly, 43% of solicitors who did not provide pro bono services suggested that there were not adequate opportunities to do so.[11] Unfortunately, it is not clear what is meant by the lack of opportunities. This phrase could be interpreted to mean that solicitors did not believe there was a need for pro bono work which seems unlikely. An alternative interpretation for this phrase is that their firm did not support pro bono opportunities. Reasons cited for not undertaking pro bono work include transactional lawyers stating that they are not litigators, lack of time, cost to the firm in terms of time and money, lack of knowledge in relation to relevant laws affecting the indigent, and not knowing how to get involved in an area of pro bono that interests the individual.[12] Some lawyers also express concern about a perceived conflict of interest.[13] All these reasons have been recognised as barriers to solicitors undertaking pro bono in England and

[8] The Pro Bono Protocol defines pro bono as 'legal advice or representation provided by lawyers in the public interest including to individuals, charities and community groups who cannot afford to pay for that advice or representation and where public and alternative means of funding are not available.' Further, '[l]egal work is pro bono legal work only if it is free to the client, without payment to the lawyer or law firm (regardless of the outcome) and provided voluntarily either by the lawyer or his or her firm.' The Joint Pro Bono Protocol for Legal Work available at http://www.lawsociety.org.uk/Support-services/Practice-management/Pro-bono/The-pro-bono-protocol/ (accessed 23 September 2016)

[9] Ibid

[10] Ibid

[11] Ibid

[12] Robert S. Gerber, 'The Top Five Excuses for Not Doing Pro Bono Work, and Why They're All Bad' San Diego Daily Transcript 4 May 2005 Available at https://www.sheppardmullin.com/media/article/324_pub388.pdf (accessed 2 December 2016)

[13] For example, see Elisabeth Wentworth, '*Barriers to Pro Bono: Commercial Conflicts of Interest Reconsidered' (2001)* 19 Law in Context: A Socio-Legal Journal 166

Wales.[14] Kutik however identifies one of the biggest barriers preventing pro bono work as 'inertia', explaining that lawyers 'haven't done it, [they] don't know how to do it, and [they] won't make the effort to learn.'[15]

Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 made significant cuts to the scope of legal aid in England and Wales as of 1 April 2013. As a consequence of these cuts, the number of unrepresented individuals in the family courts has increased. The National Audit Office reports an increase of 30% of family court cases in which neither party had legal representation in 2013-14 compared with 2012-13.[16] The number of litigants in person appearing before the civil courts is also likely to have increased but there is not sufficient data in relation to this.[17] The Master of the Rolls, Lord Dyson, in giving evidence to the House of Commons Justice Committee summed up the issue stating:

> *"It is impossible to prove but it would be extraordinary, frankly, if there were not some cases that are decided adversely to a litigant in person which would have been decided the other way had that litigant in person been represented by a competent lawyer. It is inevitable."*[18]

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[14] LawWorks, 'The Case for Pro Bono and Getting Started' Available at file:///C:/Users/intel/Downloads/lawworks-pro-bono-mini-guide-the-case-for-pro-bono-and-getting-started.pdf (accessed 2 December 2016)

[15] David A. Kutik, '*Pro Bono: Why Bother'(2005)* 22:7 GPSolo 44, 46

[16] National Audit Office, 'Implementing reforms to civil legal aid' (2014) HC 784, Session 14-15 para. 1.25 Available at https://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf (accessed 23 September 2016)

[17] Ibid, para. 1.24

[18] House of Commons Justice Committee, 'Eighth Report of Session 2014-15, 4 March 2015: Impact of the changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders

A further issue, as noted by Steven Matthews of the Magistrates' Association, was:

> *"[individuals would be] put off making what may be a legitimate application because of the fact that they cannot get legal representation, have been unable to get advice and are put off by the forms and the process and so on."*[19]

It is difficult to quantify the numbers of individuals who decide not to pursue a legitimate legal claim because they are put off by the process. However, one Australian report estimated that not knowing what to do was cited as the reason for inaction in 30% of substantial civil legal problems not acted upon in 2008.[20]

A depressing picture is therefore emerging that at a time when demand, or at least a need, for pro bono legal services is increasing, the percentage of solicitors providing such services is decreasing. There is perhaps a need to consider what steps can be taken to increase the provision of pro bono services by the legal profession, or indeed whether the provision of pro bono should be increased. It has been argued that increasing the provision of pro bono encourages more legal aid cuts.[21] However, these

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Act 2012', para.137 Available at http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/31102.htm (accessed 23 September 2016)

[19] Ibid

[20] Productivity Commission, 'Access to Justice Arrangements' Volume 1, 133 Available at http://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume1.pdf (accessed 29 June 2017)

[21] For example, Michael Gove MP stated that '[w]hen it comes to investing in access to justice then it is clear to me that it is fairer to ask our most successful legal professionals to contribute a little more rather than taking more rather than taking more in tax from someone on the minimum wage.' (The Rt Hon Michael Gove MP, 'What does a one nation justice policy look like? 23 June 2015 Available at https://www.gov.uk/government/speeches/what-does-a-one-nation-justice-policy-look-like (accessed 6 March 2017)). The Law Society of England and Wales maintains that 'pro bono is never a substitute for a properly funded system of legal aid, which needs skilled and experienced solicitors to provide

issues are beyond the scope of this article which will focus upon the provision of pro bono services by law students.

The opportunities for students to undertake pro bono work at law school in the UK is good with at least 70% of all law schools offering pro bono opportunities to their students.[22] However, the evidence as to whether participation in pro bono programmes impacts upon a student's desire to undertake public service work in their future career is somewhat mixed. Some quantitative studies show little or no impact of clinical and pro bono programmes on students' desire to continue in pro bono/public service work in their future careers[23] whilst other studies suggest clinical

expert legal advice to those who need it.' (The Law Society, 'Law Society statement on 'one nation justice system' 23 June 2015 Available at http://www.lawsociety.org.uk/news/press-releases/law-society-statement-on-one-nation-justice-system/ (accessed 6 March 2017)). See also Richard Abel, 'The Paradoxes of Pro Bono' (2010) 78:5 Fordham Law Review 2443

[22] Damian Carney, Frank Dignan, Richard Grimes, Grace Kelly and Rebecca Parker, 'The LawWorks Law School Pro Bono and Clinic Report 2014' Available at https://www.lawworks.org.uk/sites/default/files/LawWorks-student-pro-bono-report%202014.pdf (accessed 23 September 2016). It should be noted that 'pro bono work' was defined as 'an activity organised and/or delivered by a law school that provides a legal service to an individual, group or organisation without charge'. This is a wide definition and encompasses mandatory and voluntary activities as well as credit and non-credit bearing activities. There has been discussion as to what work is included within the meaning of 'student pro bono' (for example, Dina R. Merrell, 'Pro Bono, Pro You' (2001) 29:7 Student Law. 39; Tracey Booth, 'Student Pro Bono' (2004) 29:6 Alternative L.J. 280). For a general discussion on the definition of 'pro bono' and 'clinical legal education' see Kevin Kerrigan, 'What is Clinical Legal Education and Pro Bono?' in *A Student Guide to Clinical Legal Education and Pro Bono* (Kevin Kerrigan and Victoria Murray eds. 2011)

[23] See Deborah L. Rhode, 'Pro Bono in Principle and in Practice' (2003) 53:3 Journal of Legal Education 413; Robert Granfield, 'Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs' (2007) 54 Buffalo Law Review 1355; Paul McKeown, 'Law Student Attitudes towards Pro Bono and Voluntary Work: The Experience at Northumbria University' (2015) 22:1 International Journal of Clinical Legal Education [vi]

legal education and pro bono work can have a positive impact upon students and their willingness to undertake public service work.[24]

Why Should Students do Pro Bono?

If a law student were to carry out a simple Google search asking 'Why should students do pro bono' it elicits pages of results from various professional bodies, universities and the wider media extoling the benefits of such work. Academic literature addressing this issue tends to encompass conceptual articles citing reasons why the authors believe students should engage in pro bono activities.[25] Surprisingly there has been little empirical research reporting the reasons students cite as motivating them into carrying out pro bono work.

The reasons for undertaking pro bono work can broadly be categorised as practical, tactical and ethical.[26] Practical reasons include enhanced legal skills, broader legal knowledge, experience, employability and increased job satisfaction. Tactical reasons include promoting the image of the individual, the organisation and the legal

[24] See Sally Maresh, 'The Impact of Clinical Legal Education on Decisions of Law Students to Practice Public Interest Law' in *Educating for Justice: Social Values and Legal Education* (Jeremy Cooper and Louise G. Trubek eds. 1997); Deborah A. Schmedemann, 'Priming for Pro Bono Publico: The Impact of the Law School on Pro Bono Participation in Practice', in *Private Lawyers and the Public Interest: The Evolving Role of Pro Bono in the Legal Profession* (Robert Granfield and Lynn Mather eds. 2009)

[25] For example, Howard Lesnick, 'Why Pro Bono in Law Schools' (1994) 13:1 Law and Inequality 25; Di Mari Ricker, 'Pro Bono Pays' (1997) 26:3 Student Law 30; Deborah L. Rhode, 'The Pro Bono Responsibilities of Lawyers and Law Students' (2000) 27:2 William Mitchell Law Review 1201; Craig Linder, 'Student-Lawyer Partnerships for Pro Bono' (2007) 35:7 Student Law 29

[26] Stephen Parker, 'Why Lawyers Should Do Pro Bono Work' (2001) 19 Law in Context: A Socio-Legal Journal 5

profession as a whole. From an ethical perspective, it has been argued that lawyers should undertake pro bono work because they are under a moral obligation to do so due to the privileged position the legal profession occupies in society.[27]

Further, the motivating factors to undertake pro bono work may also be categorised as intrinsic or extrinsic. Intrinsic motivation can 'be defined as the doing an activity for its inherent satisfactions rather than for some separable consequence.'[28] Within the context of pro bono work, those who undertake such work due to their own 'personal characteristics, values and attitudes'[29] are intrinsically motivated. Extrinsic motivation 'is a construct that pertains whenever an activity is done in order to attain some separable outcome.'[30] If pro bono work is carried out to improve skills, enhance reputation or for some other reward, this is extrinsically motivated behaviour. Alternatively, extrinsic motivation also encompasses behaviour motivated to avoid adverse consequences such as failing a programme of study if a pro bono requirement is mandated.

Extrinsic motivation has been criticised within education as:

> 'the more we reward people for doing something, the more likely they are to lose interest in whatever they had to do to get the reward. Extrinsic motivation,

[27] See Parker n.26; Deborah Rhode, 'Cultures of Commitment: Pro Bono for Lawyers and Law Students' (1999) 67 Fordham Law Review 2415, 2419

[28] Richard M Ryan and Edward L Deci, 'Intrinsic and Extrinsic Motivations: Classic Definitions and New Directions' (2000) Contemporary Educational Psychology 54, 56

[29] Rhode, n.27, 2427

[30] Ibid. 60

> in other words, is not only quite different from intrinsic motivation but actually tends to erode it.'[31]

Within clinical legal education it has been argued that extrinsic motivation is 'less effective than, and may actually erode, intrinsic motivation.'[32] However, the fundamental problem is that 'intrinsic motivation will occur only for activities that hold intrinsic interest for an individual'[33] and therefore if a student has not previously experienced any form of voluntary work, they may hold no interest in the subject matter. If it is envisaged that law schools can instil a pro bono ethos in students then it is necessary to look beyond intrinsic and towards extrinsic motivation to attract and encourage students to participate and value the activity.

Ryan and Deci posit that '[t]his problem is described within [Self-Determination Theory (SDT)] in terms of fostering the *[internalisation] and integration* of values and behavioural regulations.'[34] [original emphasis] Organismic Integration Theory, a sub-theory of SDT, was 'introduced to detail the different forms of extrinsic motivation and the contextual factors that either promote or hinder [internalisation] and integration of the regulation for these [behaviours].'[35] The OIT taxonomy can be visualised at *Fig.1* below.

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[31] Alfie Kohn, 'How Not to Teach Values: A Critical Look at Character Education' (1997) Phi Delta Kappan Available at http://www.alfiekohn.org/article/teach-values/?print=pdf

[32] Donald Nicolson, 'Education, Education, Education: Legal, Moral and Clinical' (2008) 42:2 Law Teacher 145, 154

[33] Ryan and Deci, n.28, 59

[34] Ibid, 60

[35] Ibid, 61

Fig.1 A taxonomy of human motivations[36]

Extrinsic motivation can be categorised as:

- *External regulation*

  Action performed due to an external demand or to obtain an external reward[37]
- *Introjected regulation*

  Actions performed with a feeling of pressure in order to avoid guilt or anxiety or to attain ego-enhancements or pride[38]
- *Identification*

  Person identifies the personal importance of the regulation and therefore accepts it as their own[39]
- *Integrated regulation*

  Fully assimilate identified regulations to the self through self-examination and alignment with other values and needs[40]

[36] Drawn from Ryan and Deci, n.28, 61

[37] Ryan and Deci, n.28, 61

[38] Ibid, 62

[39] Ibid

[40] Ibid

Within the context of pro bono work, as identified earlier, students may be motivated to undertake such work for a variety of reasons. If students conduct mandatory pro bono work, or if the work is performed for assessment purposes, this is an example of external regulation and therefore the behaviour is perceived as controlled and lacking autonomy. However, if students engage in pro bono work because they recognise it will enhance their legal skills and improve their employability, they will identify with the value of the activity in relation to their own career objectives. If this is taken a step further, and through reflection, the value of pro bono work is brought into congruence with the student's other values and needs, then the pro bono work becomes assimilated and extrinsically motivated actions become autonomous and self-determined. Whilst the student may originally become exposed to pro bono work because it is mandated, or they wish to achieve a good grade, they may then experience the intrinsic value of the work in itself thus shifting their own values. For example, Quigley, drawing upon the work of Mezirow, posits that educators can utilise the phenomenon known as the 'disorientating moment' where the student is exposed to a disorientating or disturbing experience to transform their 'societal and personal beliefs, values and norms.'[41]

There are very few reported empirical studies asking students what motivates them to conduct pro bono. Combe, with reference to the Aberdeen Law Project, reports that '[t]he highest ranking reason for joining was for experience, followed by social justice

[41] Fran Quigley, 'Seizing the Disorientating Moment: Adult Learning Theory and Teaching Social Justice in Law School Clinics' (1995) 2 Clinical Law Review 37, 51-56

and skills development…social justice was not the primary factor in their joining the volunteer activity.'[42] Nicolson, with reference to the Law Clinic at the University of Strathclyde, reports that 'self-centred reasons' ('To gain useful skills' and 'To put into practice theoretical knowledge') ranked higher than 'altruistic reasons' ('To help others' and 'To increase access to justice') as the reason for wanting to join the clinic.[43] However, those students 'who successfully completed the rigorous selection process seemed far more motivated by altruism in their decision to apply for membership compared to general Clinic applicants.'[44] This is probably explained by the fact students are selected on the basis of their commitment to social justice.[45]

A study by Evans and Palermo into Australian lawyers' values considered pro bono in the context of professional responsibility.[46] Respondents were fairly equally divided as to whether they would agree to pursue a hypothetical pro bono case.[47] Of those respondents who would accept the pro bono case, access to justice was ranked as the most important motivating factor for taking on the case. However, this is qualified as 'participants clearly expressed this issue in relation to personal interests

[42] Malcolm M. Combe, 'Selling intra-curricular clinical legal education' (2014) 48:3 The Law Teacher 281, 290 DOI: 10.1080/03069400.2014.965950; See also 'Student Attitudes to Clinical Legal Education' Available at https://basedrones.wordpress.com/student-attitudes-to-clinical-legal-education/ (accessed 22 September 2016)

[43] Donald Nicolson, 'Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice' (2013) 16:1 Legal Ethics 36, 43

[44] Ibid

[45] Donald Nicolson, '"Our roots began in (South) Africa": Modelling law clinics to maximise social justice ends' (2016) 23:3 International Journal of Clinical Legal Education 87, 106

[46] Adrian Evans and Josephine Palermo, 'Zero Impact: Are Lawyers' Values Affected by Law School' (2005) 8:2 Legal Ethics 240

[47] Ibid, 249

and desires rather than mentioning any professional ethics'.[48] Other motivating factors determining how respondents would act include professional ambition (relating to the high profile nature of the case), employer loyalty (prioritise work for employer) and employment security (if they pursued a case against the will of their employer).[49]

An interesting qualitative study was conduct by Behre into student motivations for pro bono following a tornado that devastated Tuscaloosa, Alabama in April 2011.[50] Whilst the circumstances of this study are very specific to the events at the time, the findings are useful. Behre reports that students were initially motivated through the 'need to help' and 'as a natural response to the shock of witnessing the tornado's destruction.'[51] '[S]urvivor guilt' and the 'need to give back to the community' were also cited as initial motivating factors to volunteering.[52] These motivating factors are intrinsic and 'as a direct response to witnessing a natural disaster.'[53] However, the student's rationale for their continued volunteer effort provides a good level of insight into student motivation. 'Meaningful volunteer experiences' such as 'personal, meaningful interaction with strangers',[54] organisation,[55] 'opportunities for students to

[48] Ibid, 250

[49] Ibid

[50] Kelly Alison Behre, 'Motivations for Law Student Pro Bono: Lessons Learned from the Tuscaloosa Tornado' (2012-2013) 31 Buffalo Public Interest Law Journal 1

[51] Ibid, 28

[52] Ibid, 29

[53] Ibid

[54] Ibid, 30

[55] Ibid, 31

use their professional training',[56] and the opportunity to gain 'new legal knowledge and skills'[57] were all cited as motivating factors. Behre however notes that '[s]tudents in general were more concerned about how they could help people and less concerned about how the experience would benefit them.'[58] Finally, 'membership in the community' was also cited as a motivating factor for volunteering and the students 'valued the experiences they had connecting to people from diverse backgrounds.'[59]

Methodology

Law students at Northumbria University were invited to enter an essay competition entitled 'Pro Bono: What's in it for law students?' The writer of the winning essay was awarded £125 voucher and the publication of their essay in the International Journal of Clinical Legal Education.[60] A representative of the International Journal of Clinical Legal Education adjudicated the competition. The students were not provided with any guidance as to the definition of 'pro bono' and therefore the essays reflect the students' own interpretation of this term. Further, the competition was open to all law students at Northumbria University regardless of whether they had any pro bono or clinical legal education experience. This is not a comparative study, merely a study considering the student perspective. The essays were analysed using NVivo software.

[56] Ibid, 34

[57] Ibid

[58] Ibid

[59] Ibid, 34-38

[60] The decision was also taken to publish three High Commended essays at the conclusion of the competition. The writers of these essays also received a voucher to the value of £25.

The competition was arguably subjective; no criteria was set to determine the winning essay. This was deliberate to encourage honest views as to the motivating factor for undertaking pro bono work. The decision was taken to avoid pre-defined criteria as this may have resulted in essays becoming formulaic.

What the students say:

The essays reveal that the reasons students believe they should undertake pro bono work are varied.

The article will explore the various reasons and motivations for undertaking pro bono work in more detail below. Before these reasons and motivations are considered, I will first look at the students' understanding of pro bono.

Understanding Pro Bono

As stated above, there is no settled definition of pro bono work and this article is not intended to consider what type of work should or should not be included. Further, it is beyond the scope of this article to consider whether clinical type activities fall within the definition. Pro bono is shortened from the Latin term 'pro bono publico' meaning 'for the public good'. There is no requirement, at face value, for the work to be carried out for a particular group or individual, or indeed without charge, for it to be classified as pro bono. However, it is typically expected that work will only qualify as pro bono

work if it is carried out for free and on behalf of individuals, charities and community groups who cannot afford to pay for advice and representation.[61]

The consensus amongst the students is that pro bono work should be carried out for low income and vulnerable members of society with statements such as:

> *"at its most primal level pro bono work protects those who do not have the financial means to benefit from the legal system."*[62]

and

> *"[p]ro bono operates with the aim of protecting those who are most vulnerable in society, whom are in need of legal representation and cannot afford it."*[63]

Further, it is also apparent that the students recognise pro bono work as an innate part of the legal profession stating:

> *"As future custodians of the legal profession, law students should embark on pro bono as it reflects the core values of justice."*[64]

One student however recognised that there is a conflict within the legal profession between the Government (or the State) and the profession's responsibility to ensure access to justice stating:

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[61] See for example The Law Society, The Joint Pro Bono Protocol for Legal Work Available at http://www.lawsociety.org.uk/support-services/practice-management/pro-bono/the-pro-bono-protocol/ (accessed 15 September 2016); [61] American Bar Association, ABA Model Rule 6.1 Available at http://www.americanbar.org/groups/probono_public_service/policy/aba_model_rule_6_1.html (accessed 15 September 2016)

[62] Essay 4

[63] Essay 2

[64] Essay 5

> *"the Government proposed that pro bono could fill the void left by the withdrawal of funding. Many in the profession attacked this notion as fanciful. However, to ignore such a notion would be ultimately unwise. It is clear there is mounting pressure on all entering the profession to complete their fair share of pro bono work."*[65]

There is also explicit recognition that pro bono work is carried out for reputational advantage, in other words, for tactical reasons.

> *"[Pro bono] also operates to support the reputation of the profession overall. Lawyers are required to uphold public confidence in the [profession] and pro bono work works to dispel the stereotypes which plague lawyers. It promotes the idea that [lawyers] are not here to charge extortionate fees, but are actually here to provide a public service. Pro bono work shows a clear dedication to the law for the right reasons, a desire to help people and an interest in the law, regardless of the time or effort they may have to expel in the process."*[66]

The essays suggest that students understand pro bono to be an important aspect of the legal profession and further, it involves working for the benefit of vulnerable and indigent clients thus supporting access to justice. The students demonstrate that whilst there are conflicts arising as to where the responsibility lies for ensuring access to justice, there is recognition that the legal profession shares that responsibility.

[65] Essay 4

[66] Essay 6

Further, the legal profession as a whole benefits from pro bono work due to the positive image it portrays.[67]

Why should students undertake pro bono?

We can broadly categorise the reasons cited by the students for undertaking pro bono as:

- Public service
- Skills
- Employability
- Networking
- Experience
- Satisfaction[68]

There are areas of natural overlap in the reasons cited by the student. For example, enhancing skills and experience are likely to improve employability. However, within the analysis, the focus has been on the primary motivating factor.

- *Public Service*

Public service was the only reason cited by every student as a reason to undertake pro bono work. However the weight given to public service among the essays varied

[67] Although see Gary A. Hengstler, 'Vox Populi - The Public Perception of Lawyers: ABA Poll' (1993) 79 A.B.A. Journal 60, 62 which reports that 'minorities, the unemployed, members of low-income households, and adults under 30 were the most likely to feel favourably towards lawyers'

[68] The reasons cited by the students for undertaking pro bono work accord with reasons cited by Parker. See n.26

considerably. Whilst one student devoted over half their essay to public service, other students merely acknowledges the public service ethos and instead concentrates their essay on the benefits to the individual:

> *"Whilst the case for the utility of pro bono for the aggrieved has been made extensively, this essay considers how the volunteers may benefit themselves in the process."*[69]

The essays support the notion that law students see themselves as part of the wider community saying, for example, that:

> *"by participating in pro bono work, law students contribute constructively to the community around them in a most unique way."*[70]

It may be questioned as to how engagement with the wider community is a benefit to the student. In response to this question, the law school is about more than teaching students' knowledge and skills; indeed it is a 'professional socialization experience'.[71] This wider role is also recognised by The Quality Assurance Agency for Higher Education (QAA) in the United Kingdom in setting out benchmark standards to describe a law student's skills and qualities of mind. The QAA states that a graduate of law with honours is expected to have demonstrated, amongst other things, an 'awareness of principles and values of law and justice, and of ethics' and a 'knowledge and understanding of theories, concepts, values, principles and rules of public and

[69] Essay 8

[70] Essay 4

[71] James L. Baillie and Judith Bernstein-Baker, 'In the Spirit of Public Service: Model Rule 6.1, the Profession and Legal Education' (1995) 13:1 Law & Inequality 51, 67

private laws within an institutional, social, national and global context'.[72] Engagement with the wider community fulfils this wider role for the law school by providing the student with a 'professional socialization experience' and facilitating their understanding of the role of law within the 'institutional, social, national and global context'.

Through exposure to a wide variety of people, especially those from backgrounds that the students may not have ordinarily been exposed to, the student becomes a more rounded individual and thus develops as a professional. This is explained by one student as follows:

> *"Clients that students experience in [p]ro [b]ono work tend to come from a variety of social backgrounds. This helps to break down any unconscious social bias they may have, to ensure that in practice they approach each case with an open mind and with the necessary social awareness and empathy required of a lawyer. Working in [p]ro [b]ono work prior to going in[to] practice helps students to develop as lawyers whose primary concern is to help their clients rather than being purely motivated by money and career advancement."*[73]

There is further recognition within the essays that this engagement with the community can place the law into context for the student and add perspective to their aspirations as a lawyer that is unachievable in the classroom environment. For

[72] QAA, 'Subject Benchmark Statement: Law' (2015) Available at http://www.qaa.ac.uk/en/Publications/Documents/SBS-Law-15.pdf (accessed 28 June 2017)

[73] Essay 12

example, Baillie and Bernstein-Baker considered a number of studies and concluded that merely including discussions on the need for pro bono in a classroom setting would not have an effect on student attitudes.[74] It is therefore important for students to experience pro bono so they can therefore feel the intrinsic benefit of pro bono work, a notion summarised as follows:

> *"It is imperative to understand that the benefits of [p]ro [b]ono are not limited to professional applications; legal involvement within the community allows one to make meaningful contributions to those in need, and in doing so allows the student to appreciate the "vital role the law plays." Legal [s]ervice has been denoted as being "unaffordable and out of reach." The common view held is that "one of the most perplexing facts about our perplexing legal market is its failure to provide affordable services for just about anyone but the rich and corporations." Thus, by providing legal aid to those who lack financial stability, the student is able to experience "intrinsic morale" and self-worth, something that all lawyers must be familiar with, and something that extends beyond the walls of the classroom."*[75]

The students' also demonstrated awareness that the altruistic value of pro bono work also improved the often-tarnished reputation of lawyers and therefore whilst the work

[74] Baillie and Bernstein-Baker, n.71, 64

[75] Essay 11

is of benefit to the wider community, it is also of benefit to the legal profession as a whole.[76] This is illustrated as follows:

> *"Lawyers are often branded with a reputation of arrogance and elitism. However, this does not stead well when those who are in need of legal help cannot access it, when [l]egal [a]id has been cut so drastically in the last 3 years. Therefore, the English [l]egal[s]ystem relies upon [pro bono] work to not only erode this stereotype, but to show that lawyers and law students alike, can show compassion by working on cases for free."*[77]

- *Skills*

Ten of the students referred to skills development within their essays as a reason to undertake pro bono work.[78] Both legal and personal skills can be developed as summarised below:

> *"It allows [students] to develop vital, practical legal skills (eg. advocacy, legal research, interviewing), as well as other relevant ones such as personal organisation, presentation and teamwork (useful in a legal working environment)"*[79]

There is also a distinct overlap between the development of skills through pro bono work and other motivating factors. Through the utilisation of lawyering skills,

[76] For example, the Australian Pro Bono Manual explicitly cites 'reputation' as a benefit of pro bono work. (Australian Pro Bono Centre and Victoria Law Foundation, 'The Australian Pro Bono Manual' (2005) 1.4)

[77] Essay 2

[78] Earlier research suggests that students valued the personal benefits of pro bono such as skills development. See McKeown, n.23, xxvii

[79] Essay 3

students are able to experience what it is like to work as a lawyer in practice,[80] to gain confidence that they have the requisite ability and provided validation for their chosen career path:

> *"The skills developed in [p]ro [b]ono legal practice are invaluable to the pursuit of a career as a practicing lawyer. Almost every role within the front line services of the legal profession requires basic abilities in client and case management. The focus on techniques such as interviewing, legal writing, organisation, and management of the expectations of client qualify students perfectly to move forward in their legal career. Not only does the development of such skills help undoubtedly benefit students going into practice, but in my own experience provides the confidence to embark on that course. I for one can say that prior to my experience in [p]ro [b]ono legal work [I] certainly [was not] confident in pursuing a career as a lawyer. However in developing these skills and confidence, and engaging in [first-hand] experience working as a trainee solicitor, albeit in a [p]ro [b]ono setting, verified the enjoyable and exciting nature a career as a lawyer presents."*[81]

It is important that we do not under-estimate the role of the supervisor within the learning process. Within the context of clinical legal education, Cozens states that the 'supervisor is possessed with the ability to place the student's experiences into a

[80] See also Pam Feinstein, '*Gain Experience through Pro Bono'* (2012) 29:1 GPSolo 17; Dina R. Merrell, '*Pro Bono, Pro You'* (2001) 29:7 Student Lawyer 39

[81] Essay 12

coherent learning structure so that they make sense to the student.'[82] There is an appreciation of this from one student who states:

> *"Pro bono volunteers are generally supported and supervised throughout their volunteering enabling them to receive feedback for self-development."*[83]

This is further supported through students reflecting as an important part of this development:

> *"[U]ltimately it provides an opportunity for students of law to reflect upon their own weaknesses and strengths, to better their own legal skills, to engage with real clients"*[84]

In enabling this self-development, there must be clear boundaries as to the role of the supervisor. Cozens sets out two levels of supervisor intervention; the first is guidance thus allowing the student to act in the role of the lawyer and accept responsibility for that role; the second is direct intervention whereby the supervisor will replace the student's control of the situation.[85] The latter intervention meant there is little educational value in the experience.[86] Whilst the supervisor is important within the student's educational development, the student must assume responsibility for their own learning.

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[82] Michael Cozens, '*Clinical Legal Education: A Student Perspective*' (1993) 2 Dalhouise Journal of Legal Studies 201, 226

[83] Essay 5

[84] Essay 9

[85] Cozens, n.82, 231-232

[86] Ibid, 233

- *Experience*

As cited earlier, a significant motivating factor to undertake pro bono work is the experience of practise.[87]

> *"The ideals of [pro bono] give students the fundamental opportunity to experience the expectations of a prospective lawyer"*[88]

There is also a perception that the experience afforded by pro bono work is different to any other experience a law student may have through their university career. The students stated that the practise of law is different to how it is taught in the classroom. Further, the experience is more beneficial than work experience within a law firm as it is hands on.

> *"There is a definitive difference between being taught the law and practicing the law. Any opportunity in which you can use the knowledge you have been taught, and putting this in to practice, will always be beneficial. Working on a [pro bono] basis is unlike any mini-pupillage or vacation scheme. You are not pushed aside and left to shadow the lawyers that are working on the case, but you yourself are involved. You have a legal duty to your client. You are responsible for your client. Working a case on a [pro bono] basis creates a strong platform for a future legal career."*[89]

[87] See n.80

[88] Essay 11

[89] Essay 2

> *"The bridge between the way the law is taught at an academic level and the way the law works in reality is a very important distinction for students. Pro bono provides a degree of realism that no work experience can replicate, and is arguably a better introduction than anything preceding a [t]raining [c]ontract or [p]upillage."*[90]

Further, the students also perceive that pro bono work will help them stand out from the crowd.

> *"To the careerist, it offers necessary work experience to compliment applications for training contracts and pupillages. With attrition rates for career progression being as gruelling as ever (most notably in the case of the bar), pro bono work offers the aspiring lawyer a chance to apply their academics to real problems. In the current recruitment climate, work experience and a commitment to the legal profession has become a pre-requisite, not a bonus. Fortunately, pro bono work offers both, and is a valuable asset to any pragmatic law student."*[91]

On a final note regarding experience, some of the students cited personal experience of engaging in pro bono work and the effect it has had on them. For example, one student stated:

> *"having engaged with my [University's] [pro bono] clinic…alongside volunteering at the Citizens Advice Bureau, the importance and value of [pro bono] work for the modern day law student cannot be stressed enough. The benefits are two-fold, first and foremost, the wealth of experience that a student can gain through practical work is incomparable*

[90] Essay 6

[91] Essay 8

> *to that of regular modular studies, secondly, engaging with [pro bono] work whether through a clinic or indeed volunteering, not only has the ability to give a law student a humbling experience, but also an appreciation for the legal sector and perhaps further motivation for the students own career."*[92]

The student goes on to state:

> *"Aside from the practical experience that [pro bono] work can provide, I believe it a great way in which to instil a sense of ethics and appreciation of the client-solicitor relationship from an early stage. Both the [pro bono] clinic and the Citizens Advice Bureau allowed me to engage with those who would not normally be able to receive legal advice and as a result, I was fortunate enough to experience the appreciation projected from those that I was helping."*[93]

It is possible that this experience can be created through the provision of a university based law clinic as summarised by another student:

> *"Speaking as a product of Northumbria University's Exempting Law Degree and [having] worked in their prestigious Student Law Office the benefits of [p]ro [b]ono are benefits that I have experienced personally. My resounding support for [p]ro [b]ono legal work therefore comes from experience."*[94]

[92] Essay 9

[93] Essay 9

[94] Essay 10

- *Employability*

As discussed above, experience through pro bono work can also enhance employability. Students made frequent references to the opportunity to build their CV:

> *"Pro bono work is invaluable to the CV of any law student, and is quickly becoming a necessity rather than an addition. It is not difficult to see why. Pro bono work provides hands-on experience with real life clients, cases and legal processes. If a candidate can demonstrate a proven ability for the kind of tasks which would be assigned to them during employment, then half the battle is already won."*[95]

Further, another student considered the issue of pro bono from the perspective of potential employers and satisfying their own pro bono initiatives:

> *"More and more law firms see the need for pro bono work and expect their lawyers to contribute. Why wait until it's expected of you? Impress them by having made a start on your own initiative"*

Whilst the students suggest that pro bono will assist them in securing employment, interestingly, graduate recruitment is also cited as a reason for law firms to have pro bono programmes. The Law Society of England and Wales report that:

> *'New graduates expect much more than just a healthy remuneration package and good career prospects; many law firms report that students being interviewed for vacation*

[95] Essay 1

> *schemes ask detailed questions about their firm's pro bono programme and the opportunities available to them.'*[96]

It appears that law firms, in part, will offer a pro bono programme to attract high-calibre graduates while students will undertake pro bono opportunities to secure employment. This suggests that pro bono capacity is potentially increased by both law firms and students desire to stand out to each other.

- *Academic*

Four of the students identified enhancing a student's academic understanding of the law as a motivating factor to undertake pro bono work.[97] The theme of this motivation is that pro bono work improves their academic understanding of the law by placing it into context as shown in the quote below:

> *"Academics have long discussed the ramifications of graduates that are technically sound in knowledge of the law itself and the procedural steps that accompany statute, but could not begin to understand the effects on a client of the application of said statute. For example, you may understand that an application can be made under Section 33 of the Family Law Act 1996 for an Occupation Order but until you have met the client who happens to be a victim of domestic violence, who fears for the safety of her children and*

[96] The Law Society of England and Wales, 'Pro Bono Manual: A practical guide and resource kit for solicitors' (2016); See also Australian Pro Bono Centre, n.76

[97] See McKeown, n.23, xxix. Students also reported benefiting from a better academic understanding of the law

> *understood how this application will affect this whole [family's] life you cannot truly believe yourself to be educated in that area of law."*[98]

There was also an appreciation from these students that the academic law can be different to the practical law with one student stating:

> *"[Although] it's easy to get lost in the intricacies of implied terms and the construction of contracts, practical law is often very different to academic law. Therefore, for the enthusiast, exposure to real cases and the ability to assist and advise both collaboratively and autonomously is an excellent learning tool and will invariably help cement essential legal principles in the context of tangible problems."*[99]

- *Satisfaction*

Personal and job satisfaction is often cited as a reason to undertake pro bono work. There is an inherent satisfaction in doing a good deed and doing a good job for someone. Dinovitzer and Garth report that engaging in some pro bono work provided a sense of satisfaction for respondents although more pro bono hours significantly decreased satisfaction.[100] This supports the notion that doing some altruistic work is beneficial but doing too much may have a negative impact on the individual. It is

[98] Essay 10

[99] Essay 8

[100] Ronit Dinovitzer and Bryant G. Garth, 'Pro Bono as an Elite Strategy in Early Lawyer Careers' in Private Lawyers and the Public Interest: The evolving role of pro bono in the legal profession (Robert Granfield and Lynn Mather eds. 2009),

suggested that this negative impact may be as a result of too little paying work within the law firm or a 'lack of fit' between the pro bono and the business.[101]

Satisfaction was also cited and appeared to be a strong motivating factor by six of the students in their essays with one student saying:

> *"Law students are rewarded and paid in the sense of job satisfaction. The payment is the feeling you get knowing that you have been able to help someone. Knowing that you are able to put what you have learnt in to practice. Knowing that if you can successfully handle a [pro bono] case, you can be successful when you graduate"*[102]

Further, one student reflects upon the often-perceived burden of pro bono work and the hardships faced by law students stating:

> *"For those that live and love the law, pro bono does not burden the volunteer with having to work; it gifts them with getting to work. It allows the long hours spent in the library, the years of debt following extortionate professional qualification fees, and the mountain of extra-curricular obligations required to succeed as a lawyer to be mere afterthoughts for the student."*[103]

Whilst personal satisfaction may be a highly influential factor motiving students to undertake pro bono, the impact of the work must also be borne in mind. It must be remembered that students have other commitments, whether this be on their programme of study or outside of the university. Further, any pro bono programme

[101] Ibid

[102] Essay 2

[103] Essay 8

to complement the students' studies and thus provide a fit and therefore maintain anticipated satisfaction.

- *Networking/Professional Relationships*

Pro bono programmes will often bring students into contact with other members of the legal profession. This contact can be categorised as a benefit to the student.[104] This may be due to collaboration between the university and an external law firm. Alternatively, students may liaise with opposing lawyers in relation to their case. Two students highlighted that pro bono work can result in the development of professional relationships although the perception was be of personal benefit to the student. Whilst not explicit in the comment below, it is likely to mean that the student can utilise the contact to enhance future employment prospects for example:

> *"[L]inks can be established with important legal organisations. As a law student, it is important to establish as many contacts as possible and pro bono work provides a fantastic opportunity to create meaningful relationships which may prove useful in the future."*[105]

[104] Harry S. Margolis, '*The Elder Law Clinic*' in The ElderLaw Portfolio Series Release #43 (Harry S. Margolis, Christine J. Vincent. Esq, and Daniel Waltz eds 2013) 1B-13

[105] Essay 1

Discussion

Limitations

As with all studies, the conclusions of this study are subject to its limitations. In particular, this was a small-scale study considering the opinions of students based at a one university. It is likely that the students who participated in the study had a predisposition to pro bono and altruistic behaviour, thus were interested in the subject matter of the study. However, the incentive of a prize may have mitigated this factor and attracted the views of those individuals who are more extrinsically motivated. However, I suggest we can learn from the students and assist in the development of future pro bono programmes.

Student Motivations

The students who participated in this study clearly demonstrated mixed motivations for undertaking pro bono work. Whilst many of the motivations were for personal benefit such as enhancing their skills, knowledge and employability, there was also recognition amongst all the students that pro bono work has wider social benefits including the promotion of access to justice and enhancing the community in which they live. One student expressed this as follows:

> *"Pro Bono work operates to defend the vulnerable in society…[t]his alone means pro bono is well worth the time and effort for students, regardless of the useful personal skills and confidence they will also develop in the process."*[106]

Whilst another student stated:

> *"You may be able to do some good, and that will be of benefit to you as well as society: we all have to play in social responsibility"*[107]

There is a link between the students cited motivations for undertaking pro bono work and Adult Learning Theory. As such, there is a theoretical basis as to why the provision of pro bono opportunities in law schools will enhance student skills, legal knowledge and consequentially, employability. Pro bono work is therefore an educational experience for the students.

Firstly, it is necessary to engage the students in the culture of pro bono work, recognising that the motivation for each student will be different. As such, perhaps there we should not isolate individual motivators but instead recognise the holistic nature of motivation. The Andragogical Model assumes that adults, when undertaking to learn something on their own, will invest considerable time into investigating the benefits of the activity.[108] As educators, we can draw the student's

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[106] Essay 6

[107] Essay 7

[108] Malcolm S. Knowles, Elwood F. Holton and Richard A. Swanson, 'The Adult Learner: The Definitive Classic in Adult Education and Human Resource Development' (2012) 7th Edn Routledge Oxon 63; see also Frank S. Bloch, 'The *Andragogical Basis of Clinical Legal Education'* (1982) 35:2 *Vanderbilt Law Review* 321 for discussion on application of Adult Learning Theory to clinical legal education

attention to an array of benefits that they can evaluate and align with their own objectives. Further, if a student opts to undertake pro bono work, they will feel a sense of autonomy thus aligning with the notion of 'self-concept'.[109] Knowles at al. state that '[t]he minute adults walk into an activity labelled "education," "training," or anything synonymous, they hark back to their conditioning in their previous school experience, put on their dunce hats of dependency, fold their arms, sit back, and say "teach me."'[110] Through engagement in pro bono activity, students are engaged in self-directed learning and less likely to resent or resist the learning activity.

The pro bono experience in itself aligns with the Androgogical Model as the emphasis 'is on experiential techniques – techniques that tap into the experience of the learners.'[111] Students also develop a 'readiness to learn'[112] because they are dealing with real life legal problems that require them to seek out and assimilate the relevant knowledge and skills.

Adults also have a life-centred orientation to learning and therefore learn 'new knowledge, understanding, skills, values and attitudes most effectively when they are presented in the context of application to real-life situations.'[113] Assisting a pro bono client with a real legal problem will therefore assist student in acquiring legal

[109] Ibid
[110] Ibid, 64
[111] Ibid
[112] Ibid, 65
[113] Ibid, 66

knowledge and skill but also will influence their values and attitudes through exposure to new people and situations.[114]

Finally, the most important motivators for adult learning are 'internal pressures' such as a desire for increased job satisfaction and self-esteem.[115] We can see that the students are exhibiting such motivation.[116]

The question then becomes how we capitalise on these motivations to instil a culture of pro bono and volunteering within the law school whilst providing a rewarding educational experience for the students.

Pro bono in law school

As outlined above, Adult Learning Theory means there is an educational basis for incorporating pro bono programmes in law schools. However, it is important that such programmes are well designed to engage students and achieve the desired outcomes.

Extrinsic motivation means that students are likely to engage with the programmes. The students value the skills development, the experience that they will acquire and, as a consequence the enhanced employability. The supervision of the programme and the students are important to ensure that students achieve the learning outcomes, and

[114] For example, Behre, n.50; Maresh, n.24; Schmedemann, n.24

[115] Knowles, n.108, 67

[116] See n.102 and n.103

do not become merely observers but are responsible within the role of a lawyer creating an environment of autonomy and self-directed learning.

It is also important that pro bono programmes expose students to new people from different backgrounds. Intrinsically, students often value meeting strangers and this has the potential to create the 'disorientating moment'. Again, through guidance from their supervisor, students can reflect upon the situation, challenging their own perceptions of the world. Through such self-examination, students can achieve 'integration' on the 'taxonomy of human motivation' and internalise thus an extrinsically motivated experience will hold intrinsic interest.

Conclusion

We do not have the necessary evidence to draw any conclusions as to whether students will become intrinsically motivated to engage in public service after university as a longitudinal study would be required. However, on a theoretical basis, there is evidence to suggest that students can be extrinsically motivated to engage. Through mere experience, some students may experience the inherent satisfaction of pro bono activity and therefore wish to continue. Others however may 'identify' the personal importance of the activity through an appreciation of its application to their own life and career goals, thus beginning the process of internalisation. As educators we can guide our students through the reflective process, help them make sense of their experiences and integrate the pro bono experience with their sense of self. Whilst the students are still extrinsically motivated, the perceived locus of causality will

become more internalised thus, hopefully, instilling a continuing commitment to pro bono work in the future.

There are numerous reasons why students may wish to undertake pro bono work whilst at law school. Of these, experience is a highly influential factor as it not only provides a strong extrinsic motivation to participate in pro bono work initially, but the pro bono experience may also facilitate a deep intrinsic motivation to continue with the work into the future. Through experience, students can develop skills and improve their employability but they can also feel the inherent satisfaction of helping others and making a difference.

The development of pro bono initiatives in law schools benefits students personally and the students recognise this. Pro bono schemes will also benefit the community through the assistance offered by the students whilst engaging in the programme. As such, the University may also benefit from an enhanced reputation amongst the student body and the wider community.

As a consequence of providing pro bono programmes, students may reflect upon their experience and assess their own values and attitudes towards society, which may have a transformative impact upon their lives and their continuing participation in such as activity. However, to achieve this, the students must be provided with not only the experience but also the ability to reflect upon that experience.

CHAPTER SIX

CAN SOCIAL JUSTICE VALUES BE TAUGHT THROUGH CLINICAL LEGAL EDUCATION?

PAUL MCKEOWN

Introduction

This chapter will explore whether we can teach students the value of social justice through clinical methodology. It is important to understand where people have come from and where they are going. With this is mind, this chapter will consider how an individual's values are moulded, as well as explore the institutional values of the legal profession.

The definition of social justice has been explored elsewhere in this book. As a term, it is often used within education without definition, with a sense that the definition is obvious. Social justice has been defined as "equality of rights for all peoples and the possibility for all human beings, without discrimination, to benefit from the economic and social progress disseminated and secured through international cooperation".[1]

This definition encompasses common conceptions of social justice espoused by Rawls' Principles of Justice: Equal Liberties; Equal Opportunity and the Difference Principle.[2] This can be contrasted with the elements of social justice espoused by Miller, namely: need (referring to

[1] United Nations, "Social Justice in an Open World: The Role of the United Nations." 2006. http://www.un.org/esa/socdev/documents/ifsd/SocialJustice.pdf accessed 15 March 2016.
[2] John Rawls, *A Theory of Justice*. Oxford: Oxford University Press, 1999.

the basic necessities), desert (referring to reward); and equality (the notion that citizens are equal).[3]

It has been argued that social justice is a value of the legal profession and therefore lawyers should seek to promote and attain social justice through their work. It is sometimes difficult to reconcile the abstract theories with the practical application of the law. However, these theories can be utilized to critically analyse and evaluate policy, legal processes and the law to determine whether they are consistent with the notion of social justice.

This chapter will consider this perceived value and surrounding issues primarily from the context of the legal profession and legal education within England and Wales. In particular, the chapter will explore whether clinical legal education can be used to teach students the value of social justice. Reference will be made to other jurisdictions and many of the issues considered will be universal.

Values and the Individual

It is necessary to understand the notion of values in order to discuss the issues concerned in this chapter. This is a difficult task given the volume of literature across a range of disciplines. A starting point is a layman's understanding of values as defined in the Oxford Dictionary as "principles or standards of behaviour; one's judgement of what is important in life".[4]

From this definition, we get a sense of the personal nature of values. An individual's values are a culmination of their own life experience. Family, social and economic background, religion, and relationships are all prevalent in forming values. Socialization theory usually stresses the family as the most important mechanism for the transmission of values, although the influence of peers, school and sociohistorical events have also been recognized.[5] Webb states that whilst we draw on "many familial and

[3] David Miller, *Principles of Social Justice*. Cambridge, MA: Harvard University Press, 1999.

[4] See http://www.oxforddictionaries.com/definition/english/value accessed 30 August 2016.

[5] Dean R. Hoge, Gregory H. Petrillo and Ella I. Smith, "Transmission of Religious and Social Values from Parents to Teenage Children." *Journal of Marriage and Family* 44, no. 3 (1982): 569.

wider cultural influences to help shape our value system, the ultimate construct is our own, and each of us builds our own set of value priorities out of our life experience."[6]

It is therefore important to recognize that each person will have their own value system, even where they have shared similar experiences.

Values in Legal Education

There is a fundamental question as to the extent of the role played by institutions of higher education in educating students in relation to values. We can question whether these institutions teach knowledge or whether they have a broader remit.

It has been argued that teachers in higher education can do two things:

> (1) introduce students to bodies of knowledge and traditions of inquiry that had not previously been part of their experience; and (2) equip those same students with the analytical skills – of argument, statistical modelling, laboratory procedure – that will enable them to move confidently within those traditions and to engage in independent research after a course is over.[7]

However, it has also been argued that institutions of higher education have a broader role for their students. Lewis argues that

> universities have forgotten their larger educational role for college students. They succeed, better than ever, as creators and repositories of knowledge. But they have forgotten that the fundamental job of undergraduate education is to turn eighteen- and nineteen-year-olds into twenty-one- and twenty-two-year-olds, to help them grow up, to learn who they are, to search for a larger purpose for their lives, and to leave college as better human beings.[8]

[6] Julian Webb, "Taking Values Seriously." In *The Ethics Project in Legal Education,* edited by Michael Robertson, Lillian Corbin, Kieran Tranter and Francesca Bartlett. London: Routledge, 2011.
[7] Stanley Fish, *Save the World on Your Own Time*. Oxford: Oxford University Press, 2008: 12–13.
[8] Harry R. Lewis, *Excellence Without a Soul: Does Liberal Education Have a Future?* New York: Public Affairs, 2007: xiv.

There is also an argument that "[c]reating and imbuing knowledge is a process that has to be accompanied by the cultivation of ethical standards that guide the application of that knowledge".[9] In essence, with knowledge comes power and with power comes responsibility. If institutions of higher education provide students with knowledge they also have the responsibility to equip their students with the ability to use that knowledge.

Further, Heuser suggests that "the role of tertiary education serves as the foundation for expanding social and economic development".[10] If we consider the mission statements of universities, it is clear that their remit is broader than teaching knowledge and skills. For example, Newcastle University aims to "play a leading role in the economic, social and cultural development of the North East of England".[11] Northumbria University states that it "will have a strong national and international presence, while continuing to play a leading role in the North East, contributing to its business and economy and its culture and success as a civil society".[12] Both these statements recognize that the universities are part of the wider community and therefore have a broader social remit.

The consensus is that universities do have a broader remit to engage in ethical and values education. If this argument is accepted, we should then consider how this broader remit is relevant to legal education.

Duhaime asks "why did the student go to law school?" and answers, "[t]o become a lawyer".[13] If we are teaching students to become lawyers, we must consider whether we are teaching them the values of the legal profession, or broader societal values.

It is arguable that a traditional legal education in England and Wales does not teach values. This was identified in the Legal Education and Training

[9] Brian L. Heuser, "Academic Social Cohesion within Higher Education." *Prospects* 37 (2007): 299.
[10] Ibid.: 294.
[11] See http://www.ncl.ac.uk/about/vision/mission/ accessed 29 March 2016.
[12] See https://intranet.northumbria.ac.uk/vision2025/vision2025/ accessed 29 March 2016.
[13] Gretchen Duhaime, "Practicing on Purpose: Promoting Personal Wellness and Professional Values in Legal Education." *Touro Law Review* 28, no. 4 (2012): 1207.

Review (hereafter LETR) that highlighted professional ethics and legal values as a gap, or at least an area where something more or better could be done in legal education.[14]

In England and Wales, legal education has traditionally been divided into stages: academic, vocational and training.[15] The academic stage has traditionally been taught through a three-year Qualifying Law Degree or, for those who have not obtained a Qualifying Law Degree, a one-year Graduate Diploma in Law. The vocational stage of qualification requires students to complete the Legal Practice Course if they wish to qualify as a solicitor or the Bar Professional Training Course if they wish to qualify as a barrister. Before admission to the profession, students wishing to qualify as solicitors must complete a two-year training contract whilst barristers must complete a one-year pupillage. Both the training contract and the pupillage are completed in practice.[16]

This separation of the stages of qualification has meant legal ethics has not traditionally featured at the academic stage although the Law Society of England and Wales has contended that legal ethics should be a core area of a Qualifying Law Degree.[17] Further, legal ethics is regarded as one of the most important areas of knowledge by members of the legal profession.[18]

However, it is not universally accepted that ethics and values should be taught at undergraduate level. Legal academics have taught from a "neutral and value-free perspective" and, where moral issues are raised, the

[14] LETR: Legal Education and Training Review. "Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales" 2013: para 2.101. http://letr.org.uk/wp-content/uploads/LETR-Report.pdf accessed 30 August 2016.

[15] Some universities, such as Northumbria University, have integrated the academic and vocational stages of qualification. A list of institutions offering integrated programmes is available at http://www.sra.org.uk/students/exempting-law-degrees.page accessed 30 August 2016.

[16] Please note that at the time of writing the Solicitors Regulation Authority is reviewing the approach to qualification as a solicitor. Further details can be obtained at https://www.sra.org.uk/t4t/ accessed 29 March 2016. The Bar Standards Board are also reviewing the route to qualification as a barrister. Further details can be found at https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/future-bar-training/ accessed 29 March 2016.

[17] LETR (n14): para. 2.57.

[18] Ibid.: para. 2.68.

academic's role is to educate the students about the complexities of the argument but express no opinion as to the relative merits of the various possible moral positions in relation to the issues raised.[19] It is of note that one academic is quoted in the LETR report as saying:

> And I can see that the more you start incorporating these skills into the degree within our sort of timetable, things like communication and mooting and legal skills and presentations and group work and possibly ethics – the more you start getting these skills in, the less room you have to teach philosophy, theory, rights, justice, the liberal arts kind of side of it.[20]

The LETR report recommended that Qualifying Law Degrees and the Graduate Diploma in Law should embed an awareness and understanding of legal ethics and professional values.[21] However, as the comment above suggests, there is not universal agreement within higher education as to whether professional ethics should be incorporated at undergraduate level. This raises the question as to whether a law degree is a professional degree. Again, referring back to the separation of the stages of qualification in the English and Welsh legal system, it is perhaps easier to reconcile that professional ethics are embodied within the Legal Practice Course or the Bar Professional Training Course, being the vocational stages of qualification. After all, not every entrant to an undergraduate law programme will pursue a career in the law, whilst it is likely those enrolling on a vocational programme at least set out to pursue such a career.

The Law Society of England and Wales states that 31,800 people applied to study law at undergraduate level in 2014 of which 21,775 were accepted on to courses. In the year ending 31 July 2014 there were 5,001 new traineeships registered.[22] The Bar Standards Board states that there were 397 new pupillages registered in the year 2013/14.[23] Whilst we must be

[19] Fiona Cownie, "Alternative Values in Legal Education." *Legal Ethics* 6, no. 2 (2003): 179.
[20] LETR (n14): para. 2.103.
[21] Ibid.: para. 4.104.
[22] See https://www.lawsociety.org.uk/Law-careers/Becoming-a-solicitor/Entry-trends/ accessed 29 March 2016.
[23] See https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/pupillage-statistics/ accessed 29 March 2016. Please note that in the year 2012/13 there was a rise in the number of pupillages registered to 514. This is explained by a change from a shared recruitment timetable where all pupillages

careful about looking at statistics in isolation, these figures support the anecdotal evidence that the majority of those studying law at an undergraduate level will not pursue a career as a solicitor or a barrister. It is therefore questionable whether we need to teach professional ethics and values at an undergraduate level.

As entrants to the legal profession in England and Wales are required to possess a Qualifying Law Degree or Graduate Diploma in Law, these are professional programmes of study with the curriculum set by professional bodies.[24] Where a programme of study is required to enter a particular profession, this should be regarded as a professional degree. It is however possible to obtain a law degree which is not a Qualifying Law Degree and therefore such a programme may be regarded as a liberal arts degree.

"[P]rofessional education aims to initiate novice practitioners to think, to perform, and to conduct themselves (that is, to act morally and ethically) like professionals."[25] Sullivan et al. stated that professional education involved six tasks:

1. Developing in students the fundamental knowledge and skill, especially an academic knowledge base and research
2. Providing students with the capacity to engage in complex practice
3. Enabling students to make judgments under conditions of uncertainty
4. Teaching students to learn from experience
5. Introducing students to the disciplines of creating and participating in a responsible and effective community
6. Forming students able and willing to join an enterprise of public service.[26]

were registered at the start of the legal year, beginning in October, to a system whereby organizations offering pupillage recruit to their own timetable. This meant that pupillages registered in 2012/13 would previously have been included in the 2013/14 statistics.

[24] The foundations of legal knowledge subjects for a Qualifying Law Degree are contract, tort, constitutional and administrative law, criminal law, property, equity and trusts and law of the European Union

[25] William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond and Lee S. Schulman, *Educating Lawyers: Preparation for the Profession of Law*. Jossey-Bass, 2007: 22.

[26] Ibid.

The LETR report made a number of recommendations as to the future of legal education in England and Wales. It has been recognized that:

> The learning outcomes at initial stages of [legal services education and training] should include reference (as appropriate to the individual practitioner's role) to an understanding of the relationship between morality and law, the values underpinning the legal system, and the role of lawyers in relation to those values.[27]

Further support for the importance of teaching ethics and values can be found in the Subject Benchmark Statement for Law published by the Quality Assurance Agency for Higher Education (hereafter QAA).[28] The Subject Benchmark Statement was revised to reflect "that a law graduate is far more than the sum of their knowledge and understanding, and is a well skilled graduate with considerable transferable generic and subject-specific knowledge, skills and attributes".[29] The QAA expects that:

> At undergraduate level students are aware of the consequences of law as a human creation and that it is subject to the ethics and values of those that make and apply it. The implications of this in the context of securing justice and the public interest is considered as part of legal study . . . it is expected that students will have opportunities to discuss ethical questions and dilemmas that arise in law and to consider the features of ethical decision making.[30]

In the UK, it is expected that a graduate of law with honours should demonstrate "awareness of principles and values of law and justice, and of ethics" as well as "knowledge and understanding of theories, concepts, values, principles and rules of public and private laws within an institutional, social, national and global context".[31]

[27] LETR (n14): xiv.
[28] "Subject Benchmark Statements form part of the UK Quality Code for Higher Education . . . which sets out the Expectations that all providers for UK higher education . . . are required to meet" QAA. "Subject Benchmark Statement: Law." (2015): 2, http://qaa.ac.uk/en/Publications/Documents/SBS-Law-15.pdf accessed 30 August 2016.
[29] QAA (n28): 4.
[30] Ibid.: 6.
[31] Ibid.: 7.

The literature suggests that law schools should certainly be engaging in education of professional ethics and values. However, as many law graduates will not pursue a legal career, it is also important that students have an ability to apply these values, as well as their ability to engage in critical analysis and evaluation to wider societal values.

Values and the Profession

If, as stated above, it is a university's role to educate students in relation to professional values, it is important to identify what we mean by these professional values. Professional ethics can be seen as "a critical defining feature of professional service".[32] There is an innate conflict between the roles of a legal educator, and at the heart of that conflict is determining what we are trying to achieve. On one hand, we are providing a professional education to students, teaching them the knowledge and skills to be lawyers. On the other, we are required to teach our students the values of that profession. The legal profession spans numerous jurisdictions, and we must therefore question whether it is possible to identify a set of core values for a global legal profession.

The International Bar Association describes the lawyer's role as

> the client's trusted advisor and representative, as a professional respected by third parties, and as an indispensable participant in the fair administration of justice. By embodying all these elements, the lawyer, who faithfully serves a client's interests and protects the client's rights, also fulfils the functions of the lawyer in society – which are to forestall and prevent conflicts, to ensure that conflicts are resolved in accordance with recognised principles of civil, public or criminal law and with due account of the rights and interests, to negotiate and draft agreements and other transactional necessities, to further the development of the law, and to defend liberty, justice and the rule of law.[33]

This description sees the lawyer's role as multifaceted, with obligations to individual clients and wider obligations to society. The International Bar Association has identified ten principles to "promote and foster the ideals

[32] LETR (n14): para 2.71.
[33] International Bar Association, "IBA International Principles on Conduct for the Legal Profession" (2011): 10.

of the legal profession".[34] The principles are independence; honesty, integrity and fairness; conflicts of interest; confidentiality/professional secrecy; clients' interest; lawyers' undertaking; clients' freedom; property of clients and third parties; competence; and fees.[35] The Council of Bars and Law Societies of Europe (hereafter CCBE) have also set out a list of core principles, which are "essential for the proper administration of justice, access to justice and the right to a fair trial".[36] The core principles demonstrate a remarkable similarity to those identified by the International Bar Association.

It is perhaps worth a look at the language used by the International Bar Association and the Council of Bars and Law Societies of Europe. They have used the term "principles" which is arguably different from "values" and "rules". Webb describes values as "highly abstract, pervasive and aspirational". Rules are "concrete, highly situational and deontological". Principles however sit somewhere between "sharing the deontological character of rules, but tend to be more abstract than rules".[37] It is therefore a question as to whether principles can be said to represent the values of the legal profession. The Macrate Report identifies four fundamental values of the profession: provision of competent representation; striving to promote justice, fairness and morality; striving to improve the profession and professional self-development.[38] The ACLEC Report identifies legal values as "a commitment to the rule of law, to justice, fairness and high ethical standards, to acquiring and improving professional skills, to representing clients without fear or favour, to promoting equality of opportunity, and to ensuring that adequate legal services are provided to those who cannot afford to pay for them".[39] Other values cited in literature "include loyalty to one's client, social justice, fidelity to a set of legal norms, or most recently, interpersonal consideration such as care, mercy

[34] Ibid.: 5.
[35] Ibid.: 5–6.
[36] CCBE, "Charter of Core Principles of the European Legal Profession and Code of Conduct" (2013): 5.
[37] Webb (n6): 13.
[38] American Bar Association, *Legal Education and Professional Development – An Education Continuum: Report of The Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992: 140–141.
[39] The Lord Chancellor's Advisory Committee on Legal Education and Conduct, *First Report on Legal Education and Training*, (1996): para 2.4.

and connectedness".[40] Whilst it is clear that there are perhaps differing views as to the values of the legal profession, there is also a significant level of consensus even if expressed in slightly different ways. The principles identified by the International Bar Association appear to reflect these values and provide the necessary framework upon which build a code of conduct reflecting those values. It is worth noting the words of The Hon. Justice Susan Kiefel of the High Court of Australia as regards the Rules of Professional Conduct:

> The Rules reflect the profession's thinking and identify standards of conduct for disciplinary purposes and serve as guides to practitioners. They cannot provide the answer to every ethical and moral question which a lawyer may face; for that a lawyer needs his or her own moral compass. A lawyer also needs a clear and firm understanding of what it is to be a member of the legal profession. It is in this regard that the profession's Code of Conduct may offer valuable guidance.[41]

One area of debate relates to whether a lawyer can, or indeed should, decline or cease to act where the client's case conflicts with the lawyer's personal values. Nicolson and Webb speculate on the "standard conception" meaning that "lawyers are expected zealously to represent the interests of anyone who is prepared to pay their fees, or qualifies for a state legal aid scheme, irrespective of the morality of the client's objectives or the most effective means of achieving such objective".[42] With this in mind, the starting point is to consider the relevant codes of conduct. In England and Wales, the relevant codes are set out in the Solicitors Regulation Authority's (hereafter SRA) Code of Conduct[43] for solicitors or the Bar

[40] W. Bradley Wendel, "Value Pluralism in Legal Ethics." *Washington University Law Review* 78, no. 1 (2000): 114.

[41] Hon. Justice Susan Keifel, "Ethics and the Profession of the Lawyer." Paper from Queensland Law Society, The Vincents' 48th annual Symposium, 2010, http://www.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/kiefelj-2010-03-26.pdf accessed 24 August 2016.

[42] Donald Nicolson Julian Webb, "Lawyers' Duties, Adversarialism and Partisanship in UK Legal Ethics." *Legal Ethics* 7, no. 2 (2004): 134.

[43] The SRA is the regulatory body of the solicitor's profession in England and Wales. The Code of Conduct is available at http://www.sra.org.uk/solicitors/handbook/code/content.page accessed 30 August 2016.

Standards Board Handbook[44] for barristers. The SRA Code of Conduct sets out 10 mandatory principles and states that solicitors must:

1. uphold the rule of law and the proper administration of justice;
2. act with integrity;
3. not allow your independence to be compromised;
4. act in the best interests of each client;
5. provide a proper standard of service to your clients;
6. behave in a way that maintains the trust the public places in you and in the provision of legal services;
7. comply with your legal and regulatory obligations and deal with your regulators and ombudsman in an open, timely and co-operative manner;
8. run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles;
9. run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity; and
10. protect client money and assets.[45]

The BSB set out similar obligations as core duties. The mandatory principles and core duties share the vision of the International Bar Association and CCBE principles for the legal profession. Thus, it appears to reflect the values of the profession.

Solicitors are able to decline instructions from clients, or indeed terminate instructions, so long as they comply with the law and the Code of Conduct.[46] In essence, a solicitor can decline instructions so long as the reason for doing so does not constitute unlawful discrimination. That said, in practice, a solicitors' firm is a commercial undertaking and therefore it is questionable how many solicitors would decline to act in an area where they are competent to do so. This is particularly important in an era where

[44] The BSB is the regulatory body of barristers in England and Wales. The Handbook setting out the Code of Conduct is available at https://www.barstandardsboard.org.uk/media/1731225/bsb_handbook_sept_2015.pdf accessed 30 August 2016.
[45] SRA. "SRA Code of Conduct 2011." (2016). Available at http://www.sra.org.uk/solicitors/handbook/code/content.page
[46] SRA (n45): O(1.3).

the traditional legal profession in England and Wales is under threat following the advent of alternative business structures,[47] the decline of legal aid[48] and changes to civil litigation.[49] As a consequence of these threats law firms must, more than ever, commercialize their practice. With increasing levels of commercialization, and the need to do more at a cheaper cost, there is a threat to the "moral compass" of the profession.[50] Goldsmith recounts a conversation with a lawyer that appears to highlight this issue:

> There is no more idea of service to a client. . . . It is all just billable hours. We are machines making money for the firm. We use precedents that have been agreed at head office, different precedents for different kinds of circumstances. Who cares how much money we make as individuals, even if it is a lot? The values have gone out of our lives.[51]

These comments demonstrate the importance of values, personal and professional, as the individual appears to have lost the notion of being a professional and instead describes himself as a "machine". This supports a notion that once values are lost, individuals lose job satisfaction.

However, whilst in theory solicitors are entitled to decline instructions, one rule in the barrister's code of conduct of particular note is known as the "cab-rank" rule and states:

[47] An alternative business structure, an entity created by the Legal Service Act 2007, allows non-lawyers to own and invest in law firms.
[48] Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) significantly reduced the scope of civil legal aid in England and Wales. Prior to LASPO, the Access to Justice Act 1999 provided that all areas were in scope unless specifically excluded in Schedule 2 of that Act. However, LASPO amended the scope rules so the all areas were out of scope unless provided for within Schedule 1 of that Act. Section 10 of LASPO provides for exceptional case funding but a detailed consideration of the provisions is beyond this chapter.
[49] Part 2 of LAPSO implemented reforms to the funding of civil litigation in England and Wales such as changes to conditional fee agreements and the extension of the availability of Damages Based Agreements. Further reforms included the increase in the small claims limit from £5,000 to £10,000 for non-personal injury claims and significant increases to court fees.
[50] LETR (n14): para 2.71.
[51] Jonathan Goldsmith, "The Core Values of the Legal Profession for Lawyers Today and Tomorrow." *Northwestern Journal of International Law & Business* 28, no. 3 (2008): 445.

> If you receive instructions from a professional client . . . and the instructions are appropriate taking into account the experience, seniority and/or field of practice of yourself . . . you must . . . accept the instructions addressed specifically to you, irrespective of:
> a. the identity of the client;
> b. the nature of the case to which the instructions relate;
> c. whether the client is paying privately or is publicly funded; and
> d. any belief or opinion which you may have formed as to the character, reputation, cause, conduct, guilt or innocence of the client.[52]

With the "cab-rank" rule the BSB explicitly state that a barrister cannot decline instructions on behalf of a client based upon their "belief or opinion" or in other words, their own moral perspective. Whilst it would be naïve to believe all barristers in practice will accept all instructions in which they are competent to act,[53] nevertheless it is enshrined within the professional code of conduct that instructions cannot be declined merely because their client's instructions conflict with the barrister's personal values.

Nicolson argues for the notion of moral activism in lawyers stating that "depending on the particular practice context and all the unique circumstances of each individual case, lawyers may be justified in refusing to represent particular individuals or (after moral dialogue) to do everything legal and not prohibited by professional rules for them".[54] It appears this argument fails to consider the position of the barrister, whose professional code of conduct prohibits the refusal of instructions. Further, it is arguable that the cab-rank rule promotes access to justice as it ensures representation for all clients "no matter how repugnant or ill founded" their cause.[55]

However, an analysis beyond the professional obligations of barristers is warranted in light of the fact that solicitors, and lawyers in other jurisdictions, are not bound by the same professional code of conduct and

[52] BSB. *The Bar Standards Board Handbook*. (2015): 44, rC29, https://www.barstandardsboard.org.uk/media/1731225/bsb_handbook_sept_2015.pdf.
[53] For further commentary see Duncan Webb, "Civil Advocacy and the Dogma of Adversarialism." *Legal Ethics* 7, no. 2 (2004): 213–215.
[54]Donald Nicolson, "In Defense of Contextually Sensitive Moral Activism."" *Legal Ethics* 7, no. 2 (2004): 269.
[55] Webb (n53), 214.

are therefore free to decline instructions. Dare argues that the role of law "in Western democracies is to mediate between reasonable but inconsistent views of what we should do as a community".[56] Dare considers a lawyer's duty is to act in accordance with the principles of neutrality, non-accountability and partisanship. If lawyers allow their own view of the good to influence their actions, they "'privilege' the view they favour and disenfranchise the view of the client". [57] The principle of neutrality therefore serves an important function in ensuring someone has access to their legal rights regardless of how morally objectionable those rights may be. Further, the lawyer is not judged by the moral status of their client's project and therefore the principle of non-accountability provides a defence for those who act for clients in unpopular cases.[58] Drawing a distinction between "mere-zeal" and "hyper-zeal", Dare states that the principle of partisanship requires a lawyer to act with "mere-zeal", that is "to zealously pursue the client's legal rights. He is to be partisan in the sense that he must bring all his professional skills to bear upon the task of securing *his* client's rights. But he is under no obligation to pursue interests that go beyond the law."[59]

Nicolson is critical of Dare's contention, arguing that "[t]he idea that the law naturally mediates between competing interests ignores the unequal access of different social groups to the making and application of law, and the fact that law is already imbued with the values and interests of those who historically have held power in society".[60] Further, Nicolson argues against the proposition that lawyers should strive for legal reform rather than impose their personal morality on clients whose cause is unjust. He poses two problems, namely that the professional norms and practice context which discourages moral engagement is also likely to discourage lawyers from seeking law reform. Further, the institutions of government do not work sufficiently efficiently, fairly and democratically to justify lawyers being required to leave all moral and political decisions to the holders of formal power.

[56] Tim Dare, "Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers." *Legal Ethics* 7, no. 1 (2004): 27.
[57] Ibid.: 28.
[58] Ibid.: 29.
[59] Ibid.
[60] Nicolson (n54), 270.

It appears, if I have understood the arguments correctly, that arguments for moral activism in lawyers undermine the democratic state, the rule of law and the administration of justice. It is the role of Parliament to make and repeal laws; a body elected based upon the manifesto promises of the various political parties and therefore, in theory, reflects the will of the people. It is the role of courts to apply the law as Parliament had intended. It is a lawyer's role to apply those laws and advocate on behalf of their clients. If we accept the proposition that lawyers act as gatekeepers to the legal system, then it is not the role of a lawyer to deny access as to do so would be to deny justice. Sharwood summed this up when he stated, "[t]he lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the function of both judge and jury".[61] Whilst some members of society are denied access to justice, due to the cost or other reasons, it seems illogical to suggest that lawyers address this balance by potentially depriving others of their legal rights.

If we are teaching students to be lawyers, it is incumbent upon us to work within the ethical rules of the profession. However, as highlighted, the rules do not provide all the answers and therefore we must educate students on exercising their own moral compass. It is difficult to establish the extent of the role of lawyers in determining the relationship between morality and the law, and it is the topic of significant academic debate. However, I would contend that the base line for teaching professional ethics and values must be the relevant codes of conduct. However, should institutions of higher education, and therefore law schools, go beyond merely teaching professional ethics? This issue will be explored below within the context of clinical legal education.

Values and Clinical Legal Education

There is no universally accepted definition of clinical legal education. Kerrigan defines clinical legal education "as learning through participation in real or realistic legal interactions coupled with reflection on this experience".[62] If we consider social justice, clinical legal education has

[61] Editors, "'Sharwood's Professional Ethics." *University of Pennsylvania Law Review* 3 (1855): 193–203.
[62] Kevin Kerrigan, "What is Clinical Legal Education and Pro Bono." In *A Student Guide to Clinical Legal Education and Pro Bono*, edited by Kevin Kerrigan and Victoria Murray. Palgrave Macmillan, 2011: 5.

been particularly susceptible to this value. The central goal of clinical legal education is the engagement of students in the pursuit of social justice through the provision of legal services to the poor and others who lack access to legal services.[63] Wizner contends that students are motivated to learn by being given the responsibility to handle real client cases. As the student gains a feeling of personal responsibility, so they grow a feeling of social responsibility for the provision of legal services to the poor. This sense of social responsibility occurs when representing those on a low income. Kerrigan deliberately avoids using social justice within the definition of clinical legal education. His rationale for doing so is that social justice should "be viewed as part of the culture of clinical legal education as opposed to its meaning".[64]

In understanding the social justice mission of clinical legal education, we must consider the history of the movement. In the United States, "the major social issues of the 1960s and 1970s – poverty and civil rights, the women's movement, the Vietnam War – had a profound influence on the direction of clinical programmes, leading to greater student demand and more specific focus on providing legal services in areas such as poverty law, civil rights, women's rights, consumer rights, and environmental protection".[65] Within this environment students were critical of law schools, believing they "supported and perpetuated an unjust status quo".[66]

The development of clinical legal education in the UK was somewhat different and therefore we must consider this within the context of publicly funded litigation. The system of state funded litigation that we understand to be legal aid was introduced by the Legal Aid and Advice Act 1949. At its inception, it was available to 80% of the adult population and was at

[63] Stephen Wizner, "Is Social Justice Still Relevant?" *Boston College Journal of Law & Social Justice* 32, no. 2 (2012): 345.
[64] Kerrigan (n62): 16.
[65] Jeff Giddings, Roger Burridge, Shelly A. M. Gavigan and Catherine F. Klein, "The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada and Australia." In *The Global Clinical Movement: Educating Lawyers for Social Justice* edited by Frank S. Bloch, Oxford Scholarship, 2010 DOI: 10.1093/acprof:oso/9780195381146.001.000193/acprof:oso/9780195381146.001.0001 accessed 31 August 2016.
[66] Wizner (n63): 347.

least as comprehensive as any in the developed world.[67] It is against this backdrop that access to justice was not a significant issue within the UK for the latter part of the twentieth century. There were a number of reforms to the legal aid system, notably the Legal Aid Act 1988 and the Access to Justice Act 1999. By 2009, the percentage of people eligible for publicly funded advice had fallen to 29%.[68] However, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 reduced the scope of legal aid with a view to saving the public purse an estimated £350 million in 2014/15 annually over the longer term against a scheme which cost over £2 billion each year.[69] Following the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in April 2013 there were large reductions in Legal Help[70] workload and expenditure – around one-third of pre-LASPO levels as well as a substantial fall in civil representation[71] and around two-thirds of pre-LASPO levels.[72]

Further, it has been argued that clinical legal education exposes privileged students to social issues for the first time. For example, students coming from privileged and wealthy backgrounds are unaware of the needs of the

[67] Richard I. Morgan, "The Introduction of Civil Legal Aid in England and Wales, 1914–1949." *Twentieth Century British History* 5, no. 1 (1994): 73.
[68] Jon Robins, "Legal aid in 21st-century Britain." *The Guardian*, 12 March 2009, http://www.theguardian.com/money/2009/mar/11/legal-aid-justice-gap accessed 30 August 2016.
[69] Ministry of Justice, "Reform of Legal Aid in England and Wales: the Government Response" (2011): 7, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228890/8072.pdf accessed 31 August 2016.
[70] "A form of civil legal service which includes advice and assistance about a legal problem, but does not include representation or advocacy in proceedings". Ministry of Justice, *A Guide to Legal Aid Statistics in England and Wales* (2016): 21, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486060/a-guide-to-legal-aid-statistics-in-england-and-wales.pdf accessed 31 August 2016.
[71] "Representation by solicitors and barristers for civil cases which could go to court." Ministry of Justice (n70): 19.
[72] Ministry of Justice, *Legal Aid Statistics in England and Wales July to September 2015* (2015): 5. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486034/legal-aid-statistics-bulletin-jul-to-sep-15.pdf accessed 31 August 2016.

poor.[73] Whilst this may be true in some countries, the arguments are perhaps weaker in the UK context. In the academic year 2014/15, 33% of young full-time first degree entrants in the UK were from a lower socio-economic class.[74] The percentage of UK domiciled young entrants to full-time first degree courses in law from lower socio-economic classes was 35.4%.[75] Historically, live client clinics in the UK have been concentrated in new universities (former polytechnics and colleges of higher education that were given university status after 1992) with a 1996 study reporting that 23% of new universities offered a live client clinical programme in contrast to 5% of old universities (pre-1992 universities).[76] Grimes states that activity on the clinical front "'was led by [Northumbria University] and followed by Sheffield Hallam University".[77] Both institutions cited by Grimes are new universities and continue to have active live client clinical programmes. The percentage of young full-time first degree entrants from a lower socio-economic class in 2014/15 at Northumbria University was 37.2% whilst Sheffield Hallam University has 40.8%.[78]

As there is no data regarding the socio-economic class of students undertaking clinical programmes, no conclusions can be drawn. However, the data above suggests in a UK context that a significant proportion of students from less economically privileged backgrounds would have the opportunity to participate in clinical legal education programmes. It therefore does not support a general assertion that the student's first

[73] For example see Jane Harris Aiken, "Striving to Teach Justice, Fairness, and Morality." *Clinical Law Review* 4, no. 1 (1997): 1–64: 7; Pamela N. Phan, "Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice." *Yale Human Rights & Development Law Journal* 8 (2005): 117–152, at 126.

[74] HESA, "Table T1a –Participation of under-represented groups in higher education: UK domiciled young full-time first degree entrants 2014/15." https://www.hesa.ac.uk/pis/urg accessed 31 August 2016.

[75] HESA, "Table SP5 – Percentage of UK domiciled young entrants to full-time first degree courses from NS-SEC Classes 4, 5, 6 and 7 by subject and entry qualification 2014/15." https://www.hesa.ac.uk/pis/urg accessed 31 August 2016.

[76] Richard Grimes, Joel Klaff and Colleen Smith, "Legal Skills and Clinical Legal Education – A Survey of Undergraduate Law School Practice." *Law Teacher* 30, no.1 (1996): 63.

[77] Richard Grimes, "Learning Law by Doing Law in the UK." *International Journal of Clinical Legal Education* 1 (2000): 55.

[78] Ibid.

exposure to the problems of the poor are during a clinical programme as many students may be from such a background.

If the aim of a clinical programme is to inculcate a sense of public service in students, we must consider the evidence as to whether this aim is being met. Whilst you will hear numerous anecdotal accounts of the impact of clinical programmes on students, the empirical evidence is mixed. Quantitative studies suggest law school pro bono programmes have little or no impact on students and their willingness to undertake pro bono in the future.[79] However, a study by Schmedemann reports that participation in a non-mandatory pro bono programme at law school correlated with pro bono participation by new lawyers.[80]

A key aspect appears to relate to whether the law school pro bono activity was mandatory or voluntary. This is an important point in relation to the evidence as those who participate in voluntary pro bono activity at law school may already have a greater inclination to participate in pro bono work. In other words, participation in clinical programmes and pro bono work at law school arguably does not have any impact upon whether a student participates in their future career as they are already inclined to participate.

Within clinical legal education programmes, the supervisor will play an important role, not least because they are responsible for the student's work. The role of the clinical supervisor has been described as "training law students in lawyering skills, introducing students to the full scope of

[79] See Deboarh L. Rhode, "Pro Bono in Principle and in Practice." *Journal of Legal Education* 53, no. 3 (2003): 413–464; Robert Granfield, "Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs." *Buffalo Law Review* 54, no. 5 (2007): 1355–1412; Josephine Palermo and Adrian Evans, "Almost There – Empirical Insights into Clinical Method and Ethics Courses in Climbing the Hill towards Lawyers' Professionalism." *Griffith Law Review* 17, no. 1 (2008): 252–284; Paul McKeown, "Law Student Attitudes towards Pro Bono and Voluntary Work: The Experience at Northumbria University." *International Journal of Clinical Legal Education* 22, no. 1 (2015): [vi]-[xlv].

[80] Deborah A. Schmedemann, "The Impact of Law School on Pro Bono Participation in Practice." In *Private Lawyers and the Public Interest: The Evolving Role of Pro Bono in the Legal Profession* edited by Robert Granfield and Lynn Mather. Oxford: Oxford University Press, 2009.

the legal system and its actors, and developing in students an understanding and appreciation of professional responsibility issues".[81] It is the latter role that may prove controversial with the notion of professional responsibility, incorporating professional values, being somewhat of a grey area.

Many clinical supervisors have argued that law school clinics should seek social justice as their primary mission.[82] Further, clinical legal education organizations such as the European Network for Clinical Legal Education (ENCLE) cite the pursuit of social justice as a specific objective.[83] As such, many clinical legal education programmes expressly adopt a value orientated perspective such as social justice. Alternatively, there are clinical legal education programmes that prioritize the education of the students. These clinical models have been labelled social justice orientated clinics and educational orientated clinics.[84] Whilst the goals of social justice and education are not mutually exclusive, there has been academic debate over which should take precedence. Nicolson, a fierce advocate for social justice orientated clinics, argues that clinics should prioritise the social justice mission. "Otherwise, they risk being seen as practising law on the poor rather than for the poor, and implicitly conveying to students that their interests – now educational, later commercial – trump those of clients and the community."[85] In contrast, Wilson argues:

[81]Frank S. Bloch, "Andragogical Basis of Clinical Legal Education." *Vanderbilt Law Review* 35, no. 2 (1982): 321–354.

[82] See M. A. Du Plessis, "Clinical Legal Education: Determining the Mission and Focus of a University Law Clinic and Required Outcomes, Skills & Values." *De Jure* 48, no. 2 (2015): 312–327; Donald Nicolson, "Education, Education, Education: Legal, Moral and Clinical." *Law Teacher* 42, no. 2 (2008): 145–172; Stephen Wizner and Jane Aiken, "Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice." *Fordham Law Review* 73, no. 3 (2004–2005): 997–1012; Margaret Martin Barry, Jon C. Dubin and Peter A. Joy, "Clinical Education for This Millennium: The Third Wave." *Clinical Law Review* 7, no. 1 (2000–2001): 1–76; Jon C. Dubin, "Clinical Design for Social Justice Imperatives." *SMU Law Review* 51, no. 5 (1997–1998): 1461–1506.

[83] See http://www.encle.org/about-encle/what-are-our-goals accessed 25 August 2016.

[84] Donald Nicolson, "'Our Roots Began In (South) Africa": Modelling Law Clinics To Maximise Social Justice Ends." *International Journal of Clinical Legal Education* 23, no. 3 (2016): 100.

[85] Ibid.: 99.

> The mission of clinical programmes within law schools should properly be pedagogically driven, not service driven. Loading students down with too many cases of poor clients is a disservice to both student learning and client service, and even the most accomplished clinical supervisor cannot provide quality oversight with an excessive number of clients served by large numbers of students."[86]

Ferris recognizes that social justice orientated clinics have played an important role and fit the broader role of universities, but ultimately states "it is not appropriate to place community justice above the educational interests of the students, and whilst a commitment to some form of social altruism might inform an academic in her life and practice this is not a legitimate reason to impose this value choice upon students".[87]

A further argument is that the aim of a law school "is first and foremost about educating students . . . without students, there are no law schools".[88] Kosuri contends that clinics should base their client selection on their teaching goals rather than the reverse.[89] Further, students should not be dissuaded from working in the clinic merely because they do not share the ideology.[90] By increasing the variety of perspectives, this will enhance the learning experience for everyone and lead to a "profounder understanding of issues, people and values".[91]

Whatever the orientation of the clinical programme, be it social justice or educational, it is possible to explore values with the students. To understand values, we must understand moral behaviour. Rest identifies four components of effective moral or ethical actions; moral sensitivity; moral judgement; moral motivation; and moral character. [92] Moral

[86] Richard J. Wilson, "Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education." *German Law Journal* 10, issues 6/7 (2009): 835.
[87] G. Ferris, *Uses of Values in Legal Education*. Intersentia, 2015: 235.
[88] Praveen Kosuri, "Losing My Religion: The Place of Social Justice in Clinical Legal Education." *Boston College Journal of Law & Social Justice* 32, no. 2 (2012): 336.
[89] Ibid.: 337.
[90] Ibid.: 338.
[91] Ibid.
[92] James R. Rest, "Background: Theory and Research." In *Moral Development in the Profession: Psychology and Applied Ethics* edited by James R Rest and Darcia Narvaez. Lawrence Erlbaum Associates, 1994.

sensitivity involves the recognition or awareness of moral or ethical issues in any given situation. Moral judgement (or moral reasoning) concerns how people think about the ethical aspects of life. Moral motivation relates to a person's desire to act morally or ethically. Finally, moral character relates to the person's ability to see the moral action through.

Clinical legal education provides an environment in which students can develop moral behaviour, particularly live-client clinics where students are faced with real clients and real legal problems. As students are exposed to real clients, they are provided with an opportunity to develop moral sensitivity. This may include the recognition of professional conduct issues such as conflict of interest or confidentiality. Students may also encounter social issues for the first time such as poverty, homelessness and access to justice. Clinical legal education may also assist in the development of moral reasoning. As discussed above, an essential element of clinical legal education is the reflective practice. Students will think about their cases and issues which arose in those cases. Small group discussions between students, supported by staff, exploring ethical dilemmas has been effective and powerful in developing moral reasoning although it is unknown how and why.[93] The issue then becomes how clinical legal education develops moral motivation and moral character.

In addressing this issue, it is necessary to consider the underpinning educational theory. Andragogy (Adult Education Theory) was introduced by Malcolm S. Knowles who developed a model based upon several assumptions different from a pedagogical model:

1. The need to know – adults need to know why they need to learn something before undertaking to learn it. [94]
2. The learners' self-concept – adults develop a self-concept of being responsible for making their own decisions and will resent and resist others imposing their will.[95]
3. The role of learners' experiences – adults come into education with a greater volume and quality of life experience. Emphasis should be

[93] Ferris (n87), 192.
[94] M. S. Knowles, E. F. Holton and R. A. Swanson, *The Adult Learner The Definitive Classic in Adult Education and Human Resource Development*. London: Routledge, 2012: 63.
[95] Ibid.: 63–64.

placed on individualising the teaching and learning strategy to as each individual will draw upon their own life experience, greater use of experiential learning making use of the learners' experiences. However, it should be noted that adults, unlike children, define themselves by their experiences. As such, if an adult's experiences are ignored or devalued, this will be perceived as rejecting them as person.[96]

4. Readiness to learn – adults will become ready to learn those things that they need to know to deal with real life situations.[97]
5. Orientation to learning – adults are motivated to learn to the extent that they perceive it will help assist with real life tasks or problems. Knowledge, understanding, skills, values and attitudes are learnt most effectively in real life situations.[98]
6. Motivation – adults are responsive to external motivators such as better jobs and higher salaries, but the most potent motivators are internal pressures such as increased job satisfaction, self-esteem and quality of life.[99]

Andragogy "shows how and why clinical legal education meets the needs of adult law students at the threshold of their professional careers".[100] In particular, clinical legal education focuses on experiential learning methods and places the individual learner at the heart of the learning experience. Quigley posits that clinical legal education, designing a methodology around Adult Learning Theory, can be used to teach social justice using the opportunities provided by the programme.[101] Drawing upon the work of Mezirow, Quigley argues that clinicians should utilize the "disorientating moment" when the student experiences an event that is disorientating or even disturbing because it cannot be explained by reference to the student's previous experience and understanding.[102] By reflecting on the event, and engaging in "critical thinking focusing on re-assessment of societal and personal beliefs, values and norms" the student

[96] Ibid.: 64–65.
[97] Ibid.: 65–66.
[98] Ibid.: 66–67.
[99] Ibid.: 67.
[100] Bloch (n80): 337.
[101] Fran Quigley, "Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics." *Clinical Law Review* 2, no. 1 (1995–1996): 38.
[102] Ibid.: 51.

can have a "transformative" learning experience as they re-orientate and perceive the world in a different way.[103] Quigley proposes a three-stage method; first to facilitate the occurrence of a disorientating event through live clients and focusing on social justice issues; secondly, facilitate work on making sense of the experience through reflection and discussion; and thirdly, allow the student to give effect to their value re-orientation by making choices or otherwise acting upon their new understanding.[104]

Ferris applauds the approach taken by Quigley stating:

> This model, of using clinical education to facilitate the re-evaluation by the student of previous uniformed value positions is not objectionable. The learning model places agency in the student. The method is one that is fully open, and relies for effectiveness upon the heightened consciousness and awareness of the student to the values being re-evaluated. This use of clinic must be considered a valid and appropriate one in trying to facilitate the development of salience for moral motivations in law students.[105]

The role of the clinical supervisor is important within this process as their function is to facilitate the transformative experience. Often, there is a low supervisor/supervisee ratio in clinical programmes[106] thus allowing the supervisor time to embark on the journey with the student. It should be noted that the purpose "is not to proselytize law students into accepting the law teacher's personal vision of justice but to assist students, in fact to demand that students become aware of their responsibility to do justice and the need to develop their own reflective system of justice".[107] As noted above, there is no accepted definition of social justice and therefore the student may disagree with the clinical supervisor's notion of social justice. For example, an environmental law clinic may represent an action group opposed to the building of a factory in a Green Belt zone.[108] From an

[103] Ibid.: 52.
[104] Ibid.: 53–56.
[105] Ferris (n87): 239.
[106] Nicolson (n84): 100–101.
[107] David Barnhizer, "University Ideal and Clinical Legal Education." *New York Law School Law Review* 35, no. 1 (1990): 112.
[108] A Green Belt zone is a designated area to prevent urban sprawl. The Green Belt serves five purposes: to check the unrestricted sprawl of large built-up areas; to prevent neighbouring towns merging into one another; to assist in safeguarding the countryside from encroachment; to preserve the setting and special character of

environmental perspective it appears that there is value in preventing the factory. However, if it is proposed that the factory be built in an area of social deprivation and high unemployment, then it is arguable that society would benefit from it construction. Alternatively, a clinic representing a tenant facing eviction for the non-payment of rent may be applauded for maintaining someone's home. However, what if the non-payment of rent meant the landlord could not pay their mortgage and thus faced their property being repossessed? Both scenarios raise issues relating to fairness and opinions may differ as to the fair result.

If we return to the assumptions of andragogy set out above, to impose personal views would violate the student's self-concept, ignore or devalue the student's own life experiences, and violate the principle that Higher Education should be aligned with the student's own interest. This is not to say that clinical supervisors should be value neutral. It has been argued that clinical supervisors "can avoid indoctrination only by identifying and discussing non-coercively the value preferences implicit in his teaching; this action put the student on notice that he must provide an argument and evidence that the teacher will not".[109] Further, clinical supervisors should "be far more willing than they have been to explore competing concepts of practical justice, often calling into question the legitimacy of their own beliefs".[110] Clinical legal education should be about exposing the students to the issues and allowing them to consider the situation and make their own judgement on each case. The role of the clinical supervisor is "not the 'sage on the stage' but the 'guide on the side'."[111]

Clinical legal education affords students with the opportunity to gain practical experience and engage in reflection on that experience. The clinical supervisor can guide the student through that experience,

historic towns; and to assist in urban regeneration, by encouraging the recycling of derelict and other urban land. (Department for Communities & Local Government, National Planning Policy Framework, Planning Practice Guidance, http://planningguidance.communities.gov.uk/blog/policy/achieving-sustainable-development/delivering-sustainable-development/9-protecting-green-belt-land/ accessed 31 August 2016.

[109] Robert J. Condlin, "Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction." *Maryland Law Review* 40, no. 2 (1981): 280.

[110] Barnhizer (n107): 111.

[111] Wilson (n86): 829.

challenging the student's perception of events, guiding the student to identify issues raised. This experience and reflection may transform the student's perception, or indeed may validate their previously held perception. Either way, the student is better equipped to critically analyse and evaluate the world around them. As such, they have the ability to use their own moral compass when making judgements in their professional and wider life.

Conclusion

There is no consensus as to what we mean by social justice and thus it has an individual meaning to each person formed by their own life experiences. Whilst we can teach professional codes of conduct, espousing professional values, there are still grey areas requiring the use of a moral compass. In answering the title question, clinical legal education cannot teach values, such as social justice per se, as it is for each student to construct their own values. Law schools, and clinical legal education programmes, can provide a framework for the construction of their value system such as teaching students the relevant laws, legal systems and codes of conduct governing behaviour. Clinical legal education also provides a basis for discussion of societal norms which also influence how individuals think. Finally, law schools can teach the students the theories upon which values such as social justice can be measured against. Educating students in the skill of critical analysis and evaluation, through reflective practice, may influence, shape and sometimes define values and therefore impact on the values system. However, it is unlikely, and arguably should not, dictate what those values should be. Clinical legal education can however provide the environment for this construction to take place. The role of clinical supervisors is to facilitate the students learning through the provision of experiential learning opportunities and provide guidance whilst the student reflects upon and (re)constructs their value system. This may or may not result in a transformative experience. The student may or may not be instilled with a sense of altruism and public service. However, the student should have a better understanding of the world and a basis for that understanding.

IF WE COULD INSTIL SOCIAL JUSTICE VALUES THROUGH CLINICAL LEGAL EDUCATION, SHOULD WE?

Paul McKeown* and Elaine Hall**

Abstract: Universities are more than just institutions for the transfer of knowledge; they are institutions where students learn about the world and how it works, and in clinical legal education, there is a long and persistent tradition of seeing the formation of "social justice" clinicians as a principal educational goal. This article covers three areas: we ask "Why do we believe values are formed in clinic?" and in Section II "Do values change at university and if so, how?", examining what evidence there is for a sufficient degree of plasticity in undergraduate populations so that values might change over a module or a year and what evidence there is that changes to values at university (if any) persist into later life. Section III takes a broader philosophical position in relation to legal education and the ethical imperatives of the teacher, asking "if we can make students believe something, is this a good thing?"

Keywords: *clinical legal education; values and virtue education; personal and psychological development; evidence-based pedagogy; ethical and educational duties*

Universities are more than just institutions for the transfer of knowledge; they are institutions where students learn about the world and how it works. Within the discipline of law, the Quality Assurance Agency for Higher Education (QAA) states that students graduating from an undergraduate degree should be "aware of the consequences of the law as a human creation and that it is subject to the ethics and values of those that make and apply it",[1] and in clinical legal education, there is a long and persistent tradition (exemplified most recently in the study by Nicholson[2]) of seeing the formation of "social justice" clinicians as a principal educational goal. This article covers three areas: we ask "why do we believe values are formed in clinic?" through a geographical/historical analysis of the culture of clinical legal education in the United States, Australia, the United Kingdom, Europe, Africa and

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1 Quality Assurance Agency, "Subject Benchmark Statement: Law (2015)" (The Quality Assurance Agency for Higher Education, July 2015) 6, available at www.qaa.ac.uk/publications/information-and-guidance/publication?PubID=2966#.WsYstkxFw2w (visited 20 March 2018).

2 Donald Nicholson, "Our Roots Began in (South) Africa: Modeling Law Clinics to Maximize Social Justice Ends" (2016) 23(3) Int'l J Clinical Legal Educ 87.

Asia, noting in particular the elements that have transcended context and those which have been particularly shaped by local circumstances. Section II explores the question "do values change at university and if so, how?" using the latest research from neuroscience and education to assess how we currently understand the development of personal and professional values. In particular, what evidence there is for a sufficient degree of plasticity in undergraduate populations so that values might change over a module or a year and what evidence there is that changes to values at university (if any) persist into later life? Section III takes a broader philosophical position in relation to legal education and the ethical imperatives of the teacher, asking "if we can make students believe something, is this a good thing?". Taking the position that our role is primarily to develop students' ability to think rather than telling them what to think in order to "develop their own reflective system of justice",[3] we problematise the transmission of values through direct pedagogy, modelling and the unconscious curriculum.

I. Why Do We *Believe* Values Are Formed in Clinic?

In understanding why we believe values are formulated in clinic, it is important to consider the history of the clinical legal education movement from its inception to its gradual spread across the globe.

Scholars have spilt much ink setting out the history of clinical legal education.[4] We can trace the genesis of the clinical legal education movement to Jerome Frank's seminal paper, "Why Not a Clinical Lawyer-School?".[5] In his critique of legal education in American law schools, Frank posited that law schools should "get in intimate contact with what clients need and with what courts and lawyers actually do".[6] Of particular note is that Frank's conceptualisation for a legal clinic:

> "would not confine their activities to such as are now undertaken by the Legal Aid Society. They could take on important work for governmental

3 David Barnhizer, "The University Ideal and Clinical Legal Education" (1990) 35(1) N Y L Sch L Rev 87, 112.

4 See generally Frank S Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford: OUP, Oxford Scholarship Online Edition, 2011); Stephen Wizner, "Is Social Justice Still Relevant" (2012) 32(2) BC J L & Soc Just 345, 356; Bruce Lasky and Shuvro Prosun Saker, "Introduction: Clinical Legal Education and Its Asian Characteristics" in Shuvro Prosun Saker (ed), *Clinical Legal Education and Asia: Accessing Justice for the Underprivileged* (New York: Palgrave Macmillan, 2015); Stephen Wizner, "Beyond Skills Training" (2001) 7 Clinical L Rev 327, 340; Margaret Martin Barry et al, "Clinical Education for This Millennium: The Third Wave" (2000) 7(1) Clinical L Rev 1, 76; Jon Dubin, "Clinical Design for Social Justice Imperatives" (1998) 51 SMU L Rev 1461; Phillip Schrag and Michael Meltsner, "Reflections on Clinical Legal Education" (Boston: Northeastern University Press, 1998); George Grossman, "Clinical Legal Education: History and Diagnosis" (1973) 26(2) Journal of Legal Education 162.

5 Jerome Frank, "Why Not a Clinical Lawyer-School?" (1933) 81(8) University of Pennsylvania Law Review 907.

6 *Ibid.*, p.913.

> agencies or other quasi-public bodies. The professional work they would do would include virtually every kind of service rendered by law offices".[7]

The clinical legal education movement boom began during the mid-20th century in the United States.[8] This was an era of social upheaval including the civil rights movement, women's rights and the Vietnam War. There were also issues around poverty with governmental measures for the "provision of legal services for both civil and criminal legal problems of those unable to afford legal counsel".[9] With the increased demand for legal services:

> "[i]t became a standard motto of the times that professional responsibility applies not only to the ethics involving the individual attorney's relationship with his client, but also to the responsibility of the profession as a whole to see to it that legal services are made available to all segments of society".[10]

At this time, the Ford Foundation "became interested advancing the cause of practical law training for the sake of professional responsibility".[11] With this in mind, the Ford Foundation established and funded the Council on Legal Education and Professional Responsibility (CLEPR) in 1967, which would be the "leading force behind the widespread movement toward clinical legal education".[12] Nearly half of the existing law schools in the United States received funding from CLEPR to establish clinical programmes.[13] Other law schools, inspired by the success of CLEPR funded programmes, started their own.[14]

The MacCrate Report, published in 1992, supported the use of clinical legal education as a methodology for teaching legal skills and professional responsibility.[15] In response to the MacCrate Report, the American Bar Association amended its accreditation standards in 1996 requiring all accredited law schools to offer live-client or other real-life practice experiences.[16] This rule persists, and all accredited law schools are required to "provide substantial opportunities to

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7 *Ibid.*, p.918.

8 Jeff Giddings et al, "The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada and Australia" in Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford: OUP, Oxford Scholarship Online Edition, 2011); see Grossman, "Clinical Legal Education: History and Diagnosis" (n.4).

9 See Grossman, "Clinical Legal Education: History and Diagnosis" (n.4) p.173.

10 *Ibid.*

11 *Ibid.*, p.172.

12 *Ibid.*, p.173.

13 See Giddings et al, "The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada and Australia" (n.8).

14 See Schrag and Meltsner, "Reflections on Clinical Legal Education" (n.4).

15 American Bar Association, Section of Legal Education and Admissions to the Bar, Legal Education and Professional Development — An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap ("MacCrate Report") (Chicago: ABA Publishing, 1992) pp.234–235.

16 Peter Joy, "The Cost of Clinical Legal Education" (2012) 32(2) BC J L & Soc Just 309, 325.

students for: (1) law clinics or field placement(s); and (2) student participation in *pro bono* legal services, including law-related public service activities".[17]

The notion of public service and professional responsibility are embedded within the origins and development of clinical legal education in the United States. However, the clinical movement in the United Kingdom was somewhat different.

The clinical movement in the United Kingdom started in the 1970s. The University of Kent was the first to establish a clinic incorporated into the curriculum in 1973. This was followed by the establishment of other clinical programmes including the Warwick Legal Practice Programme with the main objective of providing "a special form of legal education to law students".[18] By the mid-1990s, eight universities reported running a live-client clinical programme.[19] Only two of these programmes offered a full representation service to clients, while other programmes limited their work to advice or representation before the county court or tribunal.[20] It is worth noting that six of the universities that offered a live-client clinical programme were "new universities".[21] A review of legal education and the Lord Chancellor's Advisory Committee on Legal Education and Conduct (ACLEC) Report conducted during this period, published in 1996, supported the use of clinical methods to integrate theory and practice.[22] Since this period, clinical legal education has seen continued growth in the United Kingdom with at least 70 per cent of law schools offering *pro bono* opportunities to students.[23]

Since the early days of clinical activity in the United Kingdom, the educational value of clinical legal education has been the primary driving force behind the movement although there have be some advocates, such as Donald Nicholson, for putting the social justice mission at the forefront of the clinical movement.[24]

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17 American Bar Association, *ABA Standards and Rules of Procedure for Approval of Law Schools 2016–17* (ABA, 2016) Standard 303, available at www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf (visited 10 March 2018).

18 See Giddings et al, "The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada and Australia" (n.8).

19 Richard Grimes et al, "Legal Skills and Clinical Legal Education — A Survey of Undergraduate Law School Practice" (1996) 30(1) Law Teacher 44, 64.

20 *Ibid.*

21 *Ibid.*

22 Lord Chancellor's Advisory Committee on Legal Education and Conduct, First Report on Legal Education and Training (HMSO, 1996).

23 Damien Carney et al, "The LawWorks Law School Pro Bono and Clinic Report 2014" (LawWorks, 2014) 10, available at www.lawworks.org.uk/sites/default/files/LawWorks-student-pro-bono-report%20 2014.pdf (visited 10 March 2018); clinical legal education and *pro bono* are widely regarded as different concepts. However, the report defined "*pro bono*" as "an activity organised and/or delivered by a law school that provides a legal service to an individual, group or organisation without charge", thus encompassing clinical activities.

24 See Nicholson, "Our Roots Began in (South) Africa: Modeling Law Clinics to Maximize Social Justice Ends" (n.2); Donald Nicholson, "Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice" (2013) 16 Legal Ethics 36; Donald Nicolson, "Education, Education, Education: Legal, Moral and Clinical" (2008) 42(2) Law Tchr 145; Donald Nicholson, "Legal

The LawWorks Pro Bono and Clinic Report 2014 cited "educational value" as the most important reason for respondents to undertake *pro bono* activities and "social justice" as the second most important reason.[25] It is likely that the reason the United Kingdom has pursued clinical activities primarily for educational reasons rather than social justice reasons is the historical availability of legal aid. Under the Legal Aid and Advice Act 1949, legal aid was available to everyone of "small and moderate means" and "in all courts and tribunals where lawyers normally appears for private clients".[26] In the 1970s, the Green Form scheme facilitated the provision of advice and assistance "on any matter of English law on the basis of a simplified test of income and expenditure".[27] From 1979 and throughout the early 1980s, 79 per cent of the population were eligible for legal aid.[28]

Unfortunately, and largely as a consequence of cost to the public purse, cuts were made in terms of eligibility which meant that the percentage of households eligible for civil legal aid fell from 77 per cent in 1979–1980 to 47 per cent in 1994–1995.[29] The availability of legal aid was further eroded as Sch.2 of the Access to Justice Act 1999 removed a number of areas from the scope of civil legal aid.[30] This meant that even those who were financially eligible could not receive public funding if their case was out of scope. By 2007, the percentage of the population eligible for civil legal aid had fallen to 29 per cent. Throughout this period, the number of private practice solicitors engaged in legal aid work was falling with the not-for-profit sector providing an increased proportion of legal help in social welfare law.[31] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), often heralded as the death knell of legal aid, saw vast areas of law removed from the scope of legal aid with only those areas listed in Sch.1 of the Act falling within scope.

While the last 30 years has seen an erosion of legal aid, the poorest were still eligible to receive assistance. Therefore, the use of clinical legal education as a vehicle to provide legal assistance to the poor was not a significant factor in its development in the United Kingdom. It was not until the implementation of LASPO in April 2013 that the number of individuals unable to obtain advice and

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Education or Community Service? The Extra-Curricular Student Law Clinic" (2006) 3 Web Journal of Current Legal Issues, available at http://www.bailii.org/uk/other/journals/WebJCLI/2006/issue3/nicolson3.html (visited 10 March 2018).

25 See Carney et al, "The LawWorks Law School Pro Bono and Clinic Report 2014" (n.23) p.39.

26 Sir Henry Brooke, "The History of Legal Aid 1945–2010" (Bach Commission on Access to Justice — Appendix 6, 2017), available at www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission-Appendix-6-F-1.pdf (visited 10 March 2018).

27 *Ibid.*, p.8.

28 *Ibid.*

29 *Ibid.*, p.11.

30 For example, personal injury other than clinical negligence, conveyancing, wills and defamation.

31 See Brooke, "The History of Legal Aid 1945–2010" (n.26) p.23.

assistance became a significant issue.[32] This has seen some calls to utilise clinical legal education to fill the access to justice gap.[33]

In Australia, the clinical movement can be traced back to the establishment of clinical programmes at Monash University, La Trobe University and the University of New South Wales by "young academics and socially active students" in the mid-1970s and early 1980s.[34] Following reforms to the university sector in Australia, the number of law schools expanded and clinic was seen as a way for new law schools to differentiate themselves in an increasingly competitive market.[35] The Australian clinics have benefited from key members of academic staff remaining involved with their programmes for more than 20 years.[36] People with a strong commitment to access to justice issues staff the clinics, bringing an emphasis on community service and using the law and legal system to achieve community development objectives.

In Africa, law clinics were established for two purposes: "to provide legal services and access to justice, and to teach law students practical skills".[37] Live-client clinics are the accepted norm in Africa with universities "surrounded by seas of poverty and often the services provided by national legal aid schemes are minimal".[38] The first clinical programme established in South Africa was in 1972 by law students from the University of Cape Town.[39] This programme was managed entirely by students, under supervision by external legal practitioners,

32 While it is accepted that the number of litigants in person have increased, it is difficult, if not impossible, to find reliable data regarding the number of individuals impacted by the reduction in legal aid. For example, there are no available data regarding the number of individuals who choose not to pursue a matter because they cannot find legal assistance. Further, civil courts and tribunals do not collate records on the number of litigants represented. However, the National Audit Office reported that the number of family cases in which neither party was represented had increased by 30 per cent. See, House of Commons Justice Committee, Impact of Changes to Civil Legal Aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012: Eighth Report of Session 2014–15 (HC 311, 2015) p.36.

33 Civil Justice Council, Access to Justice for Litigants in Person (or Self-represented Litigants): A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice (2011) p.55. Victoria Murray, "The Rise and Fall of Social Justice within Clinical Legal Education" in Chris Ashford and Paul McKeown (eds), *Social Justice and Legal Education* (Newcastle upon Tyne: Cambridge Scholars, 2018).

34 See Giddings et al, "The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada and Australia" (n.8); see also Jeff Giddings, "Clinical Legal Education in Australia: A Historical Perspective" (2003) 3 Int'l J Clinical Legal Educ 7.

35 See Giddings et al, "The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada and Australia" (n.8).

36 *Ibid.*

37 David McQuoid-Mason et al, "Clinical Legal Education in Africa: Legal Education and Community Service" in Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford: OUP, Oxford Scholarship Online Edition, 2011).

38 *Ibid.*

39 *Ibid.*; see also Peggy Maisel, "Expanding and Sustaining Clinical Legal Education in Developing Countries: What We Can Learn from South Africa" (2007) 30(2) Fordham Int'l LJ 374.

without support from the faculty.[40] In 1973, the Ford Foundation funded a legal aid conference in South Africa resulting in the establishment of five clinical programmes within two years. The clinical movement developed in South Africa throughout the apartheid era. The liberal universities primarily tried to assist the victims of apartheid, while those universities that supported the apartheid regime focused on practical skills.[41] Throughout the 1980s, the clinical movement spread throughout southern Africa to countries such as Zimbabwe and Botswana. It has continued to progress and includes clinics in many countries throughout the region. Often referred to as "legal aid clinics", the service element rather than the learning and teaching aspect is emphasised.[42]

In East Africa, there were a number of clinics established in the early 1970s such as the clinic at the University of Dar-Es-Salaam in Tanzania.[43] Other clinics, such as the one at University of Addis Ababa, Ethiopia, and Makerere University, Uganda, were set up but did not survive the political turmoil of the time.[44] Throughout the 1990s and 2000s, law clinics have been established in countries such as Kenya, Rwanda and Somaliland.[45] The law clinics were established "principally to bridge the gap between imparting practical legal skills and theory".[46] The clinics also responded to a "growing need for basic legal advice by indigent populations".[47]

The clinical movement in West Africa has developed differently, partly due to the differences between anglophone and francophone countries. While there were some early initiatives in Nigeria during the 1980s, the clinical movement really began following the First All-Africa Colloquium on Clinical Legal Education in 2003, the establishment of the Network of University Legal Aid Institutions (NULAI) in 2003 and the first Nigerian Clinical Legal Education Colloquium in 2004.[48] Financial support was received from international agencies including the Open Society Institute and the MacArthur Foundation.[49] The law teachers who founded NULAI recognised:

> "that law degree programmes and teaching methods in Nigerian Universities are not adapted to participatory and interactive learning and teaching; and

40 *Ibid.*
41 *Ibid.*
42 *Ibid.*
43 *Ibid.*
44 *Ibid.*
45 *Ibid.*
46 *Ibid.*
47 *Ibid.*
48 *Ibid.*; further, for a history of clinical legal education in Nigeria, see generally Gbenga Oke-Samuel, "Clinical Legal Education in Nigeria — Developments and Challenges" (2008) 17(1) Griffith L Rev 139; Ndubuisi Madubuike-Ekwe, "Challenges and Prospects of Legal Education in Nigeria: An Overview" (2017) 8(1) Nnamdi Azikiwe U J Int'l L & Juris 128.
49 *Ibid.*

> that the law curriculum is not skills focused and lacks opportunity for community service and the development of the mentality in using law for social change and development".[50]

In francophone Africa, law clinics were run in partnership with NGOs and law students. In Morocco, a Human Rights Clinic Programme was established in partnership with the Law Faculty of Mohammedia at the University of Hassan II by the American Bar Association Rule of Law Initiative in 2005.

In Asia, the development of clinical legal education has been described as "amorphous".[51] The reason has been attributed to the fact that it is a "broad continent with many nationalities, religions, ethnicities, languages and cultures" and the same can be said of the legal systems:

> "which possess a mixture of common law, civil law, Shari'ah law, and customary law structures, often with a number of these structures existing within a single nation state. These legal systems have a multitude of roots and origins, with some dating back centuries and others having a more recent strong colonialist influence".[52]

While legal education in Asia is also as "multifaceted" as the various legal systems, there are also common attributes.[53] One of the primary issues common around Asia is that students are often "passive learners", while teachers are seen as the "gurus imparting knowledge".[54] Clinical legal education challenges this attitude as the clinical teacher is "not the 'sage on the stage' but the 'guide and the side'".[55] Further, lawyering skills, professional ethics and societal responsibilities are not generally taught at the undergraduate level.[56] While clinical legal education is seen as addressing these issues within Asian legal education, Lasky and Sarker highlighted that:

> "one contemporary core commonality of most of these Asian CLE programs can be found in their focused social justice mission of delivering legal assistance and empowerment to the poor and marginalized, while simultaneously developing legal knowledge, skills, ethics, and *pro bono values* within the participating university students".[57] (emphasis added)

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50 *Ibid.*
51 See Lasky and Sarker, "Introduction: Clinical Legal Education and Its Asian Characteristics" (n.4) p.5.
52 *Ibid.*, p.6.
53 *Ibid.*
54 *Ibid.*
55 Richard Wilson, "Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education" (2009) 10 German LJ 823, 829.
56 See Lasky and Sarker, "Introduction: Clinical Legal Education and Its Asian Characteristics" (n.4) p.6.
57 *Ibid.*

Throughout Southeast Asia, the development of clinical programmes has often been in conjunction with organisations external to the university. Organisations, such as the United Nations, through their Development Programme,[58] the Open Society Justice Initiative[59] and Bridges Across Borders South East Asia Community Legal Education Initiative,[60] as well as a number of other non-governmental organisations have worked with universities and assisted indigent groups.[61]

In India, early clinical programmes were inspired by two influential reports published in the 1970s aiming to integrate legal education with attempts to encourage the legal profession to contribute to social change.[62] Both reports highlighted that clinical legal education would provide skills training while benefiting the poor.[63] In 1981, the Committee for Implementing Legal Aid Schemes concluded that "court or litigation-oriented legal aid programs could not alone provide social justice in India" and recommended the establishment of legal aid clinics in law schools to motivate student to provide legal aid to the poor.[64] In 1997, the Bar Council of India issued a circular directing all universities and law colleges to incorporate clinical type programmes into their three- and five-year law curricula.[65] Interestingly, the type of activities which satisfied the circular included "moot court; student chambering; attendance, observation, and reflection of both civil and criminal trials; drafting pleadings and conveyances; professional ethics; and training in legal aid".[66] It appears that these activities are predominantly for the educational benefit of the student, particularly in relation to skills and legal practice, rather than providing any benefit to the poor.

In Continental Europe, the clinical movement flourished in the former Soviet countries of Central and Eastern Europe.[67] Throughout the Communist-era, members of the legal profession lacked ability and competence and/or were reluctant to engage in rule of law, human rights and public interest lawyering. This mentality persisted after the fall of Communism. It is against this backdrop that an ambitious agenda for law reform was set in motion throughout the 1990s

58 For further information, see www.undp.org/.

59 For further information, see www.opensocietyfoundations.org/about/programs/open-society-justice-initiative.

60 For further information, see www.babseacle.org/.

61 See generally Bruce Lasky and MRK Prasad, "The Clinical Movement in Southeast Asia and India: A Comparative Perspective and Lessons to be Learned" in Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford: OUP, Oxford Scholarship Online Edition, 2011).

62 *Ibid.*

63 *Ibid.*

64 *Ibid.*

65 *Ibid.*

66 *Ibid.*

67 See generally Dubravka Aksamovic and Phillip Genty, "An Examination of the Challenges, Successes and Setbacks for Clinical Legal Education in Eastern Europe" (2014) 20(1) Int'l J Clinical Legal Educ 427; Martin Tomoszek, "Legal Clinics and Social Justice in Post-Communist Countries" in Chris Ashford and Paul McKeown (eds), *Social Justice and Legal Education* (Newcastle upon Tyne: Cambridge Scholars, 2018).

including reform of legal institutions, legislation and the need to educate and empower a new generation of legal professionals. A fundamental problem existed in that universities saw themselves as identifying and defining concepts of law rather than analysing and solving legal problems. As a consequence, various international donor initiatives were launched to train judges and lawyers on issues related to human rights, democracy and the rule of law. One initiative started in 1996 related to the promotion of human rights and the operation of university legal clinics. Students were "trained in legal skills and values" and would provide free legal assistance. The initiative received financial support from a number of organisations including the American Bar Association's Central European and Eurasian Law Initiative, the Ford Foundation, the Open Society Institute and Soros Foundations Network. Between 1997 and 2002, more than 75 university law clinics were established in more than 20 countries. The clinics usually focused on "both skills and values training" while working with vulnerable and indigent groups.

Western Europe has long been regarded as the last bastion resisting the clinical movement.[68] Wilson identifies five critiques of clinical legal education that have been addressed in other parts of the world, but have arguably stifled development in Europe, namely, the existence of pre-existing apprenticeships before entry into the legal profession; the large size of undergraduate classes; a threat to the legal profession losing paying clients; the number of small law firms; and the utilisation of clinics to fill the legal services gaps for the poor.[69]

Wilson also identifies "traditions" within the civil law system that perhaps hindered the development of clinical legal education. First, the "conception of law" is different between civil and common law jurisdictions. Civil law systems see the law as "a series of fundamental principles", while in common law jurisdictions, the law is "a means of providing remedies for certain cases: remedies proceed rights".[70] Second, the nature and status of the professoriate are different in civil law jurisdictions. The professoriate "not only expresses the law but formulates it".[71] This echoes the academic/practitioner divide cited in the literature. Finally, Wilson highlights the high level of state control over legal education resulting in standardised programmes with little room for innovation.

However, despite the aforementioned challenges, clinical legal education has started to infiltrate the Western European law school. One reason cited for the ingress of clinical activity is the Bologna Process seeking to harmonise education across the signatory countries, including all European Union member states. The Bologna Process requires a focus not only on technical knowledge but also the competencies

68 The United Kingdom is the exception in Western Europe.

69 See Wilson, "Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education" (n.55).

70 *Ibid.*

71 *Ibid.*

and skills required for a successful legal career and active participation in economy and society.[72] The Council of Bars and Law Societies of Europe has also produced a report identifying the skills and attributes of a successful lawyer. There is a focus on skills, ethics and values that cannot be taught in a classroom or a lecture theatre but instead are best learnt through clinical programmes.[73] The Quality Assurance, Accreditation and Assessment Committee, a committee of the European Law Faculties Association, identified four "competencies" for law students. One of these competencies includes "an understanding of core values associated with the law".[74] In 2013, the European Network for Clinical Legal Education (ENCLE) was established. ENCLE's objectives include, *inter alia*, the pursuit and promotion of social justice values and diversity as core values of the legal profession and improvement to the quality of legal education.[75]

The clinical literature originates predominantly from the United States.[76] In the early clinical literature, while it is noted that there were some educational benefits from participation in assisting to indigents, this was secondary to community service.[77] Mkwebu highlighted the dangers of citation bias, attaching higher status to the literature from the United States at the expense of publications from elsewhere.[78] Further, often the same group of authors are cited,[79] for example, Stephen Wizner, Jane Aiken and Jon Dubin, each with a distinguished background of public service activities, are fierce proponents of public service.[80]

There is little empirical evidence to support the transformational impact of clinical legal education on students' public interest ethos.[81] A number of quantitative studies have found no evidence that clinical experiences while in law school influenced a desire in students to conduct public service and/or *pro bono* in

72 William Woodruff and Andreas Bucker, "The Bologna Process and German Legal Education: Developing Professional Competence through Clinical Experiences" (2008) 9 German LJ 575.

73 See Wilson, "Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education" (n.55).

74 *Ibid.*

75 ENCLE, "About ENCLE: What Are Our Goals?", available at encle.org/about-encle/what-are-our-goals (visited 26 March 2018).

76 Tribe Mkwebu, "A Systematic Review of Literature on Clinical Legal Education: A Tool for Researchers in Responding to an Explosion of Clinical Scholarship" (2015) 22(3) International Journal of Clinical Legal Education 1, 22.

77 See Grossman, "Clinical Legal Education: History and Diagnosis" (n.4) p.174.

78 See Mkwebu, "A Systematic Review of Literature on Clinical Legal Education: A Tool for Researchers in Responding to an Explosion of Clinical Scholarship" (n.76) p.28.

79 *Ibid.*, p.31.

80 See Barry et al, "Clinical Education for This Millennium: The Third Wave" (n.4); Wizner, "Beyond Skills Training" (n.4); Stephen Wizner and Jane Aiken, "Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice" (2004) 73 Fordham L Rev 997; Wizner, "Is Social Justice Still Relevant" (n.4); Dubin, "Clinical Design for Social Justice Imperatives" (n.4); Jane Aiken, "The Clinical Mission of Justice Readiness" (2012) 32 BCJL & Soc Just 231.

81 See Schrag and Melstner, "Reflections on Clinical Legal Education" (n.4).

their future career.[82] Other studies suggest an increased willingness to participate in public service and/or *pro bono* activity following graduation.[83]

Notions of social justice, public interest and service are perhaps more nuanced. While respondents in the studies highlighted above did not report an increased willingness to participate in public service and *pro bono* work, they did report improvement to their awareness of social and economic issues such as poverty.[84] Thus, while clinical programmes may not create an army of "social justice warriors", it may be inculcating an ability within students to think about and critically evaluate the law and its wider social context. Indeed, the MacCrate Report also noted the limitations on a law school's ability to prepare students for life in practice. While a law school can:

> "help students recognize ethical dilemmas and can provide the rudiments of training for resolving them … the exposure of students to these issues in law school clinical programs … is very limited compared to the variety and complexity of ethical dilemmas that students confront in practice".[85]

The MacCrate Report states that practising lawyers "may be more significant than law teachers" in teaching professional values.[86]

If we examine the development of clinical legal education, its origins and global spread, patterns begin to emerge. We see that clinical legal education has taken root in periods of social and political upheaval, for example, the civil rights movement, the fall of communism and apartheid. In the United Kingdom and Australia, clinical legal education was adopted during the period of educational reform with "new universities" adopting the method and thus differentiating themselves from the Establishment. We can hypothesise that this is due to the activist traditions of clinical legal education. Often, clinical programmes have been established with international sponsorship aimed at social and economic change. Clinical programmes are often expensive to run in comparison to traditional classroom teaching. Clinical programmes may therefore need to address the aims (and values) of sponsor organisations to attract the necessary funding. We must also remember that a basic

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82 See Deborah Rhode, "Pro Bono in Principle and in Practice" (2003) 53(3) Journal of Legal Education 413; Robert Granfield, "Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs" (2007) 54 Buffalo Law Review 1355; Paul McKeown, "Law Student Attitudes towards Pro Bono and Voluntary Work: The Experience at Northumbria University" (2015) 22(1) International Journal of Clinical Legal Education 6.

83 See Sally Maresh, "The Impact of Clinical Legal Education on Decisions of Law Students to Practice Public Interest Law" in Jeremy Cooper and Louise Trubek (eds), *Educating for Justice: Social Values and Legal Education* (Dartmouth: Ashgate, 1997); Deborah Schmedemann, "Priming for Pro Bono Publico: The Impact of the Law School on Pro Bono Participation in Practice" in Robert Granfield and Lynn Mather (eds), *Private Lawyers and the Public Interest: The Evolving Role of Pro Bono in the Legal Profession* (New York: OUP 2009); Bharat Malkani and Linden Thomas, "The Birmingham Pro Bono Group: A Case Study of Social Justice in Legal Education" in Chris Ashford and Paul McKeown (eds), *Social Justice and Legal Education* (Newcastle upon Tyne: Cambridge Scholars, 2018).

84 See works referred to in note 82.

85 See MacCrate Report (n.15) p.235.

86 *Ibid.*, p.236.

premise of clinical legal education is real-life experience. If clinical programmes are going to provide their students with a real-life experience, they need a source that experience. At the risk of sounding cynical, the poor and disadvantaged in society are a source of clients as they are unlikely to receive assistance elsewhere. Whether the educational mission or the social justice mission primarily motivates a clinical programme, it is likely that the poor and disadvantaged will provide the client base of the programme. As a consequence, an epistemic system belief has emerged in relation to the notion of social justice and public service, inextricably fusing the concepts within the very fabric of clinical legal education. So much so that for many, it has become a part of the definition of clinical legal education.

The purpose of this historical tour is to provide the narrative explanation for the widely held beliefs that social justice and clinic are inextricably intertwined, that to attempt to disentangle them is wrong and that the principal goals of clinical activity are the material benefit to the community and the moral benefit to the students. We would also like to explore the philosophical and psychological nature of these beliefs. Achinstein[87] gave us a framework for understanding the different ways in which beliefs are formed, held and supported through different engagements with Hypothesis (H) and Evidence (E) (Table 1).[88] This framework allows us to interrogate the basis for beliefs and assumptions and could be used hierarchically, privileging certain kinds of knowledge and evidence and dismissing others as lesser or flawed,[89] but this would be a misunderstanding of the way in which human beings deal with complexity.[90] Epistemic system and subjective evidence necessarily form large parts of our reality, as it is simply not practical to interrogate everything in daily life with the rigour needed to produce potential, much less veridical evidence.

We introduce this framework as a background to the discussion that follows, as a prompt for writers and readers to ask "Why do I think this? How do I know?". For example, the historical overview above suggests the hypothesis that the United Kingdom has the most "educationally-driven" model of clinic and that educational goals are rated above social justice goals[91] although social justice remains a close second. The different kinds of evidence for this hypothesis are often woven together in the discourse, with culturally specific explanations merged with the data from empirical studies. This is not to say that these different kinds of evidence cannot or should not

87 Peter Achinstein, *The Book of Evidence* (Oxford: Oxford University Press, 2001).

88 This table is a summary of Kvernbekk's 2011 discussion of Achinstein developed by Elaine Hall for the Association of Law Teachers 2016 conference keynote: "The Use of Evidence in Writing about Legal Education."

89 Tone Kvernbekk, "The Concept of Evidence in Evidence-Based Practice" (2011) 5 Educational Theory 515, particularly the discussion that Veridical evidence for a proposition is an ideal state (*cf* Peircean ideas of the "long run" discussed in Cornelis de Waal, *Peirce: A Guide for the Perplexed* (London: Bloomsbury, 2013)) or a temporary state of certainty in which we consider there is sufficient "warrant for action" (John Dewey, *Experience and Education* (New York: MacMillan, 1938)) and so we can act "as if" the evidence were veridical and permanent. This is useful where discussions of potential evidence meet the need for certainty in policymakers.

90 Charles Peirce, "The Fixation of Belief" *Popular Science Monthly* (Vol 12, November 1877) p.1.

91 See Carney et al, "The LawWorks Law School Pro Bono and Clinic Report 2014" (n.23).

Table 1: Types of Evidence (from Achinstein, 2001 and Kvernbekk, 2011)

	Epistemic situation evidence	Subjective evidence	Veridical evidence	Potential evidence
Description	Evidence that is understood within a particular cultural, historical or knowledge context	Evidence that is part of an individual or group belief structure	Evidence that transcends situations and beliefs	Evidence that is strongly related to experience, present and future
Requirement	That the inquirer could construct or maintain H based on the E within the limitations of their context	That the links between E and H are held to be true and consistent by the inquirer(s)	The data supporting E need to be objective, although not necessarily complete (conclusive)	The data supporting E must be objective and rigorous and are understood not to be conclusive
Limitation	This belief is not challenged by ideas from beyond the epistemic context	It is not necessary for any empirical elements to come into this inquiry	Both E and H need to be true (very hard to establish)	H may be false even where there is good E to support it
Link to beliefs	The inquirer was justified in believing H on this E, in context.	The inquirer(s) believe that E is evidence for H, that H is true, E does not have to be empirically true, provided that it is believed.	E is evidence for H and provides a good reason to believe H, since both E and H are true.	E is evidence for H and provides a good reason to believe H until other E emerges to challenge

support one another but that as academics and clinicians we must be clearer about how we are constructing our arguments: the *a priori* logic of a *subjective* response may be strong and the data from a *potential* study constructed to deductively explore the logic may be rigorous. This does not mean that together they are unassailable. The logic of the subjective response is falsifiable *both* through a competing *a priori* argument *and/or* through the failure of the data to support the hypothesis. Indeed, if we can ever get close to veridical evidence, it is by putting all forms of argument into harm's way both from their natural enemies and from the potential challenge of other forms of evidence.

Table 2: UK Clinics Favour Educational Goals

Epistemic situation evidence	Subjective evidence	Veridical evidence	Potential evidence
The tradition of legal aid means that, until recently, student clinics have not been driven by the need to provide basic and emergency services. Our culture has allowed more focus on students' learning opportunities.	Clinic experience and high-performing students go hand in hand. These students go on to be active *pro bono* professionals. There is a positive cycle or ecosystem at work.	Clinical experience teaches specific knowledge and skills unavailable through other routes[92]/does it better than other forms of teaching (eg, traditional or simulation[93]).	Students express high levels of satisfaction with clinical programmes,[94] demonstrate skills development that could be linked to employability[95] and perform better in other areas after clinic.[96]

A further challenge to our mental architecture in relation to clinic is to imagine the ideal conditions for collecting potential or veridical evidence based on this belief system and compare this to the reality in the field. If it were the case that educational benefits are as important as social justice benefits, several key indicators such as equality of opportunity and access for students, central position and value shown through credit-bearing and clinical skills as the focus of assessment and impact on the final grade would arguably need to be present to indicate these values being expressed in practice (Figure 1).

Where one or more of these factors is absent, it becomes necessary to challenge the originally stated value, the extent to which it is subordinate to other values or pressures in the environment and therefore the extent to which it could potentially be shaping the learning experience.

92 Unsurprisingly, there are no data as yet to support this assertion that meets the veridical threshold.

93 Limited data, much contested on both sides of this assertion, see Richard Grimes, *Learning through Experience: Developing Clinical Models for Legal Education* (PhD Dissertation, Northumbria University, 2017).

94 Rachel Dunn, "The Taxonomy of Clinics: The Realities and Risks of All Forms of Clinical Legal Education" (2016) 3(2) Asian Journal of Legal Education 174.

95 Jill Alexander and Carol Boothby, "Framing Clinical Legal Education at Northumbria Law School: Challenges Old and New" (forthcoming, 2018) 5 German Journal of Legal Education.

96 Elaine Hall, Cath Sylvester and Carol Boothby, "Proof Beyond Reasonable Doubt? Using Large Data Sets to Explore the Impact of Clinical Education" (Seminar, IJCLE/ACCLE Conference, Toronto, July 2016); Sylvester, Hall and O'Boyle, this volume.

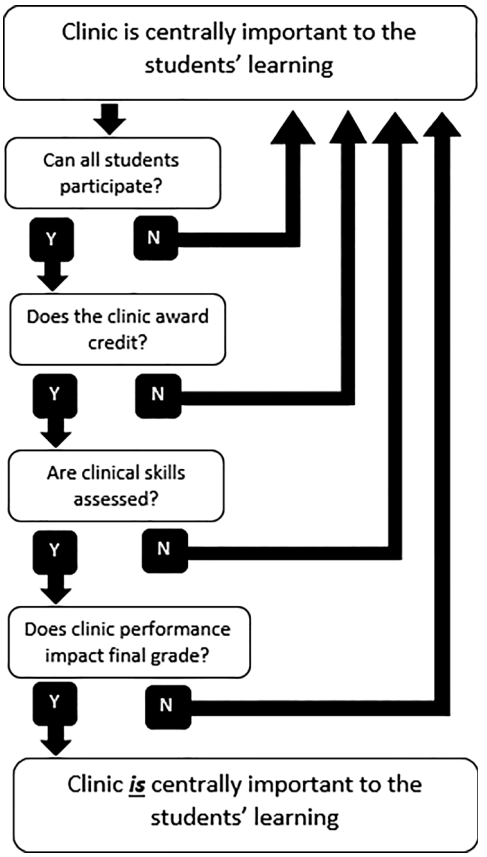

Figure 1: Decision Tree Exploring the Central Position of Clinic in the Curriculum

II. Do Values Change at University and If So, How?

This section seeks to unpack the "taken-for-granted" in academics' discourse about what we do and to expose some of our assumptions, abductive leaps and fondly held beliefs to critical scrutiny. In the spirit of Peirce,[97] this process is intended to assuage our discomfort, since we are no longer satisfied in the fixed beliefs about the plasticity of students' values and how that idea sits within a relatively straightforward model of transformative higher education. We make no claims to reaching full scientific enquiries on each of the points raised, since we have not the resource or expertise to do so. Nevertheless, we want to signpost where the method of authority has been used in respect of psychological and neuroscientific literature and where the method of *a priori* has been used and make clear the logical stutter and flow of our constructions.

97 See Peirce, "The Fixation of Belief" (n.90).

A. Becoming a person — the formation of values and beliefs into early adulthood

The age of criminal responsibility has varied across history and culture with a great deal of ahistorical and culturally imperialist snootiness about others' practices compared to our (exemplary) own.[98] There remains, however, a thread of awareness that there is a point in a young person's cognitive and moral development when they understand both that there is a concept of right and wrong and that this concept applies directly to their own actions. A number of ideas cluster around this thread: that this happens at different ages for individuals and that locally constructed norms of right and wrong may vary are relatively uncontroversial addenda; that good and evil are innate in the individual has become relatively unfashionable; and cultural primacy (particularly in the academy) is given to the notion that values and virtues are acquired socially. Where is this process of "virtue acquisition" happening and what do we (think we) know about how?

(i) Family and culture

In this section, we are primarily using the method of authority, drawing on an integrative psychotherapeutic literature to provide a narrative of development that is rooted in individuals' experience. The neuroscientific perspective on the development of the self is not entirely absent from this discourse, but it is subordinated to metaphors of the social world. The world of the infant is initially undifferentiated: there are no "others" and everything revolves around the child's sensory gratification.[99] It is through the inevitable and healthy frustrations of desire and the disappointments of the fallible flesh that the infant develops both a sense of good and bad experience from their own point of view as well as a sense of others as meaningful and separate individuals.[100] Gradually, the child develops from this sense of self and others a *self-consciousness*.[101] The child comes to understand their role in the family, the location of power and the thoughts feelings and actions that are and are not permitted:[102] some of this comes through explicit family messages

98 Problematised by Raymond Arthur, "Exploring Childhood, Criminal Responsibility and the Evolving Capacities of the Child: The Age of Criminal Responsibility in England and Wales" (2016) 67(3) Northern Ireland Legal Quarterly 269.

99 Louis Cozolino, *The Neuroscience of Psychotherapy: Healing the Social Brain* (New York: Norton, 2002).

100 Allan Schore, "Minds in the Making: Attachment, the Self-organising Brain and Developmentally-Oriented Psychoanalytic Psychotherapy" (2001) 17(3) British Journal of Psychotherapy 299–328; Allan Schore, "The Effects of a Secure Attachment Relationship on Right Brain Development, Affect Regulation and Infant Mental Health" (2001) 22 Infant Mental Health Journal 7.

101 Carl Rogers, *On Becoming a Person: A Therapist's View of Psychotherapy* (London: Constable & Robinson, 1961); Jeremy Holmes, *The Search for the Secure Base: Attachment Theory and Psychotherapy* (Hove: Brunner-Routledge, 2001).

102 Donald Winnicott, "The Theory of the Parent-Child Relationship" (1960) 41 International Journal of Psychoanalysis 585; Ronald Laing and Aaron Esterson, *Sanity, Madness and the Family* (Oxford: Routledge, 1964).

and the overt use of reward and sanction[103] and some from less overt sources. Most of us can call to mind an example from childhood when we learned via a sanction that it was *not ok to bite your sister*.[104] We internalised and generalised[105] this experience so that, when we went to school, we were aware that biting others (no matter how annoying they were) was likely to also be *not ok.* There is a high level of social convergence across time and cultures in acceptable public behaviour, suggesting that the *performance* of "good" is something we curate quite well, passing on to our children the skills of seeming that we ourselves have learned. It is a different thing to be and to seem, and the evidence base for each has only a small amount of overlap.

This is where the less explicit messages in the family are important, since this is where the critical divergence begins. We have observed that generally there is agreement that it is *not ok to bite your sister* and that this principle can be expanded to other contexts and individuals. However, at the moment or moments where we built this understanding, each of us will have developed different contextual moral architecture which will impact our position when we meet new laws or dilemmas:

> *[empathetic] because it hurts and nobody likes to be hurt;*
>
> *[pragmatic] because she shrieked and nearly made mummy drop something and so mummy got angry;*
>
> *[avoidant] because the smack I got hurt a lot*.

This is where the microsystem[106] of the family makes a significant difference because what is "normal for round here" is interpreted by the child as a fundamental truth and carried unconsciously on into later life. It may not be the intention of the parents and carers in that moment to reinforce a pragmatic over an empathetic understanding of why something is not acceptable nor is it necessarily morally or objectively "better" to follow a particular route. It is just very important to recognise that the reasons why a group of people exhibit a socially acceptable behaviour are going to be variable in both type and intensity, so any argument that assumes convergence of understanding and motive underneath a convergent behaviour is likely to be flawed.

In the next section, we draw on the history, philosophy and sociology of education literature to understand where our concepts about learning, the influence of the educator and the plasticity of belief might have come from.

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103 Barry Singer, "Psychological Studies of Punishment" (1970) 58(2) California Law Review 405.
104 A personal example, please insert your own relevant equivalent.
105 Daniel Stern, *The Interpersonal World of the Infant* (Oxford: Routledge, 1985).
106 Urie Bronfenbrenner, "The Experimental Ecology of Education" (1976) 5(9) Educational Researcher 5.

(ii) "Give me the child before he is seven and I will show you the man"

The juxtaposition does seem a little unfair to the Jesuits.[107] Was Loyola really claiming that the education offered was producing a whole batch of similarly clean souls or just that shaping habitual behaviour in a pro-Christian, pro-social manner would increase the chances that each individual would find their own best life and chance of salvation? Nevertheless, the idea of education as a civilising force is central to this article and needs unpacking, regardless of whether we can blame the Jesuits. It is first quite important to describe the positionality of "the child" in this debate: for philosophers and educational theorists up until the 19th century, the child is most definitely a boy and one from a privileged background and the education he experiences is one that will prepare him for a leadership role in his family, his community and beyond, so whether the aim is to replicate received wisdom or to disrupt and develop new understanding it is located within this powerful position. Whether the desire is to make him "good", "effective" or indeed both, the purpose of this education is for a wider societal good, the child's learning will be the society's protection and advancement. The concept of "basic education" was viewed with suspicion; it was deemed necessary to have rich, individualised and challenging educational experiences to come away with any benefits: "A little learning is a dangerous thing; drink deep, or taste not the Pierian spring: there shallow draughts intoxicate the brain, and drinking largely sobers us again."[108] However, by the end of the 19th century, the policy of mass education had become increasingly visible in the legal and political structures in Europe and America, with an emphasis on basic skills for men and an increasing number of women.[109] This can be seen as a purely economic phenomenon that the development of industry and commerce produced both demand-side (skilled labour) and supply-side (literate consumer) drivers. However, the impetus for mass education also came from religious and social concerns about the depravity of the industrial cities: whether empirically true that moral decay was increasing, it was certainly true that the distressing sights of poverty and desperation were more visible. Moreover, in the cities, inequalities were juxtaposed without the restraint of tradition and small communities and so crimes, particularly those against property, increased.[110] Thus, although the cognitive curriculum of the early schools was basic literacy and numeracy, they all had an explicit moral

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107 Particularly when you consider that Loyola probably did not say this. Arnold Beichman et al, *Three Myths* (Washington: Heritage Foundation, 1981) p.48: posit that this saying was "attributed to him (perhaps mischievously) by Voltaire".

108 Alexander Pope, *Essay on Criticism* (1709). Printed for W Lewis in Russel Street, Covent Garden and sold by W Taylor at the Ship in Pater-Noster Row, T Osborn near the Walks, and J Graves in St James Street.

109 Paul Bolton, "Education: Historical Statistics" (Commons Briefing SN/SG/4252, House of Commons Library, 28 November 2012): free primary education for all in England comes in the Education Act 1918, which also raises the school leaving age from 12 to 14 years.

110 For an overview, Clive Emsley, "Crime and Punishment: 10 Years of Research" (2005) 9(1) Crime, Histoire & Societies 117.

curriculum as well, one in which "good" was assessed through displays of passive behaviour and deference to authority figures. The underlying pedagogic theory is one of exposure: "the child" has not yet absorbed the requisite good, by exposing him to it in this institution we will make sure he "gets" it and we will know that he "gets" it because he will not transgress. However, it is only recently that neuroscience has offered the tantalising possibility that we can view that process in real time, potentially giving insight into the difference — if any — between being and seeming.

B. Is neuroscience any help in understanding cognitive architecture?

There is an ongoing fight against "neuromyths",[111] and the tired metaphors of 20th century attempts to understand the structure of the brain which need not detain us here. Neuroscientists are not offering the snake-oil promises of old, although more cautious commentators question the nature of the observations themselves, for example, neuroimages:

> "are not photographs of the brain in action in real time … beautiful colour-dappled images are actually representations of particular areas in the brain that are working the hardest as measured by increased oxygen consumption … Despite well-informed inferences … it is very difficult for scientists to look at a fiery spot on a brain scan and conclude with certainty what is going on in the mind of a person".[112]

Nevertheless, recent advances mean that our understanding of processes and structures in the brain is at a new level of detail and sophistication: one which is cautious about the physical traces of complex processes; which takes into account the interaction between genetics and environment; and which is cautious about the implications of data relating to cohort averages for predicting individual functioning.[113] There is a growing community working actively to translate the observations of brain development and activity for teachers and considering the curriculum design, pedagogy and assessment implications of these observations.[114] However, there are important caveats, even from these dedicated advocates:

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111 Phillip Newton, "The Learning Styles Myth Is Thriving in Higher Education" (2015) Frontiers in Psychology 1908; Elaine Hall, "The Tenacity of Learning Styles: A Response to Lodge, Hansen, and Cottrell" (2016) 2(1) Learning: Research and Practice 18.

112 Sally Satel and Scott Lilienfeld, *Brainwashed: The Seductive Appeal of Mindless Neuroscience* (New York: Basic Books, 2015) pp.4–5.

113 Lucy Foulkes and Sarah-Jane Blakemore, "Studying Individual Differences in Human Adolescent Brain Development" (2018) 21 Nature Neuroscience 315.

114 See, for example, the 2018 special issue created for the Chartered College of Teachers and particularly Paul Howard-Jones et al, "Applying the Science of Learning in the Classroom" *Impact* (February 2018), available at impact.chartered.college/article/howard-jones-applying-science-learning-classroom/ (visited 10 March 2018).

> "Although the science provides principles and a scientifically determined understanding of how learning works, based on concrete measurement of behaviour and brain function, it does not provide a list of 'top tips' or practices that are guaranteed to work with any class or individual in any context."[115]

The overall picture from this field is that we do not yet have a granularity of knowledge sufficient to explain the microprocesses in the brain, and while there are exciting terms — subcortical structures, neuromodulators — in play, they are operating as powerful metaphors rather than maps for practice. Interestingly, while some academics have posited a tension between biological and psychological understandings of learning, empirical evidence of change can be seen in the overlap: training in neuroscience ideas has an impact on learners' belief in their ability to learn,[116] although not their short-term achievement. Mastery and self-concept researchers[117] have suggested that changes in belief take time to transfer into impact on attainment, but the relatively small number of long-term studies indicate that belief in the possibility of change is more critical to performance in college and lifelong learning than prior attainment.

This seems to indicate that physical routes to attitude change might be discoverable, but we are positing their existence on demonstrations (or failed demonstrations) of behavioural or cognitive change:

> "'These early experimenters,' the D.H.C. was saying, 'were on the wrong track. They thought that hypnopædia could be made an instrument of intellectual education …'
>
> 'The - Nile - is - the - longest - river - in - Africa - and - the - second - in - length - of - all - the - rivers - of - the - globe…' The words come rushing out. 'Although - falling - short - of …'
>
> 'Well now, which is the longest river in Africa?'
>
> The eyes are blank. 'I don't know.'"[118]

Huxley's example makes clear that we can spot where the brain has been washed in information, but the information has not been converted into knowledge. His characters were unable to learn cognitively from repetition in sleep, but they were able to absorb social conditioning and to accept the values and norms of their culture.

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115 *Ibid.*

116 Eleanor Dommett et al, "The Impact of Participation in a Neuroscience Course on Motivational Measures and Academic Performance" (2013) 2 Trends in Neuroscience and Education 122.

117 Herbert Marsh and Richard Shavelson, "Self-concept: Its Multifaceted, Hierarchical Structure" (1985) 20(3) Educational Psychologist 107; Carol Dweck, "From Needs to Goals and Representations: Foundations for a Unified Theory of Motivation, Personality, and Development" (2017) 124(6) Psychological Review 689.

118 Aldous Huxley, *Brave New World* (Harmondsworth: Chatto & Windus, 1932) pp.54–60.

However, the crux of the story is that these too were a veneer of performance: Bernard cynically enacted while rejecting the values, and Lenina, who appears a true believer, is not revolted but excited by savage John's difference and rejects him not because of his violation of societal rules but because he worships her in an unfamiliar way. The critical question, given that "social normativity thus does not account for all of our cognitive competence",[119] is whether we can tell the difference between conversion and performance for students encountering our moral curriculum.

While values and virtues education have developed into discrete disciplines since that time, they have not moved much beyond this exposure model and the main problem with the exposure/inoculation model is the observation of adolescence, where transgression is not only something that happens but something that seems to be developmentally necessary. We return, therefore, to the psychological literature.

(i) The second rapprochement phase: "Only Morrissey understands me"

As toddlers, we begin to explore the world, our relationship with important others and our self-consciousness by playing with the boundaries of safety and danger, conformity and transgression. This often takes the form of running away to the other side of the swings when it is "time to go home" and having to be coaxed/chased/carried. This developmental phase, *rapprochement*,[120] is important in that it gives each individual a degree of authorship in their own narrative, choosing both when and how to act and how to understand the outcomes of the action. Traditionally, psychotherapy literature recognises two rapprochements: one as the very young child separates physically (and emotionally) from the family and then later as the adolescent separates cognitively/emotionally (and physically).[121] The adolescent seeks to form their identity through new rounds of attachment processes of idealisation and twinning with self-chosen others, while still seeking to elicit response through the impact transference[122] from the (apparently despised) primary attachment figures. Emerging neuroscientific data[123] on adolescent brain functioning suggest a biochemical and electrical model for self-absorption, which can also be understood through metaphors of focus and attention: it is a big job to form a sense of self and quite possibly nobody outside the self can really understand.

Though experienced by parents and authority figures as rejection, it is possible to view adolescent behaviour as a critical and indeed scientific endeavour in which

119 Hans Bernhard Schmid, "Heidegger and the 'Cartesian Brainwash' — Towards a Non-Individualistic Account of 'Dasein'" (2004) 35(2) Journal of the British Society for Phenomenology 132.

120 Margaret Mahler et al, *The Psychological Birth of the Human Infant* (New York: Basic Books, 1975).

121 Heinz Kohut, *How Does Analysis Cure?* (Chicago: University of Chicago Press, 1984).

122 The talionic impulse (the desire to evoke pain in others) is only part of adolescent "acting out". More crucially, it is the ability to shock and evoke response from an important, *loved* other that is critical. James Masterson, *The Search for the Real Self: Unmasking the Personality Disorders of Our Age* (New York: The Free Press, 1988).

123 Sarah-Jayne Blakemore, *Inventing Ourselves: The Secret Life of the Teenage Brain* (London: Doubleday, 2018).

received wisdom is tested against alternatives. Nor is this a battle to the death: the extent to which the new models of the world are incorporated into the old echoes the adaptation of indigenous faith behaviours into colonised religious practice,[124] from both the old and the new, we keep that which is meaningful and valuable to us, weaving it together. This last is more often than not a conscious activity, since the adolescent is actively seeking a comfortable enough identity as a way of managing self-consciousness and is asking themselves aspirational and moral questions about how they are in the world and how they want to be. Therefore, at the point of applying for higher education, the young person will be somewhere in their second rapprochement,[125] with a world view accreted over time from their family of origin, their experience — passive and active — in the worlds of school, community and friendships and their emerging conscious philosophy.

(ii) Is university subject choice an identity project?

At a recent international clinical conference, colleagues reporting on their students' wonderful work with prisoners referred to the group as "baby lawyers". There was laughter and nodding in the room, this was a way of referencing the students that resonated with the audience: they were at the beginning of a journey to become like us, in fact they were already like us, part of the family. Reflecting on it now, it seems to contain a number of rather cosy assumptions about what students are doing on a law course. Do all the fresh-faced first years definitely want to be something legal: solicitors, barristers, in-house counsel, legal advisors? Are they choosing a shared identity with us, based on core values and beliefs? How do we (think we) know this?

The landscape of higher education participation is an important background for this discussion. In the United Kingdom,[126] participation in higher education increased from 3.4 per cent in 1950, to 8.4 per cent in 1970, 19.3 per cent in 1990 and 33 per cent in 2000, shifting over a couple of generations from a minority to a mainstream activity.[127] Levels of participation adjusted to the proportion of the population of young people entering first degrees (a slightly different measure, excluding mature and part-time students, which may be a more useful figure for the purpose of this article) show that in 2015, 31 per cent of 18-year olds had a university place.[128] This expansion of participation is not evenly spread across

124 Victoria Bricker, *The Indian Christ, the Indian King: The Historical Substrate of Maya Myth and Ritual* (Austin: University of Texas Press, 1981).

125 Increasingly, psychotherapists are considering the possibility that we never complete the work of the rapprochement and that we are always working on this in one form or another until we die.

126 This section reflects very particularly on the Higher Education context in England and Wales, and while there are common factors in other countries, we make no claims for a smooth translation to other jurisdictions and training regimes.

127 See Bolton, "Education: Historical Statistics" (n.109) p.14.

128 Full Fact, "Are There Record Numbers of Young People Going to University?" (1 August 2016), available at https://fullfact.org/education/are-there-record-numbers-young-people-going-university/ (visited 12 March 2018); UCAS, "End of Cycle Report 2015" (December 2015), available at www.ucas.com/sites/default/files/eoc-report-2015-v2.pdf (visited 10 March 2018).

society,[129] but nevertheless it does represent a different market for law schools as the young people deciding on their courses are significantly less likely to have family knowledge and traditions to draw upon than previous cohorts. The decision about which course, at which institution is a complex one, and although a huge amount of metrical data are publicly available, the interpretation of them is difficult since they mostly reflect the experiences and outcomes of previous cohorts.

When lawyers were made in law offices,[130] those young men who became articled clerks might reasonably be assumed to be entering upon and committing to a profession just as their brothers joined the Navy or the Church, either as members of the elite moving from their academic education to a professional practice or as members of the aspirant middle classes seeking to become a part of a professional community through the acquisition of skills. Although the composition of the legal profession[131] in general and the elite in particular (the "Magic Circle" firms, the Bar and the judiciary)[132] still demonstrates that social and cultural capital are more important than skills,[133] the entrance to an undergraduate law degree by any student is not a particularly good predictor of working as a lawyer.[134]

The purpose of higher education is a divisive subject. By definition, a university is "a high-level educational institution in which students study for degrees and academic research is done".[135] However, it is arguable that a university is much more than an institution for the creation and teaching of knowledge. In the 16th century, Francis Bacon espoused that knowledge should be useful stating that it "may not

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129 UCAS, "Record Number of 18 Year Olds Accepted to University This Year, UCAS Report Shows" (UCAS, 14 December 2016), available at www.ucas.com/corporate/news-and-key-documents/news/record-numbers-18-year-olds-accepted-university-year-ucas-report-shows (visited 10 March 2018): Of the fifth of the young English population from backgrounds with the lowest entry rate to higher education, 13.6 per cent entered university in 2016, a rise from 13.5 per cent in 2015 (an increase of 0.1 per cent point). The young people in this group typically have lower family incomes, live in areas where fewer people go to university, attend state schools and are more likely to be men or in the White ethnic group. In comparison, of the fifth of young people from backgrounds with the highest entry rate, 52.1 per cent went to university in 2016, an increase of 1.2 per cent points. Young people in this group are more likely to come from higher income families, live in advantaged areas, attend independent schools or be women or in the Asian or Chinese ethnic groups. Those from backgrounds with the highest entry rates were 3.8 times more likely to enter university in 2016 than their peers with the lowest entry rates.

130 Michael Eraut, *Developing Professional Knowledge and Competence* (Oxford: Routledge, 1994).

131 At least in England and Wales, for which we have access to data.

132 Rosaline Sullivan, "Barriers to the Legal Profession Legal Services Board" (Legal Services Board, 2010); Louise Ashley et al, A Qualitative Evaluation of Non-educational Barriers to the Elite Professions (Report for the Social Mobility and Child Poverty Commission, 2015).

133 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.

134 With the exception of a small number of institutions which offer Exempting degrees, all law graduates have to complete an additional year (on a Legal Practice Course (LPC) or Bar Practitioners Training Course (BPTC)) to be eligible for entry into the profession. Access for non-law graduates to the professional course is through the Graduate Diploma in Law (GDL), an additional year. Current routes therefore are typically six to seven years long: three-year Law undergraduate *plus* LPC/BPTC *plus* two years training contract/pupillage or three-year undergraduate *plus* GDL, *plus* LPC/BPTC *plus* two years training contract/pupillage.

135 Oxford Dictionaries, "University", available at https://en.oxforddictionaries.com/definition/university.

be as a courtesan, for pleasure and vanity only, or as a bond-woman, to acquire and gain to her master's use; but as a spouse, for generation, fruit, and comfort".[136]

Students enter higher education for a myriad of reasons. The factors range from an interest in the subject to a desire to obtain a particular job requiring a particular qualification. One study reported that 47 per cent of respondent students cited "To help get a job or better job" or "Wanted to pursue a particular career and needed a qualification" as the most important reason for entering higher education.[137] In contrast, 16 per cent of respondent students cited interest in the subject as the most important reason. The competing objectives of higher education also highlight the conflict between various stakeholders. While students want more "skills and employability-based activities", academics have expressed concern that there is "less room … to teach philosophy, theory, rights, justice, the liberal arts kind of side of it".[138]

A law degree is a professional degree. In most, if not all jurisdictions, prospective lawyers are required to have an academic qualification before seeking admission to the profession. For example, in England and Wales, a Qualifying Law Degree is the most common route to qualification as a solicitor or a barrister.[139] In the United States, admission to the bar in most states require some form of attendance and qualification from a law school prior to taking the bar exam. In New York state, s.520 of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law prescribes fours routes for an applicant to qualify to take the New York Bar Exam, all of which require some form of classroom study at a law school.

With this in mind, we must consider what a legal education at university teaches students: is it merely legal doctrine providing students with knowledge of the framework, rules and procedural steps they will encounter within the legal system? Alternatively, should legal education encompass more than knowledge and seek to broaden the individual? Cramton considered the "ordinary religion" of the law school as including:

> "a skeptical attitude toward generalizations; an instrumental approach to law and lawyering; a 'tough-minded' and analytical attitude toward legal tasks and professional roles; and a faith that man, by the application of his reason and the use of democratic processes, can make the world a better place".[140]

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136 Francis Bacon, *Advancement of Learning in the Works of Francis Bacon* (Philadelphia: Carey and Hart, 1844) p.174.

137 C Callender (undated), "Full and Part-Time Students in Higher Education: Their Experiences and Expectations", available at www.leeds.ac.uk/educol/ncihe/report2.htm (visited 01 March 18).

138 Legal Education and Training Review, Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales (LETR, June 2013) p.45.

139 Although it should be noted that under proposals made Solicitors Regulation Authority (SRA) for the introduction of Solicitors Qualifying Examination, new solicitors would not be required to hold a law degree. For further information, see Solicitors Regulation Authority, "A New Route to Qualification: The Solicitors Qualifying Examination", available at www.sra.org.uk/sra/consultations/solicitors-qualifying-examination.page (visited 10 March 2018).

140 Roger Cramton, "The Ordinary Religion of the Law School Classroom" (1978) 29 Journal of Legal Education 247, 248.

In regard to values, Cramton stated that the lawyer is "engaged in the implementation of the values of others … he need not be concerned directly with value questions". Further, Cramton also expressed that emotion, imagination, sentiments of affection and trust and a sense of wonder or awe at the inexplicable are "off limits for law students and lawyers".[141] The traditional approach to lawyering is to dehumanise the case to use legal skill to achieve the desired outcome, whether that is for the client or a cause. Finally, Cramton highlighted that faith in that the world can be a better place through application of reason and the use of a democratic process allows the pursuit of social justice.[142] It is recognised that in a "pluralistic and tolerant society", it is unlikely that there will be unanimous consensus as the morally virtuous outcome. However, if there is consensus on the decision-making, society will be a better place. The law school is a training ground for those who wish to function within the existing system. The aim of all education, including legal education, should be the encouragement of self-learning that includes the mind, spirit and body of the whole person.[143]

A key finding of the Legal Education and Training Review (LETR) relates to the teaching of legal ethics and professional values. The report found that ethics and professionalism were areas of knowledge lacking among new recruits.[144] While many elements of a traditional legal education were relevant, there was a perceived need to increase the emphasis on teaching legal ethics and legal values.[145]

The QAA states that the skills and qualities of mind for a graduate of law include, *inter alia*, "an awareness of principles and values of law and justice, and of ethics".[146] A contextual statement was added to the 2015 Benchmark Statements to reflect ethical awareness which states:

> "At undergraduate level students are aware of the consequences of law as a human creation and that it is subject to the ethics and values of those that make and apply it. The implications of this in the context of securing justice and the public interest is considered as part of legal study. Law schools will determine for themselves how ethics are addressed in the curriculum, but it is expected that students will have opportunities to discuss ethical questions and dilemmas that arise in law and to consider the features of ethical decision making."[147]

141 *Ibid.*, p.250.
142 *Ibid.*, p.251.
143 *Ibid.*, p.263.
144 See Legal Education Training Review, Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales" (n.138) p.34.
145 *Ibid.*, p.45.
146 See Quality Assurance Agency, "Subject Benchmark Statement: Law (2015)" (n.1) p.7.
147 *Ibid.*, p.6.

The inclusion of the benchmark statement is recognition that ethics and values are at the core of legal education. The statements go some way to address the concerns raised in the LETR report. If we accept that ethics and values should be addressed in legal education, what are those ethics and values?

A starting point may be to adopt professional ethics as prescribed by the relevant code of conduct published by the relevant regulatory body. We teach our students the rules that set out how one must act in any given situation. The problem with this approach in England and Wales is the shift to Outcomes Focused Regulation (OFR).[148] The emphasis was on acting in a principled manner rather than in compliance with particular rules. The approach to ethical learning is different as students need to learn how to make professional judgments rather than adopting a deontological approach.[149]

Legal education is very fond of comparing itself to medical education,[150] but there are some very important structural differences in the way in which the higher education market works for these two subjects. On the supply side, the number of places for medical students in England and Wales is firmly controlled: it is an expensive training, heavily subsidised by the government, so complex calculations are made to predict how many cardiologists, renal specialists and general practitioners will be needed, and recruitment is tailored to this, taking into account how many potential doctors will change their minds *en route*.[151] Law schools in contrast are limited in their recruitment only by the size of their classrooms and the workloads of their staff, as well perhaps as the reputational trade-off of large courses. Despite the heavy use of wigs on our websites, we know that very few of our students will ever get to wear one. If fewer than half of law students go on to be lawyers,[152] is that because there simply are not enough jobs? The pattern of employment in the law for law graduates is influenced but not determined by the ranking of the institution: it is certainly the case that graduates of Oxford or Cambridge who want training contracts are more likely to get them than graduates of Nottingham or Northumbria, but it seems equally the case that the currency of a law degree is not limited to the law. Law graduates from any institution can put that degree together with their other inherited or accrued cultural capital in exchange for jobs in linked fields such as business, politics, local and national government.

148 The SRA moved to OFR in October 2011.

149 Andrew Boon, "Professionalism under the Legal Services Act 2007" (2010) 17(3) International Journal of the Legal Profession 195.

150 Paul Maharg, *Transforming Legal Education: Learning and Teaching the Law in the Early Twenty-First Century* (Aldershot: Ashgate Publishing, 2007).

151 Vivienne Baumfield, Understanding Cost, Value and Quality in Professional Learning: What Can Teacher Educators, Medical Educators and Legal Educators Learn through Co-inquiry? (Symposium on the BERA Research Commission, The British Educational Research Association Conference, University of Leeds, September 2016).

152 Something that has been an area of concern for 50 years. JC York and RD Hale, "Too Many Lawyers? The Legal Services Industry: Its Structure and Outlook" (1973) 26 J Legal Educ 1.

Does that mean that law schools with wig-based marketing campaigns are operating in bad faith? Many legal education scholars would argue that they are not,[153] since the role of the law school is not to produce a practitioner but rather a graduate who "thinks like a lawyer". This "liberal arts" view of the law degree has its roots in the academic background of the elite entrant to the lawyers' office, where the history, culture and philosophy of the law are studied, and the hermeneutic skills of legal argument, writing and research are treated not as *skills as such*, rather as cultural and behavioural norms, acquired by osmosis.[154] In contrast, the "disciplinary practitioner" faction make much of the transferability of the embedded skills development in their degrees.[155]

To sum up, we have a much larger cohort of law students. We are not sure why they have chosen to study law, since there are many career routes open to law graduates and the choice of law may reflect nothing more than a slight preference for three years doing this rather than history or business. We are not confident that we can facilitate their transition to legal professionalism and we know that access is structurally limited by class, culture capital. Why then, does this meme of shared identity persist and why do we think it can be intensified through the university experience?

C. University education as transformation

We like to characterise the work that we do as meaningful and of high quality. This section unpacks this using more precise philosophical language[156] since we need to be careful about the elision of different kinds of quality (Figure 2): fitness defined by a regulatory body[157] is not the same as fitness as defined by the learners in an andragogic environment;[158] the democratic benefits of perfection, in which everyone has access to an identical experience, are in conflict with a curriculum of enquiry that privileges individual transformative experiences of dissonance.[159]

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153 Anthony Bradney, *Conversations, Choices and Chances: The Liberal Law School in the Twenty-first Century* (London: Bloomsbury Publishing, 2003); Jess Guth and Chris Ashford, "The Legal Education and Training Review: Regulating Socio-Legal and Liberal Legal Education?" (2014) 48(1) The Law Teacher 519.

154 Chris Ashford, "Response: The Needs of the Legal Profession and the Liberal Law School: (Re) negotiating Boundaries" in Chris Ashford, Nigel Duncan and Jessica Guth (eds), *Perspectives on Legal Education: Contemporary Responses to the Lord Upjohn Lectures* (London: Taylor & Francis, 2015) p.177.

155 *Ibid.* The gap between these factions is much more visible to them than to the outsider.

156 Drawing on Line Wittek and Tone Kvernbekk, "On the Problems of Asking for a Definition of Quality in Education" (2011) 55(6) Scandinavian Journal of Educational Research 671.

157 For example, the Solicitors' Regulatory Authority in England and Wales.

158 Paulo Freire, *Pedagogy of the Oppressed* (New York: Continuum, 1996).

159 Jack Mezirow, "Transformative Learning as Discourse" (2003) 1 Journal of Transformative Education 58.

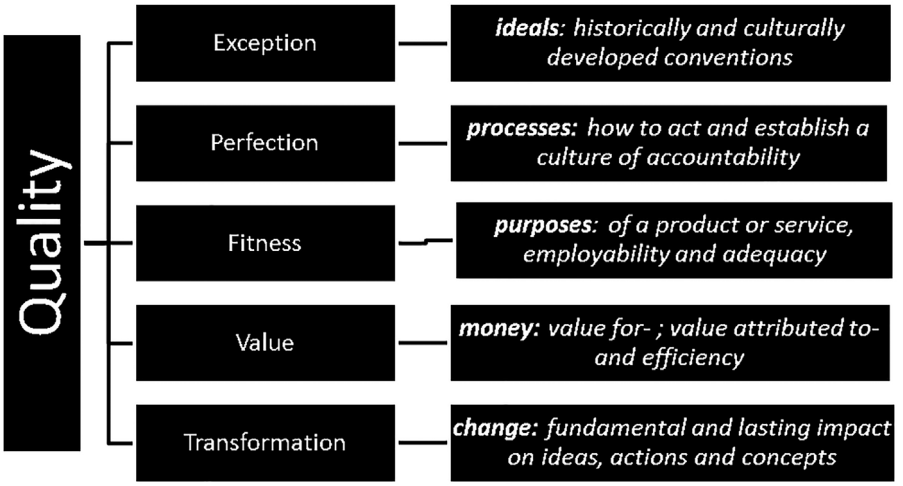

Figure 2: Five Types of Quality[160]

Therefore, effective and rigorous valuations of quality need to be predicated upon explorations of academics' core beliefs and values as educators and gatekeepers to the profession. If we return to the belief that the educational benefit of clinic is privileged in the United Kingdom over social justice goals, there are different critical questions to ask depending on our preferred indicator of quality. If we believe that clinic is an elite activity, one for which only the most academically successful students are fitted, then the way in which we set up, evaluate and develop clinic would conform to "quality as exception" standards. However, if the belief is that clinic is an educational "good" for all students we would strive towards "quality as perfection" standards, where the important elements of clinic can be part of a "core offer". Our decisions about what are the important elements might be informed by the "quality as fitness" criteria derived from theory, from legal regulators, from employers or from a combination of these. Given how labour-intensive and potentially risky clinics are, we would have to engage with "quality as value".

In this article, we are principally concerned to deal with claims for clinical experiences as transformational, with equal emphasis on "clinic" and "experience". We engage with the weak framing of experiential learning[161] as a transformative experience, not simply in cognitive terms but in terms of personal and professional identity. The international move towards an increasingly outcomes-based approach to legal education and training has raised the profile and encouraged the development

160 See Wittek and Kvernbekk, "On the Problems of Asking for a Definition of Quality in Education" (n.156): drawn from Wittek and Kvernbekk's analysis of Mari Elken's literature review.

161 Barbera Bernstein, *Pedagogy, Symbolic Control and Identity, Theory, Research, Critique* (London: Taylor & Francis, 1996); Reijo Miettinen, "The Concept of Experiential Learning and John Dewey's Theory of Reflective Thought and Action" (2000) 19(1) International Journal of Lifelong Education 54.

of a wide range of experiential learning practices. These are often described by students as "the highlight of my degree", but they are not there simply for attraction and variety. There is an implicit pedagogic intent which is based in part on broad Higher Education outcomes of graduate skills and "public good" graduates[162] and in part on an implicit sense of what it is to be a member of that discipline.

The problems of definition ("what is clinic?") are inseparable from the intent of the pedagogue ("what is clinic for?") and, as these can only be tested empirically through the experience of participants ("how well did clinic do….?"), our contention is that intent must be the point of focus, where we start and continually return in a reflexive feedback loop based on the essentially Pragmatist questions of purpose, fitness and continuing enquiry.[163]

Broadly, three kinds of claims are being made (Table 3) which rest on a variety of potential core beliefs about students, learning and the law and which have a range of supporting evidence. There are claims relating to experiential learning and dissonance; claims relating to the operationalising of rote and tacit knowledge and the development of practice expertise; and finally, claims about being and becoming through a process of observation and modelling.

Table 3: Forms of Claim Made about the Transformational Nature of Clinic

	Learning as an event: "exposure" and "contact" pedagogies[164]	**Knowing in context: expertise-related threshold concepts[165]**	**Ways of knowing: socialisation and professional values[166]**
Claim	Students are transformed…		
	by the contact with clients from different backgrounds and communities; they see the complexity of the problems and attach the issues to real lives; they develop empathy and sociopolitical criticality	by the opportunity to apply legal knowledge and skills, with real-world standards and deadlines, they have irreversible insights into how to use what they have learned	by reflecting on their own professional identity; by comparing with peers and through interaction and modelling processes with supervisors and other legal professionals

162 Melanie Walker and Monica McLean, *Professional Education, Capabilities and the Public Good: The Role of Universities in Promoting Human Development* (Oxford: Routledge, 2013).

163 John Dewey, "Propositions, Warranted Assertibility, and Truth" (1941) 38(7) Journal of Philosophy 169.

164 Daniel Powers and Christopher Ellison, "Interracial Contact and Black Racial Attitudes: The Contact Hypothesis and Selectivity Bias" (1995) 74(1) Social Forces 205; Helmut Fennes and Karen Hapgood, *Intercultural Learning in the Classroom: Crossing Borders* (London: Cassell, 1997); Basil Singh, "Shared Values, Particular Values, and Education for a Multicultural Society" (1995) 47(1) Educational Review 11.

165 Jan Meyer and Ray Land, "Threshold Concepts and Troublesome Knowledge (2): Epistemological Considerations and a Conceptual Framework for Teaching and Learning" (2005) 49 Higher Education 373; Melissa Weresh, "Stargate: Malleability as a Threshold Concept in Legal Education" (2014) 63 Journal of Legal Education 689.

166 See Eraut, *Developing Professional Knowledge and Competence* (n.130); Etienne Wenger-Trayner et al, *Learning in Landscapes of Practice: Boundaries, Identity, and Knowledgeability in Practice-Based Learning* (Oxford: Routledge, 2014).

How might some of these claims be evidenced? At a minimum, we might demand that the terms of reference are made clear and that it is possible to isolate and measure the factors involved. In Figure 3, there are three components that might be needed to explore the robustness of exposure and contact pedagogies.

Before entering clinic, some baseline assessment of students' views about their clients, the law and access to justice would be needed. How might that be gathered? Where students are selected for clinic, they sometimes write about their view of clinic as a part of the application: it seems likely that they will either already possess values aligned to the clinic or be savvy enough to profess them in such circumstances. This leaves no evidential basis to claim transformation, even if something more than confirmation and replication of values has taken place. If some robust and authentic measure of students' views is used, there still remain the nature of the clientele and the extent to which contact is a novel or strange experience. Intersectional understandings of personhood[167] mean that we can no longer use simple group descriptors of social class or race and assume that all clients and students sit on opposite sides of a divide nor that the routes to understanding between clients and students are only mediated through the unravelling of the legal problem. Interpersonal factors mean that relationships are more complex and moments of connection and identification, as well as of alienation and rejection, are difficult to predict, track or analyse. This brings us to the third element: the procedures in clinic that structurally enable students to reflect and engage with relationships. It is normal for client interactions to be evidenced and analysed in the form of notes, discussions and reflections, and these form the backbone of

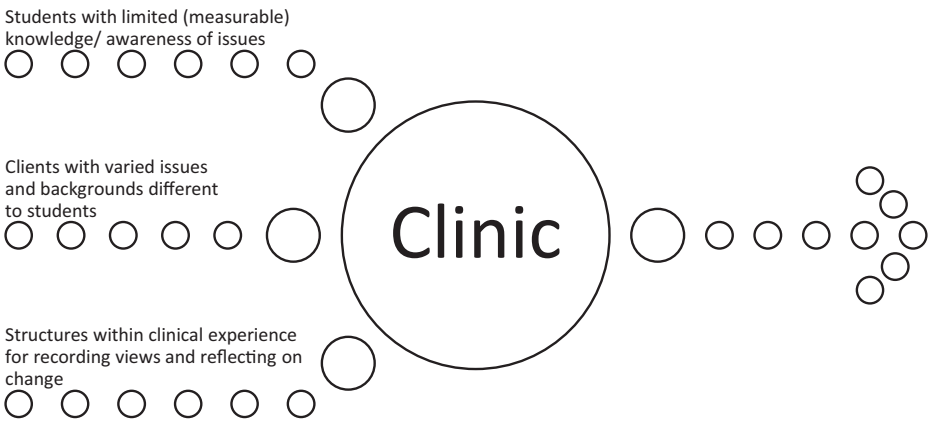

Figure 3: Exposure Pedagogy Claims — Some Key Elements Underpinning Evidence of Change

167 Kalwant Bhopal and John Preston (eds), *Intersectionality and "Race" in Education* (Oxford: Routledge, Vol 64, 2012); Angela Ferguson et al, "Intersections of Race-Ethnicity, Gender, and Sexual Minority Communities" in Marie Miville and Angela Ferguson (eds), *Handbook of Race-Ethnicity and Gender in Psychology* (New York: Springer-Verlag, 2014) p.45.

supervision in clinic.[168] However, the expressed intent (and perhaps the primary intent) of these is to ensure acceptable practice and service for the client. The idea that the student's world view is growing and changing is implicit at best in the curriculum as experienced: this means that both supervisor and student have to consciously shift away from the core of their work to look at this aspect. Moreover, the mechanisms commonly used to track and analyse student–client relationships from both perspectives, although commensurate in some ways,[169] are uneven in terms of essence and power: students may write in depth reflections and clients may tick a Likert scale box. Thus, even where all three of these elements are considered, we may not be able to accurately track what happens in the clinic nor make claims about "what's in the arrow".[170]

III. Do We Have Great Power and Great Responsibility or Delusions of Grandeur?

The psychological and sociological perspectives on the development of the self do not offer much support for the idea that any single experience institutes radical re-shaping: rather the evidence is that each new thing, however, dissonant or shocking, becomes part of the existing ecology, woven out of "nature, nurture and fate".[171] Neuroscience is not ready to help: we do not yet have tools that are sufficiently quick or discriminatory to track the process(es) of learning, and the metaphors for change are still only metaphors. Change appears to be both too fast, as in the irreversible moments of illumination on achieving a threshold concept,[172] and too slow, as in the gradual process by which new skills become incorporated into practice, temporarily disappearing from awareness into automation and, sometimes, re-emerging through metacognitive reflection as expertise.[173] Some students spend a few weeks in clinic, most have less than a year: can we envision an *a priori* model of experience and change in which students might reasonably within that limited space have a cocktail of cognitive and emotional learning that would result in a shift in values? It might well be possible to do this. However, there are significant

168 Jeff Giddings and Michael McNamara, "Preparing Future Generations of Lawyers for Legal Practice: What's Supervision Got to Do with It" (2014) 37 UNSWLJ 1226.

169 Commensurate in that they are authentic snapshots of views/satisfaction with the relationship. However, the imbalance of form and difference in engagement mean that direct comparison or simple triangulation is not robust.

170 Judith Little, *Nodes and Nets: Investigating Resources for Professional Learning in Schools and Networks* (Nottingham: National College for School Leadership, 2005).

171 James Masterson and Ralph Klein (eds), *Psychotherapy of the Disorders of the Self* (London: Brunner-Routledge, 2013).

172 Elaine Hall, "Grasping the Nettle of Doctorateness" (Paper presented at the 2016 International Conference on the Professional Doctorate, Belfast, to appear in the Special Issue of Studies in Continuing Education) (in press, 2018).

173 Kate Wall and Elaine Hall, "Teachers as Metacognitive Role Models" (2016) 39(4) European Journal of Teacher Education 403.

barriers to exploring and testing this hypothesis: for while the creative task, with the requirements of complexity, flexibility and granularity would be daunting, the practical task of communicating (to students and clinical colleagues), delivering and assessing it would be a Herculean endeavour.[174]

Nevertheless, there is a strong belief, perhaps subjective or part of an epistemic system but still pervasive within the clinical education community, that clinic does have that effect on students' knowledge, skills and values. In developing this article, we have had to consider that the absence of evidence is not the same as the evidence of absence, at least in the short term. One way to understand this is the strength of clinicians' belief: in most settings, the person who runs the clinic has a passionate (if tempestuous) relationship with clinical work. They have a commitment to the students and their learning, they love the collegial nature of supervision and they recognise the value to the clients of the work offered by the clinic. They may also have a particular passion for the clinic's specialism, community or cause. It is likely, therefore, that multiple levels of effect are in play. First, the clinician is teaching something immediate, relevant and interesting with real pressures and tight deadlines, intensifying the experience and the immediate impact on the students. They may not like or understand what is going on (or they may enjoy it hugely), but the intensity of the experience is a factor. Second, the clinician is a passionate expert and role model, whose impact is likely to be of greater magnitude than that of the "standard teacher": so much so that their data might be excluded from a standard meta-analysis.[175] There is another, final level, which brings together the Hawthorne effect and the power of belief. The students are made aware that "something special" will happen in clinic, and they obligingly — like the factory workers at Hawthorne — produce effects in response to the stimulus as they understand it. There is arguably also a twist of the clinician's self-concept in the mix, since the clinician's belief in her efficacy can be observed to have an effect of its own that is more than a "shared delusion"[176] and sheds some light on the endurance of epistemic system and subjective belief. Clinic might work in the way that we think it does, because we think that it does and we create an environment in which these effects are anticipated and noted when they occur: thus, through a collective operation of confirmation bias, we can create a clinic effect. That is not to say that there is not an objective clinic effect, there just is not currently robust enough evidence for it and still less empirical evidence for how

174 Clinic is already a hard sell in some contexts because of its resource intensive and risky nature, see Dunn, "The Taxonomy of Clinics: The Realities and Risks of All Forms of Clinical Legal Education" (n.94). Imagine telling your Dean that it needed more time and resource to investigate whether it was doing what we had always claimed that it did. It is therefore not at all that surprising that really systematic investigations of legal education are incredibly rare: Elaine Hall, "The Use of Evidence in Writing about Legal Education" (Association of Law Teachers 2015 Conference Keynote Speech, 2016).

175 Elaine Hall and Steve Higgins, "How Do You Solve a Problem Like Maria? What Meta-analysis Can Tell Us about Effective Educational Innovations and the Teacher Effect" (International Association of Cognitive Educational Psychology Conference, Durham University, Durham, 2005).

176 Ben Goldacre, *Bad Science* (London: Fourth Estate, 2009).

it might work. Either way, something is probably going on, and clinicians are all convinced that this is a good thing. There is, however, a small definitional problem.

When considering notions of social justice and values, clinicians are seeking to inculcate notions of what is "good" and what is "bad". Such questions have been debated by moral philosophers for thousands of years. This article will not provide a detailed analysis of the debate in moral philosophy but merely highlights the debate to demonstrate that not everything is black and white. Moral realists hold that moral facts are objective facts. Things are good and bad independent of us and then we discover morality. Antirealists hold the view that moral facts are not out there in the world until we put them there, facts about morality are determined by facts about us. Therefore, morality is not something we discover, but something we invent.

Normative ethics provide frameworks to assist in determining what is good and what is bad. Normative ethics can be split into three branches: virtue ethics, deontology and consequentialism. Virtue ethics focus on the character of the individual and with various virtue traits such as compassion and generosity seen good and ought to be exhibited. According to the proponents of virtue ethics, individuals should exhibit these virtuous traits even if the outcome is seen as "bad". Deontologists concentrate on the act being performed and consider whether that act is intrinsically good or bad. Consequentialists argue that we ought to look at the outcome and act in a way that brings the best possible outcome for making the world a better place. In essence, the end justifies the means and therefore the act in itself does not matter.

Applied ethics is probably the most useful branch of moral philosophy within the context of this article as it addresses practical issues faced in life such as abortion, distributive justice and famine relief. Abortion is a highly contentious issue with some proponents supporting the right to life of the unborn child while others cite women's right to choose. Such a debate is likely to have renewed significance with the Republic of Ireland, where abortion is prohibited under the constitution,[177] announcing a referendum on repealing the ban. While some theorists have posited that abortion is morally permissible,[178] others have contended that aborting a foetus is morally wrong on the grounds that killing any person is wrong.[179] With regard to distributive justice, there is disagreement among theorists as to the morally correct approach. Egalitarian theorists such as Rawls allow for inequalities where they benefit the least advantaged in society.[180] Libertarians, such as Nozick, disagree with Rawls' "difference principle" and instead espouse "entitlement theory", namely that people have entitlement over things and it is unjust to deprive people of

177 Article 40.3.3 of the Constitution of Ireland.

178 See Judith Thomson, "A Defense of Abortion" (1971) 1(1) Philosophy & Public Affairs 47; Frances Kamm, *Creation and Abortion: A Study in Moral and Legal Philosophy* (New York: OUP, 1992).

179 Don Marquis, "Why Abortion Is Immoral" (1989) 86 Journal of Philosophy 82.

180 John Rawls, *A Theory of Justice* (Oxford: OUP, Revised Edition, 1999).

those things even for the benefit of others.[181] A Marxist critique of Rawls considers the distinction between distribution and production. Wolff highlighted this point, quoting Marx: "Any distribution whatever of the means of consumption is only a consequence of the distribution of the conditions of production themselves. The latter distribution, however, is a feature of the mode of production itself."[182] Notions of actions which may be considered *good* or *moral* as opposed to *bad* or *immoral* may not always be easily defined and will often depend on an individual's moral positioning. Within the context of the law, and therefore clinical legal education, we can envisage a tiered approach to moral reasoning. Some concepts, such as the holocaust and apartheid, will be considered immoral.

On the next tier down, there will be legal issues which are divisive. Examples include issues such as abortion, euthanasia and the conflict between religious freedom and sexual orientation. We are also beginning to develop new issues in the world of social media characterised with the naming of alleged perpetrators of sexual harassment. While it is a fundamental freedom not to be harassed, assaulted or even raped, there is also a fundamental right to the presumption of innocence.[183] In the world of social media, individuals are effectively being found guilty without due process and are subjected to penal sanctions such as lost employment.

At a more mundane level, but one which will be experienced in legal clinics on a daily basis, clinicians and their students will be faced with individual cases questioning the morality of the client or the case. One example would be a landlord and tenant dispute where a landlord is seeking possession of the property and thus seeking to evict the tenant. I would preface this with the caveat that we are not concerned at present with whether the landlord is legally entitled to possession. Is it immoral for the clinic to represent the landlord in seeking to recover possession? Is it morally permissible to represent the tenant in attempting to retain possession of their home? Some legal clinics adopt a policy that they will only represent tenants.

If the landlord is seeking possession because the tenant has complained about the condition of the property, or the landlord is merely seeking to increase the rent with new tenants, then it is arguable that it is unjust to recover possession of the tenant's home.[184] However, if the reason for seeking possession was the anti-social behaviour of the tenant such as loud noise, harassment of neighbour and even criminal activity within the property. The question could legitimately be posed as to whether it is still unjust to seek possession of the tenant's home? A utilitarian (as

181 Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell, 1999, original work published in 1974).

182 Robert Wolff, *Understanding Rawls: A Reconstruction and Critique of a Theory of Justice* (Princeton, NJ: Princeton University Press, 1977).

183 Article 11 of Universal Declaration of Human Rights states: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has all the guarantees necessary for his defence."; art.6(2) of European Convention on Human Rights states: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

184 A libertarian may argue that the house is the property of the landlord, and therefore, it is unjust to deprive the landlord of possession.

a form of consequentialism) perspective suggests that the greatest good is served by evicting the individual and therefore benefiting the wider community.[185] From a Kantian (as a form of deontology) perspective, it is arguable that a landlord has a duty to the wider community to protect them from an anti-social tenant (particularly, if the landlord is a Social Landlord). From a virtue ethical position, it is arguable that it is courageous to evict an anti-social tenant, particularly one involved in criminal activity. Adopting such a pluralistic approach suggests that, from a philosophical perspective, it would be morally permissible to evict a tenant.

The world is not black and white, and indeed, there is a significant grey area when we consider cases within a clinical setting. Therefore, we must be cautious as to the imposition of our own moral perspective on our students. Notions of what is just and unjust will often be determined by an individual's moral positioning. Because our students may adopt a different moral position to ourselves does not mean they are morally wrong. Therefore, what can we do?

Our role is to provide the students with the framework to critique the world in which they live and strive to develop their own moral position. Within the professional ethics of a lawyer, there is perhaps one right that means any position is morally defensible, regardless of the case and that is the right a fair hearing with due process.

IV. Concluding Thoughts

At the core of clinical legal education is the integration of theory and practice, a pedagogical method of teaching students how to be lawyers. While this incorporates legal skills training, it has also become synonymous with moral educational development and the inculcation of a social ethos among students. There is a natural symbiotic relationship between clinical legal education, social justice and public service. There are indigent people, as well as marginalised and unrepresented groups who require assistance from those with legal knowledge and skill. The motivations to undertake a clinical programme can be varied.[186] Extrinsically motivated students who possess legal knowledge and skill (some more than others) which they may wish to hone their knowledge and skills for their future careers. Alternatively, intrinsically motivated students may wish to use their skill and knowledge for the benefit of others. Many students will have both extrinsic and intrinsic motivations. While the literature generally adopts an idealistic perspective as to the relationship between clinical legal education, social justice and public service, there is a pragmatic relationship. In essence, the students need experience, while some sections of society need assistance. As such, clinic has

185 There may of course be arguments that you are not resolving the problem, merely moving it.

186 Paul McKeown, "Pro Bono: What's in It for Law Students? The Students' Perspective" (2017) 24(2) International Journal of Clinical Legal Education 43.

often taken root in areas where there is a significant need due to poverty or other forms of social upheaval.

Unfortunately, the evidence does not exist to warrant grandiose claims as to the transformative experience clinical legal education has on students. We have been unable to find theoretical models of change that would satisfactorily account for the "one semester of clinic changed my world view" response quoted in many articles, nor does the neuroscientific or psychological literature suggest that such radical changes would operate in this way. An individual's moral development is constructed over the course of their lifetime and has numerous influential factors. It is perhaps naive to suggest that a clinical experience will shatter their whole moral matrix, but this is the kind of validation that clinical teachers have sought from their students, and perhaps unsurprisingly, students who have had a positive learning experience have framed it as transformational. Much more finely grained analysis of student experience and identity is needed before the transformational nature of clinic is clearly identified and understood. Until then, we need to be more conservative in our claims.

A realistic expectation is perhaps that the clinical experience will influence the student through exposure to new experiences and at least provide them with the framework to critically examine the world in which they live. As illustrated above, concepts of justice, right and wrong, good and bad are complicated and perhaps in many cases a mirage. Adopting a pluralistic approach, there is no one "good". Students must learn how to navigate the sociolegal system, develop moral reasoning and determine the "good" which they seek to achieve.

If a clinician seeks to impose their own beliefs on a student, the student will not have learnt how to critically evaluate a moral dilemma. The clinician is merely substituting one belief system for another. This may be particularly dangerous in assessed legal clinics where students believe that they must tell their clinical supervisor what they believe they want to hear. As Barnhizer suggested, clinicians must be prepared to have the legitimacy of their own beliefs called into question, thus enabling the exploration of competing interests and concepts of justice.[187] In adopting such an approach, we inculcate in our students the ability to think rather than what to think.

> "It is not the place of [clinicians] to prescribe what [students] ought to consider virtuous. But surely [clinics] should do whatever they can to prepare their students to arrive at thoughtful judgments of their own."[188]

187 See Barnhizer, "The University Ideal and Clinical Legal Education" (n.3) p.111.

188 Derek Bok, *Our Underachieving Colleges: A Candid Look at How Much Students Learn and Why They Should Be Learning More* (Princeton: Princeton University Press, 2006) p.150.

APPENDIX B

Co-author Declaration Forms

1. Angela MacFarlane
   Macfarlane A and McKeown P, '10 Lessons for New Clinicians ' (2008) 13 Int'l J Clinical Legal Educ 65

2. Sarah Morse
   McKeown P and Morse S, 'Litigants in Person: Is there a role for Higher Education' (2015) 49(1) Law Tchr 122

3. Rachel Dunn
   Dunn, R & McKeown, P, 'The European Network of Clinical Legal Education: The Spring Workshop 2015' (2015) 22(3) Int'l J Clinical Legal Educ 312

4. Sarah Morse
   McKeown P and Morse S, 'Further Developing Street Law' in Chris Ashford and Jess Guth (eds) The Legal Academic's Handbook (Palgrave 2016)

5. Elaine Hall
   McKeown P and Hall E, 'If We Could Instil Social Justice Values through Clinical Legal Education, Should We' (2018) 5 J Int'l & Comp L 143

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DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A

Name of candidate: Paul McKeown

Name of co-author: Angela Macfarlane

Full bibliographical details of the publication (*including authors*):

Macfarlane, A. & McKeown, P. (2008) '10 Lessons for New Clinicians' 13 International Journal of Clinical Legal Education 65

Section B

DECLARATION BY CANDIDATE (*delete as appropriate*)

I declare that my contribution to the above publication was as:

(i) ~~**principal author**~~

(ii) **joint author**

(iii) ~~**minor contributing author**~~

My specific contribution to the publication was (***maximum 50 words***):

Planning **50%**
Writing **50%**

Signed: .....(candidate) 7/8/19 (date)

Section C

STATEMENT BY CO-AUTHOR (*delete as appropriate*)

Either **(i)** **I agree with the above declaration by the candidate**

or **(ii)** ~~**I do not agree with the above declaration by the candidate for the following reason(s):**~~

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Name of candidate: Paul McKeown

Name of co-author: Sarah Morse

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Writing **50%**

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Name of co-author: Rachel Dunn

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(iii) ~~**minor contributing author**~~

My specific contribution to the publication was (***maximum 50 words***)**:**

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Data collection	**50%**
Data analysis	**50%**
Writing	**50%**

Signed: .....(candidate) 7/8/19 .....(date)

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My specific contribution to the publication was (*maximum 50 words*):

Planning **50%**
Writing **50%**

Signed: .....(candidate) 7/8/19 (date)

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Section A

Name of candidate: Paul McKeown

Name of co-author: Elaine Hall

Full bibliographical details of the publication (*including authors*)**:**

McKeown, P. & Hall, E. (2018) 'If We Could Instil Social Justice Values Through Clinical Legal Education, Should We?' 5(1) Journal of International and Comparative Law 143

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Writing **50%**

Signed: .....(candidate) 7/8/19 .....(date)

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