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# 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”,<sup>1</sup> and in clinical legal education, there is a long and persistent tradition (exemplified most recently in the study by Nicholson<sup>2</sup>) 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](http://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”,<sup>3</sup> 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.<sup>4</sup> We can trace the genesis of the clinical legal education movement to Jerome Frank’s seminal paper, “Why Not a Clinical Lawyer-School?”.<sup>5</sup> 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”.<sup>6</sup> 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.”<sup>7</sup>

The clinical legal education movement boom began during the mid-20th century in the United States.<sup>8</sup> 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”.<sup>9</sup> 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.”<sup>10</sup>

At this time, the Ford Foundation “became interested advancing the cause of practical law training for the sake of professional responsibility”.<sup>11</sup> 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”.<sup>12</sup> Nearly half of the existing law schools in the United States received funding from CLEPR to establish clinical programmes.<sup>13</sup> Other law schools, inspired by the success of CLEPR funded programmes, started their own.<sup>14</sup>

The MacCrate Report, published in 1992, supported the use of clinical legal education as a methodology for teaching legal skills and professional responsibility.<sup>15</sup> 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.<sup>16</sup> This rule persists, and all accredited law schools are required to “provide substantial opportunities to

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”.<sup>17</sup>

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”.<sup>18</sup> By the mid-1990s, eight universities reported running a live-client clinical programme.<sup>19</sup> 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.<sup>20</sup> It is worth noting that six of the universities that offered a live-client clinical programme were “new universities”.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

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 been some advocates, such as Donald Nicholson, for putting the social justice mission at the forefront of the clinical movement.<sup>24</sup>

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](http://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%202014.pdf](http://www.lawworks.org.uk/sites/default/files/LawWorks-student-pro-bono-report%202014.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 Nicholson, “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.<sup>25</sup> 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”.<sup>26</sup> 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”.<sup>27</sup> From 1979 and throughout the early 1980s, 79 per cent of the population were eligible for legal aid.<sup>28</sup>

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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> 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](http://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.<sup>32</sup> This has seen some calls to utilise clinical legal education to fill the access to justice gap.<sup>33</sup>

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.<sup>34</sup> 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.<sup>35</sup> The Australian clinics have benefited from key members of academic staff remaining involved with their programmes for more than 20 years.<sup>36</sup> 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”.<sup>37</sup> 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”.<sup>38</sup> The first clinical programme established in South Africa was in 1972 by law students from the University of Cape Town.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup>

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.<sup>43</sup> 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.<sup>44</sup> Throughout the 1990s and 2000s, law clinics have been established in countries such as Kenya, Rwanda and Somaliland.<sup>45</sup> The law clinics were established “principally to bridge the gap between imparting practical legal skills and theory”.<sup>46</sup> The clinics also responded to a “growing need for basic legal advice by indigent populations”.<sup>47</sup>

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.<sup>48</sup> Financial support was received from international agencies including the Open Society Institute and the MacArthur Foundation.<sup>49</sup> 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

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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.”<sup>50</sup>

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”.<sup>51</sup> 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.”<sup>52</sup>

While legal education in Asia is also as “multifaceted” as the various legal systems, there are also common attributes.<sup>53</sup> One of the primary issues common around Asia is that students are often “passive learners”, while teachers are seen as the “gurus imparting knowledge”.<sup>54</sup> Clinical legal education challenges this attitude as the clinical teacher is “not the ‘sage on the stage’ but the ‘guide and the side’”.<sup>55</sup> Further, lawyering skills, professional ethics and societal responsibilities are not generally taught at the undergraduate level.<sup>56</sup> 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.”<sup>57</sup> (emphasis added)

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,<sup>58</sup> the Open Society Justice Initiative<sup>59</sup> and Bridges Across Borders South East Asia Community Legal Education Initiative,<sup>60</sup> as well as a number of other non-governmental organisations have worked with universities and assisted indigent groups.<sup>61</sup>

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.<sup>62</sup> Both reports highlighted that clinical legal education would provide skills training while benefiting the poor.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> 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”.<sup>66</sup> 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.<sup>67</sup> 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

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58 For further information, see [www.undp.org/](http://www.undp.org/).

59 For further information, see [www.opensocietyfoundations.org/about/programs/open-society-justice-initiative](http://www.opensocietyfoundations.org/about/programs/open-society-justice-initiative).

60 For further information, see [www.babseacle.org/](http://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.<sup>68</sup> 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.<sup>69</sup>

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”.<sup>70</sup> Second, the nature and status of the professoriate are different in civil law jurisdictions. The professoriate “not only expresses the law but formulates it”.<sup>71</sup> 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

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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.<sup>72</sup> 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.<sup>73</sup> 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”.<sup>74</sup> 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.<sup>75</sup>

The clinical literature originates predominantly from the United States.<sup>76</sup> 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.<sup>77</sup> Mkwebu highlighted the dangers of citation bias, attaching higher status to the literature from the United States at the expense of publications from elsewhere.<sup>78</sup> Further, often the same group of authors are cited,<sup>79</sup> for example, Stephen Wizner, Jane Aiken and Jon Dubin, each with a distinguished background of public service activities, are fierce proponents of public service.<sup>80</sup>

There is little empirical evidence to support the transformational impact of clinical legal education on students’ public interest ethos.<sup>81</sup> 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](http://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.<sup>82</sup> Other studies suggest an increased willingness to participate in public service and/or *pro bono* activity following graduation.<sup>83</sup>

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.<sup>84</sup> 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.”<sup>85</sup>

The MacCrate Report states that practising lawyers “may be more significant than law teachers” in teaching professional values.<sup>86</sup>

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

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<sup>87</sup> 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).<sup>88</sup> 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,<sup>89</sup> but this would be a misunderstanding of the way in which human beings deal with complexity.<sup>90</sup> 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<sup>91</sup> 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 Kvernbek'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 Kvernbek, “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)**

	<b>Epistemic situation evidence</b>	<b>Subjective evidence</b>	<b>Veridical evidence</b>	<b>Potential evidence</b>
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 <i>pro bono</i> professionals. There is a positive cycle or ecosystem at work.	Clinical experience teaches specific knowledge and skills unavailable through other routes <sup>92</sup> /does it better than other forms of teaching (eg, traditional or simulation <sup>93</sup> ).	Students express high levels of satisfaction with clinical programmes, <sup>94</sup> demonstrate skills development that could be linked to employability <sup>95</sup> and perform better in other areas after clinic. <sup>96</sup>

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.

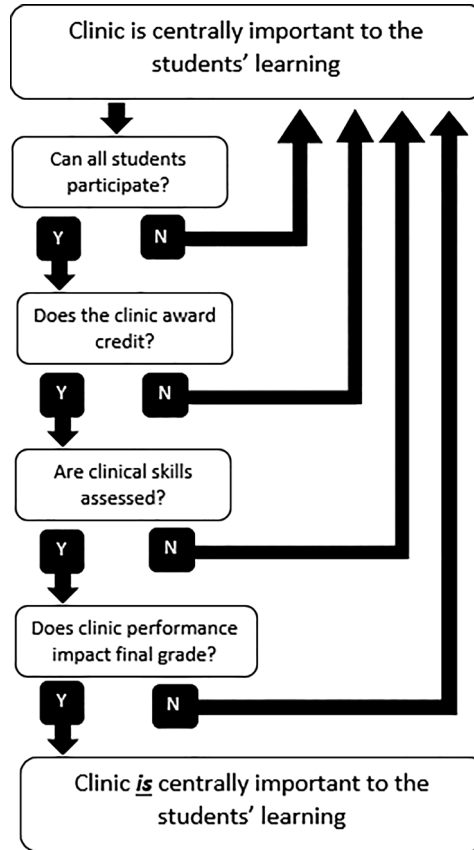


Figure 1: Decision Tree Exploring the Central Position of Clinic in the Curriculum

## 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,<sup>97</sup> 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.

<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup> 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.<sup>100</sup> Gradually, the child develops from this sense of self and others a *self-consciousness*.<sup>101</sup> 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:<sup>102</sup> 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<sup>103</sup> 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*.<sup>104</sup> We internalised and generalised<sup>105</sup> 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<sup>106</sup> 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.

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.<sup>107</sup> 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.”<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup> Thus, although the cognitive curriculum of the early schools was basic literacy and numeracy, they all had an explicit moral

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”,<sup>111</sup> 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.”<sup>112</sup>

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.<sup>113</sup> 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.<sup>114</sup> However, there are important caveats, even from these dedicated advocates:

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/](http://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.”<sup>115</sup>

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,<sup>116</sup> although not their short-term achievement. Mastery and self-concept researchers<sup>117</sup> 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.’”<sup>118</sup>

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.

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",<sup>119</sup> 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*,<sup>120</sup> 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).<sup>121</sup> 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<sup>122</sup> from the (apparently despised) primary attachment figures. Emerging neuroscientific data<sup>123</sup> 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,<sup>124</sup> 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,<sup>125</sup> 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,<sup>126</sup> 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.<sup>127</sup> 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.<sup>128</sup> 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](http://www.ucas.com/sites/default/files/eoc-report-2015-v2.pdf) (visited 10 March 2018).

society,<sup>129</sup> 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,<sup>130</sup> those young men who became articulated 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<sup>131</sup> in general and the elite in particular (the “Magic Circle” firms, the Bar and the judiciary)<sup>132</sup> still demonstrates that social and cultural capital are more important than skills,<sup>133</sup> the entrance to an undergraduate law degree by any student is not a particularly good predictor of working as a lawyer.<sup>134</sup>

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”.<sup>135</sup> 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

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](http://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".<sup>136</sup>

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.<sup>137</sup> 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".<sup>138</sup>

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.<sup>139</sup> 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 four 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."<sup>140</sup>

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](http://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](http://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”.<sup>141</sup> 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.<sup>142</sup> 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.<sup>143</sup>

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.<sup>144</sup> 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.<sup>145</sup>

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”.<sup>146</sup> 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.”<sup>147</sup>

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).<sup>148</sup> 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.<sup>149</sup>

Legal education is very fond of comparing itself to medical education,<sup>150</sup> 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*.<sup>151</sup> 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,<sup>152</sup> 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,<sup>153</sup> 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.<sup>154</sup> In contrast, the “disciplinary practitioner” faction make much of the transferability of the embedded skills development in their degrees.<sup>155</sup>

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<sup>156</sup> since we need to be careful about the elision of different kinds of quality (Figure 2): fitness defined by a regulatory body<sup>157</sup> is not the same as fitness as defined by the learners in an andragogic environment;<sup>158</sup> 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.<sup>159</sup>

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.



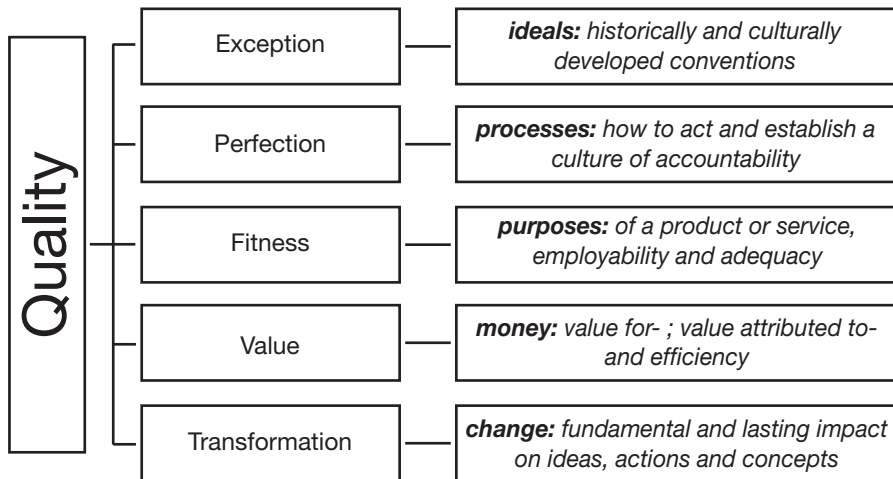


Figure 2: Five Types of Quality<sup>160</sup>

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<sup>161</sup> 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 Barbara 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<sup>162</sup> 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.<sup>163</sup>

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**

	<b>Learning as an event: “exposure” and “contact” pedagogies<sup>164</sup></b>	<b>Knowing in context: expertise- related threshold concepts<sup>165</sup></b>	<b>Ways of knowing: socialisation and professional values<sup>166</sup></b>
<b>Claim</b>	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.

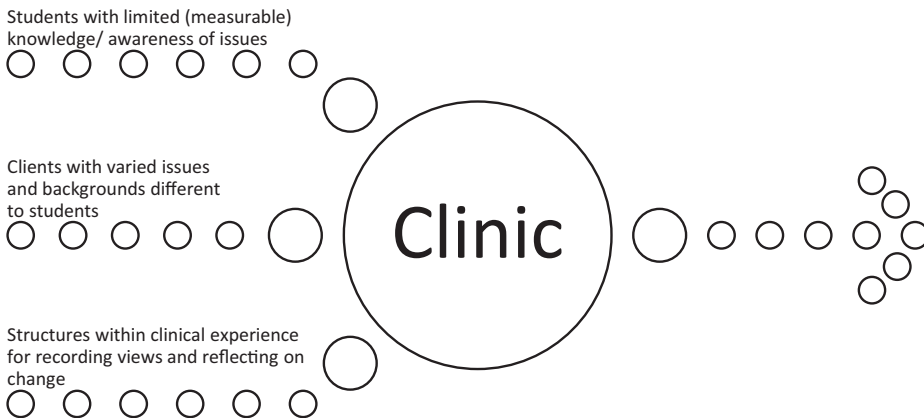
164 Daniel Powers and Christopher Ellison, “Interracial Contact and Black Racial Attitudes: The Contact Hypothesis and Selectivity Bias” (1995) 74(1) *Social Forces* 205; Helmut Fennes and Karen Haggood, *Intercultural Learning in the Classroom: Crossing Borders* (London: Cassell, 1997); Basil Singh, “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<sup>167</sup> 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.<sup>168</sup> 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,<sup>169</sup> 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”.<sup>170</sup>

### 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”.<sup>171</sup> 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,<sup>172</sup> 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.<sup>173</sup> 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.<sup>174</sup>

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.<sup>175</sup> 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"<sup>176</sup> 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

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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,<sup>177</sup> announcing a referendum on repealing the ban. While some theorists have posited that abortion is morally permissible,<sup>178</sup> others have contended that aborting a foetus is morally wrong on the grounds that killing any person is wrong.<sup>179</sup> 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.<sup>180</sup> 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

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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.<sup>181</sup> 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.”<sup>182</sup> 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.<sup>183</sup> 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.<sup>184</sup> 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.<sup>185</sup> 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.<sup>186</sup> Extrinsicly 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, intrinsicly 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

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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.<sup>187</sup> 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.”<sup>188</sup>

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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.

