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Philosophy in Action Through Clinical Legal Pedagogy

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PhD

Philosophy in Action Through Clinical Legal Pedagogy

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A written commentary submitted in partial
fulfilment of the requirements of the
University of Northumbria at Newcastle for
the degree of Doctor of Philosophy by

Published Work

April 2022

To Dr John Huntley

Declaration

I declare that the work contained in this thesis has not been submitted for any other award and that it is all my own work. I also confirm that this work fully acknowledges opinions, ideas and contributions from the work of others.

I declare that the Word Count of this Thesis Commentary is 12,222 words (excluding title pages, contents pages, acknowledgements, bibliography, and referencing).

Name: OMAR MADHLOOM

Date: 29 March 2022

Contents

Declaration.....	4
Acknowledgments.....	7
List of Publications	8
Abstract.....	10
1. Introduction.....	11
2. Ethics and legal education in England and Wales	21
3. What is the purpose of the university (and more specifically the law school)?	25
What is the purpose of the law school?	28
4. The routes to qualifying as a solicitor.....	34
4.1. The traditional route.....	36
The pedagogy of the traditional route.....	38
4.2 The SQE route.....	41
The pedagogy of SQE 1	43
5. Clinical legal education.....	46
5.1 Professional identity and ethical legal practice	46
5.2 Human flourishing.....	49
5.3 Cosmopolitan legal education	50
6. Conclusion	52
Bibliography	56
Cases	56
Statutes.....	56
Official Publications	56
Articles.....	58

Books	64
Book Chapters.....	69
Internet Sources	72
Theses	72
APPENDIX A - Accepted/Forthcoming.....	73
APPENDIX B – Co-author Declaration Forms	101
APPENDIX C - Publications	114

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List of Publications

1.	Jo Samanta, Ash Samanta and Omar Madhloom, 'A rights-based proposal for managing faith-based values and expectations of migrants at end-of-life illustrated by an empirical study involving South Asians in the UK' (2018) 32 <i>Bioethics</i> 368
2.	Omar Madhloom, 'Deception, mistake and non-disclosure: challenging the current approach to protecting sexual autonomy' (2019) 70(2) <i>Northern Ireland Legal Quarterly</i> 203
3.	Omar Madhloom, 'A normative approach to developing reflective legal practitioners: Kant and clinical legal education' (2019) 53(2) <i>The Law Teacher</i> 416-430
4.	Omar Madhloom, 'Unregulated Immigration Law Clinics and Kant's Cosmopolitan Right: Challenging the Political Status Quo' (2021) 28(1) <i>International Journal of Clinical Legal Education</i> 195
5.	Irene Antonopoulos and Omar Madhloom, 'Promoting International Human Rights Values Through Reflective Practice in Clinical Legal Education: A Perspective from England and Wales' in Patrick Blessinger and Enakshi Sengupta (eds), <i>International Perspectives in Social Justice Programs at the Institutional and Community Levels</i> (Emerald Publishing 2021), 109-127
6.	Omar Madhloom and Irene Antonopoulos, 'Clinical Legal Education and Human Rights Values: A Universal Pro Forma for Law Clinics' (2021) 9(1) <i>Asian Journal of Legal Education</i> 23
7.	Omar Madhloom and Barbara Preložnjak, 'Applying Rawls' theory of justice to Clinical Legal Education in the Republic of Croatia' in Omar Madhloom and Hugh McFaul (eds), <i>Thinking About Clinical Legal Education: Philosophical and Theoretical Perspectives</i> (Routledge 2022), 104-123
8.	Omar Madhloom, 'Public Interest Lawyering and Cosmopolitanism: a model for teaching immigration law' in Richard Grimes, Vera Honuskova and Ulrich Stege

	(eds), <i>Learning and teaching the law affecting migrants: theory and practice</i> (Routledge 2022), 39-49
9.	Omar Madhloom, 'A Kantian moral cosmopolitan approach to teaching professional legal ethic' (2022) <i>German Law Journal</i> – accepted/forthcoming

Abstract

Traditional university education promoted a separation between theory and practice. This divide, which is particularly prominent in the teaching of law, together with the dominance of the doctrinal approach in legal education, risks giving students the impression that the study and practice of law is mainly concerned with rules and principles. This thesis commentary seeks to challenge this approach by arguing that philosophy can inform both legal education and professional legal practice. It will be demonstrated that philosophy can play a role in developing students' ability to engage in reflective practice, expand legal ethics beyond the codes of professional conduct, and promote feelings such as compassion and empathy. In other words, a holistic approach, underpinned by philosophical theories, can allow educators to address the aims of legal education. It will also be argued that Clinical Legal Education (CLE) is an optimal methodology for teaching philosophy in action.

Keywords: autonomy; clinical legal education; ethics; legal education; philosophy; solicitors

Philosophy in Action Through Clinical Legal Pedagogy

1. Introduction

What is good law? How should a lawyer act in the best interest of their client? What is the basis for making ethical decisions? Do lawyers owe a moral duty to persons in other jurisdictions? Does legal education and training equip students and lawyers to address ‘gaps’ in the law and the professional codes of conduct? This thesis commentary and my published work aim to address these questions by incorporating philosophical theories into legal education. In other words, the aim is to promote a holistic approach to legal education and professional practice. [4] [5] [7] [9] With regards to the legal profession, this thesis commentary will focus on the education and training of solicitors, in England and Wales, and their regulatory body, the Solicitors Regulation Authority (SRA).¹ The overarching objective is to develop reflective practitioners who are able to frame and justify their decisions and legal arguments with reference to various philosophical models. [1] [5] [6] [9] The value of philosophy to the critical evaluation of arguments and assumptions in legal education and professional legal ethics will be explored in this thesis commentary. It will also be argued that Clinical Legal Education (CLE) is a useful methodology² for teaching philosophy in action and can add value to the education and training of future solicitors.

The term philosophy, derived from the Ancient Greek noun φιλόσοφος (philosophia) meaning ‘love of wisdom’,³ is now thought to include a variety of methods and subjects, such

¹ Solicitors Regulation Authority, ‘About us’ <<https://www.sra.org.uk/sra/>> accessed 22 February 2022.

² Gary Bellow, ‘On Teaching Teachers: Some Preliminary Reflections on Clinical Education as Methodology’ (1973) *Clinical Education for the Law Student* 375.

³ The Greek Historian Herodotus appears to have been the first to employ the verb ‘philosophise’. For further details on the origins of philosophy see, George Stuart Fullerton, *An Introduction to Philosophy* (first published 1906, Andrews UK Limited 2012).

as the character of human actions and the structure of reality.⁴ A definition of ‘philosophy’ is provided by Russell:

“Philosophy”, as I shall try to understand the word, is something intermediate between theology and science. Like theology, it consists of speculations on matters as to which definite knowledge has, so far, been unascertainable; but like science, it appeals to human reason rather than to authority, whether that of tradition or that of revelation. All DEFINITE knowledge, so I should contend, belongs to science; all DOGMA as to what surpasses definite knowledge belongs to theology. But between theology and science there is at no-man’s-land exposed to attack by both sides; this no-man’s-land is philosophy.⁵

At first glance, Russell’s definition appears to offer little by way of explanation as to the value of philosophy other than that it deals with nebulous matters. However, this definition suggests that philosophy is ‘a process of asking particular questions in particular areas’.⁶ For philosophers such as Kant, whose work has influenced my teaching and research, philosophising involves ‘not thoughts to repeat, but how to think. Think for yourselves, inquire for yourselves, stand on your own feet’.⁷ [3] [5] [6] [7] [8] [9] To apply Kant’s dictum to legal education requires asking ‘what do lawyers actually do?’.⁸ For Davis and Francois, a lawyer’s work involves paying attention to ‘the four dimensions’: legal and non-legal norms, facts, human aspirations and dynamic, and strategic interactions.⁹ Adjudication¹⁰ should also be

⁴ Richard C Taylor, ‘Philosophy’ in Robert Irwin (ed), *The New Cambridge History of Islam Vol 4* (Cambridge University Press 2010) 532.

⁵ Bertrand Russell, *A History of Western Philosophy* (Allen & Unwin 1946), xiii.

⁶ Harry Schofield, *The Philosophy of Education: An Introduction* (Routledge 2012), 11.

⁷ Quoted in John P Portelli, ‘The Socratic Method and Philosophy for Children’ (1990) 21(1/2) *Metaphilosophy* 141.

⁸ Peggy Cooper Davis and Aderson Belgarde Francois, ‘Thinking Like a Lawyer’ (2005) 81(4) *North Dakota Law Review* 795, 798.

⁹ *Ibid.*

¹⁰ Alfred William Brian Simpson, ‘The Common Law and Legal Theory’ in Alfred William Brian Simpson (ed), *Oxford Essays in Jurisprudence* (Clarendon Press 1973); Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977); Gerald J Postema, ‘Bentham and Dworkin on Positivism and Adjudication’ (1980) 5(3/4) *Social Theory and Practice* 347; H L A Hart, *The Concept of Law* (first published 1961, 3rd edn, Oxford University Press 2012), chapter VII.

included as part of ‘what lawyers do’. This involves the analysis and application of complex philosophical terms such impartiality, fairness, justice, and legitimacy.¹¹ Philosophical theories can provide a framework for lawyer-client interaction, for example through an autonomy-based approach. [3] Similarly, human rights values can inform law reform and legal practice. [1] [5] [6] Thus, philosophy can add value to the lawyer’s ‘dimensions’.

The nexus between ethics and philosophy is articulated by Frankena: ‘Ethics is a branch of philosophy; it is *moral philosophy* or philosophical thinking about morality, moral problems, and moral judgments’.¹² Thus, ethics can contribute to legal education in relation to the development of moral character and thinking/reflecting about moral issues.¹³ [3] [9] Ethics are relevant to solicitors because they possess both private and public importance.¹⁴ Legal ethics is defined as:

The critical consideration of:

1. The arrangements made by society for the delivery of legal services in particular of the legal profession, its structure, roles and responsibilities (sometimes termed macro legal ethics); [3] [7] [9]
2. The roles and responsibilities of individual lawyers in the provision of legal services together with the ethical implications of those roles; [2] [5] [8] and
3. The wider social context, especially the philosophical economic and sociological context in which lawyers work. [5] [6] [9]

¹¹ William Lucy, ‘Adjudication’ in Jules L Coleman, Kenneth Einar Himma and Scott J Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2004), 206. See also Richard A Posner, *How Judges Think* (Harvard University Press 2008).

¹² William K Frankena, *Ethics* (Prentice-Hall Inc 1963), 3. Emphasis in original.

¹³ Kenneth A Strike and P Lance Ternasky, ‘Introduction: Ethics in Educational Settings’ in Kenneth A Strike and P Lance Ternasky (eds), *Ethics for Professionals in Education: Perspectives for Preparation for Practice* (Teachers College Press 1993), 1-2.

¹⁴ Richard O’Dair, *Legal Ethics: Texts and Materials* (Butterworths 2001), 1.

With a view to identifying and, if possible, resolving ethical difficulties which face professional lawyers so to enable them to view legal practice as morally defensible and therefore personally satisfying.¹⁵

While this appears to assume the benefits of legal ethics to the lawyer, debates in legal ethics cannot occur without engaging in their philosophical underpinnings.¹⁶ In addition to professional legal ethics, philosophy can also inform ethical business decision-making in the context of the law firm and its stakeholders.¹⁷ [9] Consequently, law students ought to be exposed to philosophical theories in order to engage effectively in legal ethics.

Although deontology informs my published work, my intention is not to inculcate students in any particular theory or set of values,¹⁸ but to demonstrate how philosophy can promote reflection in CLE and legal practice. In this regard, I follow Llewellyn's pedagogic approach by firstly outlining my own 'working whole view'¹⁹ and then encouraging students to develop their own framework. This approach to teaching is also endorsed by Laswell and McDougal.²⁰ However, I acknowledge that this is not a straightforward task when using CLE as a medium for teaching philosophy because,

From the beginning of clinical legal education, one central goal has been to engage law students in the pursuit of social justice through the provision of legal assistance to the poor and others who lacked access to legal services.²¹

¹⁵ Ibid 5-6.

¹⁶ Ibid 27.

¹⁷ Thomas Donaldson, Patricia Hogue Werhane and Margaret Cording, *Ethical Issues in Business: A Philosophical Approach* (7th edn, Prentice-Hall 2002); Norman E Bowie, *Business Ethics: A Kantian Perspective* (2nd edn, Cambridge University Press 2017).

¹⁸ Donald Nicolson, 'Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice' (2013) 16 *Legal Ethics* 36; Donald Nicolson, 'Legal education, ethics and access to justice: forging warriors for justice in a neo-liberal world' (2015) 22(1) *Legal Ethics* 51.

¹⁹ Quoted in William Twining, *Karl Llewellyn and the Realist Movement* (2nd edn, Cambridge University Press 2014), 173.

²⁰ Harold D Lasswell and Myers S McDougal, 'Legal Education and Public Policy: Professional Training in the Public Interest' (1943) 52(2) *The Yale Law Journal* 203.

²¹ Stephen Wizner, 'Is Social Justice Still Relevant?' (2012) 32(2) *Boston College Journal of Law and Social Justice* 345, 345.

CLE is, therefore, not a value-neutral form of experiential learning. However, despite CLE's social justice underpinning, it is a methodology that can be used to teach alternative viewpoints in relation to justice and the limitations of social justice theories. [7] A further influence of Llewellyn's work on this thesis commentary is the value of experiential education because '[t]echnique without ideals is a menace... Ideals without technique are a mess'.²² Consequently, this thesis commentary aims to incorporate philosophical theories into legal education through experiential learning, namely CLE.

One of the benefits of CLE is that it promotes reflective practice.²³ [3] [5] [6] Although CLE programmes may adopt different pedagogic methodologies;²⁴ and some may focus on educational goals²⁵ while others prioritise promoting social justice,²⁶ literature on reflective practice appears to inform CLE programmes in various jurisdictions.²⁷ [3] [5] [6] Different authors have provided their own definitions of reflection. According to Dewey, reflection represents the 'reconstruction and reorganisation of experience which adds to the meaning of experience, and which increases ability to direct the course of subsequent experience'.²⁸ For

²² Karl Lewellyn, 'The Adventures of Rollo' (1952) 2(1) University of Chicago Law School Record 18, 23.

²³ Victoria Murray, 'Reflection' in Kevin Kerrigan and Victoria Murray (eds), *A Student Guide to Clinical Legal Education* (Palgrave 2011), 226-249.

²⁴ Omar Madhloom and Hugh McFaul (eds), *Thinking About Clinical Legal Education: Philosophical and Theoretical Perspectives* (Routledge 2022).

²⁵ Hugh Brayne, Nigel Duncan, and Richard, *Clinical Legal Education: Active Learning in Your Law School* (Blackstone Press Ltd 1998).

²⁶ Donald Nicolson, 'Legal Education or Community Service? The extra-curricular student Law Clinic' [2006] Web JCLI <<http://www.bailii.org/uk/other/journals/WebJCLI/2006/issue3/nicolson3.html>> accessed 14 February 2021.

²⁷ Rachel Spencer, 'Holding Up the Mirror: A theoretical and practical analysis of the role of reflection in Clinical Legal Education' (2012) 18 International Journal of Clinical Legal Education 181; Timothy Casey, 'Reflective Practice in Legal Education: The Stages of Reflection' (2014) 20 Clinical Law Review 317; José Garcia-Añón, 'How do we assess in Clinical Legal Education? A "reflection" about reflective learning' (2016) 23(1) International Journal of Clinical Legal Education 48; Michele M Leering, 'Perils, pitfalls and possibilities: introducing reflective practice effectively in legal education' (2019) 53(4) The Law Teacher 431; Anna Cody, 'Reflection and clinical legal education: how do students learn about their ethical duty to contribute towards justice' (2021) 32(1-2) Legal Ethics 13; Omar Madhloom and Hugh McFaul, 'Introduction' in Madhloom and McFaul (n 24) 3.

²⁸ John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (first published 1916, Myers Education Press 2018), 83.

Boud, Keogh, and Walker, 'reflection is an important human activity in which people recapture their experience, think about it, mull it over and evaluate it'.²⁹ Rice argues that:

The act of reflecting is one which causes us to make sense of what we've learned, why we've learned it, and how that particular increment of learning took place. Moreover, reflection is about linking one increment of learning to the wider perspective of learning - heading towards seeing the bigger picture. Most of all, however, it is increasingly recognised that reflection is an important transferable skill, and is much valued by all around us, in employment, as well as life in general.³⁰

The above definitions share three features. First, reflection can serve as a methodology for teaching and learning.³¹ [3] A second commonality is that reflection involves an experience upon which the learner analyses and evaluates. Third, reflection is a form of mental processing, similar to thinking. This feature is highlighted by Moon, who writes that reflection is 'applied to relatively complicated or unstructured ideas for which there is not an obvious solution and is largely based on the further processing of knowledge and understanding and possibly emotions that we already possess'.³² Furthermore, solicitors are encouraged by the SRA to engage in reflection.³³ Consequently, reflection need not be restricted to university education, it can also serve to promote continuing professional development among solicitors. This thesis commentary and my published work aim to demonstrate that reflective practice³⁴ can be enhanced by applying various philosophical theories to analysing the law and professional legal ethics. [3] [5] [6] [7]

²⁹ David Boud, Rosemary Keogh and David Walker, 'Promoting Reflection in Learning: a Model' in David Boud, Rosemary Keogh and David Walker (eds), *Reflection: Turning Experience into Learning* (Routledge Falmer 1994), 19.

³⁰ Phil Race, 'Evidencing Reflection: Putting the 'w' into reflection' ESCALATE Learning Exchange (2002) <<http://escalate.ac.uk/1049>> accessed 22 February 2022.

³¹ Georgina Ledvinka, 'Reflection and assessment in clinical legal education: Do you see what I see?' (2006) 9 *International Journal of Clinical Legal Education* 29.

³² Jennifer Moon, *Reflection in Learning and Professional Development: Theory and Practice* (Routledge 2000), 152.

³³ Solicitors Regulation Authority, 'Templates' <<https://www.sra.org.uk/solicitors/resources/cpd/tool-kit/resources/templates/>> accessed 25 February 2022.

³⁴ Donald A Schön, *The Reflective Practitioner: How Professionals Think in Action* (Basic Books 1983).

In the context of the legal profession, reflection is a process through which a lawyer evaluates their work to develop professional expertise.³⁵ In other words, it is a soft skill which helps develop hard skills by allowing the lawyer to ‘identify successful actions, avoid prior mistakes, adjust current conduct based on past learning, and apply current lessons to future practice’.³⁶ A solicitor employed by a law firm might have to decide on a course of action which is not covered by the ethical framework promulgated by the SRA. For example, a solicitor advising a fossil fuel company may reflect on the tension between their duty to act in the best interest of their client (private duties) and the impact of their client’s actions on the environment and the public (public duties). The solicitor in this situation must continue to act for their client because they can only cease acting with good reason and on reasonable notice, or with the client’s consent.³⁷ Unlike doctors, whose conscientious objection to abortion is protected by the Abortion Act 1967, lawyers do not have a statutory right to refuse to act for clients unless they have good reason or the client consents. The solicitor in this case might conclude that they can no longer represent new clients who are fossil fuel companies because their public duties override their private duties. In this example, the conclusion is the product of engagement with philosophical concepts such as autonomy, duty, and the tension between private and public duties.

Drawing upon my published work, this thesis commentary will consider whether philosophy can develop students’ lawyering skills and promote their reflective practice to facilitate their engagement in ‘problem solving’ as well as ‘problem setting’.³⁸ One of the benefits of this approach is that students are equipped with the relevant practical and conceptual tools to enter into the ‘swampy lowlands, where situations are confusing messes incapable of technical solution and usually involve problems of greatest human concern’.³⁹ In other words, reflective practice can equip students and future practitioners to not only deal with

³⁵ Alexander Scherr and Margaret Martin Barry, ‘Reflection and Writing Journals’ in Leah Wortham, Alexander Scherr, Nancy M Maurer and Susan L Brooks (eds), *Learning from Practice: A Textbook for Experiential Legal Education* (West Academic Publishing 2016), 203.

³⁶ Wortham (n 35).

³⁷ In relation to termination of retainers see Underwood, *Son & Piper v Lewis* [1894] 2 QB 306; *Richard Buxton (Solicitors) v Huw Llewelyn Paul Mills-Owens and the Law Society (Intervener)* [2010] EWCA Civ 122.

³⁸ Schön (n 34) 39-40.

³⁹ *Ibid* 42.

indeterminate areas of practice, such as ethical issues which are not outlined in the professional codes of conduct, but also to analyse and critique the law. [1] [2] [5]

CLE can also act as a vehicle for teaching philosophy, because as a methodology it is an umbrella term encompassing different experiential models. Spiegelman defines CLE as ‘a method of teaching in which students’ task or role is the first step in the primary data of discussion and analysis’.⁴⁰ This narrow definition can be contrasted with a broader view which seeks to include virtually all forms of experiential learning that ‘requires the student’s active involvement and immersion in a concrete aspect of the problem under discussion’.⁴¹ This thesis commentary applies the latter approach and relies on Dunn’s broad taxonomy of clinics,⁴² which ranges from class-room based models such as problem-based learning⁴³ [8] and policy clinics⁴⁴ [4] to more practice-focused types such as externships⁴⁵ and live-client clinics.⁴⁶ [3] For present purposes, an essential component of CLE is reflection. [3] This thesis commentary seeks to demonstrate how reflection can be enhanced through philosophy in action.

Regardless of the mode of delivery and learning outcomes, CLE models promote the acquisition of soft and hard skills.⁴⁷ [9] Soft skills are ‘subjective abilities, traits, and habits

⁴⁰ Paul J Spiegelman, ‘Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake’s Ladder in the Context of Amy’s Web’ (1988) 38(1/2) *Journal of Legal Education* 243, 257.

⁴¹ Nancy L Schultz, ‘How Do Lawyers Really Think?’ (1992) 42(1) *Journal of Legal Education* 57, 67.

⁴² Rachel Ann 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, 175.

⁴³ Richard Grimes, ‘Delivering legal education through an integrated problem-based learning model – the nuts and bolts’ (2014) 21(2) *International Journal of Clinical Legal Education* 1.

⁴⁴ Liz Curran, ‘University Law Clinics and their value in undertaking client-centred law reform to provide a voice for clients’ experiences’ (2014) 12 *International Journal of Clinical Legal Education* 105; Rachel Dunn, Lyndsey Bengtsson and Siobhan McConnell, ‘The Policy Clinic at Northumbria University: Influencing Policy/Law Reform as an Effective Educational Tool for Students’ (2020) 27(2) *International Journal of Clinical Legal Education* 68; Omar Madhloom, ‘Unregulated Immigration Law Clinics and Kant’s Cosmopolitan Right: Challenging the Political Status Quo’ (2021) 28(1) *International Journal of Clinical Legal Education* 195.

⁴⁵ Neil Kibble, ‘Reflection and supervision in clinical legal education: Do work placements have a role in undergraduate legal education?’ (1998) 5(1) *International Journal of the Legal Profession* 82; Adrian Evans and Ross Hymas, ‘Specialist Legal Clinics: their pedagogy, risks and payoffs as externships’ (2015) 22(2) *International Journal of Clinical Legal Education* 147.

⁴⁶ Donald Nicolson, ‘“Education, Education, Education”: Legal, Moral and Clinical’ (2008) 42(2) *The Law Teacher* 145.

⁴⁷ Dunn, ‘The Taxonomy of Clinics’ (n 42); Rachel Dunn, ‘The knowledge, skills and attributes considered necessary to start day one training competently and whether live client clinics develop them’ (2017) (PhD thesis, Northumbria University 2017).

like empathy, communication, resilience, leadership, and self-development'.⁴⁸ In the legal profession, soft skills include practical problem-solving, ability to convey empathy to others, the ability to view a given situation from another's perspective, client relations, and business development.⁴⁹ Plowden's claim that '[CLE] puts the emotional content back into law'⁵⁰ is supported by the fact that modern CLE incorporates a social justice mission, which contains both a moral and a political purpose.⁵¹ As stated previously, due to CLE's aims being aligned with social justice, it is important to provide students with conceptual tools to allow them to engage in reflective practice and to be mindful of not inculcating them in a particular ideology. Instead, the aim should be to teach students to make autonomous moral judgements.

Hard skills, on the other hand, are tangible and incorporate fact-based capabilities such as technical proficiency and subject-matter acumen.⁵² Examples of hard skills found in the legal profession include:

[L]egal research and writing, legal analysis, oral and written advocacy, knowledge of substantive law and doctrine, as well as the ability to marshal and summarize facts, apply rules of law to facts, reach and articulate legal conclusions, brief cases, and distinguish cases.⁵³

Hard skills mirror the traditional proficiencies which underpin legal education.⁵⁴ Soft skills and hard skills are not mutually exclusive but, rather, interdependent.⁵⁵ A solicitor's legal acumen is worthless if they are unable to engage in effective communication with their client. Conversely, a solicitor's ability to empathise with their client and engage in problem-solving

⁴⁸ Randall Kiser, *Soft Skills and the Effective Lawyer* (Cambridge University Press 2017), 4.

⁴⁹ Susan Daicoff, 'Teaching relational skills: The evidence' in Deborah Maranville, Lisa Radtke Bliss, Carolyn Wilkes Kaas and Antoinette Sedillo Lopez (eds), *Building on best practices: Transforming legal education in a changing world* (LexisNexis 2015), 316.

⁵⁰ Philip Plowden, 'Clinical legal education: theory, practice and possibilities' (2004) online: UK Centre for Legal Education <<https://ials.sas.ac.uk/ukcle/78.158.56.101/archive/law/resources/teaching-and-learning-practices/plowden/index.html>> accessed 22 February 2022.

⁵¹ Jane Haris Aiken, 'Striving to Teach "Justice, Fairness, and Morality"' (1997) 4 *Clinical Law Review* 1, 3-4; Wizner, 'Is Social Justice Still Relevant?' (n 21) 353; Chris Ashford and Paul McKeown (eds), *Social Justice and Legal Education* (Cambridge Scholars Publishing 2018).

⁵² Kiser (n 48).

⁵³ Daicoff (n 49).

⁵⁴ Kiser (n 48) 5.

⁵⁵ *Ibid* 5.

will not address the client's legal issues without the solicitor also having sound knowledge of the relevant rules. CLE is, therefore, an ideal methodology for developing students' hard and soft skills.

A further advantage of CLE, as a vehicle for teaching philosophical theories, is that by examining the impact of law on individuals and society, whether through simulations or live-client clinics, students can develop a feeling of social responsibility, especially towards indigent and marginalised individuals. [7] [8] For example, in a live-client clinic, a student's 'consciousness is raised' upon realising that but for the law clinic the client would not have been able to claim their rights.⁵⁶ Thus, through CLE, moral education can be incorporated into 'law in action'.⁵⁷ Moral education is defined as the acquisition of 'a set of beliefs and values regarding what is right and wrong. This set of beliefs guides [students'] intentions, attitudes and behaviors towards others and their environment'.⁵⁸ Moral education can encourage students to develop the skills to act in accordance with their beliefs and values.⁵⁹ In the context of CLE, moral education can assist students to address normative questions such as 'what is good law?' [2] [3] [4] and ethical behaviour [3] [6] [9] beyond the negative and positive duties contained in the professional codes of conduct.⁶⁰

After the Introduction, this thesis commentary will examine the extent to which ethics informs legal education, in England and Wales (Part 2). The reason for this is that '[e]thics is a branch of philosophy concerned with how people make good and right decisions on problems with moral dimensions',⁶¹ therefore, teaching ethics/philosophy is essential to moral decision-making. Part 3 will seek to examine the aims of the university and the law school in order to determine how philosophical concepts and theories can promote these aims. Part 4 will discuss the routes to qualifying as a solicitor. Part 5 will apply philosophy to CLE in order to address

⁵⁶ Stephen Wizner, 'Beyond Skills Training' (2001) 7 *Clinical Law Review* 327, 329.

⁵⁷ Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12.

⁵⁸ J Mark Halstead, 'Moral Education' in Caroline S Clauss-Ehlers (ed), *Encyclopedia of Cross-Cultural School Psychology* (2010) <https://link.springer.com/referenceworkentry/10.1007%2F978-0-387-71799-9_260> accessed 22 February 2022. Emphasis in original.

⁵⁹ *Ibid.*

⁶⁰ Donald Nicolson, 'Mapping Professional Legal Ethics: The Form and Focus of the Codes' (1998) *Legal Ethics* 1(1) 51.

⁶¹ Andrew Boon, *Lawyer's Ethics and Professional Responsibility* (Bloomsbury 2015), 3.

the aims of legal education and promote reflective practice. This thesis commentary will conclude (Part 6) by arguing that philosophy, through CLE, can address some of the limitations of the current pedagogic approaches in legal education and training.

2. Ethics and legal education in England and Wales

Recent reforms in legal education have been influenced by the Ormerod Report,⁶² the Benson Report,⁶³ the Marre Committee Report,⁶⁴ and the Legal Education and Training Review (LETR).⁶⁵ Two themes central to this thesis commentary were examined by these reports: the academic-vocational dichotomy and the teaching of ethics. The value of professional ethics was addressed in the Benson Report:

It is essential that throughout their training students should be impressed with the importance of maintaining ethical standards, rendering a high quality of personal service, maintaining a good relationship with clients, providing information about work in hand for clients, avoiding unnecessary delays, maintaining a high standard in briefs and preparation for trial, promptly rendering accounts with clear explanations and attending to other matters mentioned elsewhere in this report.⁶⁶

Similarly, the Marre Committee Report recognised that ‘an adequate knowledge of professional and ethical standards’⁶⁷ is integral to legal education, but did not specify whether this should be taught at the academic or vocational stage. Given the prevalence of CLE programmes in both the academic and vocational stages of legal education, the logical conclusion is that legal ethics can be taught at any stage. [9]

⁶² Roger Ormerod, *Report of the Committee on Legal Education* (Cmnd 4595, 1971).

⁶³ Henry Benson, *The Royal Commission on Legal Services* (Cmnd 7648, 1979).

⁶⁴ The Committee on the Future of the Legal Profession, *A Time for Change* (General Council of the Bar and the Law Society 1988).

⁶⁵ Legal Education and Training Review, *Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales* (LETR 2013).

⁶⁶ Benson (n 63) para 39.4.

⁶⁷ The Committee on the Future of the Legal Profession (n 64) para 12.21.

There is a need, according to the LETR, to ‘strengthen requirements for education and training in legal ethics, values and professionalism, the development of management skills, communication skills, and equality and diversity’.⁶⁸ Legal education, training, and research must, therefore, include ‘appropriate learning outcomes in respect of professional ethics, legal research, and the demonstration of a range of written and oral communication skills’.⁶⁹ The LETR provides evidence of the importance of legal ethics in its survey of lawyers which reveals ‘that legal ethics and procedure came out above all other areas, having been rated “important” or “somewhat important” by over 95% and 94% of respondents, respectively’.⁷⁰ This scoring indicates that legal ethics not only have universal relevance among practitioners, but further, that they are perceived as vital to their work.⁷¹

However, legal ethics, at the time of writing of this commentary, is not a compulsory subject on the law degree. It is taught on the Legal Practice Course (LPC) (the vocational stage of solicitor training), albeit with an emphasis on the SRA’s Standards and Regulations, which contain the codes of conduct for solicitors and law firms.⁷² However, professional codes of conduct are unable to ensure that lawyers maintain high ethical standards. Nicolson suggests that this limitation can be addressed by designing a code ‘with the promotion of moral character in mind’.⁷³ [9] Nicolson argues that ‘codes and duties are highly unlikely on their own to equip lawyers to identify and resolve all potential ethical problems arising in legal practice’.⁷⁴ Nicolson’s criticism of the codes of conduct includes the principles, which provide little guidance to lawyers due to their limited content.⁷⁵ These limitations can be addressed by supplementing the codes of conduct with a moral theory such as Kantian ethics or human rights values. [5] [6] [9]

⁶⁸ Legal Education and Training Review (n 65) ix.

⁶⁹ Ibid xiv.

⁷⁰ Ibid 33.

⁷¹ Legal education and Training Review (n 65) 37.

⁷² Solicitors Regulation Authority, *SRA Standards and Regulations* (SRA November 2019). See also Lisa Webley, ‘Legal ethics in the academic curriculum: Correspondence’s report from the United Kingdom’ (2011) 14 *Legal Ethics* 132.

⁷³ Donald Nicolson, ‘Making lawyers moral? Ethical codes and moral character’ (2005) 25(4) *Legal Studies* 601, 601.

⁷⁴ Ibid 610.

⁷⁵ Donald Nicolson, ‘Mapping Professional Legal Ethics’ (n 60) 66.

Herring identifies a number of reasons for the reluctance to include legal ethics as part of the law degree. First, only a minority of law graduates proceed to the vocational stages of training,⁷⁶ therefore, a law degree is not simply a preparatory step towards a legal career.⁷⁷ Thus, academics might view their roles as educators in the context of ‘a critical and philosophical approach to the study of law’.⁷⁸ Second, there is a shortage of academic staff equipped to teach legal ethics. Moreover, given that universities are facing ever-increasing financial burdens,⁷⁹ it is likely that law schools will focus on existing modules rather than create new ones. The third reason questions whether ethics ‘can...be taught?’.⁸⁰ If a lawyer chooses to act unethically there is very little that legal ethics training can do to alter this. However, teaching ethics could act as a preventative measure. This thesis commentary takes the view that the central aim of teaching ethics is to provide law students with the conceptual tools to engage in reflective practice, to ground their reasoning in philosophical theories, and to address ambiguous terms in the law and the codes of professional conduct. Fourth, it may not be possible to assess ethical reasoning. There is also the risk that academics may impose their own ideology, for example by privileging a certain political perspective.

It is important to note that these arguments can be addressed through a CLE programme that is underpinned by philosophy. In relation to the first concern, CLE can incorporate philosophical approaches to the study of law.⁸¹ Law clinics, within the Anglo-American clinical movement, can trace their jurisprudential roots to the American Realist movement. These early clinics were introduced in order to supplement students’ learning experience, which was predominantly doctrinal in nature, and also to provide legal services to those who needed it the most.⁸² CLE programmes, therefore, entail teaching students legal ethics and the

⁷⁶ Stephen Mayson, ‘The education and training of solicitors: Time for change’ (2011) 45 *The Law Teacher* 278.

⁷⁷ Jonathan Herring, *Legal Ethics* (2nd ed, Oxford University Press 2016), 39.

⁷⁸ Herring (n77) 39.

⁷⁹ Alexandra Witze, ‘Universities will never be the same after the coronavirus crisis’ (01 June 2019) *Nature* <<https://www.nature.com/articles/d41586-020-01518-y>> accessed 22 February 2022.

⁸⁰ Laura Parks-Leduc, Leigh Mulligan and Matthew A Rutherford, ‘Can Ethics Be Taught? Examining the Impact of Distributed Ethical Training and Individual Characteristics on Ethical Decision-Making’ (2021) 20(1) *Academy of Management Learning & Education* 30.

⁸¹ Madhloom and McFaul (n 24).

⁸² Jerome Frank, ‘Why Not a Clinical Lawyer-School?’ (1933) 81 *University of Pennsylvania Law Review* 907; Karl N Llewellyn, ‘On What Is Wrong with So-Called Legal Education’ (1935) 35 *Columbia Law Review* 651;

‘law in action’.⁸³ The skills gained in CLE are not confined to the legal profession. Reflective practice and the ability to formulate persuasive arguments are skills relevant to many, if not all professions.⁸⁴ Regarding the second point, while it is difficult to comment on how law schools should allocate their resources, CLE programmes, in various forms, are available in most law schools. The issue of academic staff who are equipped to teach legal ethics is a more difficult obstacle to surmount. Given that legal ethics is underpinned by philosophical concepts which overlap with other fields, one possible solution is that CLE is taught by academics from various subjects and disciplines such as medical ethics, jurisprudence, philosophy, and socio-legal studies. Alternatively, training could be provided to existing academics so that they are equipped to teach legal ethics.

The third and fourth points can be addressed simultaneously as they both relate to the teaching of legal ethics. CLE is ‘ripe with professional and ethical situations’⁸⁵ and law teachers, especially CLE educators, cannot avoid teaching ethics.⁸⁶ This is true for several modules such as criminal law,⁸⁷ [2] immigration law,⁸⁸ [4] [8] medical ethics,⁸⁹ [1] jurisprudence,⁹⁰ and law, gender and sexuality.⁹¹ The issue of privileging a particular theory or ideology can be avoided by educating students to demonstrate an awareness of alternative theoretical models and approaches.

Jeff Giddings, Roger Burridge, Shelley A M Gavigan and Catherine F Klein, ‘The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada, and Australia’ in Frank S Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press), 5.

⁸³ Pound (n 57).

⁸⁴ Schön (n 34).

⁸⁵ Liz Curran et al, ‘Pushing The Boundaries or Preserving the Status Quo?: Designing Clinical Programs to Teach Law Students a Deep Understanding of Ethical Practice’ (2005) 8 *International Journal of Clinical Legal Education* 104,106.

⁸⁶ Carrie J Menkel-Meadow, ‘Can a Law Teacher Avoid Teaching Legal Ethics?’ (1991) 41(1) *Journal of Legal Education* 3, 3.

⁸⁷ Jeremy Horder, *Ashworth’s Principles of Criminal Law* (9th edn, Oxford University Press 2019).

⁸⁸ Joseph H Carens, *The ethics of immigration* (Oxford University Press 2013).

⁸⁹ Jonathan Herring, *Medical Law and Ethics* (8th edn, Oxford University Press 2020).

⁹⁰ Raymond Wacks, *Understanding Jurisprudence* (4th edn, Oxford University Press 2015).

⁹¹ Joanne Conaghan, *Law and Gender* (Oxford University Press 2013); Helga Varden, *Sex, love, and gender: a Kantian theory* (Oxford University Press 2020).

3. What is the purpose of the university (and more specifically the law school)?

In 1810, the Provost of Oriel College, Copleston, replied to the calumnies of the *Edinburgh Law Review*, which had been directed against the University of Oxford:

[The] purpose of the University is to counter the effects upon individual and gross materialism...not to train directly for any specific profession but rather to develop an elevated tone and flexible habit of mind which would enable them to carry out with zeal and efficiency all the offices, both private and public, of peace and war.⁹²

Copleston's reply, which was in response to the theme surrounding the conflict between liberal education and vocational practice, argues that liberal education is valuable in and of itself, rather than simply possessing an instrumental value. Guth and Ashford define liberal arts education as focusing 'on education for itself and not for a purpose and is not concerned with employability'.⁹³ Thus, liberal education is viewed as possessing an intrinsic value.

According to Newman liberal education 'prepares a [person] to fill any post with credit and master any subject with facility'.⁹⁴ Newman also subscribed to the idea of the university being the place of 'teaching universal knowledge'.⁹⁵ The university should, therefore, not train, sustain, or develop students for a particular purpose. A university which seeks to promote these aims can be said to fall within Foucault's concepts of discipline and biopower.⁹⁶ The former focuses on surveillance and control of individuals in institutions such as prisons, hospitals, and schools, in order to facilitate efficient distribution and use of power. The latter, which deals with the management of populations, is concerned with the size, health, and level of education

⁹² Quoted in Peter R H Slee, *Learning and a Liberal Education: The Study of Modern History in the Universities of Oxford, Cambridge and Manchester* (Manchester University Press 1986), 11.

⁹³ Jess Guth and Chris Ashford, 'The Legal Education and Training Review: Regulating Socio-Legal and Liberal Legal Education?' (2014) 48(1) *The Law Teacher* 5, 5.

⁹⁴ John Henry Newman, *The Idea of a University Defined and Illustrated: In Nine Discourses Delivered to the Catholics of Dublin* (Dublin 1852), 207.

⁹⁵ *Ibid* viii.

⁹⁶ Michel Foucault, *The History of Sexuality Vol I. The Will to Knowledge* (Penguin 1979), 139.

of the population, because these are directly linked to the economic capacity of the State.⁹⁷ Foucault's discipline and biopower can benefit students and lawyers in terms of identifying and critiquing educational or professional practices which promote obedience to authority and limit the scope of critical reflection.⁹⁸ [9] In a forthcoming chapter entitled, 'Biopolitics and the Solicitors Qualifying Examination', I apply Foucault's biopolitics and Freire's⁹⁹ theory of education to critique the pedagogy of the SQE. This chapter argues that the SQE not only promotes lawyer amorality but also limits solicitors to the conventional lawyering model, whereby lawyers act as agents for their clients in exchange for a fee. The chapter proposes an alternative pedagogic model which focuses on critical reflection to create an awareness in future solicitors in relation to how dominant ideologies, such as capitalism and patriarchy, shape beliefs and norms that justify and maintain economic and political inequality. [Appendix A]

Copleston's view of the purpose of the university is similar to that espoused by Mill. In his inaugural address in 1867, when installed as rector of the University of St Andrews, he argued that the objective of universities 'is not to make skilful lawyers, or physicians, or engineers, but capable and cultivated human beings'.¹⁰⁰ For Mill education is 'improvement'¹⁰¹ whereby 'each generation purposely gives to those who are to be its successors, in order to qualify for at least keeping up, and if possible for raising, the level of improvement which has been attained'.¹⁰² In this respect, Mill's idea of each generation being mindful of subsequent generations is to be found in Rawls' 'just savings principle', which forms part of his second principle of justice,¹⁰³ which deals with principle of justice between generations.¹⁰⁴ [7] The savings 'can take various forms from net investment in machinery and other means of

⁹⁷ Ibid 141.

⁹⁸ Stephen Brookfield, 'The concept of critical reflection: promises and contradictions' (2009)12(3) *European Journal of Social Work* 293.

⁹⁹ Paulo Freire, *Pedagogy of the Oppressed* (Penguin Random House UK 2017).

¹⁰⁰ John Stuart Mill, 'Inaugural Lecture at the University of St Andrews' in F A Cavanagh (ed), *James and John Stuart Mill on Education* (Cambridge University Press 1931), 133.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ John Rawls, *A Theory of Justice* (Oxford University Press 1973), 302.

¹⁰⁴ Ibid 284.

production to investment in learning and education'.¹⁰⁵ Consequently, philosophy can provide a platform for the expansion of a solicitor's duties to encompass duties to third parties and the environment.

Writers such as Copleston, Mill, Quinton,¹⁰⁶ and O'Hear,¹⁰⁷ supported the view that the values to be promoted at university were primarily concerned with intellectual excellence.¹⁰⁸ Although these theorists were of the opinion that education contributed to the development of virtue, they did not espouse the view that education can be used to 'counter the effects of gross materialism'.¹⁰⁹ However, philosophical theories such as Rawls' 'just savings principle' and theories of education, such as those developed by Freire,¹¹⁰ [7] [Appendix A] can allow for education to be used to not only develop morality but also critique and address 'gross materialism'.¹¹¹ This can be achieved by providing students with opportunities to reflect upon the intergenerational transfer of moral, cultural, and economic capital. Legal education, therefore, should include teaching students moral theories such as deontology and cosmopolitanism, which promote a sense of obligations towards others, irrespective of their nationality, gender, or any other defining characteristic. [3] [5] [6] [7] [8] [9] Cosmopolitan education is relevant for present purposes because both education and higher education, 'are central to the imaginative reconstruction of cosmopolitan society'.¹¹²

Liberal education, however, focused upon the 'world of ideas', while ignoring the 'world of practice'.¹¹³ A proponent of this form of liberal education is O'Hear who not only shares Mill's aversion of universities as places of professional education, but also supports the removal of university-based teacher training.¹¹⁴ This theory-practice divide was challenged by

¹⁰⁵ Ibid 284.

¹⁰⁶ Anthony Quinton, 'Culture, Education and Values' in John Haldane (ed), *Education Values and Culture, the Victor Cook Memorial Lectures* (University of St Andrews 1992), 24.

¹⁰⁷ Anthony O'Hear, *Education, Values and the State: Victor Cook Memorial Lectures, Centre for Philosophy and Public Affairs* (University of St Andrews 1994).

¹⁰⁸ Richard Pring, *Philosophy of Education: Aims, Theory, Common Sense and Research* (Continuum 2005), 43.

¹⁰⁹ Ibid 44.

¹¹⁰ Freire (n 99).

¹¹¹ Alfred H Lloyd, 'The History of Materialism' (1905) 10(4) *The American Historical Review* 727.

¹¹² Jon Nixon, *Higher Education and the Public Good: Imagining the University* (Bloomsbury 2012), 56.

¹¹³ Pring (n 108) 52.

¹¹⁴ Anthony O'Hear, *Education and Democracy: the Posturing of the Left Establishment* (The Claridge Press 1991), 16-19, 46.

Dewey,¹¹⁵ who also argued that philosophy could be defined as ‘the general theory of education’.¹¹⁶ Education for Dewey is ‘a fostering, a nurturing, a cultivating, process’.¹¹⁷ His aim was for each discipline to reconstruct itself in order to achieve individual and collective well-being.¹¹⁸ Eschewing the view that education should have a single aim,¹¹⁹ he advocates ‘progressive education...take part in correcting unfair privilege and unfair deprivation, not to perpetuate them’.¹²⁰ In a similar fashion, CLE should not privilege a single ideology but should be applied as a methodology for teaching ‘reflective lawyering, professional judgement and problem-solving skills, ethical lawyering, social justice, a sense of public obligation, and collaboration’.¹²¹ [4] [5] [6] [7] [8] [9] Thus, the aims of CLE are aligned with liberal education generally as well as Dewey’s notion of education.

What is the purpose of the law school?

In broad terms, law schools, in England and Wales, offer students a liberal education and seek integration with the academic life of the university.¹²² Understanding the purpose of the law school is necessary because decisions regarding the subject matter and methodologies cannot be made until the purpose of legal education is identified.¹²³ A discussion surrounding the purpose of the law school can inform the debate about what law schools should or should not be doing.¹²⁴

¹¹⁵ John Dewey, ‘The relation of theory to practice in education’ in C A McMurry (ed), *The relation between theory and practice in the education of teachers: Third Yearbook of the National Society for the Scientific Study of Education, part 1* (The University of Chicago Press 1903), 9-30; Dewey, *Democracy and Education* (n 28) 328; see also Anthony DeFalco, ‘An Analysis of John Dewey’s Notion of Occupations -Still Pedagogically Valuable?’ (2010) 26(1) *Education and Culture* 88.

¹¹⁶ Dewey, *Democracy and Education* (n 28) 349.

¹¹⁷ *Ibid* 13.

¹¹⁸ Maughn Gregory and David Granger, ‘Introduction: John Dewey on Philosophy and Childhood’ (2012) 28(2) *Education and Culture* 1.

¹¹⁹ Dewey, *Democracy and Education* (n 28) 119.

¹²⁰ *Ibid* 128.

¹²¹ Margaret Martin Barry, A Rachel Karn, Margaret E Johnson, Catherine F Klein and Lisa Vollendorf Martin, ‘Teaching Social Justice Lawyering: Systematically including Community Legal Education in Law School Clinics’ (2011) 18 *Clinical Law Review* 401, 401.

¹²² Anthony Bradney, ‘English university law schools, the age of austerity and human flourishing’ (2011) 18 (1-2) *International Journal of the Legal Profession* 59, 61.

¹²³ John R Peden, ‘Goals for Legal Education’ (1972) 24 *Journal of Legal Education* 379, 387.

¹²⁴ Bethany Rubin Henderson, ‘Asking the Lost Question: What Is the Purpose of Law School?’ (2003) 53(1) *Journal of Legal Education* 48, 52

In their 1943 essay published in the Yale Law Journal, Lasswell and McDougal, writing in relation to American legal education, argue that the ‘proper function’ of the law school is ‘to contribute to the training of policy-makers for the ever more complete achievement of the democratic values that constitute the professed ends of American polity’.¹²⁵ [5] The authors define ‘policy’ as ‘the making of important decisions which affect the distribution of values’.¹²⁶ The ‘supreme value of democracy’ is dignity of the individual.¹²⁷ This echoes Kant’s theory of ethics which focuses on human dignity.¹²⁸ [3] [4] [9] Dignity, however, is a contested philosophical term.¹²⁹ It is, therefore, essential that students are introduced to the various conceptions of dignity in order to be able to apply and develop this concept in their work. [4] [9] To train future lawyers in policy-making requires teaching students to clarify their moral values. What is essential, as far as legal education is concerned, is that a student’s choice of moral values is reached through a process of deliberation involving an awareness of the consequences of their choice on themselves and others.¹³⁰ In order for students and solicitors to engage in reflection, knowledge of philosophical concepts such as autonomy, duty, and paternalism is required. Philosophy is useful in legal education because it can inform a student’s moral standpoint and provides them with conceptual tools to construct a philosophical theory that will produce conclusions about various normative concepts such as justice [1] [7] and autonomy. [2] [9]

In his influential book, *A Theory of Justice*, Rawls introduced the concept of ‘reflective equilibrium’ for reaching a decision about what is required by justice.¹³¹ [7] The starting point is within a person’s existing convictions about justice. This is followed by developing a set of principles under which those convictions can be incorporated, so that the principles provide a general justification for one’s principles. A revision of one’s initial conception of justice will

¹²⁵ Lasswell and McDougal (n 20) 206.

¹²⁶ Ibid 207.

¹²⁷ Ibid 212.

¹²⁸ Immanuel Kant, *Groundwork of the Metaphysics of Moral* (first published 1785, H J Patton tr, Hutchinson & Co 1969), [4: 440].

¹²⁹ Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013).

¹³⁰ Lasswell and McDougal (n 20) 212.

¹³¹ Rawls, *A Theory of Justice* (n 103) 20.

need to be carried out in the event of discrepancies between one's convictions and principles.¹³² Thus, a person revises specific convictions by 'going back and forth' in order to judge whether a specific set of convictions are compatible with the set of principles to which they would be prepared to subscribe. Rawls' reflective equilibrium is a methodology for achieving an equilibrium between principles and individual judgements.¹³³ In other words, it promotes moral reasoning. Moral reasoning is described as 'a matter of bringing into harmony, or consistency, various particular judgments with each other and with the principles that we hold'.¹³⁴ The value of 'reflective equilibrium' is that one's convictions and principles are not pre-eminent but negotiable and subject to change.¹³⁵ In order to be able to consider various convictions, students ought to be taught different philosophical frameworks regarding the concept of justice, such as utilitarianism,¹³⁶ Nozick's theory of entitlement,¹³⁷ and human capabilities.¹³⁸ This approach not only avoids inculcating students in a particular theory or ideology but also allows them to identify the limitations of the different theories with reference to alternative points of view.

The above process of deliberation, or reflection, can be illustrated by the following example: a student might decide to embrace despotism, and apply ethical egoism and treats others as mere means. In other words, they might decide that their self-interest overrides the interests of others. In this scenario, the student is making an exception for themselves by choosing values that others might not share. However, the process of reflection need not end here. The student, in this scenario, might engage in further deliberation and apply Kant's Categorical Imperative (CI), which states 'I ought never to act except in such a way that I can also will that my maxim should become a universal law'.¹³⁹ The CI functions as both a

¹³² Ibid.

¹³³ Stephen Cohen, *The Nature of Moral Reasoning: The Framework and Activities of Ethical Deliberation, Argument and Decision-Making* (Oxford University Press 2004), 66.

¹³⁴ Ibid.

¹³⁵ Ibid 67.

¹³⁶ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (first published 1789, Dover Publications 2007); John Stuart Mill, *On Liberty* (first published 1863, Oxford University Press 2015); Henry Sidgwick, *The Methods of Ethics* (first published 1874, Hackett Publishing Co 1981).

¹³⁷ Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974).

¹³⁸ Amartya Sen, 'Capability and well-being' in Martha Nussbaum and Amartya Sen (eds), *The Quality of Life* (Oxford University Press 1993), 30-53; Hugh McFaul, 'Towards a capability approach to Clinical Legal Education' in Madhloom and McFaul (n 24)124-136.

¹³⁹ Kant, *Groundwork of the Metaphysics* (n 128) [4: 402].

consistency test and a universal test of the subjective principles underpinning a person's proposed intentional actions.¹⁴⁰ The CI also addresses Lasswell and McDougal's reflection on the consequences of one's morals. Maxims must incorporate the purpose which the person's action is intended to achieve.¹⁴¹ In other words, ends are incorporated into maxims. Thus, teleology is present in Kant's CI. In this regard, Wood is of the opinion that 'Kant's theory is consequentialist in its style of reasoning'.¹⁴²

The second view, regarding the purpose of legal education, is articulated by Mayson:

[T]he starting point for considering changes to professional legal education must be the needs of the employment market for qualified lawyers and, in particular, those parts of the market that offer employment to the greatest number of trainees and newly qualified lawyers.¹⁴³

This market-driven aim entails teaching students the skills of 'professional identity'¹⁴⁴ in order to achieve 'ethical legal practice'.¹⁴⁵ Professional identity includes not only professional ethics but also a 'framework of essential and transferable skills is necessary for competent professional practice', which includes negotiating and counselling skills.¹⁴⁶ Professional legal practice involves a degree of uncertainty in professional judgment.¹⁴⁷ In other words, legal practice is not simply the mechanical application of rules. Moreover, solicitors are in a position of power because most clients are unable to determine for themselves whether the legal service they receive is good or bad.¹⁴⁸ Philosophy can, therefore, provide a framework for client-centred lawyering. For example, a duty-based approach can direct the solicitor towards a

¹⁴⁰ Alan J Kears, 'A Duty-Based Approach for Nursing Ethics & Practice' in P Anne Scott (ed), *Key Concepts and Issues in Nursing Ethics* (Springer 2017), 19.

¹⁴¹ John Paley, 'Virtues of autonomy: Kantian ethics of care' (2002) 3 *Nursing Philosophy* 113,138.

¹⁴² Allen W Wood, *Kant's Ethical Thought* (Cambridge University Press 1999), 414.

¹⁴³ Stephen Mayson, *The Education and Training of Solicitors: Time for Change* (Legal Services Institute 2010), 4.

¹⁴⁴ William M Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond and Lee S Shulman, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007), 3-4, 28.

¹⁴⁵ Alice Woolley, 'Legal education, reform and the good lawyer' (2015) 51 *Alberta Law Review* 801, 802.

¹⁴⁶ Wilson Chow and Michael Ng, 'Legal education without the law – lay clients as teachers and assessors in communication skills' (2015) 22(1) *International Journal of the Legal Profession* 103, 103.

¹⁴⁷ Boon (n 61) 30.

¹⁴⁸ *Ibid.*

holistic model of lawyering whereby they inform their client, for example a corporation,¹⁴⁹ [4] of the consequences of their decisions on third parties and the environment.

Bradney rejects the view that the law degree is preparation for professional legal practice, and contends that the purpose of the law degree is the fulfilment of human flourishing.¹⁵⁰ The term ‘flourishing’, which is associated with ethics, has its roots in the Greek word eudaemon (happiness),¹⁵¹ and is found in the work of Aristotle.¹⁵² The purpose of life, for Aristotle, is flourishing achieved through the acquisition of virtue and reason.¹⁵³ The term ‘human flourishing’ can be defined as ‘a correct or honourable life...[and] also a fully human, satisfying, flourishing one’.¹⁵⁴ On this account, flourishing involves moral pursuits and autonomy. Flourishing can also encompass the development of character traits such as resilience, meaningful and productive work, altruistic activities such as pro bono services, religious pursuits, and other character traits.¹⁵⁵ These attributes are relevant to the notion of well-being. Philosophy can also be applied to justify the moral responsibility of law schools to promote student well-being and flourishing, and as a means to achieving well-being.¹⁵⁶

A fourth view holds that university law schools expand to ‘a more self-conscious multi-functional model that serves a more varied clientele, while maintaining a balance between educational, scholarly, and social objectives’.¹⁵⁷ Platsas, on the other hand, advocates a

¹⁴⁹ Jemma Slingo, ‘In focus: Should City firms cut ties with fossil fuel giants?’ (27th August 2021) *The Law Society Gazette* <<https://www.lawgazette.co.uk/news-focus/in-focus-should-city-firms-cut-ties-with-fossil-fuel-giants/5109612.article>> accessed 25 February 2022.

¹⁵⁰ Bradney (n 122); see also John Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980); Kristján Kristjánsson, ‘Recent Work on Flourishing as the Aim of Education: A Critical Review’, *British Journal of Educational Studies* (2017) 65(1) 87.

¹⁵¹ Richard Kraut, ‘Aristotle’s Ethics’ in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2018 Edition), <<https://plato.stanford.edu/archives/sum2018/entries/aristotle-ethics/>> accessed 25 February 2022.

¹⁵² Aristotle, *The Nicomachean Ethics* (trans David Ross, Oxford University Press 2009); Aristotle, *Eudemian Ethics* (trans Anthony Kenny, Oxford University Press 2011).

¹⁵³ Tony Ghaye, ‘In what ways can reflective practices enhance human flourishing?’ (2010) 11(1) *Reflective Practice* 1, 1.

¹⁵⁴ Sarah Bakewell, *How to Live: or A Life of Montaigne in one question and twenty attempts at an answer* (Vintage 2010), 4.

¹⁵⁵ Ghaye (n 153) 1.

¹⁵⁶ Nigel Ducan, Rachael Field and Caroline Strevens, ‘Ethical imperatives for legal educators to promote law student wellbeing’ (2020) 23(1-2) *Legal Ethics* 65.

¹⁵⁷ William Twining, ‘Thinking about law schools: Rutland reviewed’ (1998) 25(1) *Journal of Law and Society* 1, 4.

cosmopolitan ethos in modern legal education.¹⁵⁸ His rationale is underscored by the central claim that law is an insular academic discipline that is primarily oriented to domestic law. This, he argues, can lead to lawyers being domestically indoctrinated.¹⁵⁹ Thus, lawyers might think global but largely focus local.¹⁶⁰ Similarly, Nussbaum lists cosmopolitan ethics, which she refers to as ‘World Citizenship’, as one of the three ‘core values’ for preparing students for the ‘interlocking world in which they live’.¹⁶¹ The other two capacities are: Socratic self-examination and narrative imagination. Nussbaum’s theory is informed by Kant’s cosmopolitan approach: ‘The growing prevalence of a (narrower or wider) community among the peoples of the earth has now reached a point at which the violation of right at any one place on the earth is felt in all places’.¹⁶² Further criticism of legal education’s insular approach is found in the work of Alemanno and Khadar who contend that ‘[d]espite the massive internationalization of legal practice and culture, law continues to be presented as a predominantly domestic affair’.¹⁶³

The purposes of the law school, discussed above, can be divided into three broad themes: professional identity and ethical legal practice; human flourishing; and cosmopolitanism. The concept of dignity is relevant to all three notions, and is therefore, pervasive. The different themes will be discussed in part 5. It is first necessary to examine the pedagogy of legal education in order to determine whether teaching philosophy can contribute to the three aims identified above.

¹⁵⁸ Antonis E Platsas, ‘A Cosmopolitan Ethos for Our Future Lawyers’ (2015) 1 *Pravo. Zhurnal Vysshey shkoly ekonomiki* 150.

¹⁵⁹ *Ibid* 152

¹⁶⁰ William Twining, ‘Cosmopolitan Legal Studies’ (2002) 9(2) *International Journal of the Legal Profession* 99, 102.

¹⁶¹ Martha Nussbaum, ‘Cultivating Humanity in Legal Education’ (2003) 70 *University of Chicago Law Review* 265, 269.

¹⁶² Immanuel Kant, ‘Toward Perpetual Peace’ in Pauline Kleingeld (ed), *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (Yale University Press 2006), [8: 360].

¹⁶³ Alberto Alemanno and Lamin Khadar, ‘Introduction’ in Alberto Alemanno and Lamin Khadar (eds), *Reinventing Legal Education: How Clinical Education is Reforming the Teaching and Practice of Law in Europe* (Cambridge University Press 2018), 1.

4. The routes to qualifying as a solicitor

The previous two sections identified a theory-practice dichotomy within university education that is also present in law schools,¹⁶⁴ and that a law school should equip students for human flourishing, and employment into the legal profession. Law schools should also meet their social objectives. Moreover, a cosmopolitan ethos should inform legal education and practice. This section will examine the pedagogical approaches, in legal education and training, in order to determine the extent to which they achieve the aims identified in the previous section.

A person seeking admission as a solicitor must satisfy the relevant criteria stipulated in the SRA Authorisation of Individuals Regulations of 2019.¹⁶⁵ There are currently two pathways: the traditional pathway and the Solicitors Qualifying Examination (SQE) route. Under the traditional route a candidate must usually have completed the academic and vocational stages of training¹⁶⁶ or an apprenticeship.¹⁶⁷ The SRA must also be satisfied in relation to the candidate's character and suitability.¹⁶⁸ The academic stage involves undertaking any of the following:¹⁶⁹ a Qualifying Law Degree (QLD); a Common Professional Examination; an Exempting Law Degree; or an Integrated Course. As a result of the introduction of the SQE, candidates will have until 31 December 2032 to qualify as a solicitor under the traditional route.

The QLD, which is recognised under the Joint Statement issued by the Law Society and the General Council of the Bar, includes the study of legal subjects for the equivalent of not less than two years out of a three year or four year course of study.¹⁷⁰ Thus, a student must gain

¹⁶⁴ Anthony Bradney, *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century* (Bloomsbury Publishing 2003); Guth and Ashford (n 93).

¹⁶⁵ Solicitors Regulation Authority, 'SRA Authorisation of Individuals Regulations' (SRA May 2018) <<https://www.sra.org.uk/solicitors/standards-regulations/authorisation-individuals-regulations/>> accessed 29 January 2022.

¹⁶⁶ Ibid Regulations 1.1(a)-(c), inclusive.

¹⁶⁷ Ibid Regulation 3B.

¹⁶⁸ Ibid Regulation 1.1(d).

¹⁶⁹ Solicitors Regulation Authority, 'SRA Glossary' <<https://www.sra.org.uk/solicitors/standards-regulations/glossary/>> accessed 22 February 2022.

¹⁷⁰ Solicitors Regulation Authority, 'Joint statement on the academic stage of training' (SRA September 2021) <<https://www.sra.org.uk/become-solicitor/legal-practice-course-route/qualifying-law-degree-common-professional-examination/academic-stage-joint-statement-bsb-law-society/>> accessed 27 February 2022.

a minimum of 240 credits in the study of legal subjects in a 360 or 480 credit degree programme. In addition, the Foundations of Legal Knowledge¹⁷¹ must account for at least 180 of those credits. Subjects which are not included in the Foundations of Legal Knowledge include jurisprudence/legal theory,¹⁷² commercial law, and family law.¹⁷³ For present purposes, legal ethics and/or jurisprudence ought to be compulsory subjects on the law degree, for the reasons outlined in the previous section. The Graduate Diploma in Law (GDL) provides the equivalent of the Foundations of Legal Knowledge. Owing to the separation between the academic and the vocational stages, there is no requirement for the academic stage to include professional skills and knowledge as part of the curriculum. The academic stage is followed by the vocational training year: the LPC. The final stage involves working as a trainee solicitor for two years. The Joint Statement does not specify how the various subjects should be taught. According to Sylvester, these are ‘traditionally covered by a lecture/seminar approach’.¹⁷⁴ However, due to social-distancing measures introduced as a result of the coronavirus (Covid-19) pandemic, universities have transitioned to a ‘blended’¹⁷⁵ learning approach.¹⁷⁶ The separation between theory and practice risks teaching substantive law in isolation. In other words, students may not reflect on the impact of law on individuals or groups. [1] [4] [7] [8]

The SRA, in its report entitled *Training for Tomorrow*,¹⁷⁷ expressed concerns in relation to the qualification of solicitors.¹⁷⁸ These included the absence of a ‘standard basis on which to measure the quality of students who emerge from the education and training process’.¹⁷⁹ The

¹⁷¹ Public Law, including Constitutional Law, Administrative Law and Human Rights; Law of the European Union; Criminal Law; Obligations including Contract, Restitution and Tort; Property Law; and Equity and the Law of Trusts.

¹⁷² Regarding value of jurisprudence see, Seow Hon Tan, ‘Teaching legal ideals through jurisprudence’ (2009) 43(1) *The Law Teacher* 14.

¹⁷³ Rebecca Huxley-Bins, ‘What is the “Q” for?’ (2011) 45 *The Law Teacher* 294.

¹⁷⁴ Cath Sylvester, ‘Bridging the Gap – The Effect of Pro Bono Initiatives on Clinical Legal Education in the UK’ (2003) 3 *International Journal of Clinical Legal Education* 29, 31.

¹⁷⁵ Melissa Castan and Ross Hyams, ‘Blended Learning in the Law Classroom: Design, Implementation and Evaluation of an Intervention’ (2017) 27 *Legal Education Review* 143.

¹⁷⁶ Marcus Smith, Simone Thackray and Mark Nolan, ‘Transitioning residential schools online in a pandemic: social distancing and technology-based law teaching’ (2021) *The Law Teacher* 1.

¹⁷⁷ Solicitors Regulation Authority, *Training for Tomorrow: assessing competence* (SRA 2015) <<https://www.sra.org.uk/sra/consultations/consultation-listing/t4t-assessing-competence/>> accessed 22 February 2022.

¹⁷⁸ This was part of the SRA’s *Training for Tomorrow* programme. The programme was in response to the LETR.

¹⁷⁹ *Ibid.*

report suggests the implementation of a common professional assessment, the SQE, ‘which will ensure that all aspiring solicitors, no matter what institution they attended or pathway they took, are assessed against the same high standard of competence’.¹⁸⁰ The SQE was introduced in September 2021.¹⁸¹ A detailed discussion surrounding the pedagogy of the SQE will be discussed in part 4.2

Due to the difference between the traditional route and the SQE in terms of content and mode of delivery, this thesis commentary will address each one separately. There are other routes to qualifying as a solicitor, however, these are outside the scope of this thesis commentary.

4.1. The traditional route

This pathway is divided into two main parts: the academic and the vocational. Given this theory-practice separation, the academic stage can be described as a form of liberal education. This separation can be traced to the Attorneys and Solicitors Act 1728, which specified that no man¹⁸² could practice as a Solicitor unless his name was on the Roll,¹⁸³ and had undertaken an Articled Clerkship for at least a term of five years. The process of what one must complete in order to practice as a solicitor was not codified until the Solicitors Act 1956. This entailed completing Articled Clerkship,¹⁸⁴ passing a course of Legal Education and passing the examinations prescribed Law Society. Although the Law Society’s Training Regulations 1970 specified that four years was the longest time period that could be served under Articles, in reality law graduates commonly served only two years. The Solicitors Act 1974, which is

¹⁸⁰ Ibid.

¹⁸¹ Suzanne Townley, ‘SQE: SRA launch new route to qualification’ (September 2021) Solicitors Journal <<https://www.solicitorsjournal.com/sjarticle/SQE:%20SRA%20launch%20new%20route%20to%20qualification>> accessed 22 February 2022 .

¹⁸² In *Bebb v The Law Society* [1913] EWHC 1, the Court of Appeal held that a woman was not a ‘person’ for the purposes of the Solicitors Act 1843. Women were eventually allowed to join professional bodies, sit on juries, and be awarded degrees after the Sex Disqualification Act 1919 came into force.

¹⁸³ Prio to the Attorneys and Solicitors Act 1728, there was no legal requirement that a central record of practicing Solicitors be kept.

¹⁸⁴ Commonly referred to as ‘Articles of Training’ or ‘Articles’.

currently in force, permits the Law Society to create Training Regulations. However, this function is now within the remit of the SRA.

The division of legal education and training into separate stages: academic; vocational; and training has been criticised in the Lord Chancellor's Advisory Committee on Legal Education and Conduct (ACLEC)¹⁸⁵ for giving rise to 'adverse consequences', 'the division has encouraged the separation between theory and practice, between "academic" knowledge and "professional" expertise, and between the study of substantive and adjectival law'.¹⁸⁶ Consequently students are taught substantive law without any reference to procedure (Civil, Criminal, and Family).¹⁸⁷ Similarly, students studying modules such as Property Law are not required to engage with the practical aspects of the conveyancing process, which could be useful in terms of contextualising the theory. To overcome this issue, my co-author and I have suggested applying experiential learning, such as live-client cases, in order to incorporate theory into practice:

This method allows students to distil from the raw materials and uncertainties of their client's information the facts, which may provide a legal remedy. It is not simply the application of substantive law that students are engaged in but client interviewing, practical legal research, case file management, drafting and advising the client.¹⁸⁸

Conversely, teaching criminal procedure without reference to philosophical concepts such as autonomy, freedom, choice, and deception risks depriving practitioners of important conceptual tools needed for law reform and client advice.¹⁸⁹ [1] [2] The tension between the stages of education and training is illustrated by one academic who remarked, in relation to the content of the undergraduate law degree, 'the more you start getting these skills in, the less

¹⁸⁵ Set up under the Courts and Legal Services Act 1990.

¹⁸⁶ Lord Chancellor's Advisory Committee on Legal Education and Conduct, 'First Report on Legal Education and Training' (April 1996), para 2.11.

¹⁸⁷ Ministry of Justice, 'Procedure rules' <<https://www.justice.gov.uk/courts/procedure-rules>> accessed 22 February 2022.

¹⁸⁸ Nicolette Butler and Omar Madhloom, 'Rethinking Property Law modules: putting theory into practice' (2017) 51(4) *The Law Teacher* 440, 447.

¹⁸⁹ Omar Madhloom, 'Can gender negate consent?' (2014) 158(44) *Solicitors Journal* 15.

room you have to teach philosophy, theory, rights, justice, the liberal arts kind of side of it'.¹⁹⁰ This concern can be addressed by means of 'integrated education and training',¹⁹¹ which is found in disciplines such as architecture, medicine, and nursing. This approach has contributed to the erosion of the division between pre-clinical and clinical stages in medicine. Thus, CLE can play a vital role in this approach due to its commitment to teaching theories such as social justice,¹⁹² reflective practice, the acquisition of soft and hard skills,¹⁹³ legal ethics,¹⁹⁴ and philosophical concepts required to examine lawyer conduct¹⁹⁵ and law and legal institutions.¹⁹⁶

The pedagogy of the traditional route

The dominant method of teaching law, under this route, is the doctrinal method which focuses primarily on appellate court decisions. Teaching legal doctrine is an important part of a lawyer's training not least because knowledge of the law is what differentiates a lawyer from a lay person, but also because 'doctrinal law teaching helps to encourage and support ethical legal practice'.¹⁹⁷ While critical evaluation is possible under the doctrinal method, 'it is usually confined to examining the logic and rational coherence of particular legal decisions and areas of law'.¹⁹⁸ By focusing on what the law is, the doctrinal method risks eschewing extra-legal considerations of policy or context.¹⁹⁹ The doctrinal method is, therefore, inadequate in terms of examining the law from a socio-legal perspective and teaches students to view law in technical terms, divorced from its moral content.²⁰⁰ The conceptual separation between law

¹⁹⁰ LETR (n 65) 45.

¹⁹¹ Lord Chancellor's Advisory Committee on Legal Education and Conduct (n 186) para 2.15

¹⁹² Jacqueline Weinberg, 'Preparing Students For 21st Century Practice: Enhancing Social Justice Teaching In Clinical Legal Education' (2021) 28(1) *International Journal of Clinical Legal Education* 5.

¹⁹³ Colin James, 'Lawyers' wellbeing and professional legal education' (2008) 42(1) *The Law Teacher* 85; Francina Cantatore, 'The impact of Pro Bono law clinics on employability and work readiness in law students' (2018) 25(1) *International Journal of Clinical Legal Education* 147.

¹⁹⁴ V S Gigimon and Shruti Nandwana, 'Clinical Legal Education: A Virtual Mode of Access to Justice' (2020) 27(4) *International Journal of Clinical Legal Education* 62.

¹⁹⁵ David Luban, *Legal Ethics and Human Dignity* (Cambridge University Press 2007).

¹⁹⁶ Omar Madhloom and Barbara Preložnjak, 'Applying Rawls' theory of justice to Clinical Legal Education in the Republic of Croatia' in Madhloom and McFaul (n 24), 104 - 123.

¹⁹⁷ Woolley (n 145) 803 - 804

¹⁹⁸ Donald Nicolson and Julian Webb, *Professional Legal ethics: Critical Interrogations* (Oxford University Press 1999), 66.

¹⁹⁹ Allan C Hutchinson, 'Beyond black-letterism: Ethics in law and legal education' (1999) 33(3) *The Law Teacher* 301, 302.

²⁰⁰ Fiona Cownie, 'Alternative Values in Legal Education' (2003) 6(2) *Legal Ethics* 159, 159.

and morals has been attributed to the pervasive influence of legal positivism on legal education,²⁰¹ [3] [5] [9] which has contributed to law and morality being kept separate.²⁰² This educational model is referred to by Thornton as ‘technocratism’ which ‘focuses primarily on formal rules, creates a law school environment the technocratic is normalized’.²⁰³ Studying substantive law without reference to extra-legal matters risks ignoring the ‘relationships between private individuals and the state’.²⁰⁴ This is a serious omission because when this connection is highlighted, ‘it transforms the student’s analysis into one of public interest, and one of concern for the community as a whole’.²⁰⁵ [8] [9]

Although there are various forms of legal positivism, its main features are summarised by Hart, one of most influential legal positivists, to include law as an autonomous concept with clear demarcations between law and morality, law and politics, and law and other disciplines.²⁰⁶ Despite the fact that Hartians may argue that a valid rule is subject to moral scrutiny, it remains the case that law and morals are separate.²⁰⁷ In relation to legal education, the focus on legal rules and the separation between rules and morals risks teaching students that ‘the law has nothing to do with morality’.²⁰⁸ This approach has been criticised for not only failing to promote critical thinking but also giving students the false impression that law is amoral.²⁰⁹

Similarly, in legal ethics, legal positivism has been accused of contributing to the theory of ‘role morality’.²¹⁰ This theory requires lawyers to ‘do things which they (and others) would regard as immoral in their private lives’.²¹¹ This model has been described as ‘neutral

²⁰¹ Ibid.

²⁰² Nicolson and Webb (n198) 66.

²⁰³ Margaret Thornton, ‘Technocentrism in the Law School: Why the Gender and Colour of Law Remain the Same’ (1998) 36(2) Osgoode Hall Law Journal 369, 373.

²⁰⁴ Butler and Madhloom (n 188) 447.

²⁰⁵ Ibid.

²⁰⁶ Hart, *The Concept of Law* (n 10).

²⁰⁷ Cownie (n 200) 160.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Cèsar Arjona ‘Morality Explained: Analysing the reasons that explain the standard conception of legal ethics’ (2013) 4 Ramon Llull *Journal of Applied Ethics* 51, 57.

²¹¹ O’Dair (n 14) 134

partisanship',²¹² which consists of two principles: the 'principle of partisanship', which involves lawyers zealously pursuing their client's ends;²¹³ and the 'principle of neutrality',²¹⁴ which does not require the lawyer to engage in any moral or political considerations in achieving their client's aims. Thus, the positivist approach can contribute to a solicitor acting merely as a 'hired-gun'.²¹⁵ [3] [4] [8] Legal positivism's central thesis that there is no necessary connection between law and morality,²¹⁶ may impact on a lawyer's ethical deliberation when confronted with a legal dilemma. This approach to ethical consideration may result in the moral neutrality of the solicitor. This can be illustrated by the SRA's Principle 7, which states that a solicitor must act in the best interest of their client.²¹⁷ This approach omits duties to third parties and the environment. A solicitor's amorality is constrained, however, by the SRA's guidance that:

Should the Principles come into conflict, those which safeguard the wider public interest (such as the rule of law, and public confidence in a trustworthy solicitors' profession and a safe and effective market for regulated legal services) take precedence over an individual client's interests. You should, where relevant, inform your client of the circumstances in which your duty to the Court and other professional obligations will outweigh your duty to them.²¹⁸

The SRA appears to focus on procedural and substantive justice, and maintaining the reputation of the legal profession. This is not surprising given the SRA's regulatory function. However, the SRA's guidance is primarily aimed at the solicitor's private duties while minimising the significance of public duties. [8] [9] Failure to take public duties seriously may hinder solicitors' capacity to appreciate what is at stake when there is a conflict between duties to the

²¹² David Luban, 'Introduction' in David Luban (ed), *The Ethics of Lawyers* (Dartmouth 1994), xiv; Nicolson and Webb (n198)162.

²¹³ Nicolson and Webb (n 212) 163.

²¹⁴ Ibid.

²¹⁵ Tan (n 172) 31.

²¹⁶ H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593, 601.

²¹⁷ Solicitors Regulation Authority, 'SRA Principles' (SRA May 2018) <<https://www.sra.org.uk/solicitors/standards-regulations/principles/>> accessed 22 February 2022.

²¹⁸ Ibid.

clients and broader societal obligations. For present purposes, public duties are a type of ‘common good’, which is defined as:

[T]he distinctive and critical perspective the various professions have to offer on basic human values, on facets of the human good and the good life. It also includes the professions’ contribution to what may be called civic discourse or public philosophy – that ongoing, pluralistic conversation in a democratic society about our shared goals, our common purposes, and the nature of the good life in a just social order.²¹⁹

Thus, the common good views society as a community whose members share certain values, ends, human flourishing, and moral development.²²⁰ [5] [6] [9] ‘Public philosophy’ also implies philosophical approaches that ‘blur the line between political commentary and political philosophy’.²²¹ Public philosophy is relevant to lawyers because it can provide guidance in relation to people’s lives and shaping policies.²²² The latter signifies that philosophy has an important role to play in a pedagogy which aims to train future lawyers to become policy-makers.²²³ [5]

4.2 *The SQE route*

To qualify under this route, candidates must: have a degree in any subject (or equivalent level 6 qualification); pass stage 1 and stage 2 of the SQE assessment; complete two years’ full-time (or equivalent) qualifying work experience (QWE); and pass the SRA’s character and suitability requirements.²²⁴ SQE stage 1 (SQE 1) replaces the academic stage of the traditional route, while SQE stage 2 (SQE 2) (Practical Legal Skills), which tests skills such as client interviewing, drafting, and advocacy, replaces the LPC. One aspect which is innovative, in this

²¹⁹ Bruce Jennings, Daniel Callahan and Susan M Wolf, ‘The Professions: Public Interest and Common Good’ (1987) 17(1) *The Hastings Centre Report* 3, 4.

²²⁰ *Ibid* 6.

²²¹ Michael J Sandel, *Public Philosophy: Essays on Morality in Politics* (Harvard University Press 2005), 5.

²²² Martha C Nussbaum, ‘Public Philosophy and International Feminism’ (1998) 108 *Ethics* 762, 765.

²²³ Lasswell and McDougal (n 20).

²²⁴ Solicitors Regulation Authority, *Solicitors Qualifying Examination (SQE) route* (SRA September 2021) <<https://www.sra.org.uk/become-solicitor/sqe/>> accessed 22 February 2022

author's opinion, is the inclusion of time spent in a law clinic as part of QWE. This provides for an opportunity for CLE to address some of the limitations of the doctrinal method.

The positivist approach, discussed in the previous section, also underscores the SQE.²²⁵ [5] [9] Under this new route, candidates will be tested on the law as it stands at the date of their assessment, they will not be examined on the development of the law.²²⁶ This suggests that aspiring solicitors will not be required to demonstrate any normative analysis, such as what the law ought to be, or what purpose a particular legislation aims to serve. A further disadvantage of limiting legal analysis to settled law is that it does not equip future lawyers with the training needed to resolve 'hard cases'. According to Hart, 'hard cases' are 'where the sources of the law fail to determine a decision on some point of law'.²²⁷ In Hart's view, when faced with a hard case, judges have strong discretion to fill in the gaps and that in such cases judges do make law.²²⁸ Hart's theory of adjudication can also be applied to legal ethics and the professional codes of conduct, in that lawyers can exercise discretion in cases where there are no applicable rules or the rules are ambiguous.

Hart also argues that language has a degree of vagueness or 'open texture'²²⁹ where words have certain clear meanings, but there are instances where there exists a 'penumbra of uncertainty'.²³⁰ Lawyers, whether engaged in judicial decision-making or in private practice, face similar discretion in relation to the law [2] and the professional codes of conduct. [3] [9] Regarding the latter, O'Dair concludes that many of the provisions of the codes of conduct 'are so open textured as to confer upon lawyers a broad discretion the exercise of which will require ethical judgment'.²³¹ Philosophy can address the gaps in the law and codes of conduct and

²²⁵ Townley (n 181).

²²⁶ Solicitors Regulation Authority 'Assessment information' < <https://www.sra.org.uk/sra/policy/solicitors-qualifying-examination/sqe1-functioning-legal-knowledge-assessment-specification/> > accessed 22 February 2022.

²²⁷ Hart, *The Concept of Law* (n 10) 272-273.

²²⁸ *Ibid* 272.

²²⁹ The idea 'open texture' is generally attributed to Friedrich Waismann. See Friedrich Waismann, 'Verifiability' (1945) 19 Proceedings of the Aristotelian Society, Supplementary Volumes 100.

²³⁰ Hart (n 206) 134.

²³¹ O'Dair (n14) 16.

provide a rationale for making good and right decisions on problems with a moral dimension.²³²

[1] [2] [4]

The pedagogy of SQE 1

SQE 1 is a computer-based single best answer multiple choice test (MCQ). However, an examination of the SRA's sample MCQs reveals that most questions are in fact single correct answer. SQE 1 consists of two Functional Legal Knowledge (FLK) assessments which comprise the following subject areas:

- Business Law and Practice; Dispute Resolution; Contract; Tort; Legal System of England and Wales; Constitutional and Administrative Law and EU Law and Legal Services (FLK 1).
- Property Practice; Wills and the Administration of Estates; Solicitors Accounts; Land Law; Trusts; Criminal Law and Practice (FLK 2).²³³

Professional conduct and ethics are assessed pervasively across the above two assessments. However, professional legal ethics, in relation to the LPC and SQE 1, concern knowledge and application of professional rules. This approach suffers from various limitations. First, ethics are reduced to a set of rules, which risks giving rise to 'unethics...the careful delineation of precisely how far the lawyer can go without disbarment, with copious suggestions on how to do the things lawyers ought not to do'.²³⁴ Second, there is also the possibility that restricting ethics to rules deprives lawyers of ethical judgements.²³⁵ Third, professional legal ethics do not equip future solicitors with the necessary conceptual tools to resolve morally controversial issues, such as where a lawyer 'has chosen to accept a brief to prosecute on behalf of the state and for an executive which is undermining democracy and the rule of law'.²³⁶ Fourth, unlike

²³² Boon (n 147) 3.

²³³ Solicitors Regulation Authority, 'SQE1 assessment specification' <<https://sqa.sra.org.uk/exam-arrangements/assessment-information/sqe1-assessment-specification>> accessed 22 February 2022.

²³⁴ Deborah Rhode, *Access to Justice* (Oxford University Press 2004), 34.

²³⁵ Herring (n 77) 113.

²³⁶ Baroness Helena Kennedy QC quoted in Jemma Slingo, 'In focus: Should City firms cut ties with fossil fuel giants?' (27th August 2021) *The Law Society Gazette* <<https://www.lawgazette.co.uk/news-focus/in-focus-should-city-firms-cut-ties-with-fossil-fuel-giants/5109612.article>> accessed 25 February 2022.

regulatory bodies, law teachers, are more likely to encourage their students to reflect upon and articulate different perspectives.²³⁷

According to the SRA, ‘Candidates will be tested on the law as it stands at that date. They will not be tested on the development of the law’.²³⁸ This factual approach does not equip future solicitors to address normative questions such as ‘what is good law?’. This is a serious omission because evaluation in terms of the law’s goodness or badness involves judging it by reference to some standard which the law aspires to achieve.²³⁹ In other words, the SQE appears to promote a ‘mechanical’²⁴⁰ approach to legal practice. [8] A pedagogy grounded in predominantly doctrinal approach risks producing solicitors who are trained to ‘solve routine problems within routine procedures’.²⁴¹ Thus, they are not trained to critically reflect on complex institutions which lawyering presupposes.²⁴²

As stated previously, SQE 1 is a single best answer MCQ assessment. According to Mason this ‘embodies a thoroughly impoverished theory of law’, which he labels ‘Bleak Legal Realism’.²⁴³ Legal Realism is a reference to an influential group of American legal theorist in the early decades of the 20th century.²⁴⁴ The realists were sceptical about the extent to which rules and facts represent the law. The former is based on the assumption that rules do not play a determinative role in judicial decision-making. The latter is concerned with the uncovering the unconscious forces affecting the discovery of the facts of a given case.²⁴⁵ The crux of Mason’s argument is that legal propositions cannot be reduced to true’ or ‘false’ in a simplistic

²³⁷ Alice Wooley, ‘Intuition and theory in legal ethics teaching’ (2012) 9 University of St Thomas Law Journal 285.

²³⁸ Solicitors Regulation Authority, ‘SQE1 assessment specification’ (n 233).

²³⁹ Lon L Fuller, *The Morality of Law* (Yale University Press 1964).

²⁴⁰ Rosco Pound, ‘Mechanical Jurisprudence’ (1908) 8(8) Columbia Law Review 605.

²⁴¹ Stephen Holmes, ‘Can Foreign Aid Promote the Rule of Law’ (1999) 8(4) East European Constitutional Review 68, 71.

²⁴² Ibid 71.

²⁴³ Luke Mason, ‘SQEezing the jurisprudence out of the SRA’s super exam: the SQE’s Bleak Legal Realism and the rejection of law’s multimodal truth’ (2018) 52(4) The Law Teacher 409, 410.

²⁴⁴ Oliver Wendel Holmes Jr, ‘The Path of the Law’ (1897) 10 Harvard Law Review 457; Pound, ‘Law in Books and Law in Action’ (n 57); Jerome Frank, *Law and the Modern Mind* (Brentano’s 1930); Karl N Lewellyn, ‘Some Realism about Realism: Responding to Dean Pound’ (1931) 44 Harvard Law Review 1222.

²⁴⁵ Frank, *Law and the Modern Mind* (n 244).

manner, which is what is required by the MCQ assessment.²⁴⁶ Consequently, SQE 1 reduces legal knowledge to the ability to predict adjudicatory outcomes.²⁴⁷ However, it is the selection of an answer by the candidate which is the prediction: a prediction of someone else's adjudication in relation to the relevant question.²⁴⁸

Similar to the legal positivists, legal realists were of the opinion that 'the law as it is' must not be confused with the normative questions of what 'the law ought to be'.²⁴⁹ However, for legal realists such as Llewellyn, the separation between law and morality is a temporary divorce.²⁵⁰ In other words, at the initial stages of the inquiry, the realists keep separate what the 'courts are doing' from 'what the courts ought to do'.²⁵¹ On discovering that the courts are in fact engaged in law-making, the realists combine law with morality.²⁵² SQE 1 does not entail any normative analysis. Incorporating Llewellyn's temporary separation between law and morality can enhance the pedagogy of the SQE by directing candidates to first locate the relevant rules and then engage in a normative analysis of those rules. [1] [2]

In relation to the selection of a single best answer, the SQE appears similar to Dworkin's statement in *Law's Empire*: 'In most hard cases there are right answers to be hunted by reason and imagination'.²⁵³ For Dworkin, adjudication yields right answers to questions of law. Dworkin's thesis on adjudication shares some similarities with natural law theories, such as Fuller's procedural natural law theory,²⁵⁴ in that Dworkin asserted a necessary connection between law and morality. Unlike SQE 1, Dworkin's thesis is that the judicial task is not mechanical but creative. Dworkin compares the judge to a chain novelist who is tasked with continuing an ongoing story by interpreting previous chapters while at the same time seeking to make the novel the best it can be.²⁵⁵ Such a theory is constructive because it seeks

²⁴⁶ Mason (n 243) 410.

²⁴⁷ Ibid.

²⁴⁸ Ibid 422.

²⁴⁹ Suri Ratnapala, *Jurisprudence* (3rd edn, Cambridge University Press 2020), 112.

²⁵⁰ Karl Llewellyn, *Jurisprudence: realism in theory and practice* (University of Chicago Press 1962), 55.

²⁵¹ Ibid.

²⁵² Ratnapala (n 249) 120.

²⁵³ Ronald Dworkin, *Law's Empire* (Belknap Press 1986), viii-ix.

²⁵⁴ Fuller (n 239).

²⁵⁵ Dworkin, *Law's Empire* (n 253) 228-238.

to discover the purpose of the author in writing the book and provide the best account possible. Similarly, the judge's duty is to give an interpretation of the law which maintains the integrity of the law in that community.²⁵⁶ SQE 1 does not appear to provide any room for a constructivist interpretation, nor does it equip students to deal with hard cases, whether in relation to the law or legal ethics. The following section will examine the extent to which CLE can address the limitations of the traditional route and those of SQE 1.

5. Clinical legal education

Clinical programmes, in one form or another, are found in most law schools in England and Wales.²⁵⁷ Some clinics are intra-curricular while others are extra-curricular.²⁵⁸ CLE is a valuable methodology because it can provide a teaching environment where '[t]heory and practice would...constantly interlace' and 'students would learn to observe the true relation between the contents of uppercourt opinions and the work of practicing lawyers and courts'.²⁵⁹ Therefore, CLE can bridge the theory-practice divide by incorporating theory²⁶⁰ into experiential learning. This section examines the extent to which philosophy, through CLE, can meet the aims of the law school.

5.1 Professional identity and ethical legal practice

Philosophy can enhance professional identity and legal ethics beyond the professional codes of conduct. First, ethical theories, whether Aristotlian, Kantian, or utilitarian, are concerned with moral development. [3] [9] Second, the SRA's Standards and Regulations contain provisions which are open textured, and thereby, provide solicitors with a wide discretion the exercise of which will require ethical judgement.²⁶¹ For example, the SRA's Principle 7 specifies that solicitors must act in the best interest of their clients. However, no further guidance is provided

²⁵⁶ Ibid 95-96.

²⁵⁷ For a history of the development of clinical legal education in Britain, see Giddings et al (n 82) 6.

²⁵⁸ Nicolson, 'Legal Education or Community Service?' (n 26).

²⁵⁹ Jerome Frank, 'A Plea for Lawyer-Schools' (1947) 56 Yale Law Journal 1303, 1317.

²⁶⁰ For a discussion on the value of theory in CLE, see Mutaz M. Qafisheh, 'Clinicalism: an emerging theory in legal pedagogy' (2020) 11(4) Transnational Legal Theory 549; Hugh McFaul, 'Does Clinical Legal Education Need Theory?' (2020) 7(2) Asian Journal of Legal Education 152.

²⁶¹ See O'Dair (n 14) 16.

in relation to who decides what is in the best interest of the client. According to Boon and Levin, the ‘modern view’ is that lawyers should treat their clients ‘as individuals and allow them to reach their own decision’.²⁶² This suggests a holistic approach to legal practice which is underpinned by a commitment to personal autonomy. However, there is no universally accepted definition of autonomy. A general description of personal autonomy is provided by both Raz and Rawls. According to Raz:

[T]he ideal of personal autonomy...holds the free choice of goals and relations as an essential ingredient of individual well-being. The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.²⁶³

For Raz, personal autonomy is concerned with ‘the successful pursuits of self-chosen goals and relationships’ rather than the specific content of those goals.²⁶⁴ Rawls, on the other hand, regards personal autonomy to be associated with Kantian empirical practical reason, which is represented by a person’s rational deliberations.²⁶⁵ This can be contrasted with pure practical reason which consists of constraints that impact on one’s rational deliberations.²⁶⁶ Rawls’ conception of personal autonomy involves:

[T]he adoption of effective means to ends; the balancing of final ends by their significance for our plan of life as a whole and by the extent to which these ends cohere with and support each other; and finally, the assigning of a greater weight to the more likely consequence.²⁶⁷

²⁶² Andrew Boon and Jennifer Levin, *The Ethics and Conduct of Lawyers in England and Wales* (Hart, 2008), 183.

²⁶³ Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986), 369.

²⁶⁴ *Ibid* 370.

²⁶⁵ John Rawls, ‘Kantian Constructivism in Moral Theory’ (1980) 77(9) *The Journal of Philosophy* 515, 532.

²⁶⁶ *Ibid*.

²⁶⁷ *Ibid* 529.

Rawls' formulation of personal autonomy involves deliberative rationality,²⁶⁸ and like Raz, he prioritises the process of deliberation over the outcome.²⁶⁹ Thus, philosophy can encourage CLE students to engage in a deliberative process in relation to the content of the codes of professional conduct. Applying the various provisions of the codes of conduct, without reference to normative concepts and theories, may result in a reductivism and mechanistic application of the codes of conduct.

Although theorists of personal autonomy, such as Dworkin,²⁷⁰ Feinberg,²⁷¹ and Raz disagree on the conception of personal autonomy, they appear to be unified in their agreement that personal autonomy is a distinctive concept from moral autonomy. An autonomous person, in the moral sense, is guided by a 'universalized concern for the ends of all rational persons' rather than merely pursuing a conception of their own happiness'.²⁷² My research has focused on Kantian autonomy - 'the ground of the dignity of human nature and of every rational nature',²⁷³ - I have applied Kant's CI [3] [9] and his formula of autonomy to developing reflective practice in CLE. [4] I have also argued that the lawyer must not impose their own sense of morality in cases where the client's instructions may conflict with the moral law [9]. Thus, the role of the lawyer is to promote the client's personal autonomy and not to place themselves as the primary decision-maker. The value of incorporating Kant's moral autonomy in CLE, is that it provides an opportunity for students to reflect on both the *process* of deliberation as well as the *outcome*. CLE, however, should provide students with the opportunity to consider the various conceptions of autonomy when reflecting on whether they are acting, or have acted, in the best interest of their client. This highlights my teaching approach which seeks to avoid inculcating students in a particular theory or to show bias

²⁶⁸ Robert S Taylor, 'Kantian Personal Autonomy' (2005) 33(5) *Political Theory* 602, 605.

²⁶⁹ Taylor (n 268) 605.

²⁷⁰ Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 1988).

²⁷¹ Joel Feinberg, 'Autonomy' in John Christman and Joel Anderson (eds), *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge University Press 2005), 27–53.

²⁷² Jeremy Waldron, 'Moral Autonomy and Personal Autonomy' in John Christman and Joel Anderson (eds), *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge University Press 2005), 307.

²⁷³ Kant, *Groundwork of the Metaphysics* (n 128) [4: 436].

towards a specific philosophical term, and to demonstrate how philosophy can promote reflection in CLE and legal practice.

5.2 Human flourishing

Echoing Bradney's argument regarding the importance of a flourishing-centric education, McFaul applies the 'capability approach' to CLE on the grounds that this approach 'emphasises the fundamental aim of education is to promote human flourishing, which requires the development of practical reason and not just the acquisition of economically relevant skills'.²⁷⁴ The capabilities approach, which is associated with the work of Nussbaum and Sen, is an alternative to Rawls' theory of justice.²⁷⁵ [7] For Nussbaum, there are ten²⁷⁶ central human entitlements which should be respected and implemented by the state 'as a bare minimum of what respect for human dignity requires'.²⁷⁷ Respect and dignity are philosophically complex terms, which I have addressed in my work. [3] [4] [9] Since flourishing is associated with Aristotelian ethics and human dignity is found in Kantian ethics and human rights theories, it follows that teaching human flourishing involves at a minimum these three philosophical theories.²⁷⁸ [4] [5] [6]

Nussbaum's list of human entitlements is similar to Finnis' basic goods of human flourishing.²⁷⁹ According to Nussbaum, the list is 'a species of human rights approach' and is, therefore, 'fully universal'.²⁸⁰ Thus, Nussbaum's aim is to globalise the theory of justice.²⁸¹ Inspired by Nussbaum's work, I have incorporated human rights education into CLE in order to develop a transnational approach to law clinic collaborations and legal practice. [5] [6] [9] Teaching students theories of rights, Kant, and Rawls is not limited to CLE but also has

²⁷⁴ Hugh McFaul, 'Towards a capability approach in Clinical Legal Education' in Madhloom and McFaul (n 24) 127.

²⁷⁵ Nussbaum and Sen (n 138).

²⁷⁶ Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press 2011), 34.

²⁷⁷ Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press 2007), 70.

²⁷⁸ See John Kleinig and Nicholas G Evans, 'Human Flourishing, Human Dignity, and Human Rights' (2013) 32(5) *Law and Philosophy* 539.

²⁷⁹ Finnis (n 150).

²⁸⁰ Nussbaum, *Frontiers of Justice* (n 277) 78.

²⁸¹ Michael Freeman, *Lloyd's Introduction to Jurisprudence* (9th ed, Sweet & Maxwell 2016), 500.

relevance for practice beyond CLE. [1] [2] [9] Thus, teaching philosophy through CLE promotes a normative approach to legal practice.²⁸²

5.3 *Cosmopolitan legal education*

There are four advantages in applying a moral cosmopolitan approach into CLE. First, Kantian cosmopolitanism recognises that every person is an end in themselves. Moral cosmopolitanism also describes a willingness to act against injustices.²⁸³ [6] [8] A cosmopolitan seeks to aid those who are suffering, regardless of their geographical proximity or defining characteristics. Moral cosmopolitanism is beneficial to CLE because it extends the scope of the student's duties beyond those owed to their clients and persons within their jurisdiction. [2] [4] [9] Thus, applying moral cosmopolitanism can widen the scope of a liberal moral education.²⁸⁴

Second, cosmopolitanism ideals extend CLE beyond national laws by encouraging students to reflect on the impact on global issues such as unfair immigration policies, [4] [8] world poverty,²⁸⁵ and climate change.²⁸⁶ The version of cosmopolitan I use in my teaching recognises the different ways in which people across the world organise their lives. However, it also accepts that cross-cultural dialogue is possible. Consequently, I have developed a moral cosmopolitan framework which is underpinned by the Universal Declaration of Human Rights (UDHR) and Kant's *sensus communis*. [5] [6] [9] This framework is intended to promote the global CLE movement²⁸⁷ through transnational collaborations.

Third, by being mindful of duties towards others, irrespective of where they are in the world, students can develop moral maturity through of the acquisition of a number of soft skills such as a sense of justice, compassion, and sensitivity for human suffering.²⁸⁸ Cosmopolitan

²⁸² Adrian Evans, 'Normative Attractions to Law and Their Recipe for Accountability and Self-Assessment in Justice Education' in Frank S (n 82), 355-364.

²⁸³ Michael S Merry and Doret J de Ruyter, 'The relevance of cosmopolitanism for moral education' (2011) 40(1) *Journal of Moral Education* 1, 2.

²⁸⁴ *Ibid* 3.

²⁸⁵ Thomas Pogge, *World Poverty and Human Rights* (2nd ed, Polity Press 2002), 174-201.

²⁸⁶ Kostas Koukouzelis, 'Climate Change Social Movements and Cosmopolitanism' (2017) 14(5) *Globalizations* 746.

²⁸⁷ Richard J Wilson, *The Global Evolution of Clinical Legal Education: More than a Method* (Cambridge University Press 2018).

²⁸⁸ Andrew Linklater, 'Distant Suffering and Cosmopolitan Obligation'(2007) 44 *International Politics* 19.

traits, however, are not confined to CLE but can also serve to promote well-being in professional practice:

[A] positive personal identity can support generosity towards others as well as capacity for empathy and compassion; a positive role identity in terms of feelings of shared competence and expertise can support respect and collegiality; and a commitment to the shared values of lawyering (social identity) can create bonds and connections of a higher order.²⁸⁹

For Schopenhauer, true moral motivation is rooted in one's feelings of compassion for the suffering and happiness of others.²⁹⁰ The etymology of the term 'compassion' is derived from the Latin verb *pati* denoting 'to suffer' or 'to endure' and the prefix *cum* (with), meaning 'to suffer alongside' or 'to bear with'. Feelings of compassion are psychologically possible because of a person's innate capacity to identify with others, and 'in the case of his woe as such, I suffer directly with him, I feel *his* woe just as I ordinarily feel only my own; and likewise, I directly desire his weal in the same way I otherwise desire only my own'.²⁹¹ Identifying with others through compassion, may provide a motive for not inflicting harm on others. Consequently, the first principle of justice for Schopenhauer is 'injure no one'.²⁹² This is a negative duty. A higher degree of experience of compassion may motivate CLE students to go beyond the duties of justice by actively assisting those who are facing injustices.²⁹³ Active assistance includes engaging in law reform and global pro bono activities.²⁹⁴ [6] Moreover, having the capacity to identify with others, 'students can develop an awareness of the impact of the law on a client's autonomy'.²⁹⁵ [2] [3] This capacity to identify with the suffering of

²⁸⁹ Rachel Spearing and Rachel Field, 'Well-being and positive professional identity in the legal profession: A snapshot of the UK Bar' in Caroline Strevens and Rachael Field (eds), *Educating for Well-Being in Law: Positive Professional Identities and Practice* (Routledge 2020), 51.

²⁹⁰ Arthur Schopenhauer, *On the Basis of Morality* (trans E F J Payne, Hackett 1995), 143.

²⁹¹ *Ibid.* Emphasis in original.

²⁹² *Ibid.* 149.

²⁹³ Kenneth Pahel, 'Moral Motivation' (1976) 5(3) *Journal of Moral Education* 223, 228.

²⁹⁴ Omar Madhloom and Irene Antonopoulos, 'Clinical Legal Education and Human Rights Values: A Universal Pro Forma for Law Clinics' (2021) 9(1) *Asian Journal of Legal Education* 23, 26.

²⁹⁵ *Ibid.* 7.

others can create a sense of solidarity²⁹⁶ with those whose dignity is violated. The concept of dignity is found in the Preamble to the UDHR: ‘Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’. Human rights education is, therefore, a necessary element in relation to students’ moral development. Gray argues for a human rights approach in relation to access to justice, which decentralises duties from the state so that other actors, such as law clinics, might also hold responsibilities to promote the rights of others.²⁹⁷

The fourth advantage relates to the concept of social justice,²⁹⁸ which can be divided into two aims: assisting those who lack access to justice so that they are able to uphold their claim rights; and social justice underpinned by cosmopolitan principles of distributive justice. The latter is limited to humanitarian assistance but involves clinics engaging, individually or collaboratively, in law reform to address global institutional inequalities.²⁹⁹ This aspirational aim requires theories such as distributive justice, cosmopolitanism, and human rights theories. Philosophy can, therefore, develop CLE in a manner which educates students for world citizenship by providing an opportunity, through experiential education, to engage in law and social justice issues beyond their jurisdiction.

6. Conclusion

Legal education and training, in England and Wales, whether through the traditional pathway or the SQE route, suffers from a number of limitations which impact on achieving the aims of the law school. Firstly, the theory-practice divide can result in students spending the greater part of their legal education discussing and applying law as if it were an autonomous social institution disconnected from the complex and ambiguous social contexts within which it is

²⁹⁶ Pedro Ortega Ruiz and Ramón Mínguez, ‘Global Inequality and the Need for Compassion: Issues in moral and political education’ (2001) 30(2) *Journal of Moral Education* 155, 155.

²⁹⁷ Christopher F Gray, ‘The University of the Gambia Law Clinic: The role of the university law clinic in securing access to justice from the perspective of human rights duties’ in Madhloom and McFaul (n 24), 185.

²⁹⁸ Wizner, ‘Is Social Justice Still Relevant?’ (n 21) 345.

²⁹⁹ See, Kok-Chor Tan, ‘The need for cosmopolitan justice’ in Kok-Chor Tan, *Justice without Borders: Cosmopolitanism, Nationalism, and Patriotism* (Cambridge University Press 2004), 19-39; Kwame Anthony Appiah, ‘Education for Global Citizenship’ (2008) 107(1) *Yearbook of the National Society for the Study of Education* 83; Gillian Brock, *Global Justice: A Cosmopolitan Account* (Oxford University Press 2009); Aysel Doğan, ‘Cosmopolitan Principles of Distributive Justice’ (2010) 9(2) *Prolegomena* 243.

located.³⁰⁰ Second, due to the influence of legal positivism, students and future practitioners may view law as a ‘one-way projection of authority, originating with government and imposing itself upon the citizen’.³⁰¹ This approach, which neglects the need for cooperation between officials and the rest of society,³⁰² can lead to students and lawyers mechanically applying rules without reference to extra-legal considerations. Thirdly, focusing on the teaching of rules may result in paying insufficient attention to moral education, a necessary element in human flourishing. Fourth, while legal rules and professional legal ethics are essential elements in legal education and training, ethics is also an important dimension of law and ‘its study has a legitimate role to play in a good legal education’.³⁰³ What counts as ‘good legal education’ is a matter for debate, but for the purposes of this thesis commentary, it consists of: professional identity and ethical legal practice; human flourishing; and cosmopolitan education. Both the traditional route and the SQE do not adequately address these elements.

In relation to professional identity and ethical legal practice, the role of lawyers is not merely to apply law to existing legal problems. According to Sunstein ‘[l]aw is a normative enterprise; it is inevitably philosophical’,³⁰⁴ and for Hutchinson, law is ‘applied politics’.³⁰⁵ Therefore, legal education and training should not be taught in a manner that minimises the role of philosophical theories. Philosophy can inform and promote professional values such as empathy, neutrality and independence.³⁰⁶ [4] [9] In relation to empathy, understanding what is good for others requires the lawyer being able to understand their client’s perspective.³⁰⁷ It does not entail the lawyer applying their own views or values. Professional legal practice, should not be confined to the ‘hired gun’ metaphor. Instead, lawyers ought to be mindful of duties towards third parties and the environment. [9]

³⁰⁰ Robert Granfield, ‘The Politics of Decontextualized Knowledge: Bringing Context into Ethics Instruction in Law School’ in Kim Economides (ed), *Ethical Challenges to Legal Education & Conduct* (Hart Publishing 1998), 302.

³⁰¹ Fuller (n 239) 204.

³⁰² Ibid 39.

³⁰³ Hutchinson (n 199) 301.

³⁰⁴ Cass R Sunstein, ‘On Legal Theory and Legal Practice’ (1995) 37 *Nomos* 267, 267.

³⁰⁵ Hutchinson (n 199) 301.

³⁰⁶ Boon (n 61) 31.

³⁰⁷ Ibid 33.

Philosophical theories, such as deontology, virtue ethics, and human rights, can promote moral education and provide students and practitioners with the conceptual tools to reflect on their conduct and to determine what type of person they wish to be. For Tomain:

The Good Lawyer is about being a lawyer, and its thesis is astonishingly simple. being a lawyer is not unconnected with being a person...Further, being a good person does not preclude you from being a good lawyer – if anything, lawyers should be “more moral”.³⁰⁸

Thus, philosophical theories, such as virtue ethics and utilitarianism, and concepts, such as autonomy and dignity, can promote deliberation. Moreover, philosophy can enhance legal education and training by providing students with an opportunity to develop a cosmopolitan ethos. In terms of the legal profession, cosmopolitanism can promote the ethics of pro bono and professional conduct. [3] [9] Moral cosmopolitanism and human rights education, through CLE, can be used as a platform for engaging students in transnational legal practice.³⁰⁹ [6] [9]

Philosophy can also provide an understanding of the content of the professional codes, which, according to Nicolson, ‘is essential because of the central role codes play in professional legal ethics generally and that of the English and Welsh legal profession in particular’.³¹⁰ Philosophy can supplement the professional codes of conduct by introducing cosmopolitan duties and thereby contribute to the ethics of transnational legal practice. [3] [4] [8] [9] Thus, integrating philosophical theories in CLE can contribute to the acquisition of soft and hard skills, continuing professional development through reflective practice, and moral education.

This thesis commentary and the supporting published work have demonstrated the value of teaching future lawyers philosophy through CLE. The aim has been to demonstrate that teaching law students a variety of philosophical approaches promotes reasoned debate and an awareness of different views. Although CLE is predominantly concerned with social justice

³⁰⁸ Joseph P Tomain, ‘The legal heresiarchs: Liban’s *The Good Lawyer* (1984) 9(3) American Bar Foundation Review 693, 694.Emphasis in original.

³⁰⁹ Richard L Abel, ‘Transnational Law Practice’ (1994) 44 Case Western Reserve Law Review 737; Yves Dezalay and Bryant G Garth (eds), *Lawyers and the Construction of Transnational Justice* (Routledge 2012).

³¹⁰ Nicolson, ‘Mapping Professional Legal Ethics’ (n 60) 52.

and providing legal assistance to indigent and marginalised individuals and groups, this should not be a barrier to a teaching various philosophical concepts and theories. For example, teaching students Rawls' theory of distributive justice should also involve contrasting it with alternatives such as libertarian theories and utilitarianism.

Teaching philosophical theories and concepts, through CLE, can bridge the theory practice divide and promote the aims of both the university and the law school. Philosophy not only promotes reflective practice, but also can instil in students feelings such as compassion and empathy. I have sought through my published work to develop the scope of CLE so that it can address the limitations of the positivist approach in legal education and professional legal ethics. The latter is demonstrated by developing cause lawyering [4] [8] and incorporating empathy and compassion into the professional codes of conduct. [9] I have also sought to demonstrate how philosophy can benefit practitioners in terms of what the law ought to be in bioethics and the criminal law. [1] [2] In relation to the latter, I have argued what the law of non-consensual sexual offences ought to be using philosophical terms use such autonomy, deception, and lying. In sum, this thesis commentary has engaged in an analysis of the benefits of applying philosophical concepts and theories in legal education, professional legal ethics, transnational legal practice, and law reform.

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Biopolitics and the Solicitors Qualifying Examination

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Introduction

The Solicitors Regulatory Authority (SRA) has modified the route to qualifying as a solicitor, in England and Wales, through the Solicitors Qualifying Examination (SQE).³¹¹ This chapter examines the pedagogy of the SQE, namely SQE stage 1 (Functioning Legal Knowledge),³¹² through the lens of biopolitics. In general terms, biopolitics is a form of politics which prioritises the production and management of life.³¹³ It alludes to the fact that life can be manipulated and owned. In social theory, biopolitics is used to describe the institutions, bodies of knowledge, and administrative techniques used for ‘measuring, regulating and controlling people and behaviour in order to ensure that states get the most out of their human resources’.³¹⁴ Applying biopolitics and Freire’s theory of education, this chapter argues that the SQE’s pedagogy not only promotes lawyer amorality but also limits solicitors to the conventional lawyering model whereby lawyers act as agents for their clients in exchange for a fee. A

³¹¹ The SQE will be introduced on 1st September 2021.

³¹² Functioning legal knowledge requires candidates to ‘apply their knowledge of the law to demonstrate the competences required to the level of a newly qualified solicitor’.

³¹³ Saltman (2018), p 50.

³¹⁴ Danaher et al (2008), p 80.

supplemental egalitarian pedagogical model³¹⁵ is proposed which enables future solicitors to challenge the dominant hegemony and address societal inequalities.

Foucault is credited with introducing the concept of biopolitics in his book *The History of Sexuality*,³¹⁶ where he argues that the economic and political regulation of society, in addition to ‘discipline’ of the body, plays a key role in power relations within the modern nation state. Foucault applies analytical and historical evaluation of the various mechanisms of power and suggests that, since antiquity, new mechanisms of ‘biopower’³¹⁷ have emerged in Western societies.³¹⁸ This chapter examines biopolitics as a pedagogic power in solicitor education and training, in England and Wales, in order to address two key questions in relation to the SQE: whether the SQE empowers future solicitors with the necessary conceptual tools to engage in critical reflection, namely examining issues of power and control,³¹⁹ of juridic institutions; and does the SQE’s pedagogy promote justice?. For present purposes, justice is conceived as the ‘confluence of law and morality’,³²⁰ because it enhances analysis of the law through moral considerations rather than a purely scientific/positivist approach.³²¹ Moral education is useful for evaluating the law according to a set of principles.³²² There are three reasons for incorporating moral discourse into legal education and training. First, lawyers are expected not to merely act competently but also morally.³²³ Second, the law curriculum ought to include

³¹⁵ Giroux (2010).

³¹⁶ Foucault (1990)

³¹⁷ Foucault uses the terms ‘biopower’ and ‘biopolitics’ interchangeably.

³¹⁸ Foucault (1990), p 135.

³¹⁹ Brookfield (2009) p 298.

³²⁰ Schehr (2009) p 13.

³²¹ Madhloom (2019).

³²² See Hart (2012); Fuller (1969); Finnis (1980); Dworkin (1986).

³²³ Swygert (1989) p 807.

moral education in order to equip future lawyers with the skills required for ‘good moral counsel’.³²⁴ Third, moral education, which includes legal ethics, facilitates the evaluation of not just law, policies, and principles, but also values and the professional codes of conduct.³²⁵ As members of the legal profession, solicitors owe a duty to the common good which requires them to be more than ‘passive servants of the state, of capital, of firm, the client, or even the immediate general public’.³²⁶ Lawyers in a liberal state are a vital institution for ‘changing rules and norms, for resisting the use of legalized violence on individuals, and for encouraging trust in the system’.³²⁷ Solicitors, and lawyers in general, also have an obligation to advance the common good of the community.³²⁸ To do so, requires their education and training to equip them with the ‘deep learning and critical thinking’.³²⁹ The following section outlines the pedagogy of the SQE.

The Solicitors Qualifying Examination

In April 2017, the SRA announced that it would introduce an independent assessment, the SQE, to ensure that ‘all solicitors meet consistent, high standards at the point of entry to the profession’.³³⁰ The SQE replaces the existing system which requires prospective solicitors to successfully complete two stages of training; the academic stage and the vocational stage. There are two options to completing the academic stage; the law-graduate route, and one for non-law graduates. The former involves completing a qualifying law degree, while the latter is

³²⁴ Swygert (1989) p 814.

³²⁵ Janoff (1991); Pearce (1998); Nicolson (2006); Ferris (2015); Madhloom (2022).

³²⁶ Freidson (2001), p 217.

³²⁷ Boon (2001), p 156.

³²⁸ Demack (2003), p 27.

³²⁹ Morrison (2018).

³³⁰ Solicitors Regulation Authority ‘SRA announces new solicitors assessment to guarantee high standards’ <https://www.sra.org.uk/sra/news/press/2017/sqe-ensure-high-consistent-standards/>

achieved through the Common Professional Examination (CPE) or Graduate Diploma in Law (GDL). The academic stage is followed by the vocational part which consists of the Legal Practice Course (LPC) and a two-year period of recognised training (training contract) carried out in a law firm or in-house legal department in an organisation. Replacing these stages,³³¹ the SQE will have four elements which candidates must complete to qualify as solicitors:

- have passed SQE stages 1 and 2 to demonstrate their knowledge and skills;
- have been awarded a degree or an equivalent qualification, or have gained *equivalent experience*;
- have completed at least two years of qualifying legal work experience; and
- be of satisfactory character and suitability.³³²

SQE stage 1 replaces the academic stage, while SQE stage 2 (Practical Legal Skills), which tests skills such as client interviewing, drafting, and advocacy, replaces the LPC. Candidates will still be required to complete a period of pre-qualification legal work experience. The SQE's Qualifying Work Experience (QWE) can be gained within one role or placement or within several (provided it is in no more than four organisations).³³³

³³¹ Students will have until 31 December 2032 to qualify under the previous route.

³³² Solicitors Regulation Authority 'SRA announces new solicitors assessment to guarantee high standards' <https://www.sra.org.uk/sra/news/press/2017/sqe-ensure-high-consistent-standards/>

³³³ Solicitors Regulation Authority 'Qualifying work experience for employers' <https://www.sra.org.uk/trainees/qualifying-work-experience/qualifying-work-experience-employers/>

SQE 1 is a computer-based ‘single best answer’ multiple choice questions (MCQ) test.³³⁴ Each single ‘best answer’ question is followed by five possible answers.³³⁵ However, an examination of the SRA’s sample MCQs reveals that most questions are in fact single correct answer. Ethics, namely professional conduct, are examined pervasively. Candidates are required to apply legal principles and rules, at the level required of a newly qualified solicitor, to realistic client-based and ethical problems and situations. The focus, therefore, is on the conventional lawyering model and not on equipping candidates to engage in law reform. This is evidenced by the fact that in relation to the application and analysis of legal authorities, the SRA has confirmed that ‘Candidates will be tested on the law as it stands at the date of the assessment’ nor will they be assessed on the development of the law.³³⁶

SQE 1’s pedagogy suffers from three fundamental limitations which can hinder the development of future solicitors in relation to law reform. First, apart from limited circumstances where candidates need to demonstrate knowledge and application of primary sources of law, they will not be assessed on legal skills such as recalling specific case names, or citing statutory or regulatory authorities.³³⁷ Second, they will not be tested on the development of the law.³³⁸ Candidates will be only tested on settled law and not what the law *ought* to be. By limiting functioning legal knowledge to the application of settled law, namely ‘legal principles and rules’, the SQE adopts a positivist approach to legal training. This not only gives future solicitors the false impression that law is autonomous but fails to provide them with conceptual

³³⁴ Solicitors Regulation Authority ‘Assessment information’ <https://www.sra.org.uk/sra/policy/solicitors-qualifying-examination/sqe1-functioning-legal-knowledge-assessment-specification/>

³³⁵ For critique of the SRA’s MCQ assessment method, see Mason (2018); Morrison (2018).

³³⁶ Solicitors Regulation Authority ‘Assessment information’ <https://www.sra.org.uk/sra/policy/solicitors-qualifying-examination/sqe1-functioning-legal-knowledge-assessment-specification/>

³³⁷ Solicitors Regulation Authority ‘Assessment information’ <https://www.sra.org.uk/sra/policy/solicitors-qualifying-examination/sqe1-functioning-legal-knowledge-assessment-specification/>

³³⁸ Solicitors Regulation Authority ‘Assessment information’ <https://www.sra.org.uk/sra/policy/solicitors-qualifying-examination/sqe1-functioning-legal-knowledge-assessment-specification/>

tools, such as moral and political theories, to analyse and critique the law.³³⁹ The SQE focuses on ‘what the law is?’, which is a question of fact, and ignores the normative question ‘what is good law?’. To avoid this ‘thin’ notion of legal education, it is important that the SQE, and legal education generally, ‘moves beyond the merely descriptive towards the explanatory and analytical’.³⁴⁰ Third, excluded from the definition of functioning legal knowledge are secondary sources of law. This is a significant omission for a number of reasons. Secondary sources reflect the prevailing opinion on how courts interpret primary sources of law. They are authoritative because courts have been known to rely on secondary sources.³⁴¹ Secondary sources such as academic peer-reviewed articles highlight the potential implications of the law and suggest avenues for reform. The SQE stage 1, by omitting analysis of primary and secondary sources, focusing on a doctrinal approach to legal education, fails to equip students to engage in policy reform/making and to critically reflect on juridic institutions. The positivist and primary sources-centric pedagogy of the SQE gives rise to the risk that future solicitors, namely those who have not completed a law degree and as a result have not had the opportunity to engage in critique of the law and will be ill-equipped to engage in policymaking and law reform. The biopolitics of the SQE will be examined in the next section.

Biopolitics and the SQE

Lemke suggests three essential dimensions of biopolitics which are useful in analysing the biopolitics of the SQE. First, biopolitics entails ‘a systematic knowledge of “life” and of “living beings”’.³⁴² The SQE’s uniform curriculum and a standardised form of testing can devalue aspects of an individual. Such methods of assessment focus on types of experience that can be

³³⁹ O’Donovan (2014) p 140.

³⁴⁰ Guth and Harvey (2018), p 353.

³⁴¹ *Gapper v Avon & Somerset Constabulary* [1998] EWCA Civ 1146 (2 July 1998) citing Professor John Smith; *R v Woollin* [1998] UKHL 28; [1999] AC 82 citing John Smith, Glanville Williams, and Andrew Ashworth; *R v A* [2001] UKHL 25 citing Neil Kibble at [29]; *R v Golds* [2016] UKSC 61 citing Professor Mackay at [48]. *R v Ali Syed* [2018] EWCA Crim 2809 citing David Ormerod at [89].

³⁴² Lemke (2011), p 119.

empirically measured and quantified.³⁴³ In other words, the SQE focuses on characteristics of the individual which can be controlled. Thus, what constitutes a ‘good’ solicitor is not one who can apply reasoned legal and political analysis or relate claims to truth to historical power struggles,³⁴⁴ but rather, one who successfully completes the SQE and complies with the SRA’s vision of the conventional lawyering model. Second, Lemke argues, ‘the regime of truth cannot be separated from that of power, the question arises of how strategies of power mobilize knowledge of life and how processes of power generate and disseminate forms of knowledge’.³⁴⁵ The ‘truth’ promoted by the SRA is that there is one right answer to a legal question and that law is an autonomous and neutral concept free from political and moral evaluation.³⁴⁶ Lemke’s third dimension of biopolitics involves:

[F]orms of subjectivation, that is, the manner in which subjects are brought to work on themselves, guided by scientific, medical, moral, religious, and other authorities and on the basis of socially accepted arrangements of bodies and sexes.³⁴⁷

Subjectivation is used to assess how the regulation of life processes affect individual and collective actors and gives rise to new forms of identity.³⁴⁸ By focusing on the application of a standardised body of knowledge to resolving a client’s legal issues, the SQE’s pedagogy subjects future solicitors to the ideology of corporate culture which measures success according

³⁴³ Saltman (2018), p 51.

³⁴⁴ Saltman (2018), p 51.

³⁴⁵ Lemke (2011), p 119.

³⁴⁶ Mason (2018).

³⁴⁷ Lemke (2011), p 120.

³⁴⁸ Lemke (2011), p 119.

to billable hours calculated in six-minute increments.³⁴⁹ Therefore, the SQE is a process of knowledge production and a form of subjectivation.

Unlike law schools where teachers interact with students, challenge and motivate them using different pedagogies and teaching methods such as the flipped classroom approach,³⁵⁰ SQE 1 entails using MCQs to assess candidates' knowledge of existing rules and principles. In this sense, the SQE is analogous to Freire's 'banking' concept of education which he equates teachers with bank-clerks 'depositing'³⁵¹ information into students rather than drawing out knowledge from individual students. Thus, minimal responsibility lies with the student other than passively acquiring knowledge through deposits of information. The banking model echoes the SQE's positivist approach which focuses on 'superficial' legal knowledge and learning.³⁵² The banking concept of education regards students as an 'adaptable, manageable being' with limited 'critical consciousness', and thus, unlikely to play a significant role in transforming their world.³⁵³ Through the banking model, the SRA risks turning future solicitors into 'automatons'³⁵⁴ who are educated to accept their role in society without challenging or questioning it. The harm produced by the banking concept of education is the production of 'passive'³⁵⁵ individuals who are adapted and obedient to their world.

Freire's critique of the banking model which turns students into passive, obedient automatons is reminiscent of Llewellyn's description of the first year of law school at Columbia

³⁴⁹ Waller-Davies.

³⁵⁰ McGowan (2012); Butler and Madhloom (2016).

³⁵¹ Freire (1993) p 45.

³⁵² Morrison (2018), p 468.

³⁵³ Freire (1993) p 46.

³⁵⁴ Freire (1993) p 47.

³⁵⁵ Freire (1993) p 49.

University, where the aim is to encourage the student into ‘thinking like a lawyer’.³⁵⁶ He warns students that ‘[t]he hardest job of the first year is to lop off your common sense, to knock your ethics into temporary anaesthesia’.³⁵⁷ Unfortunately, this process of temporary moral numbing continues in today’s law schools and remains a feature of the case method pedagogy.³⁵⁸ Thus, students are led to believe that ‘thinking like a lawyer’ entails subduing their compassion, idealism, and pursuit of truth and justice.³⁵⁹ Llewellyn continues his critique:

You are to acquire ability to think precisely, to analyze coldly, to work within a body of materials that is given, to see, and see only, and manipulate, the machinery of the law. It is not easy to thus to turn human beings into lawyers. Neither is it safe. For a mere legal machine is a social danger.³⁶⁰

The SQE’s pedagogy, as a process of knowledge production, consists of three elements. First, it adopts Freire’s ‘banking’ model where future solicitors are not required to engage in critical analysis and reflection of the law and its social implications but simply to memorise information. Second, it embraces a positivist approach to legal education which is devoid of any moral or political considerations. Third, ‘thinking like a lawyer’ within this positivist approach, which is committed to the separation of law and morals, teaches students to ignore their emotional responses to the case facts, to ignore the consequences of their clients’ actions, and instead to focus on achieving their clients’ objectives. Accordingly, the SRA’s implicit message, through the SQE, is that solicitors should respond to legal, political, and social problems, not as human beings but as ‘legal machines’ devoid of moral considerations. In other

³⁵⁶ Llewellyn (2008) p 107.

³⁵⁷ Llewellyn (2008) p 107.

³⁵⁸ Sullivan et al (2007) p 78.

³⁵⁹ Wizner (1998) p 587.

³⁶⁰ Llewellyn (2008) p107.

words, as legal practitioners, they should not only ignore the moral and political dimensions of the case and focus instead on the ‘legal’ aspects but also the moral implications of their actions.³⁶¹ The next section considers the potential impact of the SQE on legal ethics.

Biopolitics, governmentality and legal ethics

Foucault describes two models of political power: the pre-modern model of juridical power and the modern normalising power.³⁶² In the former, the sovereign had the rights to take the life of those who threatened the order of the State, or to demand subjects surrender their lives in defence of the State. The normalising model, however, is concerned with power over life. In other words, the administration of bodies rather than seizure or negation. Normalising power, according to Foucault, evolved in two ‘basic forms’: discipline and biopower.³⁶³ The former operates on individuals found in institutions such as prisons, schools, and hospitals through the use of surveillance and control aimed at the efficient distribution and use of power in order to increase their ‘usefulness and docility’. Biopower, on the other hand, is aimed at the administration and production of life. While legal education can promote values committed to human rights and social justice,³⁶⁴ the vocationalisation of solicitors training, through the SQE, risks separating solicitors from the social implications of their actions, the consequences of their client’s actions on third parties, and the role of the state. By falsely placing law as a neutral and technical concept, devoid of any moral or political considerations, the SQE risks being viewed by future solicitors as being valuable only for its market application.

³⁶¹ Wizner (1998) p 588.

³⁶² Foucault (1990), p 135-139.

³⁶³ Foucault (1990), p 139.

³⁶⁴ McKeown and Ashford (2018); Antonopoulos and Madhloom (2021).

According to Foucault, the new techniques of government that developed in the modern period were distinct from the traditional forms of juridical governance such as those found in the work of classical legal positivists such as Hobbes,³⁶⁵ Bentham,³⁶⁶ and Austin.³⁶⁷ According to these theorists, in every society sovereign power rests with a definitive person or group and that all laws, which are recognised as such by courts, are to be regarded as the commands of the sovereign. For example, Austin insists on sanctions as a mark of law and a necessary element of the sovereign's command. Austin's view regarding the role of sanctions has been objected to on the ground that it distorts the true character and function of law in a society.³⁶⁸ Sanctions do not explain why law is changed and exaggerate fear.³⁶⁹ Austin's thesis omits the possibility that law may be accepted by the community as binding, irrespective of the threat of sanctions.³⁷⁰ His conception of the sovereign's authority suggests that 'obedience is rendered by one person to another because the former recognises that the latter has a right to obedience'.³⁷¹ This hierarchal subordination between citizens and the sovereign can be contrasted with the willingness to follow a rule or law because it is considered as appropriate to govern conduct between members of 'peer groups'.³⁷²

The argument that the application or threat of sanctions plays a tangential feature of law is found in the experiments of Milgram regarding the effect of authority on participants

³⁶⁵ Hobbes (2017).

³⁶⁶ Bentham (1996).

³⁶⁷ Austin (1995).

³⁶⁸ Freeman (2016), p 211.

³⁶⁹ Freeman (2016), p 211.

³⁷⁰ Goodhart (1947), p 283.

³⁷¹ Freeman (2016), p 211.

³⁷² In social theory, the term 'peer group' denotes a social group whose members have interests, social class, and age in common.

and their willingness to obey instructions even in the absence of sanctions. It is worth noting that in some instances participants also carried instructions which conflicted with their moral beliefs.³⁷³ The phenomena of obedience and the training for persons to obey are known to the social sciences from Foucault's³⁷⁴ work on governmentality and the construction of disciplinary societies to Jacques' representation of the worker as an expert in obedience.³⁷⁵ Foucault defines governmentality as a specific form of power which 'has as its target population, as its principal form of knowledge political economy, and as its essential technical means apparatuses of security'.³⁷⁶ Governmentality is associated with the modern liberal State and capitalist economy 'as the means by which population and individuals are managed so that individuals can become the self-governing subjects of the liberal legal order'.³⁷⁷ Governmentality, for present purposes, focuses on the SRA's practices that shape the subject (the solicitor). Cunha et al outline four reasons as to why participants in Milgram's experiments conformed to authority.³⁷⁸ First, most individuals are conditioned to obey authority figures such as parents, teachers, and police officers. Second, participants were conditioned through gradual demands. Third, the source of information was limited, and the situation was novel. In other words, individuals may increase their obedience to the source of information, the authority figure. Fourth, participants were not assigned any responsibility and, therefore, they were not accountable for their actions. The fourth reason, with its focus on the absence of responsibility and acting on instructions from an external source, is similar to the 'amoral theory' which

³⁷³ Milgram (1974).

³⁷⁴ Foucault (1979).

³⁷⁵ Jacques (1996).

³⁷⁶ Foucault (2000) p 220.

³⁷⁷ Veitch et al (2018) p 278.

³⁷⁸ Cunha (2010) p 293.

has become the prevalent and ‘standard conception’ of legal ethics.³⁷⁹ According to this view, a lawyer’s actions must be guided by two principles:

- the principle of *partisanship*, according to which lawyers must zealously defend the interests of their client, everything that is not technically illegal in order to further these interests, even when the result clearly thwarts the aims of substantive law; and
- the principle of *neutrality*, according to which lawyers must represent their client regardless of their own view on the justice of the cause, and are consequently absolved of any moral responsibility for acts done in the name of the client.³⁸⁰

While partisanship requires lawyers to zealously pursue their clients’ ends, the principle of neutrality shields lawyers from considering issues relating to morality or justice³⁸¹ in achieving their clients’ ends. Nicolson and Webb argue that the neutrality principle involves two related notions.³⁸² The first is based on the theory that the lawyer is not responsible for the consequences of their client’s decisions:

It is the client, not the advocate, who decides whether – and how – to enforce his legal rights in a democratic. If such conduct causes unfairness to others, it is the client, not the advocate, who should be criticised.³⁸³

³⁷⁹ Arjona (2013) p 52.

³⁸⁰ Arjona (2013) p 52.

³⁸¹ The term ‘justice’, for present purposes, refers to both procedural and substantive justice.

³⁸² Nicolson and Webb (1999) p 163.

³⁸³ Pannick (1992) p 168.

This consequentialist and passive approach ignores duties to third parties and the responsibilities that lawyers have towards society. The second idea holds that lawyers are entitled to zealously pursue their clients' objectives irrespective of how immoral or unjust they are or the means necessary to their achievements may be.³⁸⁴ Thus, while neutral partisanship is predicated on the assumption that moral neutrality promotes a 'better legal defence for the citizen and the client',³⁸⁵ it ignores the impact a client's actions can have on third parties and the environment. For Holmes and Rice, who reject the consequentialist approach in favour a contextual method to legal ethics, lawyers need to 'recognize the global effect of their conduct, and to take responsibility for it'.³⁸⁶

The potential adverse effects of neutral partisanship, on society, is illustrated by the recent controversy surrounding the appointment of David Perry QC, a British lawyer, who agreed to prosecute, on behalf of the Hong Kong government, nine pro-democracy activists.³⁸⁷ Although, Perry eventually stepped down following condemnation from the legal profession and the United Kingdom government. For example, he was described as a 'mercenary' by the Foreign Secretary, Dominic Raab.³⁸⁸ This notion of a lawyer zealously pursuing their client's ends was recently brought to the attention of solicitors, in England and Wales, by the SRA's report, *Balancing Duties in Litigation*.³⁸⁹ While maintaining that solicitors must advance their clients' cases, the report warned that they are not 'hired guns' whose sole duty is to their

³⁸⁴ Nicolson and Webb (1999) p 163.

³⁸⁵ Arjona (2013) p 53.

³⁸⁶ Holmes and Rice (2011) p 121.

³⁸⁷ Slingo (2021a).

³⁸⁸ Slingo (2021b).

³⁸⁹ Solicitors Regulation Authority 'Balancing Duties in Litigation' <https://www.sra.org.uk/risk/risk-resources/balancing-duties-litigation/>

clients.³⁹⁰ The ‘hired gun’ metaphor bears a striking similarity to Raab describing Perry as a ‘mercenary’. The ‘hired gun’ or standard conception can be contrasted with Luban’s conception of the lawyer as a moral activist, ‘in which the lawyer who disagrees with the morality or justice of a client’s ends does not simply terminate the relationship, but tries to influence the client for the better’.³⁹¹ ‘Moral activism’, as conceived by Luban, involves law reform.³⁹² Luban’s model requires the lawyer knowing what justice is in order to engage in law reform. Adopting Lasswell and McDougal’s anti-positivist model for legal education can address this conceptual gap by providing lawyers with a framework for determining the meaning of justice. According to Lasswell and McDougal, the proper function of law schools is ‘to contribute to the training of policy-makers for the ever more complete achievement of the democratic values’.³⁹³ The ‘supreme value of democracy’ is:

[T]he dignity and worth of the individual; hence a democratic society is a commonwealth of mutual deference - a commonwealth where there is full opportunity to mature talent into socially creative skill, free from discrimination on grounds of religion, culture, or class. It is a society in which such specific values as power, respect, and knowledge are widely shared and are not concentrated in the hands of a single group, class, or institution - the state - among the many institutions of society.³⁹⁴

³⁹⁰ Solicitors Regulation Authority ‘Balancing Duties in Litigation’ <https://www.sra.org.uk/risk/risk-resources/balancing-duties-litigation/>

³⁹¹ Luban (1988) p 160.

³⁹² Luban (1988) p 174.

³⁹³ Lasswell and McDougal (1943) p 206.

³⁹⁴ Lasswell and McDougal (1943) p 212.

Regarding ‘respect’, they distinguish between ‘positive respect’ and ‘negative respect’.³⁹⁵ The former is defined as ‘equality of access to opportunity for maturing latent capacity into socially valued expression’.³⁹⁶ While the latter involves promoting a person’s right to self-determination and the absence of interference with their choice.³⁹⁷ However, the ‘hired gun’ or the standard conception requires the lawyer to zealously pursue their client’s instructions regardless of the consequences on third parties. In other words, the standard conception treats law as autonomous, free from moral and political considerations, and, thus, can lead to situations where the client’s instructions undermine a person’s or a group’s right to self-determination.

The negative impact of the standard conception on third parties’ right to self-determination is seen in *Day and another (Appellants) v The Government of the Cayman Islands and another (Respondents)* JCPC 2020/0033, where the Judicial Committee of the Privy Council was asked to decide whether the Bill of Rights in the Constitution of the Cayman Islands provides a right for same-sex couples to access the institution of marriage. The controversy surrounding this case concerned the appointment of Dinah Rose QC, a barrister practising in England and Wales, to represent the Cayman government. This appointment raises two important questions in relation to legal ethics: the role of a lawyer, in this case a barrister, in the administration of justice and the value of the ‘cab rank rule’. In relation to the first issue, the lawyer for the Cayman government has two options available to them. First, to represent the client according to the standard conception. This approach involves a commitment to Hart’s

³⁹⁵ Lasswell and McDougal (1943) p 223.

³⁹⁶ Lasswell and McDougal (1943) p 223.

³⁹⁷ Lasswell and McDougal (1943) p 223.

concept of legal positivism, namely the ‘separation of law and morals’.³⁹⁸ Hart, according to Lon Fuller, was recommending that ‘law must be strictly severed from morality’.³⁹⁹ Second, to adopt Luban’s lawyering model requires the lawyer to take on the role of a moral activist and engage in law reform. Legal education can play a role in promoting Luban’s approach by training students to become policymakers committed to democratic values such as citizens’ right to self-determination.

One of the factors attributed to the continued dominance of the standard conception is legal positivism.⁴⁰⁰ In general terms, legal positivists focus on authority when determining legal validity, only considers laws imposed by valid human machinery, and is only parenthetically concerned with justice. Within the realm of legal positivism, ‘[t]he legislator is conceived as an independent authority, and the judge as a dependent authority, whereas the lawyer has no authority at all’.⁴⁰¹ Contributing to the lawyer’s lack of authority and the success of the standard conception is the separability thesis,⁴⁰² which claims the exitance of a conceptual separation between law and morality. Thus, for a legal positivist, determining normative validity involves deductive reasoning once the official authority has been identified. Unlike natural law theory, however, legal positivism maintains that moral reasoning does not have a role in this process.⁴⁰³

³⁹⁸ Hart (1957).

³⁹⁹ Fuller (1957) p 656.

⁴⁰⁰ Arjona (2013) contends that the two other factors, in addition to legal positivism, concerning the continued success of the standard conception: the adversarial system and the agency model of the lawyer-client relationship.

⁴⁰¹ Arjona (2013) p 56.

⁴⁰² The other two theses are the pedigree thesis and the discretion thesis. See Wacks (2005) p 69.

⁴⁰³ Arjona (2013) p 57.

The impact of the separation thesis on legal education, and legal practice, is that ethical dilemmas are viewed as a tension between legal and non-legal considerations.⁴⁰⁴ In the context of the SQE, there is a risk that future solicitors are being educated to view ethical dilemmas as a clash between their duty to zealously pursue their clients' ends against moral considerations that might negatively impact on securing the desired outcomes for their clients. Viewing ethical dilemmas through a positivist lens reinforces the standard conception and limits the lawyer's role to that of an agent who acts on the principal's instructions. A consequence of acting as the client's agent is that the lawyer adopts a passive role involving the provision of options and acting on the client's preferred choice. The separation thesis in legal education does not promote the alternative lawyer-client model whereby the lawyer explains the different legal options to their client and the potential ethical and legal consequences of those options on both the client and third parties. Thus, the SQE's positivist approach educates solicitors to be zealous amoral lawyers, committed to achieving their clients' objectives irrespective of the consequences these might have on third parties.⁴⁰⁵ A supplemental egalitarian model is proposed to address the limitations of the SQE.

An egalitarian approach to solicitor education and training

The SQE is criticised by Macleod for its:

[F]ocus on traditional knowledge acquisition and the static approach to skills where an increasingly dynamic approach is required, leaving a vacuum for where this should be positioned.⁴⁰⁶

⁴⁰⁴ Arjona (2013) p 57.

⁴⁰⁵ The SRA's Standards and Regulations contain provisions in relation to duties to the court, third parties, and the wider public interest. However, these are either limited in scope or lacking detail.

⁴⁰⁶ Macleod (2022) p XX.

Given the above and the limitations highlighted in this chapter, an alternative approach is to reject the SQE's 'banking' model in favour of educating students to become, what Freire terms 'more fully human',⁴⁰⁷ by which he meant a 'conscious being'⁴⁰⁸ and a subject. The Freirean individual, understood as a subject, is one who can 'relate to the world' and can change it.⁴⁰⁹ An individual's subjectivity, therefore, informs how they perceive the world and assess right from wrong. To do so requires individuals to be integrated in their world as opposed to merely being passive actors.⁴¹⁰ This highlights that lawyer amorality is insufficient for the purposes of training solicitors to challenge and change the world around them. To achieve 'integration' requires 'the capacity to adapt oneself to reality *plus* the critical capacity to make choices to transform that reality'.⁴¹¹ This would involve incorporating a critical and egalitarian model to learning and development.⁴¹² In this model of education, learners are no longer 'docile listeners' but 'critical co-investigators in dialogue with the teacher'.⁴¹³ Critical reflection and exposure to problems relating to students and their world obliges them to respond to these problems.⁴¹⁴ For reflection to be considered critical it must engage in:

[U]ncovering, and challenging, the power dynamics that frame practice and uncovering and challenging hegemonic assumptions (those assumptions we embrace as being in our best interests when in fact they are working against us).⁴¹⁵

⁴⁰⁷ Freire (1993) p 47. Emphasis in original.

⁴⁰⁸ Freire (1993) p 48.

⁴⁰⁹ Freire (2008) p 5.

⁴¹⁰ Freire (1973) p 4.

⁴¹¹ Freire (1973) p 4.

⁴¹² Freire (1993) p 53.

⁴¹³ Freire (1993) p 54.

⁴¹⁴ Freire (1993) p 54.

⁴¹⁵ Brookfield (2009) p 293.

Unlike the SQE's 'banking' model, critical reflection creates an awareness of how dominant ideologies such as capitalism and patriarchy shape beliefs and norms that justify and maintain economic and political inequality. Thus, if future solicitors are to become critically reflective practitioners, it is essential that the SQE, and legal education in general,⁴¹⁶ incorporates normative ethics⁴¹⁷ and critical theory.⁴¹⁸

Conclusion

This chapter has examined the pedagogy of the SQE through the prisms of biopolitics and Freire's 'banking' model, in order to address two main questions: whether the SQE empowers future solicitors with the necessary conceptual tools to examine and critique issues of power and control in relation to juridic institutions, and whether the SQE's pedagogic approach promotes justice. It would appear that while the biopolitics of the SQE will produce lawyers who are able to identify settled law, there is a risk that this form of biopolitics will also create solicitors who are amoral lawyers and who are not equipped to address normative questions such as 'what the law *ought* to be?'.

Jane Ching, writing in this volume, argues that in addition to caring about the law and justice, law students and junior lawyers are also concerned about 'resilience, about equality and about the planetary future'.⁴¹⁹ Thus, to address the limitations of SQE 1, namely in relation to producing solicitors who are able to shape the world around them and respond to social,

⁴¹⁶ In this regard, the SQE is no different to the

⁴¹⁷ Madhloom (2019).

⁴¹⁸ Neither the SQE nor the current qualification regime requires future solicitors to have grounding in normative ethics and critical theory. See Bar Standards Board and the Solicitors Regulation Authority, *Academic Stage Handbook* (2014).

⁴¹⁹ Ching (2022) p XX

political, and environmental problems, this chapter recommends the inclusion of an egalitarian pedagogical model which is underpinned by normative ethics and critical theory.

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APPENDIX B – Co-author Declaration Forms

1. Ash Samanta

Samanta J, Samanta A and Madhloom O, 'A rights-based proposal for managing faith-based values and expectations of migrants at end-of-life illustrated by an empirical study involving South Asians in the UK' (2018) 32 *Bioethics* 368

2. Jo Samanta

Samanta J, Samanta A and Madhloom O, 'A rights-based proposal for managing faith-based values and expectations of migrants at end-of-life illustrated by an empirical study involving South Asians in the UK' (2018) 32 *Bioethics* 368

3. Irene Antonopoulos

Antonopoulos I and Madhloom O, 'Promoting International Human Rights Values Through Reflective Practice in Clinical Legal Education: A Perspective from England and Wales' in Patrick Blessinger and Enakshi Sengupta (eds), *International Perspectives in Social Justice Programs at the Institutional and Community Levels* (Emerald Publishing 2021), 109-127

4. Irene Antonopoulos

Madhloom O and Antonopoulos I, 'Clinical Legal Education and Human Rights Values: A Universal Pro Forma for Law Clinics' (2021) 9(1) *Asian Journal of Legal Education* 23

5. Barbara Preložnjak

Madhloom O and Preložnjak B, 'Applying Rawls' theory of justice to Clinical Legal Education in the Republic of Croatia' in Omar Madhloom and Hugh McFaul (eds), *Thinking About Clinical Legal Education: Philosophical and Theoretical Perspectives* (Routledge 2022), 104-123

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A

Name of candidate: Omar Madhloom

Name of co-author: Ash Samanta

Email address of co-author: a.samanta@talk21.com

Full bibliographical details of the publication *(including authors):*

Jo Samanta, Ash Samanta and Omar Madhloom, 'A rights-based proposal for managing faith-based values and expectations of migrants at end-of-life illustrated by an empirical study involving South Asians in the UK' (2018) 32 Bioethics 368

<https://onlinelibrary.wiley.com/doi/10.1111/bioe.12447>

Section B

DECLARATION BY CANDIDATE (*delete as appropriate*)

I declare that my contribution to the above publication was as:

(ii) joint author

My specific contribution to the publication was (*maximum 50 words*):

My contribution to this article focused on the theoretical/philosophical underpinings such as the issue of rights (Kant and Rawls). I also updated the various references/citations.

Signed: **Omar Madhloom**.....(candidate)
29/01/2021.....(date)

Section C

STATEMENT BY CO-AUTHOR (*delete as appropriate*)

Either (i) I agree with the above declaration by the candidate

or (ii) I do not agree with the above declaration by the candidate for
the following reason(s):

Signed:(co-author) (date)

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A

Name of candidate: Omar Madhloom

Name of co-author: Jo Samanta

Email address of co-author: jo.samanta@dmu.ac.uk

Full bibliographical details of the publication (including authors):

Jo Samanta, Ash Samanta and Omar Madhloom, 'A rights-based proposal for managing faith-based values and expectations of migrants at end-of-life illustrated by an empirical study involving South Asians in the UK' (2018) 32 Bioethics 368

<https://onlinelibrary.wiley.com/doi/10.1111/bioe.12447>

Section B

DECLARATION BY CANDIDATE *(delete as appropriate)*

I declare that my contribution to the above publication was as:

(ii) joint author

My specific contribution to the publication was (maximum 50 words):

My contribution to this article focused on the theoretical/philosophical underpinings such as the issue of rights (Kant and Rawls). I also updated the various references/citations.

Signed: Omar Madhloom.....(candidate)
29/01/2021.....(date)

Section C

STATEMENT BY CO-AUTHOR *(delete as appropriate)*

Either (i) I agree with the above declaration by the candidate ✓

or (ii) ~~I do not agree with the above declaration by the candidate for the following reason(s):~~

Signed: *J. Samanta*.....(co-author) *15/8/21* (date)

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A

Name of candidate: Omar Madhloom

Name of co-author: Irene Antonopoulos

Email address of co-author: Irene.Antonopoulos@rhul.ac.uk

Full bibliographical details of the publication (including authors): Irene Antonopoulos and Omar Madhloom, 'Promoting International Human Rights Values Through Reflective Practice in Clinical Legal Education: A Perspective from England and Wales' in Patrick Blessinger and Enakshi Sengupta (eds), *International Perspectives in Social Justice Programs at the Institutional and Community Levels* (Emerald Publishing 2021), 109-127.

Section B

DECLARATION BY CANDIDATE (*delete as appropriate*)

I declare that my contribution to the above publication was as:

(ii) joint author

My specific contribution to the publication was (*maximum 50 words*):

My contribution to this chapter included: identifying the gaps in legal education in England and Wales, outlining the advantages of reflective practice, and examining the link between reflective practice and clinical legal education.

Signed:Omar Madhloom.....(candidate)
.....29/01/2021.....(date)

Section C

STATEMENT BY CO-AUTHOR (*delete as appropriate*)

Either (i) **I agree with the above declaration by the candidate**

or

Signed:Irene Antonopoulos.....(co-author)27/07/2021.....
(date)

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A

Name of candidate: Omar Madhloom

Name of co-author: Irene Antonopoulos

Email address of co-author: Irene.Antonopoulos@rhul.ac.uk

Full bibliographical details of the publication (including authors): Omar Madhloom and Irene Antonopoulos, 'Human rights ethos in clinical legal education: Identifying the driving values of clinical legal education within human rights obligations'

Forthcoming – to be submitted in April 2021

Section B

DECLARATION BY CANDIDATE (*delete as appropriate*)

I declare that my contribution to the above publication was as:

(ii) joint author

My specific contribution to the publication was (*maximum 50 words*):

Analysing clinical legal pedagogy and exploring the advantages of a normative framework in relation to pro bono legal services. My contribution also examines the scope of clinical legal education as a global movement that currently lacks a universal ethos.

Signed:Omar Madhloom(candidate)
.....29/01/2021.....(date)

Section C

STATEMENT BY CO-AUTHOR (*delete as appropriate*)

Either (i) **I agree with the above declaration by the candidate**

or

Signed: ..Irene Antonopoulos.....(co-author)277/07/21..... (date)

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A

Name of candidate: Omar Madhloom

Name of co-author: Barbra Preložnjak

Email address of co-author: barbara.preloznjak@pravo.hr

Full bibliographical details of the publication *(including authors)*:

Omar Madhloom and Barbra Preložnjak, 'Applying Rawls' theory of justice to clinical legal education in Croatia' in Omar Madhloom and Hugh McFaul (eds), *Thinking about clinical legal education* (Routledge 2021).

Section B

DECLARATION BY CANDIDATE *(delete as appropriate)*

I declare that my contribution to the above publication was as:

2 joint author

My specific contribution to the publication was (*maximum 50 words*):

My co-author supplied a draft chapter with an outline of the main argument, namely the use of Rawls' theory of justice in clinical legal education in the Republic of Croatia ('Croatia'). I re-wrote the chapter and expanded on the main thesis by engaging with the concept of justice, namely distributive justice, in a practical context. My contribution also included engaging with the critique aimed at Rawls' theory of justice.

Signed: **Omar Madhloom**.....(candidate)
..... **29/01/2021**.....(date)

Section C

STATEMENT BY CO-AUTHOR (*delete as appropriate*)

(i) I agree with the above declaration by the candidate

Signed: *Barbara Preložnjak* (co-author) **27/07/2021**. (date)

APPENDIX C - Publications

1. Samanta J, Samanta A and Madhloom O, 'A rights-based proposal for managing faith-based values and expectations of migrants at end-of-life illustrated by an empirical study involving South Asians in the UK' (2018) 32 *Bioethics* 368
2. Madhloom O, 'Deception, mistake and non-disclosure: challenging the current approach to protecting sexual autonomy' (2019) 70(2) *Northern Ireland Legal Quarterly* 203
3. Madhloom O, 'A normative approach to developing reflective legal practitioners: Kant and clinical legal education' (2019) 53(2) *The Law Teacher* 416-430
4. Madhloom O, 'Unregulated Immigration Law Clinics and Kant's Cosmopolitan Right: Challenging the Political Status Quo' (2021) 28(1) *International Journal of Clinical Legal Education* 195
5. Antonopoulos I and Madhloom O, 'Promoting International Human Rights Values Through Reflective Practice in Clinical Legal Education: A Perspective from England and Wales' in Patrick Blessinger and Enakshi Sengupta (eds), *International Perspectives in Social Justice Programs at the Institutional and Community Levels* (Emerald Publishing 2021), 109-127
6. Madhloom O and Antonopoulos I, 'Clinical Legal Education and Human Rights Values: A Universal Pro Forma for Law Clinics' (2021) 9(1) *Asian Journal of Legal Education* 23
7. Madhloom O and Preložnjak B, 'Applying Rawls' theory of justice to Clinical Legal Education in the Republic of Croatia' in Omar Madhloom and Hugh McFaul (eds), *Thinking About Clinical Legal Education: Philosophical and Theoretical Perspectives* (Routledge 2022), 104-123
8. Madhloom O, 'Public Interest Lawyering and Cosmopolitanism: a model for teaching immigration law' in Richard Grimes, Vera Honuskova and Ulrich Stege (eds), *Learning and teaching the law affecting migrants: theory and practice* (Routledge 2022), 39-49
9. Madhloom O, 'A Kantian moral cosmopolitan approach to teaching professional legal ethic' (2022) *German Law Journal* – accepted/forthcoming

Biopolitics and the Solicitors Qualifying Examination

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Introduction

The Solicitors Regulatory Authority (SRA) has modified the route to qualifying as a solicitor, in England and Wales, through the Solicitors Qualifying Examination (SQE).¹ This chapter examines the pedagogy of the SQE, namely SQE stage 1 (Functioning Legal Knowledge),² through the lens of biopolitics. In general terms, biopolitics is a form of politics which prioritises the production and management of life.³ It alludes to the fact that life can be manipulated and owned. In social theory, biopolitics is used to describe the institutions, bodies of knowledge, and administrative techniques used for ‘measuring, regulating and controlling people and behaviour in order to ensure that states get the most out of their human resources’.⁴ Applying biopolitics and Freire’s theory of education, this chapter argues that the SQE’s pedagogy not only promotes lawyer amorality but also limits solicitors to the conventional lawyering model whereby lawyers act as agents for their clients in exchange for a fee. A

¹ The SQE will be introduced on 1st September 2021.

² Functioning legal knowledge requires candidates to ‘apply their knowledge of the law to demonstrate the competences required to the level of a newly qualified solicitor’.

³ Saltman (2018), p 50.

⁴ Danaher et al (2008), p 80.

supplemental egalitarian pedagogical model⁵ is proposed which enables future solicitors to challenge the dominant hegemony and address societal inequalities.

Foucault is credited with introducing the concept of biopolitics in his book *The History of Sexuality*,⁶ where he argues that the economic and political regulation of society, in addition to ‘discipline’ of the body, plays a key role in power relations within the modern nation state. Foucault applies analytical and historical evaluation of the various mechanisms of power and suggests that, since antiquity, new mechanisms of ‘biopower’⁷ have emerged in Western societies.⁸ This chapter examines biopolitics as a pedagogic power in solicitor education and training, in England and Wales, in order to address two key questions in relation to the SQE: whether the SQE empowers future solicitors with the necessary conceptual tools to engage in critical reflection, namely examining issues of power and control,⁹ of juridic institutions; and does the SQE’s pedagogy promote justice?. For present purposes, justice is conceived as the ‘confluence of law and morality’,¹⁰ because it enhances analysis of the law through moral considerations rather than a purely scientific/positivist approach.¹¹ Moral education is useful for evaluating the law according to a set of principles.¹² There are three reasons for incorporating moral discourse into legal education and training. First, lawyers are expected not to merely act competently but also morally.¹³ Second, the law curriculum ought to include moral education in order to equip future lawyers with the skills required for ‘good moral counsel’.¹⁴ Third, moral education, which includes legal ethics, facilitates the evaluation of not

⁵ Giroux (2010).

⁶ Foucault (1990)

⁷ Foucault uses the terms ‘biopower’ and ‘biopolitics’ interchangeably.

⁸ Foucault (1990), p 135.

⁹ Brookfield (2009) p 298.

¹⁰ Schehr (2009) p 13.

¹¹ Madhloom (2019).

¹² See Hart (2012); Fuller (1969); Finnis (1980); Dworkin (1986).

¹³ Swygert (1989) p 807.

¹⁴ Swygert (1989) p 814.

just law, policies, and principles, but also values and the professional codes of conduct.¹⁵ As members of the legal profession, solicitors owe a duty to the common good which requires them to be more than ‘passive servants of the state, of capital, of firm, the client, or even the immediate general public’.¹⁶ Lawyers in a liberal state are a vital institution for ‘changing rules and norms, for resisting the use of legalized violence on individuals, and for encouraging trust in the system’.¹⁷ Solicitors, and lawyers in general, also have an obligation to advance the common good of the community.¹⁸ To do so, requires their education and training to equip them with the ‘deep learning and critical thinking’.¹⁹ The following section outlines the pedagogy of the SQE.

The Solicitors Qualifying Examination

In April 2017, the SRA announced that it would introduce an independent assessment, the SQE, to ensure that ‘all solicitors meet consistent, high standards at the point of entry to the profession’.²⁰ The SQE replaces the existing system which requires prospective solicitors to successfully complete two stages of training; the academic stage and the vocational stage. There are two options to completing the academic stage; the law-graduate route, and one for non-law graduates. The former involves completing a qualifying law degree, while the latter is achieved through the Common Professional Examination (CPE) or Graduate Diploma in Law (GDL). The academic stage is followed by the vocational part which consists of the Legal Practice Course (LPC) and a two-year period of recognised training (training contract) carried

¹⁵ Janoff (1991); Pearce (1998); Nicolson (2006); Ferris (2015); Madhloom (2022).

¹⁶ Freidson (2001), p 217.

¹⁷ Boon (2001), p 156.

¹⁸ Demack (2003), p 27.

¹⁹ Morrison (2018).

²⁰ Solicitors Regulation Authority ‘SRA announces new solicitors assessment to guarantee high standards’ <https://www.sra.org.uk/sra/news/press/2017/sqe-ensure-high-consistent-standards/>

out in a law firm or in-house legal department in an organisation. Replacing these stages,²¹ the SQE will have four elements which candidates must complete to qualify as solicitors:

- have passed SQE stages 1 and 2 to demonstrate their knowledge and skills;
- have been awarded a degree or an equivalent qualification, or have gained *equivalent experience*;
- have completed at least two years of qualifying legal work experience; and
- be of satisfactory character and suitability.²²

SQE stage 1 replaces the academic stage, while SQE stage 2 (Practical Legal Skills), which tests skills such as client interviewing, drafting, and advocacy, replaces the LPC. Candidates will still be required to complete a period of pre-qualification legal work experience. The SQE's Qualifying Work Experience (QWE) can be gained within one role or placement or within several (provided it is in no more than four organisations).²³

SQE 1 is a computer-based 'single best answer' multiple choice questions (MCQ) test.²⁴ Each single 'best answer' question is followed by five possible answers.²⁵ However, an examination of the SRA's sample MCQs reveals that most questions are in fact single correct answer. Ethics, namely professional conduct, are examined pervasively. Candidates are required to apply legal principles and rules, at the level required of a newly qualified solicitor,

²¹ Students will have until 31 December 2032 to qualify under the previous route.

²² Solicitors Regulation Authority 'SRA announces new solicitors assessment to guarantee high standards' <https://www.sra.org.uk/sra/news/press/2017/sqe-ensure-high-consistent-standards/>

²³ Solicitors Regulation Authority 'Qualifying work experience for employers' <https://www.sra.org.uk/trainees/qualifying-work-experience/qualifying-work-experience-employers/>

²⁴ Solicitors Regulation Authority 'Assessment information' <https://www.sra.org.uk/sra/policy/solicitors-qualifying-examination/sqe1-functioning-legal-knowledge-assessment-specification/>

²⁵ For critique of the SRA's MCQ assessment method, see Mason (2018); Morrison (2018).

to realistic client-based and ethical problems and situations. The focus, therefore, is on the conventional lawyering model and not on equipping candidates to engage in law reform. This is evidenced by the fact that in relation to the application and analysis of legal authorities, the SRA has confirmed that ‘Candidates will be tested on the law as it stands at the date of the assessment’ nor will they be assessed on the development of the law.²⁶

SQE 1’s pedagogy suffers from three fundamental limitations which can hinder the development of future solicitors in relation to law reform. First, apart from limited circumstances where candidates need to demonstrate knowledge and application of primary sources of law, they will not be assessed on legal skills such as recalling specific case names, or citing statutory or regulatory authorities.²⁷ Second, they will not be tested on the development of the law.²⁸ Candidates will be only tested on settled law and not what the law *ought* to be. By limiting functioning legal knowledge to the application of settled law, namely ‘legal principles and rules’, the SQE adopts a positivist approach to legal training. This not only gives future solicitors the false impression that law is autonomous but fails to provide them with conceptual tools, such as moral and political theories, to analyse and critique the law.²⁹ The SQE focuses on ‘what the law is?’, which is a question of fact, and ignores the normative question ‘what is good law?’. To avoid this ‘thin’ notion of legal education, it is important that the SQE, and legal education generally, ‘moves beyond the merely descriptive towards the explanatory and analytical’.³⁰ Third, excluded from the definition of functioning legal knowledge are secondary sources of law. This is a

²⁶ Solicitors Regulation Authority ‘Assessment information’ <https://www.sra.org.uk/sra/policy/solicitors-qualifying-examination/sqe1-functioning-legal-knowledge-assessment-specification/>

²⁷ Solicitors Regulation Authority ‘Assessment information’ <https://www.sra.org.uk/sra/policy/solicitors-qualifying-examination/sqe1-functioning-legal-knowledge-assessment-specification/>

²⁸ Solicitors Regulation Authority ‘Assessment information’ <https://www.sra.org.uk/sra/policy/solicitors-qualifying-examination/sqe1-functioning-legal-knowledge-assessment-specification/>

²⁹ O’Donovan (2014) p 140.

³⁰ Guth and Harvey (2018), p 353.

significant omission for a number of reasons. Secondary sources reflect the prevailing opinion on how courts interpret primary sources of law. They are authoritative because courts have been known to rely on secondary sources.³¹ Secondary sources such as academic peer-reviewed articles highlight the potential implications of the law and suggest avenues for reform. The SQE stage 1, by omitting analysis of primary and secondary sources, focusing on a doctrinal approach to legal education, fails to equip students to engage in policy reform/making and to critically reflect on juridic institutions. The positivist and primary sources-centric pedagogy of the SQE gives rise to the risk that future solicitors, namely those who have not completed a law degree and as a result have not had the opportunity to engage in critique of the law and will be ill-equipped to engage in policymaking and law reform. The biopolitics of the SQE will be examined in the next section.

Biopolitics and the SQE

Lemke suggests three essential dimensions of biopolitics which are useful in analysing the biopolitics of the SQE. First, biopolitics entails ‘a systematic knowledge of “life” and of “living beings”’.³² The SQE’s uniform curriculum and a standardised form of testing can devalue aspects of an individual. Such methods of assessment focus on types of experience that can be empirically measured and quantified.³³ In other words, the SQE focuses on characteristics of the individual which can be controlled. Thus, what constitutes a ‘good’ solicitor is not one who can apply reasoned legal and political analysis or relate claims to truth to historical power struggles,³⁴ but rather, one who successfully completes the SQE and complies with the SRA’s

³¹ *Gapper v Avon & Somerset Constabulary* [1998] EWCA Civ 1146 (2 July 1998) citing Professor John Smith; *R v Woollin* [1998] UKHL 28; [1999] AC 82 citing John Smith, Glanville Williams, and Andrew Ashworth; *R v A* [2001] UKHL 25 citing Neil Kibble at [29]; *R v Golds* [2016] UKSC 61 citing Professor Mackay at [48]. *R v Ali Syed* [2018] EWCA Crim 2809 citing David Ormerod at [89].

³² Lemke (2011), p 119.

³³ Saltman (2018), p 51.

³⁴ Saltman (2018), p 51.

vision of the conventional lawyering model. Second, Lemke argues, ‘the regime of truth cannot be separated from that of power, the question arises of how strategies of power mobilize knowledge of life and how processes of power generate and disseminate forms of knowledge’.³⁵ The ‘truth’ promoted by the SRA is that there is one right answer to a legal question and that law is an autonomous and neutral concept free from political and moral evaluation.³⁶ Lemke’s third dimension of biopolitics involves:

[F]orms of subjectivation, that is, the manner in which subjects are brought to work on themselves, guided by scientific, medical, moral, religious, and other authorities and on the basis of socially accepted arrangements of bodies and sexes.³⁷

Subjectivation is used to assess how the regulation of life processes affect individual and collective actors and gives rise to new forms of identity.³⁸ By focusing on the application of a standardised body of knowledge to resolving a client’s legal issues, the SQE’s pedagogy subjects future solicitors to the ideology of corporate culture which measures success according to billable hours calculated in six-minute increments.³⁹ Therefore, the SQE is a process of knowledge production and a form of subjectivation.

Unlike law schools where teachers interact with students, challenge and motivate them using different pedagogies and teaching methods such as the flipped classroom approach,⁴⁰ SQE 1 entails using MCQs to assess candidates’ knowledge of existing rules and principles. In this sense, the SQE is analogous to Freire’s ‘banking’ concept of education which he equates

³⁵ Lemke (2011), p 119.

³⁶ Mason (2018).

³⁷ Lemke (2011), p 120.

³⁸ Lemke (2011), p 119.

³⁹ Waller-Davies.

⁴⁰ McGowan (2012); Butler and Madhloom (2016).

teachers with bank-clerks ‘depositing’⁴¹ information into students rather than drawing out knowledge from individual students. Thus, minimal responsibility lies with the student other than passively acquiring knowledge through deposits of information. The banking model echoes the SQE’s positivist approach which focuses on ‘superficial’ legal knowledge and learning.⁴² The banking concept of education regards students as an ‘adaptable, manageable being’ with limited ‘critical consciousness’, and thus, unlikely to play a significant role in transforming their world.⁴³ Through the banking model, the SRA risks turning future solicitors into ‘automatons’⁴⁴ who are educated to accept their role in society without challenging or questioning it. The harm produced by the banking concept of education is the production of ‘passive’⁴⁵ individuals who are adapted and obedient to their world.

Freire’s critique of the banking model which turns students into passive, obedient automatons is reminiscent of Llewellyn’s description of the first year of law school at Columbia University, where the aim is to encourage the student into ‘thinking like a lawyer’.⁴⁶ He warns students that ‘[t]he hardest job of the first year is to lop off your common sense, to knock your ethics into temporary anaesthesia’.⁴⁷ Unfortunately, this process of temporary moral numbing continues in today’s law schools and remains a feature of the case method pedagogy.⁴⁸ Thus, students are led to believe that ‘thinking like a lawyer’ entails subduing their compassion, idealism, and pursuit of truth and justice.⁴⁹ Llewellyn continues his critique:

You are to acquire ability to think precisely, to analyze coldly, to work within
a body of materials that is given, to see, and see only, and manipulate, the

⁴¹ Freire (1993) p 45.

⁴² Morrison (2018), p 468.

⁴³ Freire (1993) p 46.

⁴⁴ Freire (1993) p 47.

⁴⁵ Freire (1993) p 49.

⁴⁶ Llewellyn (2008) p 107.

⁴⁷ Llewellyn (2008) p 107.

⁴⁸ Sullivan et al (2007) p 78.

⁴⁹ Wizner (1998) p 587.

machinery of the law. It is not easy to thus to turn human beings into lawyers.

Neither is it safe. For a mere legal machine is a social danger.⁵⁰

The SQE's pedagogy, as a process of knowledge production, consists of three elements. First, it adopts Freire's 'banking' model where future solicitors are not required to engage in critical analysis and reflection of the law and its social implications but simply to memorise information. Second, it embraces a positivist approach to legal education which is devoid of any moral or political considerations. Third, 'thinking like a lawyer' within this positivist approach, which is committed to the separation of law and morals, teaches students to ignore their emotional responses to the case facts, to ignore the consequences of their clients' actions, and instead to focus on achieving their clients' objectives. Accordingly, the SRA's implicit message, through the SQE, is that solicitors should respond to legal, political, and social problems, not as human beings but as 'legal machines' devoid of moral considerations. In other words, as legal practitioners, they should not only ignore the moral and political dimensions of the case and focus instead on the 'legal' aspects but also the moral implications of their actions.⁵¹ The next section considers the potential impact of the SQE on legal ethics.

Biopolitics, governmentality and legal ethics

Foucault describes two models of political power: the pre-modern model of juridical power and the modern normalising power.⁵² In the former, the sovereign had the rights to take the life of those who threatened the order of the State, or to demand subjects surrender their lives in defence of the State. The normalising model, however, is concerned with power over life. In other words, the administration of bodies rather than seizure or negation. Normalising power,

⁵⁰ Llewellyn (2008) p107.

⁵¹ Wizner (1998) p 588.

⁵² Foucault (1990), p 135-139.

according to Foucault, evolved in two ‘basic forms’: discipline and biopower.⁵³ The former operates on individuals found in institutions such as prisons, schools, and hospitals through the use of surveillance and control aimed at the efficient distribution and use of power in order to increase their ‘usefulness and docility’. Biopower, on the other hand, is aimed at the administration and production of life. While legal education can promote values committed to human rights and social justice,⁵⁴ the vocationalisation of solicitors training, through the SQE, risks separating solicitors from the social implications of their actions, the consequences of their client’s actions on third parties, and the role of the state. By falsely placing law as a neutral and technical concept, devoid of any moral or political considerations, the SQE risks being viewed by future solicitors as being valuable only for its market application.

According to Foucault, the new techniques of government that developed in the modern period were distinct from the traditional forms of juridical governance such as those found in the work of classical legal positivists such as Hobbes,⁵⁵ Bentham,⁵⁶ and Austin.⁵⁷ According to these theorists, in every society sovereign power rests with a definitive person or group and that all laws, which are recognised as such by courts, are to be regarded as the commands of the sovereign. For example, Austin insists on sanctions as a mark of law and a necessary element of the sovereign’s command. Austin’s view regarding the role of sanctions has been objected to on the ground that it distorts the true character and function of law in a society.⁵⁸ Sanctions do not explain why law is changed and exaggerate fear.⁵⁹ Austin’s thesis omits the possibility that law may be accepted by the community as binding, irrespective of the threat of sanctions.⁶⁰ His conception of the sovereign’s authority suggests that ‘obedience is rendered

⁵³ Foucault (1990), p 139.

⁵⁴ McKeown and Ashford (2018); Antonopoulos and Madhloom (2021).

⁵⁵ Hobbes (2017).

⁵⁶ Bentham (1996).

⁵⁷ Austin (1995).

⁵⁸ Freeman (2016), p 211.

⁵⁹ Freeman (2016), p 211.

⁶⁰ Goodhart (1947), p 283.

by one person to another because the former recognises that the latter has a right to obedience'.⁶¹ This hierarchal subordination between citizens and the sovereign can be contrasted with the willingness to follow a rule or law because it is considered as appropriate to govern conduct between members of 'peer groups'.⁶²

The argument that the application or threat of sanctions plays a tangential feature of law is found in the experiments of Milgram regarding the effect of authority on participants and their willingness to obey instructions even in the absence of sanctions. It is worth noting that in some instances participants also carried instructions which conflicted with their moral beliefs.⁶³ The phenomena of obedience and the training for persons to obey are known to the social sciences from Foucault's⁶⁴ work on governmentality and the construction of disciplinary societies to Jacques' representation of the worker as an expert in obedience.⁶⁵ Foucault defines governmentality as a specific form of power which 'has as its target population, as its principal form of knowledge political economy, and as its essential technical means apparatuses of security'.⁶⁶ Governmentality is associated with the modern liberal State and capitalist economy 'as the means by which population and individuals are managed so that individuals can become the self-governing subjects of the liberal legal order'.⁶⁷ Governmentality, for present purposes, focuses on the SRA's practices that shape the subject (the solicitor). Cunha et al outline four reasons as to why participants in Milgram's experiments conformed to authority.⁶⁸ First, most individuals are conditioned to obey authority figures such as parents, teachers, and police officers. Second, participants were conditioned through gradual demands. Third, the source of

⁶¹ Freeman (2016), p 211.

⁶² In social theory, the term 'peer group' denotes a social group whose members have interests, social class, and age in common.

⁶³ Milgram (1974).

⁶⁴ Foucault (1979).

⁶⁵ Jacques (1996).

⁶⁶ Foucault (2000) p 220.

⁶⁷ Veitch et al (2018) p 278.

⁶⁸ Cunha (2010) p 293.

information was limited, and the situation was novel. In other words, individuals may increase their obedience to the source of information, the authority figure. Fourth, participants were not assigned any responsibility and, therefore, they were not accountable for their actions. The fourth reason, with its focus on the absence of responsibility and acting on instructions from an external source, is similar to the ‘amoral theory’ which has become the prevalent and ‘standard conception’ of legal ethics.⁶⁹ According to this view, a lawyer’s actions must be guided by two principles:

- the principle of *partisanship*, according to which lawyers must zealously defend the interests of their client, everything that is not technically illegal in order to further these interests, even when the result clearly thwarts the aims of substantive law; and
- the principle of *neutrality*, according to which lawyers must represent their client regardless of their own view on the justice of the cause, and are consequently absolved of any moral responsibility for acts done in the name of the client.⁷⁰

While partisanship requires lawyers to zealously pursue their clients’ ends, the principle of neutrality shields lawyers from considering issues relating to morality or justice⁷¹ in achieving their clients’ ends. Nicolson and Webb argue that the neutrality principle involves two related notions.⁷² The first is based on the theory that the lawyer is not responsible for the consequences of their client’s decisions:

⁶⁹ Arjona (2013) p 52.

⁷⁰ Arjona (2013) p 52.

⁷¹ The term ‘justice’, for present purposes, refers to both procedural and substantive justice.

⁷² Nicolson and Webb (1999) p 163.

It is the client, not the advocate, who decides whether – and how – to enforce his legal rights in a democratic. If such conduct causes unfairness to others, it is the client, not the advocate, who should be criticised.⁷³

This consequentialist and passive approach ignores duties to third parties and the responsibilities that lawyers have towards society. The second idea holds that lawyers are entitled to zealously pursue their clients' objectives irrespective of how immoral or unjust they are or the means necessary to their achievements may be.⁷⁴ Thus, while neutral partisanship is predicated on the assumption that moral neutrality promotes a 'better legal defence for the citizen and the client',⁷⁵ it ignores the impact a client's actions can have on third parties and the environment. For Holmes and Rice, who reject the consequentialist approach in favour a contextual method to legal ethics, lawyers need to 'recognize the global effect of their conduct, and to take responsibility for it'.⁷⁶

The potential adverse effects of neutral partisanship, on society, is illustrated by the recent controversy surrounding the appointment of David Perry QC, a British lawyer, who agreed to prosecute, on behalf of the Hong Kong government, nine pro-democracy activists.⁷⁷ Although, Perry eventually stepped down following condemnation from the legal profession and the United Kingdom government. For example, he was described as a 'mercenary' by the Foreign Secretary, Dominic Raab.⁷⁸ This notion of a lawyer zealously pursuing their client's ends was recently brought to the attention of solicitors, in England and Wales, by the SRA's report, *Balancing Duties in Litigation*.⁷⁹ While maintaining that solicitors must advance their

⁷³ Pannick (1992) p 168.

⁷⁴ Nicolson and Webb (1999) p 163.

⁷⁵ Arjona (2013) p 53.

⁷⁶ Holmes and Rice (2011) p 121.

⁷⁷ Slingo (2021a).

⁷⁸ Slingo (2021b).

⁷⁹ Solicitors Regulation Authority 'Balancing Duties in Litigation' <https://www.sra.org.uk/risk/risk-resources/balancing-duties-litigation/>

clients' cases, the report warned that they are not 'hired guns' whose sole duty is to their clients.⁸⁰ The 'hired gun' metaphor bears a striking similarity to Raab describing Perry as a 'mercenary'. The 'hired gun' or standard conception can be contrasted with Luban's conception of the lawyer as a moral activist, 'in which the lawyer who disagrees with the morality or justice of a client's ends does not simply terminate the relationship, but tries to influence the client for the better'.⁸¹ 'Moral activism', as conceived by Luban, involves law reform.⁸² Luban's model requires the lawyer knowing what justice is in order to engage in law reform. Adopting Lasswell and McDougal's anti-positivist model for legal education can address this conceptual gap by providing lawyers with a framework for determining the meaning of justice. According to Lasswell and McDougal, the proper function of law schools is 'to contribute to the training of policy-makers for the ever more complete achievement of the democratic values'.⁸³ The 'supreme value of democracy' is:

[T]he dignity and worth of the individual; hence a democratic society is a commonwealth of mutual deference - a commonwealth where there is full opportunity to mature talent into socially creative skill, free from discrimination on grounds of religion, culture, or class. It is a society in which such specific values as power, respect, and knowledge are widely shared and are not concentrated in the hands of a single group, class, or institution - the state - among the many institutions of society.⁸⁴

Regarding 'respect', they distinguish between 'positive respect' and 'negative respect'.⁸⁵ The former is defined as 'equality of access to opportunity for maturing latent capacity into socially

⁸⁰ Solicitors Regulation Authority 'Balancing Duties in Litigation' <https://www.sra.org.uk/risk/risk-resources/balancing-duties-litigation/>

⁸¹ Luban (1988) p 160.

⁸² Luban (1988) p 174.

⁸³ Lasswell and McDougal (1943) p 206.

⁸⁴ Lasswell and McDougal (1943) p 212.

⁸⁵ Lasswell and McDougal (1943) p 223.

valued expression'.⁸⁶ While the latter involves promoting a person's right to self-determination and the absence of interference with their choice.⁸⁷ However, the 'hired gun' or the standard conception requires the lawyer to zealously pursue their client's instructions regardless of the consequences on third parties. In other words, the standard conception treats law as autonomous, free from moral and political considerations, and, thus, can lead to situations where the client's instructions undermine a person's or a group's right to self-determination.

The negative impact of the standard conception on third parties' right to self-determination is seen in *Day and another (Appellants) v The Government of the Cayman Islands and another (Respondents)* JCPC 2020/0033, where the Judicial Committee of the Privy Council was asked to decide whether the Bill of Rights in the Constitution of the Cayman Islands provides a right for same-sex couples to access the institution of marriage. The controversy surrounding this case concerned the appointment of Dinah Rose QC, a barrister practising in England and Wales, to represent the Cayman government. This appointment raises two important questions in relation to legal ethics: the role of a lawyer, in this case a barrister, in the administration of justice and the value of the 'cab rank rule'. In relation to the first issue, the lawyer for the Cayman government has two options available to them. First, to represent the client according to the standard conception. This approach involves a commitment to Hart's concept of legal positivism, namely the 'separation of law and morals'.⁸⁸ Hart, according to Lon Fuller, was recommending that 'law must be strictly severed from morality'.⁸⁹ Second, to adopt Luban's lawyering model requires the lawyer to take on the role of a moral activist and engage in law reform. Legal education can play a role in promoting Luban's approach by

⁸⁶ Lasswell and McDougal (1943) p 223.

⁸⁷ Lasswell and McDougal (1943) p 223.

⁸⁸ Hart (1957).

⁸⁹ Fuller (1957) p 656.

training students to become policymakers committed to democratic values such as citizens' right to self-determination.

One of the factors attributed to the continued dominance of the standard conception is legal positivism.⁹⁰ In general terms, legal positivists focus on authority when determining legal validity, only considers laws imposed by valid human machinery, and is only parenthetically concerned with justice. Within the realm of legal positivism, '[t]he legislator is conceived as an independent authority, and the judge as a dependent authority, whereas the lawyer has no authority at all'.⁹¹ Contributing to the lawyer's lack of authority and the success of the standard conception is the separability thesis,⁹² which claims the existence of a conceptual separation between law and morality. Thus, for a legal positivist, determining normative validity involves deductive reasoning once the official authority has been identified. Unlike natural law theory, however, legal positivism maintains that moral reasoning does not have a role in this process.⁹³

The impact of the separation thesis on legal education, and legal practice, is that ethical dilemmas are viewed as a tension between legal and non-legal considerations.⁹⁴ In the context of the SQE, there is a risk that future solicitors are being educated to view ethical dilemmas as a clash between their duty to zealously pursue their clients' ends against moral considerations that might negatively impact on securing the desired outcomes for their clients. Viewing ethical dilemmas through a positivist lens reinforces the standard conception and limits the lawyer's role to that of an agent who acts on the principal's instructions. A consequence of acting as the client's agent is that the lawyer adopts a passive role involving the provision of options and acting on the client's preferred choice. The separation thesis in legal education does not

⁹⁰ Arjona (2013) contends that the two other factors, in addition to legal positivism, concerning the continued success of the standard conception: the adversarial system and the agency model of the lawyer-client relationship.

⁹¹ Arjona (2013) p 56.

⁹² The other two theses are the pedigree thesis and the discretion thesis. See Wacks (2005) p 69.

⁹³ Arjona (2013) p 57.

⁹⁴ Arjona (2013) p 57.

promote the alternative lawyer-client model whereby the lawyer explains the different legal options to their client and the potential ethical and legal consequences of those options on both the client and third parties. Thus, the SQE's positivist approach educates solicitors to be zealous amoral lawyers, committed to achieving their clients' objectives irrespective of the consequences these might have on third parties.⁹⁵ A supplemental egalitarian model is proposed to address the limitations of the SQE.

An egalitarian approach to solicitor education and training

The SQE is criticised by Macleod for its:

[F]ocus on traditional knowledge acquisition and the static approach to skills where an increasingly dynamic approach is required, leaving a vacuum for where this should be positioned.⁹⁶

Given the above and the limitations highlighted in this chapter, an alternative approach is to reject the SQE's 'banking' model in favour of educating students to become, what Freire terms 'more fully human',⁹⁷ by which he meant a 'conscious being'⁹⁸ and a subject. The Freirean individual, understood as a subject, is one who can 'relate to the world' and can change it.⁹⁹ An individual's subjectivity, therefore, informs how they perceive the world and assess right from wrong. To do so requires individuals to be integrated in their world as opposed to merely being passive actors.¹⁰⁰ This highlights that lawyer amorality is insufficient for the purposes of training solicitors to challenge and change the world around them. To achieve 'integration' requires 'the capacity to adapt oneself to reality *plus* the critical capacity to make choices to

⁹⁵ The SRA's Standards and Regulations contain provisions in relation to duties to the court, third parties, and the wider public interest. However, these are either limited in scope or lacking detail.

⁹⁶ Macleod (2022) p XX.

⁹⁷ Freire (1993) p 47. Emphasis in original.

⁹⁸ Freire (1993) p 48.

⁹⁹ Freire (2008) p 5.

¹⁰⁰ Freire (1973) p 4.

transform that reality'.¹⁰¹ This would involve incorporating a critical and egalitarian model to learning and development.¹⁰² In this model of education, learners are no longer 'docile listeners' but 'critical co-investigators in dialogue with the teacher'.¹⁰³ Critical reflection and exposure to problems relating to students and their world obliges them to respond to these problems.¹⁰⁴ For reflection to be considered critical it must engage in:

[U]ncovering, and challenging, the power dynamics that frame practice and uncovering and challenging hegemonic assumptions (those assumptions we embrace as being in our best interests when in fact they are working against us)'.¹⁰⁵

Unlike the SQE's 'banking' model, critical reflection creates an awareness of how dominant ideologies such as capitalism and patriarchy shape beliefs and norms that justify and maintain economic and political inequality. Thus, if future solicitors are to become critically reflective practitioners, it is essential that the SQE, and legal education in general,¹⁰⁶ incorporates normative ethics¹⁰⁷ and critical theory.¹⁰⁸

Conclusion

This chapter has examined the pedagogy of the SQE through the prisms of biopolitics and Freire's 'banking' model, in order to address two main questions: whether the SQE empowers future solicitors with the necessary conceptual tools to examine and critique issues of power and control in relation to juridic institutions, and whether the SQE's pedagogic approach

¹⁰¹ Freire (1973) p 4.

¹⁰² Freire (1993) p 53.

¹⁰³ Freire (1993) p 54.

¹⁰⁴ Freire (1993) p 54.

¹⁰⁵ Brookfield (2009) p 293.

¹⁰⁶ In this regard, the SQE is no different to the

¹⁰⁷ Madhloom (2019).

¹⁰⁸ Neither the SQE nor the current qualification regime requires future solicitors to have grounding in normative ethics and critical theory. See Bar Standards Board and the Solicitors Regulation Authority, *Academic Stage Handbook* (2014).

promotes justice. It would appear that while the biopolitics of the SQE will produce lawyers who are able to identify settled law, there is a risk that this form of biopolitics will also create solicitors who are amoral lawyers and who are not equipped to address normative questions such as ‘what the law *ought* to be?’.

Jane Ching, writing in this volume, argues that in addition to caring about the law and justice, law students and junior lawyers are also concerned about ‘resilience, about equality and about the planetary future’.¹⁰⁹ Thus, to address the limitations of SQE 1, namely in relation to producing solicitors who are able to shape the world around them and respond to social, political, and environmental problems, this chapter recommends the inclusion of an egalitarian pedagogical model which is underpinned by normative ethics and critical theory.

¹⁰⁹ Ching (2022) p XX

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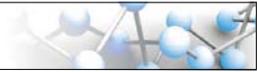
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A rights-based proposal for managing faith-based values and expectations of migrants at end-of-life illustrated by an empirical study involving South Asians in the UK

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Abstract

International migration is an important issue for many high-income countries and is accompanied by opportunities as well as challenges. South Asians are the largest minority ethnic group in the United Kingdom, and this diaspora is reflective of the growing diversity of British society. An empirical study was performed to ascertain the faith-based values, beliefs, views and attitudes of participants in relation to their perception of issues pertaining to end-of-life care. Empirical observations from this study, as well as the extant knowledge-base from the literature, are used to support and contextualise our reflections against a socio-legal backdrop. We argue for accommodation of faith-based values of migrants at end-of-life within normative structures of receiving countries. We posit the ethically relevant principles of inclusiveness, integration and embedment, for an innovative bioethical framework as a vehicle for accommodating faith-based values and needs of migrants at end-of-life. These tenets work conjunctively, as well as individually, in respect of individual care, enabling processes and procedures, and ultimately for formulating policy and strategy.

KEYWORDS

end-of-life care, faith-based values, Kantian ethics, Rawls, rights

1 | INTRODUCTION

The current scale of international migration is an important issue for many high-income countries and is accompanied by opportunities as well as challenges.¹ In Europe, Germany witnessed the largest increase in international migration, and between 2014 and 2015 the U.K. saw an increase of 24%.² Data from the most recent U.K. census reveals significant changes in ethnic and religious diversity.³ Since 2001, the

proportion of White British dropped from 87.5% to 80.5% of the population. There were four million fewer Christians in England and Wales in 2011 compared with 10 years previously, and there has been a substantial increase in the number of persons professing non-Christian faiths or holding no religious belief. While the U.K. has accepted migrants for centuries, the last decade has been different, particularly in respect of the free movement of mainly younger, economically active, persons from Eastern Europe.

Despite recent demographic trends related to Eastern Europe, South Asians (who began to arrive in the U.K. nearly 70 years ago) remain the largest minority ethnic group in the U.K.⁴ Many of these first-generation migrants are now reaching the ends of their lives, and the availability of responsive end-of-life care has become a new priority.

It has long been recognized that views and perceptions of end-of-life care are diverse and tend to be influenced by notions of culture, faith and belief. Although the population of Britain has traditionally

¹The Organisation for Economic Co-operation and Development (OECD). 2015. Comprehensive and co-ordinated international response needed to tackle refugee crisis. Retrieved from <http://www.oecd.org/migration/comprehensive-and-co-ordinated-international-response-needed-to-tackle-refugee-crisis.htm> [Accessed Jul 7, 2017].

²Barrett, D. (2015). Migration to Britain sees one of the largest shifts in the developed world, says OECD report. *The Telegraph*. Retrieved from <http://www.telegraph.co.uk/news/uknews/immigration/11881723/Migration-to-Britain-sees-one-of-the-largest-shifts-in-the-developed-world-says-OECD-report.html> [Accessed Jul 7, 2017].

³Office for National Statistics (ONS). (2011). Census 2011. Religion in England and Wales. Retrieved from <http://www.ons.gov.uk/> [Accessed Jul 7, 2017].

⁴Ibid.

been Christian, a significant proportion is affiliated to other religions or to no religion at all.⁵ Faith and religious belief can be expected to have particular significance at the end of life, at which time philosophical, moral and spiritual considerations are likely to be engaged with.

A liberal and economically developed society ostensibly respects and recognizes the rights of persons and purports to uphold values such as tolerance, equality and diversity in the context of its trans-cultural socio-legal framework. These values are exemplified by initiatives such as reforms to the equality and diversity agenda, as well as by the more established human rights jurisprudence, which collectively proscribes discrimination by service-providers on grounds that include religion and belief.

The right to freedom of religion or belief is enshrined in Article 9 of the European Convention on Human Rights. The scope of this freedom has broad application and confers absolute protection to the internal dimension of religious belief ('forum internum') and proscribes coercive interference with freedom to have, or adopt, a religion or belief of one's personal choice. In respect of freedom to express or manifest personal faith or belief ('forum externum'), restrictions may be applied in order to pursue a legitimate aim. Nevertheless, any restriction must be a proportionate response.⁶

In Great Britain, the legal recognition of freedom of religion (or none) has become clear following implementation of the Equality Act 2010. Section 4 of the Act describes 'religion and belief' (or none) as being a protected characteristic, where 'religion' means any religion and 'belief' means any religious or philosophical belief.⁷ It is unlawful for service-providers or those exercising a public function to discriminate, harass or victimize those with a protected characteristic.⁸ This duty is accompanied by positive obligations to have 'due regard' to equality of opportunity and the need to foster good relations.⁹ In the U.K. it remains the case that most people die in public hospitals. All public bodies that provide end-of-life care therefore have a positive duty to promote equality of opportunity and good relations between people of different faiths as well as the secular. Service-users are protected when requesting services as well as during service provision, and provider organizations and those exercising public functions have a duty to make reasonable adjustments.¹⁰

In a previous paper, we presented aspects of a focus group study that pertained specifically to perceptions of South Asian cultural values in respect of end-of-life care.¹¹ The key values that emerged were dignity, equality, religious beliefs and relational acceptance of decision-making for themselves by others (with lesser reliance on self-determined choice).

⁵Office for National Statistics. Census. (2011). *Religion in England and Wales 2011*. Retrieved from <http://www.ons.gov.uk/> [Accessed Jul 7, 2017].

⁶Taylor, P. M. (2005). *Freedom of religion. UN and European human rights law and practice*. Cambridge: Cambridge University press.

⁷s.10 Equality Act 2010.

⁸Part 3 (including sch. 2 and 3) Equality Act 2010.

⁹s.149 Equality Act 2010.

¹⁰s.29(7) Equality Act 2010.

¹¹Samanta, J., & Samanta, A. (2013). Exploring cultural values that underpin the ethical and legal framework of end-of-life care: A focus group study of South Asians. *J Med Law and Ethics*, 1, 61–72.

In this paper, we propose a bioethical framework that accommodates religious and faith-based values of migrants at end-of-life, within the normative canvas of receiving countries. We articulate this innovative framework on the basis of our personal reflections embedded within an ethical and socio-legal context, and illustrated by empirical observations obtained from a focus group study of South Asians living in the U.K. Its message is relevant for all countries that are experiencing increased migration of diverse populations.

2 | THE EMPIRICAL STUDY

For the purpose of this article, 'South Asians' are persons who originate through their family line from the Indian sub-continent, and who self-identify themselves as such in respect of their ethnicity. In the main they comprise either first- or second-generation migrants to the U.K. Although the focus of this article is 'faith-based', ethnicity (as opposed to 'race') nevertheless remains a relevant category, as values and attitudes of persons are linked to both culture and ethnicity. The categorization of race and ethnicity has been helpfully clarified by a research project that was conducted at Ludwig Maximilians Universität München Institute for Sociology.¹² Racial categorization is based upon grouping by a commonality of physical, biological and genetic traits usually resulting from ancestry. Ethnic categorization is founded on a commonality of geographic origin, language and culture resulting in values that may be shared and held in high esteem by members of that group. Our study focuses on the latter. We therefore do not see the need for digression into race, but hold that ethnicity is relevant for our discourse.

The study took place in Leicester, a city in the Midlands, which has one of the largest Asian/Asian-British populations. Ethical approval was obtained from De Montfort University, Leicester. Prior to commencement, outline details of the study aims and objectives were given to participants. Consent was obtained for the discussions to be digitally recorded. The participants were self-selected members of the South Asian community who responded to an advertised call (made on our behalf) by the Leicester Centre for Ethnic Health Research. The Centre has a public consultation panel and an established acumen for supporting research projects that seek to recruit participants of Black minority ethnic origin. Participants were of both genders, of Hindu and Islamic faiths, and were born abroad or in the U.K. The age range was between 28 and 72 years. In total there were 12 participants, six males and six females, seven of Hindu and five of Muslim faith.

A qualitative approach was chosen to ascertain the values, beliefs, views and attitudes of participants in relation to their perception of issues pertaining to end-of-life care. Two focus groups lasting two hours were facilitated, during which participants were encouraged to interact among themselves rather than with the facilitator, who intervened at times to clarify ambiguities and challenge apparent inconsistencies. Participants were asked to express their views in terms of

¹²This was conducted under the lead of Prof. Dr. Hella von Unger. Retrieved from <https://bibliothek.wzb.eu/pdf/2014/iii14-601.pdf> [Accessed Jul 7, 2017].

what they would expect for someone of their faith or religion in respect of end-of-life care provided within an institutional setting in the receiving country. They were to do so by reflecting (separately) upon two hypothetical scenarios: first, if the recipient was a known close family member; and second, if the recipient was a distant unknown person.

Verbatim transcripts were generated within a week of each session, verified for accuracy against the voice recordings, and then played back to ensure that the speech extractions were mapped appropriately to follow each individual's personal contribution. Unabridged transcripts were used to enhance the rigour of the strategy.¹³ An open coding system was used followed by axial coding to identify generic category themes and to link these to their subcategories using a variant of content analysis with words and phrases being assigned to the generic categories.¹⁴ In order to ensure verifiable results and to reduce the possibility of bias, two persons worked independently on the data. Collaborative discussion of the findings took place (between JS and AS) in order to avoid critical issues being overlooked.

3 | EXPLICATION OF FINDINGS AND DISCUSSION

3.1 | Methodological challenges

Perhaps because of the nature of the subject, we received an outpouring of personal tales with emotive stories that contained sensitive information. As a result, after having analysed the transcripts, we determined that the usable data in terms of verbatim quotations would be limited. However, there were a number of extractions that were potentially valuable from an ethical perspective.

We are mindful of the growing use of empirical research to inform debate in normative ethics. This has been deployed principally for gathering qualitatively rich data and using research methods from the social sciences.¹⁵ It is quite rightly urged that empirical data in the context of ethics should be used cautiously and responsibly so as not to distort results inadvertently, thereby generating misleading normative ethical conclusions. Marcel Mertz and colleagues have helpfully set out a 'road map' with detailed criteria for conforming to empirical research in ethics.¹⁶ Nonetheless, we are equally mindful that in combining ethics

with empirical data, a useful starting point is people's actual beliefs, intuitions and other attributes such as values and attitudes.¹⁷

With this in mind, we recourse to a 'hybrid methodology' that we believe is best suited to encompass the transdisciplinary arc of clinical practice and law within which our expertise lies. We present our findings and subsequent discussion in the light of a perspective that attempts to integrate socio-empirical and normative methods. In this paper we use extractions from the data sets to illustrate concepts of key relevance to the area of managing faith-based values and expectations of South Asians (of Hindu and Muslim faith). Illustrative quotations have been infused within the discussion to maintain fluidity of discourse. The sources of contributions are indicated according to gender and religious denomination: Muslim male; Muslim female; Hindu male; and Hindu female.

The key concepts that we elaborate upon are (a) an intrinsic right to religious and faith-based values at end-of-life; (b) the right to respect for freedom of religion at end-of-life; and (c) culture-dependent spiritual beliefs pertaining to death. Our framing of these key concepts is reflective and dually founded upon several years of clinical experience (AS) of caring for patients from a migrant South Asian background,¹⁸ as well as educed from academic literature, which can be an effective way of maximizing the utility of the collective knowledge-base and is an important source of information.¹⁹ We contextualise our discourse against a socio-legal background to enable us to articulate the principles for an innovative bioethical framework for accommodating minority faith-based needs at the healthcare organizational level. We hope that the proposed framework may have some impact upon informing policy-makers as to the management of minority faith-based values at end of life.

Given that this study utilizes a hybrid methodology, it cannot be claimed that the conventions of any one of the disciplines (law, clinical practice and ethics) that perfume this study must be followed strictly, as there is no standardized way (as yet) of describing a process for epistemic integration across disciplines. However, we do not believe that the approach we have taken detracts from the usefulness of this study, because, to the best of our knowledge, there is very little similar data available from countries receiving South Asian diaspora. We believe that our observations will add value to the literature in these areas of academia and practice.

¹³Bloor, M., Frankland, J., Thomas, M., & Robson, K. (2001). *Focus groups in social research*. London: Sage Publications Ltd; Krueger, R. A. (1998). *Analysing and reporting focus group results*. London: Sage Publishing, p. 128; Braun, V., & Clarke, V. (2006). Using thematic analysis in psychology. *Qual. Res. Psychol.*, 77, 77–101.

¹⁴Strauss, A., & Corbin, J. (1998). *Basics of qualitative research: Techniques and procedures for developing grounded theory*. (3rd Ed.) London: Sage Publications.

¹⁵See for example Haimes, E. (2002). What can the social sciences contribute to the study of ethics? Theoretical, empirical and substantive considerations. *Bioethics*, 16(2), 89–113. See also Borry P., Schotsmans, P., & Dierickx, K. (2005). The birth of the empirical turn in bioethics. *Bioethics*, 19 (1), 49–71

¹⁶Mertz, M., Inthorn, J., Renz, G., Rothenberger, L. G., Salloch, S., Schildman, J. . . . Schickantz, S. (2014). Research across the disciplines: a road map for quality criteria in empirical research. *BMC Medical Ethics*, 15, 17.

¹⁷Borry P., Schotsmans, P., & Dierickx, K. (2004). Empirical ethics: a challenge to bioethics. *Medicine, Healthcare and Philosophy*, 7, 1–3.

¹⁸Samanta, A., Johnson, M. R. D., Guo, F. & Adebajo, A. (2009). Snails in bottles and language cuckoos: An evaluation of patient information resources for South Asians with osteomalacia rheumatology. *Rheumatology*, 48(3), 299–303; Samanta, A., Shaffu, S., Panchal, S. et al. (2012). Tinkering at the edges or collaborative symbiosis? Ethnicity and rheumatology: a consensual review discussion. *Diversity and Equality in Health and Care*, 9, 209–217; Samanta, A., & Shaffu, S. (2012). Ethnicity and musculoskeletal health: Consensus and consensus. *Diversity and Equality in Health and Care*, 9, 219–222.

¹⁹See for example, Gleit, B. G., & Graham, B. (1989). Secondary data analysis: A valuable resource. *Nursing Research*, 38(6), 380–381. See also Hinds, P. S., Vogel, R. J. & Clarke-Stefan, L. (1997). The possibilities and pitfalls of doing a secondary analysis of a qualitative data set. *Qualitative Health Research*, 7(3), 408–424.

3.2 | An intrinsic right of religious and faith-based values at end-of-life

Freedom to practise rituals of religious significance at end-of-life was a shared expectation of participants. But the question remains as to why the beliefs of any minority group should merit special recognition in policy, as well as protection in law. Respect for faith and religious belief derives from the historic suppression of minority groups by dominant populations and is founded upon sociological arguments that minority interests and characteristics such as culture, ethnicity and religion are worthy of protection.²⁰ From the perspective of cultural anthropology, the normative content of concepts such as race, rights and religious minorities has evolved from a shared origin and is influenced by the development of minority rights that have ancestry in religious ideology. It is from here that respect for faith and belief have developed alongside ethnicity and culture to become major players on the contemporary legal and political scene.

Attempts to avoid religious conflict lie at the heart of policies of tolerance that have evolved subsequently into laws and policies to protect minority rights. Recognition of religion as a human right can be viewed as part of the wider notion of respect for 'peoplehood' in representing the depiction of the person as part of a unified collective, or else as a shared value belonging to a defined class of persons.²¹ Nevertheless, these societal values that depict the universality of human rights have developed from the wellspring of Western thought, and it is these same thoughts and values that have transmuted into ideals of almost global influence. The extent to which assumptions such as these can still be justified, or whether such ideals represent a form of cultural hegemony, is debatable.

An accepted formulation of the universal right to freedom of religion might be representation in a way that reflects characteristics of identity including diversity, religion, or culture. One participant referred to the recent death of her father by explaining that the (White British) general practitioner had handled end-of-life care sensitively by respecting the family's religious rites and needs, and emphasized that 'we were allowed to do everything according to our religion'.²² The real relevance of this universal right, particularly in the context of care of the dying, was to embed a genuine ethos of diversity based upon religious liberty as a collective interest for all, irrespective of race or religion. This was exemplified by a participant who said that if 'a person is dying he must have respect - it does not matter who he is or what religion'.²³

One participant argued that the expression of faith and religious belief at end-of-life should be unrestrained on the basis that this was 'a right since this is part of our society, our beliefs and our culture'.²⁴ Section 13(1) of the Human Rights Act 1998 provides that 'If a court's determination of any question arising under this Act might affect the

exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right'.²⁵ In essence, this implies that the courts ought to give privileged attention to collective aspects of religious liberty. In protecting this right it is assumed that where there is conflict the concept of collective liberty ought to prevail, justified on the basis of proportionality. Collective religious liberty operates to empower communities who share a common faith and who structure and organize their lives according to the principles of their religious ideals. While the effects will be felt principally on community life, which in turn impacts upon the lives of individuals, its scope is wider than Article 9 and extends to privileges that can incorporate (inter alia) hospital care.²⁶

Religious communities can, at times, carry out functions similar to those of the state. These functions include, for example, marriage, education, burial and care given before, or at the time of, death. This was illustrated by one participant who stated that: 'In my religion [Islam] administering simple hygiene at the time of death should be left to the family and [my religious] community rather than non-Muslim doctors or nurses.' This was because care given by a person of a different gender from the patient could be detrimental spiritually.²⁷ For followers of Islam the need for expedited disposal of the body is imperative and a definitive timeframe exists. Lack of appreciation or facilitation, along with direct or indirect constraints, could lead to avoidable delays and the possibility of indirect discrimination. This was a major consideration for one participant because the body needs to be buried on the day of death.²⁸

Recognition and facilitation of such aspects of religious liberty cannot be achieved without privileging religious perspectives, or practices, of minority groups. Whilst a liberal democracy might not wish to debate questions of religious truth, the state is nonetheless compelled to weigh the relative values of expression of religious belief. A commitment to religious rights and immunities represents a form of 'passive' protection in that it represents a refusal to use state force to modify behaviour based on a conviction of righteousness founded upon religious belief (subject to the derogations of Article 9(2)). This compares with the granting of specific privileges, as a form of positive protection, based upon the assessment of specific religious rituals and needs at end-of-life in the context of the perceived value of that religion's impact upon society.

Although collective religious rights are recognized in law it is debatable whether these rights have a separate and independent existence.²⁹ Collective rights derive from individual interests and gain

²⁰Stolzenberg, N. M. (2011). Righting the relationship between race and religion and law. *Oxf. J. Leg. Stud.*, 31(3), 1-20.

²¹Ibid.

²²Muslim female participant (DW).

²³Hindu male participant (QJ).

²⁴Muslim female participant (VE).

²⁵Cumper, P. (2000). Religious organisations and the Human Rights Act 1998. In P. W. Edge & G. Harvey (Eds.), *Law and religion in contemporary society: Communities, individualism and the state* (pp. 17-30). Aldershot: Ashgate.

²⁶Rivers, J. (2000). From toleration to pluralism: Religious liberty and religious establishment under the United Kingdom's Human Rights Act. In Rex J. Ahdar (Ed.), *Law and religion* (pp. 133-162). Aldershot: Ashgate.

²⁷Muslim female participant (UF).

²⁸Muslim female participant (VE).

²⁹Rivers, J. (2010). *The law of organised religions: Between establishment and secularism*. Oxford: Oxford University Press; Parekh, B. (2000). *Rethinking multiculturalism: Cultural diversity and political theory*. London: Palgrave.

validity and value from the constituents of that collective. Historically, protection of religious interests has been used to prevent conflict caused by religious diversity. From a utilitarian perspective, this protection might seem to be a relatively weak interest and one to be prevailed upon readily if this is likely to conflict with the competing rights of others. Calls have been made, for example, to withdraw state funding from the Multi-faith Group for Healthcare Chaplaincy.³⁰

A more fundamental reason for protection is based upon respect for dignity.³¹ Although the individual is the primary right-holder, the collective dimension cannot be ignored because its value derives from the multiplicity of discrete personal interests. The shared concern of several participants was that failure to recognize religious interests as a collective right at end-of-life would be stark evidence of the subjugation of minority faith groups by secularism. If no protection was afforded then this meant that their religion and faith was unrecognized. The consensus was that 'There is a huge knowledge gap in hospitals between what is provided and what we want on the basis of our religious beliefs.'³²

Whether the state should maintain impartial neutrality between the religious beliefs of people or whether these beliefs ought to be incorporated into the fabric of state policy, to facilitate manifestation of such beliefs through state emanations such as the National Health Service (NHS, as a government organization), is moot. Rightly, or wrongly, in the U.K. there is no neutrality between the state and the Church, which is part of the constitutional structure. Secularism, founded on the concept of a clear divide between the religious and non-religious, is unlikely to be perceived as neutral by the devout. The non-allowance, non-acceptance or even neutral stance taken by public organizations towards manifestation of religious beliefs may lead to alienation of followers and compel the faithful to behave in a way that is contrary to their preferred ideal.³³ One narrow secularist view is that religion ought to be a matter confined to the private realm. This perspective, however, might not align with the ethos of a publicly funded national health service (as in Britain) and where the majority of deaths still occur in hospitals. Lack of policy in this area carries the risk that health professional discretion might prevail over faith-based end-of-life preferences, and all the more so given the imbalance in power between health professionals and the patient.

At the end of life, the notion of religion and its linked spirituality can be of crucial importance to the individual, the family and the wider community. A dichotomy between manifestation of religious belief and secular acceptance of the same could cause tension. If policymakers feel bound to prioritize the religious perspective (or lack thereof) of the majority, then this could impact negatively upon minority groups. A

middle path is needed that draws upon both reason and faith in decision-making that can be expected to impinge upon personal choice about how to die in a hospital.³⁴ Participants felt that as members of minority faiths they had a right to a defined space for religious expression within this public domain. As an example, a comment was made emphasizing that it was necessary to raise the 'religious rights of [minority group] patients and make them aware of these rights.'³⁵

3.3 | The right to respect for freedom of religion at end-of-life

Religious freedom at end-of-life was expressed strongly by one participant who felt that: 'Our religious sensitivities need to be respected. We are entitled to this right.'³⁶ Debates about law and freedom of religion tend to be argued from two sides. One perspective, grounded in equality and parity of religious and secular belief, argues against conferment of privilege upon religious perspectives and ideologies.³⁷ This approach, in effect, removes religion from the equation and in so doing prevents its selection for prejudice, or partiality. With regard to end-of-life care, the liberal humanitarian approach would be to consider the needs of each and every individual flexibly on an empathic and personalized basis as opposed to an application of a rule-based process designed chiefly to mitigate against discrimination. Pro-forma-based end-of-life care plans, for example, prevent religious belief from being selected for preferential recognition and favour with the touchstone as 'equality' rather than respect for religion or belief.

The alternative approach is that religion has an essential quality of inherent worth.³⁸ This calls for respect for religion and belief as a core characteristic, recognized as intrinsically valuable, which justifies rights to freedom of religion. A potential problem with this approach is the wide variation in beliefs and practices. Distillation of an irreducible core of divergent religions is not simple.³⁹ For one participant, the principal need was for '... raising rights of patients and making them aware [as this] will allow translational conveyance of the message to the clinical staff.'⁴⁰ On probing the point, it was apparent that the 'message' that participants wanted to convey consisted of two components: first, that minority non-Christian faiths (in common with Christianity) held a core element that was prized by the devout; second, that one's inner values were reflected in religious belief. At times these components tended to be conflated during cross-discussion within the group. There was an expectation that: 'People giving medical care at end of life should

³⁰National Secular Society (NSS). (2012). NSS Briefing: Hospital Chaplaincy. Retrieved from <http://www.secularism.org.uk/uploads/nss-hospital-chaplaincy-campaign-briefing.pdf> [Accessed Jul 7, 2017].

³¹Dworkin, R. (1985). *A matter of principle*. Boston, MA: Harvard University Press; Dworkin, R. (1997). *Taking rights seriously*. London: Bloomsbury Academic.

³²Muslim male participant (ZA).

³³Parekh, B. (2000). *Rethinking multiculturalism: Cultural diversity in political theory* (2nd edn). London: Palgrave Macmillan.

³⁴Wicks, E. (2009). Religion, law and medicine: Legislating on birth and death in a Christian state. *Med. Law Rev.*, 17(3), 410–437.

³⁵Hindu male participant (SH).

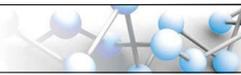
³⁶Hindu male participant (SH).

³⁷Sager, L. G. (2008). The moral economy of religious freedom. In P. Cane, C. Evans & Z. Robinson (Eds.) *Law and religion in theoretical and historical context* (pp. 16–25). Cambridge: Cambridge University Press.

³⁸Webber, J. (2008). Understanding the religion in freedom of religion. In P. Cane, C. Evans & Z. Robinson (Eds.) *Law and religion in theoretical and historical context* (pp. 26–43). Cambridge: Cambridge University Press.

³⁹R (Hodkin & Anor) v Registrar-General of Births, Deaths and Marriages [2013] UKSC 77.

⁴⁰Hindu male participant (QJ).



respect ethical and moral religious implications.⁴¹ This was supported by the comment that 'I think that personal values should be taken into account like washing and hygiene [at end-of-life].'⁴² Expressions such as these would suggest that consideration of one's own inner beliefs and attempts to define a synergy with these and other existing values might not wholly align in respect of migrant group expectations from the receiving country.

For participants, the overarching expectation was that the NHS, as a public body, would facilitate religiously motivated end-of-life requirements deemed necessary by the faithful based on their religious beliefs. This would align with a liberal state that recognizes and supports an equitable value system. Participants felt that 'There is a huge knowledge gap between what is provided [by the NHS] and what [followers of minority faiths] want,'⁴³ and that it was important for health professionals to understand and respect religious feelings.⁴⁴ This was particularly apparent at end-of-life, when 'personal values should be taken into account' and when religious and cultural 'sensitivities need to be respected.'⁴⁵ There are two principal reasons for this. First, it is equitable and fair to all and yet compatible with the possibly strongly held beliefs of some individuals. Second, it avoids the need to justify (on grounds of political theory) the reasons why special recognition, or protection, on the basis of faith should extend to some, when those beliefs are not shared by all.⁴⁶

3.4 | Culture-dependent spiritual beliefs pertaining to death

All participants held the view that a dignified death was paramount within their frames of reference. This was exemplified by reluctance to being just kept alive by artificial means: 'if there was a high chance I would never regain consciousness, I would not want to be kept alive by machines'⁴⁷; and 'there is no point in being kept alive on machines if they do not wake you up.'⁴⁸ While conceptions of dignity were fundamental, equally important was the support and presence of family and friends. There was a reluctance to accept medical treatment that preserved life in an impaired state of consciousness: 'Look at the Liverpool Care Pathway. The main option is one of pain relief and you are dosed up. I do not believe in that. We, as Muslims, want to be alert for as long as possible in order to read our final prayers (Shahada) which is a declaration of faith.'⁴⁹

Similar views were held by others: 'That is a problem with Hindus as well. If you are dying you need to read Bhagavad Gita. You pass

from one body to another. The person should be conscious for that.'⁵⁰ There was a clear expectation that a dignified death, on this interpretation, ought to be facilitated by public healthcare. The unanimous view was that organizations could not provide the necessary environments for some aspects of spiritual beliefs as articulated as 'hospitals cannot help when the soul comes out of the body because you have to die.'⁵¹ Participants were emphatic about the need to avoid treatments that could blunt conscious awareness at the end of life. This need was founded upon belief of the need to allow passage of the immortal soul as a separate entity from the physical body.

From a Westernised perspective it might be difficult to appreciate why some minority faith groups consider that consequences could be devastating if specific spiritual rituals are not adhered to at the end of life. Assumptions that modern Christian theological beliefs ought to prevail over the non-Christian dualism that characterizes the beliefs of some minority faith followers can cause tensions, particularly if the beliefs of the latter are injured in some way around the time of death. The concept of man as a unified being is a solipsistic conclusion that can be challenged on the basis that dualism has been the consensus for centuries. In fact, the pre-Darwinian traditional concept of the soul as the incorporeal entity of divine creativity derives from orthodox Western theology.⁵² By comparison, the 'no soul' doctrine as typically employed in its modern (Western) formulation has been dominant only for the last century or so.⁵³ Dualism, as a commonplace view in everyday life and morality (right versus wrong), might be expected to permeate circumstances normatively at end-of-life. Faith and religious belief are often governed by traditional customs and systems. Within the framework of law and jurisprudence in a multi-cultural society, these customs and systems need explicit acknowledgement by the courts in the event of litigation that involves freedom of religion.

Faith-based practices and rituals carried out at the time of death may have profound significance for the dying individual and their loved ones. Yet facilitating these practices within mainstream health services may present real challenges.⁵⁴ Empirical evidence suggests that at the time of death, and during bereavement, the prevailing characteristics

⁵⁰Hindu male participant(LO).

⁵¹Hindu female participant (TG).

⁵²St Thomas Aquinas (1964). *Summa Theologiae*, Ia, Q.90, art. 2 (E. Hill, Trans.) (Vol. 13, pp. 7-9). New York: McGraw Hill; Augustine (1991). *The Trinity*, (Book 10, Chapter 10, Section 16) (E. Hill, Trans). New York: New City Press.

⁵³Ducharme, H. M. (2001). The image of God and the moral identity of persons: An evaluation of the holistic theology of persons. In R. O'Dair & A. Lewis (Eds.), *Law and religion: Current Legal Issue 4* (pp. 1-25). Oxford: Oxford University Press.

⁵⁴Lloyd, M. (1995). *Contact Pastoral Monographs No. 5* (pp. 1-32). *Embracing the paradox: Pastoral care with dying and bereaved people*. Edinburgh: Contact Pastoral Limited Trust; Lloyd, M. (1996). Philosophy and religion in the case of death and bereavement. *J. Relig. Health*, 35, 295-3010. The long tradition of nurses recognising spiritual need in palliative care and at end of life is acknowledged in the literature and these professionals are likely to be most closely associated with the personal expression of belief at this time: see, Amente, M. O. (1997). Spiritual care: The heart of palliative nursing. *Int J Palliat Nursing*, 3(1), 4; Barnum, B. S. (1996). *Spirituality in nursing: From traditional to New Age* (2nd edn). London: Springer Publishing.

⁴¹Muslim female participant (UF).

⁴²Muslim female participant (DW).

⁴³Muslim male participant (BY).

⁴⁴Muslim female participant (VE).

⁴⁵Muslim female participant(UF).

⁴⁶Meyerson, D. (2008). Why religion belongs in the private sphere, not the public square. In P. Cane, C. Evans & Z. Robinson (Eds.) *Law and religion in theoretical and historical context* (pp. 44-71). Cambridge: Cambridge University Press.

⁴⁷Muslim female participant (DW).

⁴⁸Hindu female participant (RI).

⁴⁹Muslim female participant(UF).

are emotional intensity, existential anxiety and spiritual or religious concerns.⁵⁵ Minority ethnic faith groups may commemorate death from an explicit faith-based perspective set in the nuanced context of belief in the divine and the afterlife which demands preparation, and never more so than at the time of death.⁵⁶

While every religion incorporates a common, deeper strand that reflects a universal element of the psycho-spiritual experience, some attitudes to spirituality are faith-specific. One study carried out in a non-European population revealed fundamental beliefs that gave comfort at the time of death.⁵⁷ One of these was the importance of dying in a manner that ensures transmigration of the soul, which characterizes some faiths that are not practised by a substantial part of the European population. Family and friends are expected to facilitate the peaceful passing of the soul through the medium of religious and spiritual rituals in accordance with the inevitability of karma, which resonates with conceptions of peaceful death for Hindus.⁵⁸

Specific end-of-life rituals can be fundamentally important for the dying (and for their family and friends) in sustaining spiritual bonds and offering a sense of dignity and meaning during the transition from life. The adoption of a trans-cultural approach may well be a challenge for healthcare policy as well as for the need to comply with equality and human rights.

3.5 | Limitations of the data

Owing to resource constraints the data were derived from only two focus groups. Purposive sampling was used to invite 12 participants who were self-selected according to their interest in the research and on the basis of their self-identified religious affiliation. The study did not seek to draw a random sample, and it cannot be inferred therefore that the results are representative, nor can they be presented as 'scientific evidence'. The focus of the empirical study was end-of-life care and did not explore wider issues such as the attitudes of Hinduism and Islam to treatment decisions, palliative sedation or culturally related spiritual beliefs that favour consciousness, thereby impacting upon pain and symptom management.

We do not aver that our data found normative recommendations. For the reasons above (as well as for some already discussed as part of methodological challenges) we have used data to illustrate the themes of this paper. We offer our empirical observations in support of our reflective constructs within this area of humanitarian care at the time of death and align these with concepts arising from clinical experience as well as the literature.

⁵⁵Holloway, M. (2007). Spiritual need and the core business of social work. *Br. J. Soc. Work*, 37(2), 265–280.

⁵⁶Firth, S. (1999). Spirituality and ageing in British Hindus, Sikhs and Muslims. In A. Jewell (Ed.), *Spirituality and ageing* (pp. 158–174). London: Jessica Kingsley.

⁵⁷Holloway, M. (2006). Death the great leveller? Towards a transcultural spirituality of dying and bereavement. *J. Clin. Nursing*, 15(7), 833–839.

⁵⁸Firth, *op. cit.*, note 53.

4 | A FRAMEWORK FOR ADDRESSING ETHICAL IMPLICATIONS FOR HEALTHCARE

4.1 | Faith-based values and expectations as a moral right

In considering a rights-based approach to faith-based values at end of life, Moskop argues: 'Since the duty to provide adequate health care cannot be fulfilled by individuals, we will require a theory which posits important rights against society with corresponding social obligations and which seek to integrate such rights and obligations within a coherent and morally defensible social system.'⁵⁹ Moskop applies Rawls' theory of justice as fairness to the distribution of healthcare,⁶⁰ which is built upon a theory of justice whereby all individuals matter equally and maximally.⁶¹

For Rawls, the question whether religious belief ought to be given special status and respect depends upon the interrelationship of the key concepts of 'comprehensive doctrine' and 'reasonable pluralism'.⁶² A comprehensive doctrine combines value in human life and principles of personal character with ideals of friendship, family and associational relationships. Human reason is exercised within a framework of reasonable pluralism and represents plurality of reasonable (yet possibly incompatible) comprehensive doctrines. 'Comprehensive doctrines' may therefore be composed of a range of disparate values subsumed within reasonable pluralism and may encompass faith and religious belief. On this interpretation there should be nothing particularly distinctive about either faith or religion that would permit unusual privilege. Reasonable people should therefore be willing to set aside contested beliefs for the purpose of advancing the cause of justice as part of overall political ideology.

Rawls uses the 'justice as fairness' approach to justify protection of *individual* freedom of religion based upon liberalism as a political doctrine. Political liberalism is based upon social orders or a justified hierarchy of values. The tension that inevitably underpins this thesis relates to the validity that all reasonable people ascribe to purist principles of justice without recourse to *personal* privileges based on reasons of faith or belief. The reasonableness paradigm is wide and predicated on co-operation on even terms with all persons enjoying equal status.⁶³

Rawls' justification for liberal rights (including freedom of religion) depends upon reasonable people's respect for equality of citizenship and co-operation on terms that are acceptable to all. This aligns with Kant's supreme principle of morality, which requires you to: '[a]ct in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never

⁵⁹Moskop, J. C. (1983). Rawlsian justice and a human right to health care. *Journal of Medicine and Philosophy*, 8(4), 329–338, at p. 331.

⁶⁰Kant, I. (1996). *The metaphysics of morals*. Cambridge: Cambridge University Press, p. 23.

⁶¹Rawls, J. (2000). *A theory of justice*. Oxford: Oxford University Press.

⁶²Rawls, J. (1993). *Political liberalism*. New York: Columbia University Press.

⁶³Rawls, J. (1997). The idea of public reason revisited. *Univ. Chic. Law Rev.*, 64(3), 765–807.



simply as a means.⁶⁴ A right, according to Kant, is '[a]ny action... if it can coexist with everyone's freedom in accordance with a universal law'.⁶⁵ Thus, a moral obligation must be capable of being applied universally, equally applicable to all individuals.⁶⁶ Consequently, the significance of a rights-based approach is that it recognizes that each individual person is important. Individuals possess rights by virtue of the fact of being human.

4.2 | A framework to accommodate faith-based values and expectations

Based upon our personal and experiential reflections and our discourse supported by empirical observation we propose principles for a framework to accommodate faith-based values and expectations of migrant groups at end of life, and we suggest that this might assist receiving countries in providing ethnically and culturally sensitive care for this group of people. The ethically relevant principles that may have key implications for policy and healthcare are *inclusiveness*, *integration* and *embedding*. These tenets impact respectively on end-of-life care at individual, institutional and policy levels and are integral to the ethical values of virtue, tolerance and respect for the individual.

4.2.1 | Inclusiveness

Globalization, as well as international migration, has led to the mushrooming of cultural diversity in many receiving countries that were characterized previously by their long histories of monochromatic communities. It has long been recognized that lack of understanding of different cultures may lead to health disparities.⁶⁷ Racial stereotyping can also affect the ability of migrants to use public services.⁶⁸ These inequalities have predominantly been recognized in relation to physical diseases.⁶⁹ We have argued previously that healthcare providers have a duty to acknowledge the multiracial character of the populations they serve and to be prepared to address these needs proactively.⁷⁰

Recognition of diverse religious and faith-based values at end-of-life is essential for full inclusiveness of migrants within receiving societies and in order to provide needs-responsive healthcare. We have already advanced rights-based arguments in support that are buttressed by respect for the individual and protection of dignity. These

values are of universal application premised on the basis of equality of persons. Although freedom of religion is enshrined in law,⁷¹ meeting faith-based values at end of life is different and requires commitment to inclusion of people within the fabric of society, conceptually founded on moral, or humanitarian, rights.

The significance of this distinction relates to the subjective experience of the dying person, as opposed to an ideological commitment or preservation of an orthodox health professional rule or guideline. Pluralism of values at end-of-life implies that good care should properly be centred on the person's own conceptions on what is good. Unless there is true inclusiveness there will be a mismatch between expectations formed on diverse faith- and religion-based values and the experiences of the individual, as well as family members, at end-of-life.

4.2.2 | Integration

In order to benefit the individual migrant, inclusiveness needs to be integrated into institutional processes. Integration requires acceptance and acknowledgement of inclusiveness and personal values. Participants in this study shared the expectation that those near to death had the right to manifest their religious beliefs openly in public and felt that there should be legal protection for the same.⁷² Certain rituals motivated by religious belief may not align readily with normative Western values and therefore may be less likely to be acknowledged by healthcare professionals. By way of example, Hindu participants referred to the importance of bedside chanting by the extended family. Public expression of grief, such as weeping and wailing, were perceived as facilitative and a necessary requirement to ensure the safe onward passage of the soul. Furthermore, at end-of-life, certain religious rites demand that no foreign material is present in the body. A decision to follow this religious ritual might conceivably conflict with medical advice. For integration, it is necessary to raise awareness and knowledge about minority faith-based and religious values at end-of-life. This requires education and training of staff at all levels so that health professionals are adequately equipped with the transactional skills for multicultural end-of-life care. Such training needs to be disseminated widely and monitored, in order to ensure sustainable consistency for respect and empowerment of migrant values.

In addition to these educational imperatives, a further potential challenge is lack of resources. While lack of resources are undoubtedly important and a current priority, certain adaptations might be achieved relatively easily without incurring considerable expense. Muslim participants, for example, explained that wearing a *jilbab*, a loose, full-length body covering, is required for devout persons at the time of death, and yet this option is not available routinely in hospital settings. The issue of wearing a *jilbab* (as part of school uniform) has been tested in the House of Lords.⁷³ Although the circumstances were different from those at end-of-life, the court was

⁶⁴Kant, I. (1969). *The moral law*. London: Hutchinson University Library, p. 91.

⁶⁵Kant, *op. cit.*, note 60, p. 23.

⁶⁶*Ibid*: 23.

⁶⁷Bischoff, A. (2003). *Caring for migrant and minority patients in European hospitals: A review of effective interventions*. Basel: Swiss Forum for Migration and Populations Studies.

⁶⁸Al Abed, N. A., Davidson, P. M., & Hickman, L. D. (2013). Healthcare needs of older Arab migrants: A systematic review. *J. Clin. Nurs.*, 23, 1770–1784.

⁶⁹Rhodes, P., & Nocon, A. A. (2003). A problem of communication? Diabetes care amongst Bangladeshi people in Bradford. *Health Soc, Care Community*, 11, 45–54.

⁷⁰Samanta, A., Samanta, J., & Johnson M. R. D., & Brooks, N. (2005). Rheumatoid arthritis in minority ethnic groups: Batons of disease, clinical and social cultural features amongst British South Asians. *Divers Equal Health Care* 2, 99–118.

⁷¹Article 9 of the European Convention on Human Rights.

⁷²Hindu male participant (KP).

⁷³*Begum v Tenby High School* [2006] UKHL 15.



impressed by the 'immense pains' the school had taken to devise an inclusive policy to respect religious beliefs by engaging with local communities to ascertain real, as opposed to perceived, cultural and religious needs without detriment to the wider society and norms.

Integration at healthcare institutional level is based on an assessment of the needs of migrants, and addressed by raising awareness, providing training and developing services that are culturally compliant.

4.2.3 | Embedment

For inclusiveness and integration to have real meaning, culture-specific values for end-of-life care need to be embedded in decision-making at all levels. Such embedment needs to be driven through strategy and policy in order to overcome obstructions to social cohesion within wider communitarian norms.

Within Europe, there is a large variety of health policy approaches that are directed at addressing migrant healthcare needs.⁷⁴ While some countries have tried to develop suitable initiatives, specific strategies are often lacking. This is despite recognizing that over a decade ago the European Commission stressed the need to remove barriers of inequality, such as health, as well as the more general and universal needs of migrants, including end-of-life care, when vulnerabilities become more acute.⁷⁵ Although there has been some focus (over the last 40 years) on health needs,⁷⁶ less attention has been paid to healthcare needs more generally. The challenge for receiving nations will be to provide end-of-life and healthcare more generally for migrants with specific characteristics and requirements by translation into creative new models for the provision of such care.

The importance of early embedment cannot be overemphasized because any change from embedment takes time. England has a long history and experience of receiving migrants and having a national health system that provides universal coverage and equal rights to access as for the native population. It promotes racial equality values⁷⁷ and supports the inclusion of minority groups in programmes that deal with health promotion.⁷⁸ Yet such initiatives⁷⁹ can be successful only if there is a clear recognition that embedment into health policy works most effectively in conjunction with integration into processes, along with inclusiveness of individual values.

Although hospitals must have an equality and diversity policy in place that is consistent with multi-faith perspectives, it is arguable that

⁷⁴Vazquez, M. L., Terraza-Nunez, R., Vargas, I., Rodriguez, D., & Lizana, T. (2011). Health policies for migrant populations in three European Countries: England; Italy & Spain. *Health Policy*, 101, 70–78.

⁷⁵Badilla, B., & Pereira, M. (2007). *Health and migration in the EU: Building a shared vision for action. Challenges for health in the age of migration*. Lisbon: Health and migration in the European Union.

⁷⁶Aday, L. A., & Andersen, R. M. (1974). A framework for the study of access to medical care. *Health Services Research*, 9, 208–220.

⁷⁷Department of Health. (2004). *Race equality action plan*. London: Department of Health

⁷⁸Department of Health. (2007). *Single equality scheme. 2007–2010*. London: Department of Health.

⁷⁹Department of Health (2009). *Religion or belief: A practical guide for the NHS*. London: Department of Health.

the public sector duty to advance the equality agenda could turn into a mere 'tick box' exercise that emphasizes compliance with bureaucratic process rather than introducing positive change.⁸⁰ The achievement of real and substantive enhancement of quality and acceptance of the nuances of migrant faith-based values at end-of-life requires a new, proactive culture. A narrow approach based on policy objectives alone may have little effect other than perpetuating a restrictive regime for those of minority groups.

5 | CONCLUSION

In this paper we argue that the faith-based and cultural values of migrants regarding end-of-life care expectations should be accepted and accommodated as part of the receiving country's societal norms. End-of-life care is a live theme at a time when increasing international migration is leading to new challenges for providers of public health-care. We argue that an expectation for tolerance of these values is supported on the ethical basis of a moral right.

However, it would be jejune to merely acknowledge such an entitlement. Supportive healthcare systems are necessary for actual fulfilment of these values, by enabling care at end-of-life that is meaningful spiritually, as well as physically.

In order to achieve this, we have posited the ethically relevant principles of inclusiveness, integration and embedment, for a bioethical framework as a vehicle for translating a moral supposition into practice. These tenets work conjunctively, as well as individually, in respect of individual care, enabling processes and procedures, and ultimately for formulating policy and strategy.

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CONFLICT OF INTEREST

The author declares no conflict of interest.

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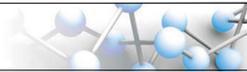
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⁸⁰Vickers, L. (2011). Promoting equality or fostering resentment? The public sector equality duty, and religion and belief. *Legal Studies*, 31, 135–158.



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Deception, mistake and non-disclosure: challenging the current approach to protecting sexual autonomy

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Abstract

English criminal law appears reluctant to criminalise deceptive sexual behaviour. It currently does so only in circumstances where the defendant has actively lied to the complainant regarding a fact recognised by law as crucial to consent. This restrictive approach arguably fails in many cases to protect the complainant's sexual autonomy. The central argument presented in this article is that all forms of deception, including non-disclosure, a false promise and mistake as to a material fact, may distort the complainant's decision-making process and undermine her ability to make an informed choice. A material fact is one which plays a significant role in a person's decision to engage in sex. This article advocates that the law of rape should be widened to include mistake on the part of the complainant and non-disclosure by the defendant.

Keywords: autonomy; consent; deception; lying; rape; sexual offences; undercover police

Introduction

In this article, I will argue that a complainant (C) should be deemed not to have consented to sexual activity in cases where any ostensible consent arises from deception¹ or misunderstanding, such as C's mistake, relating to a material fact. A material fact is one which plays a significant role in C's decision to permit or engage in sexual activity;² and it may be material to her, whether it would be material to someone else. A commitment to protecting sexual autonomy entails recognising that individuals are worthy of respect and, therefore, owed a duty not to have their sexual autonomy violated.³

Despite the self-evident value of sexual autonomy, the philosophical boundaries of acceptable behaviour have proven difficult to determine. Many definitions are reliant upon notions of 'consent', yet it is widely recognised that this term is fraught with

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1 For present purposes, 'deception' is synonymous with fraud, non-disclosure, false promise, mistake and misrepresentation.

2 David Archard, *Sexual Consent* (Perseus 1997) 46; Jonathan Herring, 'Mistaken Sex' [2005] *Criminal Law Review* 511, 518.

3 Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* vol 1 (Home Office 2000) paras 0.3–0.4.

conceptual ambiguity.⁴ The current law of sexual offences only permits narrow forms of deception to negate consent; the defendant (D) must have ‘actively’ or ‘deliberately’ deceived C.⁵ Section 76 of the Sexual Offences Act 2003 (the Act), allows for deception to negate consent in only two circumstances. Consent will be deemed to be absent where D ‘intentionally deceived’ C as to the nature or purpose of the relevant act,⁶ or where C ‘was intentionally induced’ to consent by D impersonating a person known personally to her.⁷ Deceptions falling outside these two categories may not negate consent. It is doubtful whether broader notions of deception, such as taking advantage of C’s mistake or non-disclosure of a material fact, will be allowed to vitiate consent under s 74 of the Act. A person consents under s 74 ‘if he agrees by choice and has the freedom and capacity to make that choice’. Although courts use the term ‘active deception’, ‘lying’ is the more accurate term, as it involves making an assertion which D knows is false. Moreover, in *R v B*,⁸ the Court of Appeal refused to hold that deception was analogous to non-disclosure.

It will be argued that, although lying and deceiving are philosophically distinct concepts, maintaining this distinction in the criminal law results in a failure to adequately protect sexual autonomy. Both lying and deceiving result in manipulating an individual’s sexual choice by limiting the options available and preventing her from acting according to her own standards. The central argument in this paper is that the law of sexual offences should allow for all lies, deceptions, mistakes and non-disclosure relating to a material fact⁹ to negate consent. Since the Act, undue rigidity has been applied by the courts in terms of the categories which negate consent. This suggests that the *R v Olujoba*¹⁰ approach is preferable because it permitted the jury to decide in each case whether consent was present. This article will chart the unjustifiable approach to protecting autonomy.

The first section of this article addresses the relationship between sexual autonomy and non-consensual sexual offences, specifically the offence of rape, to show that it only permits narrow forms of deception to negate consent. The distinction between lying and deceiving will be examined to show that both concepts, while philosophically distinct, can violate sexual autonomy. It will then be argued that English law should allow broader notions of deception, such as mistake and non-disclosure, to vitiate consent. The article will conclude by arguing that the proposal can be accommodated within the existing law of sexual offences.

The current law of sexual offences

The origins of the Act lie in the recommendations of a Home Office review completed in July 2000. The focus of the review’s recommendations was on personal autonomy, the prevention of sexual abuse or exploitation and the removal of discrimination in sex offences law.¹¹ Despite emphasising the importance of sexual autonomy, the review did not define this concept. This omission could be due to the fact that autonomy has been

4 Jennifer Temkin and Andrew Ashworth, ‘The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent’ [2004] *Criminal Law Review* 328, 328; Victor Tadros, ‘Rape without Consent’ (2006) 26 *Oxford Journal of Legal Studies* 515, 521.

5 *Assange v Sweden* [2011] EWHC 2849 (Admin) [102]; *R v McNally (Justine)* [2013] 2 Cr App R 28 [21].

6 Sexual Offences Act, s 76(2)(a).

7 *Ibid* s 76(2)(b).

8 *R v B* [2006] EWCA Crim 2945, [21].

9 Archard (n 2) 46; Herring (n 2) 518.

10 *R v Olujoba* [1982] QB 320.

11 Home Office (n 3) paras 0.3–0.4.

described as a spacious word, capable of containing a variety of philosophical implications.¹² A common element exists amongst the various definitions; the emphasis on freedom of the individual. The review concluded that there should be a statutory definition of consent for the purposes of any non-consensual sexual offence. The definition of consent found in s 74 of the Act has been supplemented in certain circumstances by 'evidential' and 'conclusive' presumptions contained in ss 75 and 76. The review recommended that consent should be defined as 'free agreement'.¹³ The Home Office review noted that the *Oxford English Dictionary* defines the verb 'to consent' as 'to acquiesce, or agree' and the noun 'consent' as 'voluntary agreement, compliance or permission'.¹⁴ It recognised that these definitions cover a range of behaviour from whole-hearted enthusiastic agreement to reluctant acquiescence. However, in the context of sexual relationships, the core element is an agreement between two people to engage in sex.¹⁵ By focusing on active deception, the current law fails to recognise the wide range of behaviours that are capable of negating consent.

The Home Office review recognised that:

People have devised a complex set of messages to convey agreement and lack of it – agreement is not necessarily verbal, but it must be understood by both parties. Each must respect the right of the other to say 'no' – and mean it.¹⁶

The Law Commission had suggested that an apparent agreement should not count as consent unless it is a 'free and genuine agreement'.¹⁷ It suggested that consent should be defined as 'subsisting, free and genuine agreement'.¹⁸ This was rejected by the Home Office review as being too complex and introducing an unnecessary semi-contractual obligation complication into consent.¹⁹ Instead, it recommended a definition based on 'free agreement' because of its simplicity and clarity. This, however, does not resolve the issue that 'freedom' and 'agreement' are ambiguous and complex concepts, which defy precise definition.²⁰

Section 74 comes close to the definition proposed by the review by assuming that 'agreement by choice' cannot exist in the absence of freedom and capacity to make that choice.²¹ To protect sexual autonomy in cases involving deception, the focus should be on whether the agreement was made as a result of manipulating C's decision to agree to sex. A person is unable to make an informed choice when her options are limited by deception. Thus, 'freedom' should inform 'choice'.

12 Richard Stanley Peters, 'Reason and Passion' in R F Dearden, P H Hirst and R S Peters (eds), *Education and the Development of Reason* (Routledge 2010) 161; D Pole, 'The Concept of Reason' in *ibid* 130; R P Wolff, *In Defence of Anarchism* (Harper & Row 1970) 14.

13 Home Office (n 3) para 2.10.5.

14 *Ibid* para 2.10.4.

15 *Ibid* para 2.10.5.

16 *Ibid*.

17 Law Commission, 'Consent to Sex' in Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* vol 2 (Home Office 2000) para 2.10.

18 *Ibid* para 5.1.

19 Home Office (n 3) para 2.10.5

20 Richard Card, Alisdair A Gillespie and Michael Hirst, *Sexual Offences* (Jordans 2008) 49.

21 *Ibid*.

CRIMINALISING DECEPTION, MISTAKE AND NON-DISCLOSURE

Liberal retributive principles require that only conduct which is blameworthy can legitimately be subject to state punishment.²² Blameworthiness requires D to possess capacity for responsible agency. In other words, D knew what he was doing when he committed the offence, and exercised choice and a sufficient degree of control in doing so.²³ Blameworthiness, in the context of deception, is analysed in terms of the harm caused to C and the wrongfulness of obtaining sex by deception, non-disclosure or mistake. Harm deals with the degree to which the deceptive conduct causes, or risks causing a 'significant setback to another's interests'.²⁴ Determining wrongfulness involves examining the extent to which the criminal act involves the violation of a moral norm.²⁵ In the context of sex by deception, it is possible to violate C's sexual autonomy (wrongfulness) without causing her any harm.²⁶ It is argued that the wrongfulness of deception is that it may lead to a violation of sexual autonomy. The argument in favour of expanding the types of deception which negate consent is that rape should be understood as involving a violation of C's sexual autonomy.²⁷

Sexual autonomy and the law of rape

Prior to the Act, the common law recognised only two types of deceptions which were capable of negating C's apparent consent: mistake as to the nature of the act²⁸ and mistake as to D's identity.²⁹ Mistakes falling outside these two fixed categories did not negate consent. The narrow approach of the common law is demonstrated in the case of *R v Linekar*.³⁰ C, a prostitute, agreed to sex with D on the understating that she would be paid £25. He in fact never paid and never intended to pay. D's conviction for rape was quashed. In *Linekar*, and other similar cases,³¹ the evidence suggests that had C known the truth she would not have agreed to the sexual act, and in each case D had knowledge of this. Although these cases were correctly decided, in terms of the application of the law, it will be argued that in such cases, a duty of care ought to exist in sexual relationships and individuals owe a duty of responsibility when it comes to information regarding a material fact.

22 Stuart P Green, 'Lies, Rape, and Statutory Rape' in Austin Sarat (ed), *Law and Lies: Deception and Truth-Telling in the American Legal System* (Cambridge University Press 2015) 205.

23 Nicola Lacey and Hanna Packard, 'To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice' (2015) 35 *Oxford Journal of Legal Studies* 665.

24 Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (Oxford University Press 1984) 31–36.

25 Green (n 22) 205.

26 John Gardner and Stephen Shute, 'The Wrongness of Rape' in J Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2007) 16.

27 Joan McGregor, 'Force, Consent, and the Reasonable Woman' in J Coleman and A Buchanan (eds), *Harm's Way: Essays in Honour of Joel Feinberg* (Cambridge University Press 1994) 231.

28 *R v Flattery* (1876–77) LR 2 QBD 410; *R v Williams* [1923] 1 KB 340.

29 *R v Elbekkay* [1995] Crim LR 163.

30 *R v Linekar* [1995] QB 250.

31 *Papadimitropoulos v The Queen* (1957) 98 CLR 249; *Bolduc and Bird v The Queen* (1967) 63 DLR (2d) 82.

SEXUAL AUTONOMY

Both English law³² and international law³³ recognise that rape is a violation of sexual autonomy. The next step is to determine whether deception relating to a material fact should constitute a violation of sexual autonomy which results in negating consent. The deception must have been 'material'. As Jonathan Herring rightly argues, 'she should not fall outside the law's protection simply because others do not agree with the reasons behind her sexual decisions'.³⁴ Rape law recognises the concept of autonomy in sexual relationships. However, the courts have yet to provide a definition of sexual autonomy. Jennifer Temkin argues that the overriding objective of the law of rape should be the protection of 'sexual choice', the individual's right to choose when and with whom to engage in sexual activity.³⁵ Anderson makes a similar argument by contending that sexual autonomy involves 'freedom from undesired sexual activity and freedom to engage in desired sexual activity'.³⁶

To argue that deception relating to a material fact violates sexual autonomy and negates consent, it is important to highlight the value of sexual autonomy and the problems caused by its erosion. Sexual autonomy is limited by the rights of others and, as a result, it cannot entail the freedom to have sex whenever and with whomever one chooses.³⁷ It has been described as vital to the goals of securing women's equality with men and promoting a more general form of autonomy for women.³⁸ Thus, a special type of autonomy should be afforded to individuals in relation to their sexual activity.³⁹ It is argued that autonomy should refer to self-direction rather than to self-sufficiency.⁴⁰ The current law of rape does not allow individuals to achieve self-direction where their decision to agree to sex has been manipulated by deception. Deceptive conduct, relating to a material fact, influences an individual's agreement to sex by limiting the options available to her.

Autonomy has been described as comprising of two aspects: positive and negative.⁴¹ Positive autonomy relates to an individual's right to decide when and with whom to engage in sex, whilst negative autonomy involves the right to refuse relations with others and have effect given to that refusal.⁴² This description is misleading because of the tension between them. It is impossible to reconcile both positive and negative autonomy. While positive autonomy deals with an individual's right to choose, and the latter involves the right to refuse, the right to refuse should be the dominant aspect. However, this does

32 *R v Konzani* [2005] EWCA CRIM 706, [42].

33 *Prosecutor v Kunarac*, Case No IT-96-23-T & IT-96-23/1-T (International Criminal Tribunal for the Former Yugoslavia 22 February 2002) [440].

34 Jonathan Herring, *Criminal Law* (3rd edn, Palgrave 2015) 110.

35 Jennifer Temkin, 'Towards a Modern Law of Rape' (1982) 45 *Modern Law Review* 399, 401; see also Nicola Lacey where she provides a similar definition of sexual autonomy in 'Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law' (1998) 11 *Canadian Journal of Law Jurisprudence* 47, 52.

36 Scott Anderson, 'On Sexual Obligation and Sexual Autonomy' (2013) 28 *Hypatia* 122, 133.

37 Vanessa E Munro, 'Sexual Autonomy' in M D Dubber and T Hornle (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press 2014) 745.

38 Scott A Anderson, 'Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution' (2002) 112 *Ethics* 748, 750-51.

39 *Ibid* 770.

40 *Ibid*.

41 Catherine Elliott and Claire de Than, 'The Case for a Rational Reconstruction of Consent in Criminal Law' (2007) 70(2) *Modern Law Review* 22, 231.

42 See Isaiah Berlin, 'Two Concepts of Liberty' (originally published in 1958) in I Berlin, *Four Essays on Liberty* (Oxford University Press 1969).

not assist in resolving the issue of why inducing by lying about the fact that they were to have sex⁴³ or about D's identity negate consent whereas other deceptions, such as marital status, using birth control, carrying a sexually transmitted disease, or making false promises, such as D's commitment to entering into a long-term relationship, are not considered sufficiently serious to violate autonomy and negate consent. What it does show is that sexual autonomy is composed of a 'complex, multifarious collection of rights'⁴⁴ and that C's choice to refuse sex, based on a material fact, might be removed where her agreement is procured by deception, mistake or non-disclosure.

Choice and consent

Commentators such as Herring,⁴⁵ Vanessa Munro,⁴⁶ and Stephen Schulhofer⁴⁷ highlight the importance of treating sexual autonomy as a central principle. Lying and deceiving undermine sexual autonomy in a similar manner to force or the threat of force by limiting the options available to an individual.

The concept of choice, which forms part of the definition of consent in s 74, relates to notions of autonomy, liberty and responsibility.⁴⁸ In *R (on the application of F) v Director of Public Prosecutions*, Lord Judge CJ held that, 'choice' is crucial to the issue of 'consent'.⁴⁹ Unfortunately, his Lordship stated that the evidence relating to choice and freedom to make a choice should be approached in a 'broad common sense way'.⁵⁰ This dictum is similar to the direction in *Olugboja*,⁵¹ which held that juries should '[apply] their combined good sense, experience and knowledge of human behaviour to all the relevant facts of that case', when distinguishing between consent and submission.⁵² The *Olugboja* direction was criticised by the Home Office review for giving rise to confusion and uncertainty,⁵³ despite the fact that it removed the fixed category of circumstances which negated consent, and allowed individuals to set their own standards.⁵⁴ This can be contrasted with the current approach which fails to recognise an individual's own perceptions of her interests.

If choice presupposes that an individual has alternatives, her decision should be made on the basis of adequate information about each in order for that choice to be informed.⁵⁵ Choice presupposes two linked capabilities.⁵⁶ First, it involves a sense of self-awareness, whereby individuals are able to decide 'which of the accessible options will best realise [their] ideal, and thus suit [them]'.⁵⁷ This suggests that choice is a subjective

43 For example, fraudulent medical procedures.

44 Green (n 22) 205.

45 Jonathan Herring, 'Rape and the Definition of Consent' (2014) 26 National Law School of Indiana Review 6.

46 Vanessa E Munro, 'Constructing Consent: Legislating Freedom and Legitimizing Constraints in the Expression of Sexual Autonomy' (2008) 41 Akron Law Review 923.

47 Stephen J Schulhofer, *Unwanted Sex: Culture of Intimidation and Failure of Law* (Harvard University Press 2000).

48 Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 1988) 61.

49 *R (on the application of F) v Director of Public Prosecutions* [2013] EWHC 945 (Admin); [2014] QB 581; [2014] 2 WLR 190, [26].

50 *Ibid* [26].

51 *R v Olugboja* [1982] QB 320.

52 *Ibid* 332.

53 Home Office (n 3) para 2.2.3.

54 Simon Gardner, 'Appreciating *Olugboja*' (1996) 16(3) Legal Studies 275, 287.

55 David Ormerod, *Smith and Hogan's Criminal Law* (14th edn, Oxford University Press 2015) 823.

56 David Levine, *Wealth and Freedom: An Introduction to Political Economy* (Cambridge University Press 1995) 28.

57 *Ibid*.

state of mind. Applying this subjective facet to sexual autonomy implies that individuals are able to choose between the alternatives available and to distinguish between them based on preferences. For some it may be their preference to only have sexual relationships with those from a particular religious or socio-economic group. The second element of choice is autonomy, 'the sense of having an inner core capable of identifying wants and pursuing their satisfaction'.⁵⁸ The relationship between self-awareness and autonomy is best articulated by Robert Lindley who suggests that autonomy consists of two elements. Firstly, it involves an individual acting on reasons based on her own goals and purposes.⁵⁹ The second element requires freedom from external constraints such as being manipulated by others to do their will.⁶⁰ To protect sexual autonomy, the law of rape should safeguard an individual's right not to be manipulated by lies or deception. Deceiving another into agreeing to sex is an affront to autonomy.⁶¹

THE IMPACT OF DECEPTION ON SEXUAL AUTONOMY

Although moral philosophers tend to distinguish between lying and deceiving,⁶² the courts distinguish between active deception,⁶³ non-disclosure⁶⁴ and mistake.⁶⁵ Here, it will be argued that a more holistic concept of deception is preferable, because it addresses whether the deception employed impacted on another's decision to agree to sex. The selectivity associated with the current approach has resulted in inconsistency and fails in its primary purpose of protecting sexual autonomy.⁶⁶

Deception encompasses an unlimited variety of methods by which the deceiver creates false impressions in another's mind.⁶⁷ The term is used in this article to refer to the communication⁶⁸ of a message⁶⁹ that is intended to mislead.⁷⁰ Deception, unlike lying, need not be directed at a specific individual. Examples of indirect deceptions include where D removes his wedding ring to mislead others about his marital status or where he gives the impression that he is a footballer or film producer.⁷¹ Deception includes actions, omissions, words and strategic silences.⁷² It is recognised that deception is an element of many forms of acceptable social behaviours, such as tact, politeness or evasion.⁷³ In the context of sexual relationships, parties rarely disclose every potentially

58 Ibid.

59 Robert Lindley, *Autonomy (Issues in Political Theory)* (Palgrave Macmillan 1986) 6.

60 Ibid.

61 Larry Alexander and Emily Sherwin, 'Deception in Morality and Law' (2003) 22 *Law and Philosophy* 393, 432.

62 Immanuel Kant, 'Ethical Duties towards Others: Truthfulness' in *Lectures on Ethics*, L Infield (trans) (Harper Row 1963) 266; Sissela Bok, *Lying: Moral Choice in Public and Private Life* (Random House 1978); Albert Vrij, *Detecting Lies and Deceit: Pitfalls and Opportunities* (Wiley 2000); D Fallis, 'What is Lying?' (2009) 106 *Journal of Philosophy* 29.

63 *McNally (Justine)* (n 5).

64 *R v B* [2006] EWCA Crim 2945.

65 *Linekar* (n 30).

66 Home Office (n 3) para 2.10.4.

67 Alexander and Sherwin (n 61) 400.

68 'Communication' can be direct or indirect.

69 Words and conduct.

70 Stuart P Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press 2007) 76.

71 *R v Melitti* [2001] EWCA Crim 1563.

72 Alexander and Sherwin (n 61) 400.

73 Jonathan E Adler, 'Lying Deceiving, or Falsely Implicating' (1997) 94 *Journal of Philosophy* 435, 435.

relevant detail.⁷⁴ There are a variety of methods by which one can tacitly mislead. Examples include clothing, cosmetics, religious symbols and removing one's wedding ring. Sexual autonomy is violated where an individual resorts to such deceptions to procure sex, knowing that his deception relates to a material fact. According to Adler, 'deception need not be intentional or voluntary, as lying must'.⁷⁵ However, he concedes that both lying and deception aim for the victim to believe falsely.⁷⁶ Thus, sexual autonomy should be deemed to have been violated where a lie or deception might cause another to be misled and results in her agreement to sex, provided this deception related to a material fact.

Where D intentionally misleads C about a material fact and manipulates her agreement to sex, despite being aware of C's mistake, C's consent should be vitiated by the deception. Applying the concept of relational autonomy, a duty must be imposed on individuals to disclose a fact which they know is material to others or correct mistakes relating to a material fact. The relevance of relational autonomy is that it recognises the importance of relational obligations and responsibilities⁷⁷ which are vital in the context of sexual activity.

THE IMPACT OF LYING ON SEXUAL AUTONOMY

Although a universally accepted definition of lying does not exist, it has been defined as a 'statement made by one who does not believe it with the intention that someone else shall be led to believe it'.⁷⁸ This definition requires further clarification to fully distinguish it from deception. Lying involves a much narrower range of behaviours than deception generally.⁷⁹ Deception, as shown above, includes a variety of methods by which the deceiver produces false impressions in another's mind.⁸⁰ Unlike deceptions, lies require an assertion that 'we present ourselves as believing something while and through invoking (although not necessarily gaining) the trust of the one' to whom we assert.⁸¹

Lying is viewed as wrong for various reasons. Thomas Aquinas maintained that lying is contrary to the law of nature.⁸² Immanuel Kant also viewed lying, which he defined as 'false assertion', to be 'directly opposed to the natural purposiveness of the speaker's capacity to communicate his thoughts', and the liar 'throws away and, as it were, annihilates his dignity as a human being'.⁸³ Kant illustrates the absolute character of the moral imperative not to lie by giving the example of lying to the murderer at the door who asks about the whereabouts of his intended victim.⁸⁴ Lying is wrong because it

74 Jed Rubenfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013) 122 *Yale Law Journal* 1372, 1372.

75 Adler (n 73) 435.

76 Ibid.

77 Jonathan Herring, 'Relational Autonomy and Consent' in Alan Reed and Michael Bohlander (eds), *Consent: Domestic and Comparative Perspectives* (Routledge 2017) 27.

78 Arnold Isenberg, 'Deontology and the Ethics of Lying' in William Callaghan, Leigh Cauman, Sidney Mothersill et al (eds), *Aesthetics and Theory of Criticism: Selected Essays of Arnold Isenberg* (University of Chicago Press 1973) 248; for an alternative definition see Alexander and Sherwin (n 61).

79 Green (n 70) 77.

80 Alexander and Sherwin (n 61) 400.

81 D Simpson 'Lying, Liars and Language' (1992) 52 *Philosophy and Phenomenological Research* 623, 625.

82 Thomas Aquinas, *Summa Theologiae* vol 4 (McGraw-Hill 1972).

83 Immanuel Kant, *The Metaphysics of Morals*, Mary Gregor (trans) (Cambridge University Press 1996) 182.

84 Immanuel Kant, 'On Supposed Right to Tell Lies from Benevolent Motives' in T K Abbott (ed and trans), *Kant's Critique of Practical Reason and Other Works on the Theory of Ethics* (Dover Publications 1989) 36.

violates autonomy by forcing an individual to pursue the speaker's objectives, rather than her own preferences.⁸⁵

Lying asserts what D believes to be false.⁸⁶ Deceptions, on the other hand, are invitations by D to accept as true his deceptive behaviour.⁸⁷ In his treatment of the false promise case, under the Formula of Humanity, Kant explained that the victim of the lie would not agree to being used to the advantage of the false promisor and 'cannot contain the end of this action in himself'.⁸⁸ Kant's treatment of the false promisor can be equally applied to all forms of deception, including Herring's example of the rogue who falsely proclaims his love,⁸⁹ to show that deceptions violate sexual autonomy. Consent should be deemed to be absent where an individual is deceived in relation to a material fact and agrees to sex because of that deception. Sexual autonomy is violated because there is lack of reciprocity between the parties. But for D's deception, C would not have agreed to sex. Applying an autonomy-based argument, which focuses on protecting the individual's ability to choose from a set of options, suggests that a successful lie or deception distorts the reasoning process of the individual deceived. It displaces her will and manipulates her action for the speaker's end.⁹⁰

Deception and the current law of sexual offences

To illustrate the deficiency of the law of non-consensual sex in cases involving lying and deceiving, it is illuminating to consider the decision of the Crown Prosecution Service (CPS) not to prosecute undercover police officers who engaged in sexual relations with women. In *AJA & Others v Commissioner of Police for the Metropolis*,⁹¹ the CPS halted criminal proceedings against six defendants who had been due to stand trial at Nottingham Crown Court on charges related to a conspiracy to sabotage a coal-fired power station at Ratcliffe-on-Soar. The CPS was concerned that Nottinghamshire Police had failed to comply with its pre-trial disclosure obligations relating mainly to the work of undercover police officer Mark Kennedy.⁹² It later emerged that PC Kennedy had had at least one long-term, intimate sexual relationship with a woman involved with one of the groups he had infiltrated. Following this discovery, allegations concerning undercover police officers acting beyond their authorisation, or taking action which was authorised but should not have been, were reported in the media. It was claimed that several officers had intimate relationships with members of the groups they had infiltrated. One officer was said to have fathered a child in such a relationship before disappearing.⁹³

In February 2013, the Home Affairs Committee invited the women involved to give evidence. One witness explained that:

85 D A Strauss, 'Persuasion, Autonomy, and Freedom of Expression' (1991) 91 *Columbia Law Review* 334, 355.

86 F A Siegler, 'Lying' (1966) 3 *American Philosophical Quarterly* 128, 130.

87 Green (n 70) 77.

88 Immanuel Kant, *The Moral Law*, H J Paton (trans) (Hutchinson & Co 1969) 91.

89 Herring (n 2) 511.

90 Kant (n 62); Alexander and Sherwin (n 61) 397; P J Griffiths, *Lying: An Augustinian Theology of Duplicity* (Brazos Press 2004); J E Mahon, 'A Definition of Deceiving' (2007) 21 *International Journal of Applied Philosophy* 181.

91 *AJA & Others v Commissioner of Police for the Metropolis* [2013] EWCA Civ 1342; [2014] 1 WLR 285.

92 *Ratcliffe-on-Soar Power Station (Operation Aeroscope) Disclosure* (Reference: 2011/000464, Final Report of an Independent Investigation by the Independent Police Complaints Commission 2012).

93 P Lewis, R Evans and S Pollack, 'Trauma of Spy's Girlfriend: "Like being Raped by the State"' *The Guardian* (London, 24 June 2013) <www.theguardian.com/uk/2013/jun/24/undercover-police-spy-girlfriend-child>.

How it feels to me is that it is not having found out that your partner was lying about who they are; it is finding out that your most personal relationship was being controlled by the state without your knowledge.⁹⁴

Another woman who had a child with an undercover police officer stated:

We are psychologically damaged; it is like being raped by the state. We feel that we were sexually abused because none of us gave consent.⁹⁵

It is, therefore, clear that the complainants would not have engaged in sex with the undercover police officers had they known their true identities. The conduct of the undercover police officers, with which the Home Affairs Committee⁹⁶ concerns itself, appear to both pre-date⁹⁷ and post-date the Act.⁹⁸ The CPS examined various leading authorities on the meaning of consent, as set out in the Act, and concluded that, in accordance with the principles established by case law, there was insufficient evidence to prosecute for rape because ‘any deceptions in the circumstances of this case were not such as to vitiate consent’.⁹⁹

The first case to be considered by the CPS was that of *Assange v Sweden*.¹⁰⁰ The Divisional Court was asked to determine, inter alia, whether the principle of dual criminality was met on the facts of the case. It was alleged that Assange had intercourse with C after deliberately creating a tear in the condom, or that he had removed it, knowing that C had only consented to sex on the condition that he wore a condom. According to the court, C was not deceived as to the ‘nature or purpose of the act’ as set out in s 76(2)(a) of the Act. In emphasising the limited scope of s 76, the court stated:

[Section 76] deals simply with a conclusive presumption in the very limited circumstances to which it applies. If the conduct of the defendant is not within s 76, that may not preclude reliance on s 74. *R. v B* goes no further than deciding that failure to disclose HIV infection is not of itself relevant to consent under s 4.¹⁰¹

The issue of non-disclosure, which is a form of deception, was discussed in *B*:

[The] fact that the defendant may not have disclosed his HIV status is not a matter which could in any way be relevant to the issue of consent under section 74 in relation to the sexual activity in this case.¹⁰²

Thus, active non-disclosure of HIV does not vitiate consent. It is difficult to justify this position given the fact that D’s HIV-positive status was a material fact in terms of C’s decision to agree to sex.

94 House of Commons – Home Affairs Committee, *Undercover Policing: Interim Report* (HC 837, Thirteenth Report of Session 2012–13, TSO 2013) <<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmhaff/837/83702.htm>>.

95 Ibid.

96 Ibid.

97 Mark Kennedy met Anna in 2005, when she was 21 years old.

98 Robert Lambert, using the undercover persona of Mark ‘Bob’ Robinson, formed a sexual relationship with a woman, who was unaware of his true identity at the time.

99 Crown Prosecution Service, ‘Charging Decision Concerning MPS Special Demonstration Squad’ (*Blog of the Crown Prosecution Service*, 21 August 2014) <<http://blog.cps.gov.uk/2014/08/charging-decision-concerning-mps-special-demonstration-squad.html>>.

100 *Assange* (n 5).

101 Ibid [90].

102 *R v B* (n 8) [21].

The second case considered was *R (on the application of F)*.¹⁰³ The facts of this case were similar to those of *Assange*, in that C, who did not wish to become pregnant, consented to sex with her husband on the condition that he would withdraw his penis before ejaculating within her vagina. During intercourse, shortly after penetration, D informed her that he would be ejaculating within her vagina 'because you are my wife and I'll do it if I want'.¹⁰⁴ He ejaculated before she could say or do anything about it. The CPS decided not to prosecute D for rape because the evidence would be insufficient to establish a realistic prospect of conviction. C sought judicial review of that decision. Lord Judge CJ stated that, at the time of reaching the decision not to prosecute, the Crown Prosecutor had not had the benefit of the decision of the Divisional Court in *Assange*:

What the *Assange* case underlines is that 'choice' is crucial to the issue of 'consent' ... The evidence relating to 'choice' and the 'freedom' to make any particular choice must be approached in a broad common sense way. If before penetration began the interested party had made up his mind that he would penetrate and ejaculate within the claimant's vagina, or even, because 'penetration is a continuing act from entry to withdrawal' (see section 79(2) of the 2003 Act) he decided that he would not withdraw at all, just because he deemed the claimant subservient to his control, she was deprived of choice relating to the crucial feature on which her original consent to sexual intercourse was based. Accordingly, her consent was negated. Contrary to her wishes, and knowing that she would not have consented, and did not consent to penetration or the continuation of penetration if she had any inkling of his intention, he deliberately ejaculated within her vagina. In law, this combination of circumstances falls within the statutory definition of rape.¹⁰⁵

It is important to note that in *Assange* and *R (on the application of F)*, the agreement to sex was based on a stipulated condition. Rogers criticises *Assange* because liability for rape and other non-consensual sexual offences should only arise where C has not been willing 'to be used for the sexual gratification of another in a way that shows regard to one's own sexual preferences'.¹⁰⁶ This analysis endorses the fact that a commitment to sexual autonomy should take into account the significance of the sexual act for C, and her state of mind at the time of agreeing to engage in sex.

The final case considered was *R v McNally*,¹⁰⁷ in which D, a female who posed as a boy called 'Scott' on an online social media site, deceived C as to her gender. D pleaded guilty to six counts of assault by penetration, contrary to s 2 of the Act. D appealed on the grounds that she should not have been convicted at trial because the elements of the offence had not been made out. She argued that deception as to gender could not vitiate consent, being deception as to a quality or attribute, as stated in *B*.¹⁰⁸ D contended that she had not been advised as to the relevant legal elements when deciding to plead guilty. D also appealed against sentence. The Court of Appeal dismissed her appeal against conviction but allowed her appeal against sentence.

In relation to the first ground for appeal, the court held that 'some deceptions (such as, for example, in relation to wealth) will obviously not be sufficient to vitiate

103 *R (on the application of F) v DPP* [2013] EWHC 945 (Admin).

104 *Ibid*.

105 *R (on the application of F)* (n 103) [26].

106 Jonathan Rogers, 'The Effect of "Deception" in the Sexual Offences Act 2003' (2013) 4 *Archbold Review* 7.

107 *R v McNally (Justine)* (n 5)

108 *R (on the application of F)* (n 103).

consent'.¹⁰⁹ Thus, it is settled law that not all deceptions will negate consent. It is unclear whether this dictum provides any indication as to the scope of s 74.¹¹⁰

Two issues stem from the court's decision to limit the types of deceptions which negate consent. Firstly, the court has failed to recognise the importance of a material fact to the individual complainant. For some it is important that their sexual partner is of a certain religion or free from HIV, while the same facts might not be relevant to others. The concern with framing D's liability in terms of 'active deception' is that consent under s 74 would only be vitiated where D lied to C about a fact recognised by the courts. Consent will not be negated where D withholds a material fact or where he takes advantage of a mistake, despite the fact that C would not have agreed had she known the truth. Secondly, the court did not provide an explanation as to why only gender deception could negate consent, while other categories such as wealth would not vitiate consent. The danger of this approach is that it considers certain deceptions as too trivial, irrespective of their importance to the individual and risks giving rise to discrimination.¹¹¹

Returning to the case of the undercover police officers, the officers withheld a material fact relevant to the complainants, namely that they were undercover police officers. Although, under the current law, non-disclosure, a form of deception, may not negate consent, the undercover officers, to perpetuate their tacit deception, would undoubtedly have had to engage in active deception or lying. Thus, in some cases which appear to involve only tacit deception, D might have also resorted to lying to maintain the deception. This analysis does not suggest that being a police officer is akin to gender. The argument put forward in this article is that deception relating to any material fact, whether it involves religion, gender or wealth, could negate consent.

The current distinction between lying and deceiving is applied without justification and results in the failure of the law to provide an effective framework for the protection of sexual autonomy. While it is accepted that in the context of the criminal law in practice, individuals may be prevented from setting their own boundaries of acceptability, an autonomous individual should be 'exempt from arbitrary control, un-coerced and unrestricted'.¹¹² Individuals should be directed by considerations, desires, conditions and characteristics that are not simply imposed externally upon them.¹¹³

Proposal for reform: removing the distinction between lying and deceiving

A tradition in ethics maintains that lying is a significantly worse form of behaviour than deception.¹¹⁴ A sharp distinction between lying and deception is drawn by deontological theorists such as Kant, who focused on the nature of false assertions. Hence, there is no

¹⁰⁹ *R v McNally (Justine)* (n 5) [25].

¹¹⁰ Karl Laird, 'Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003' [2014] *Criminal Law Review* 492, 506.

¹¹¹ Gender fraud cases include *R v Barker (Gemma Louise)* [2012] EWCA Crim 1593; *R v Chris Wilson* [2013] unreported; *R v Kyran Lee (Mason)* [2015] unreported; *R v Gayle Newland* [2017] unreported (the defendant's actual name is Gail, but due to a typographical error in a court report she has always been referred to as Gayle); for a detailed critique of the court's decision in *R v McNally (Justine)* (n 5), see Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-consent' [2014] *Criminal Law Review* 207.

¹¹² Matti Wiberg, 'Political Autonomy: Ambiguities and Clarifications' in M Suksi (ed), *Autonomy: Applications and Implications* (Kluwer Law International 1998) 44.

¹¹³ John Christman, 'Constructing the Inner Citadel: Recent Work on the Concept of Autonomy' (1988) 99(1) *Ethics* 109, 114.

¹¹⁴ Adler (n 73) 435.

wrong in the act of packing luggage in the presence of others to create the impression that one is about to leave town.¹¹⁵ While those who observe this conduct may form a false belief, they 'have no right to expect that my action will express my real mind'.¹¹⁶ Although the deceiver has succeeded in deceiving others, Kant insisted that: 'I have not lied to them, for I have not expressed an opinion.'¹¹⁷ It is submitted that Kant's analysis of his example should not apply to sexual offences as the act of packing was intended to create a false belief that he was embarking on a journey. By making a false statement, the liar is indicating that he is expressing an opinion.¹¹⁸ This form of deception, which involves taking advantage of another's mistake, is capable of violating sexual autonomy if an individual is mistaken about a material fact and the deceiver, rather than correcting the mistake, takes advantage of this and uses C for his own gratification.

Roderick Chisholm and Thomas Feehan ask, 'why is lying thought to be worse . . . than other types of intended deception?'¹¹⁹ The authors' answer is that only lying involves assertion and 'lying, unlike the other types of intended deception, is essentially a breach of faith'.¹²⁰ Applying this reasoning to Kant's example of the packed bags, the authors argue that he has not invited his friends to assume that he is about to make a journey.¹²¹ Chisholm and Feehan (as well as Kant) fail to take into account the impact of deception on the individual's decision, as well as the fact that the deceiver has deliberately packed the bags for the purpose of misleading his friends. Deceptions may not involve an assertion, but they can amount to a breach of faith where the deceiver acts on the other's mistake. A prostitute who agrees to sex in the mistaken belief that she will be paid has had her decision manipulated by this deception.¹²² While it is true that she has agreed to sex and has not been misled as to the mechanics of the act, her agreement is based on the understanding that she would be paid for sex. Had she known the truth she would not have agreed to sex. Deception, therefore, uses an individual's own decision-making powers against them.¹²³ Alan Wertheimer notes that 'current social norms may understate the seriousness of sexual deception'.¹²⁴ He suggests that sexual consent may be vitiated by deception about one's marital status, an affair with a partner's sister, one's views on contentious moral issues like abortion, one's feelings, or one's intentions to marry.¹²⁵

Failure to protect sexual autonomy in cases involving mistake on C's part appears to hold individuals responsible for making an inference resulting from another's actions. This appears analogous to the concept of contributory negligence. The individual's ability to exercise self-determination in pursuing her own interests implies that others have a duty to honour this attempt, as she must honour that of others. Taking advantage of another's mistake, or deliberately engineering or procuring that mistake, is a violation of sexual autonomy because the person's decision to engage in sex has been influenced by the conduct of the deceiver. Kant's distinction between lying and deceiving is presumably

115 Kant (n 62) 226.

116 Ibid.

117 Ibid.

118 Roderick M Chisholm and Thomas D Feehan, 'The Intent to Deceive' (1977) 74 *Journal of Philosophy* 143, 149.

119 Ibid 153.

120 Ibid.

121 Ibid.

122 *Linekar* (n 30).

123 Herring (n 2).

124 Alan Wertheimer, *Consent to Sexual Relations* (Cambridge University Press 2003) 199.

125 Ibid.

based on the idea that individuals are rational, autonomous beings and ultimately responsible for their inferences.¹²⁶ However, the distinction cannot be justified where the end result is obtaining sex. Whether sex is obtained by lying or deceiving, sexual autonomy has been violated.

Returning to the case of the undercover police officers, it is irrelevant whether the deception as to their true identity was active or tacit. The issue for the courts should be whether withholding information manipulated C's sexual decision. Given the complainants' evidence to the Home Affairs Committee, it is doubtful they would have agreed to sex with police officers.

Non-disclosure and mistake should nullify consent because it prevents individuals from setting their own standards with regards to the characteristics of their sexual partners. Consent should be deemed valid where C is mistaken about D's attributes, such as his marital status, religious affiliations and wealth. Where D withholds information relating to a material fact, and he does so for the purpose of manipulating her decision to have sex, C's consent should be considered to have been vitiated by his non-disclosure. The focus should be on the impact the deceptive conduct had on the individual's choice. In *R v Cuerrier*,¹²⁷ the Supreme Court of Canada held that '[t]he dishonest action or behaviour must be related to the obtaining of consent to engage in sexual intercourse'.¹²⁸ This should consist of either deliberate deceit regarding D's HIV status or non-disclosure of that status.¹²⁹ Thus, without disclosure of HIV status, consent cannot be freely given. According to the court, 'consent cannot be simply to have sexual intercourse . . . it must be to have intercourse with a partner who is HIV-positive'.¹³⁰ This reasoning can be applied to any material fact. The issue is whether D manipulated C's sexual choice by taking advantage of her mistake.

A more recent Canadian case, with facts similar to *Assange*, is *R v Hutchinson*.¹³¹ C agreed to sexual activity with D, insisting that he use a condom to prevent conception. D deliberately poked holes in the condoms to get C pregnant without her permission. He succeeded in getting C pregnant, and this resulted in her having an abortion, which gave rise to complications. The trial judge found that the complainant had not consented to unprotected sex and convicted H of sexual assault. On appeal, the majority upheld the conviction on the basis that condom protection was an 'essential feature' of the sexual activity, and therefore the complainant did not consent to the 'sexual activity in question'. In relation to the concept of 'harm' caused by D's deception, the court concluded that:

'[H]arm' does not encompass only bodily harm in the traditional sense of that term; it includes at least the sorts of profound changes in a woman's body – changes that may be welcomed or changes that a woman may choose not to accept – resulting from pregnancy. Depriving a woman of the choice whether to become pregnant or increasing the risk of pregnancy is equally serious as a 'significant risk of serious bodily harm' within the meaning of *Cuerrier*, and therefore suffices to establish fraud vitiating consent.¹³²

126 Adler (n 73) 444.

127 *R v Cuerrier* [1998] 2 SCR 371.

128 *Ibid.*

129 *Ibid.*

130 *Ibid.*

131 *R v Hutchinson* (2013) 105 WCB (2d) 806 (a decision of the Nova Scotia Court of Appeal).

132 *Ibid* [70].

Hutchinson both actively deceived C and took advantage of her mistake relating to a material fact, namely, that he would use a condom to avoid an unwanted pregnancy. The court held that there was no consent because protected sex was an essential feature of the proposed sexual activity and not a separate component from what C was consenting to.¹³³ A fact which is material to C should, therefore, be an essential feature of the sexual activity.

The law's deficiency and inconsistent approach to responding adequately in cases involving non-disclosure of a material fact can be illustrated by using two examples¹³⁴ in which deception was used. In *R v Richardson*,¹³⁵ it was held that a dentist had not assaulted her patients merely because she treated them whilst suspended from practice. Allowing the appeal, it was held that an assault could only occur where consent was given in the mistaken belief that the dentist was other than she truly was. Although the complainants were unaware that D was no longer qualified to practise, they were fully aware of her identity. D's non-disclosure, about a material fact such as medical qualifications, would not go to the nature or purpose of the act. A different outcome was reached in *R v Tabassum*,¹³⁶ where several complainants allowed D to examine their breasts on the basis of a false representation that he was medically qualified and conducting a survey into breast cancer. The evidence showed that, in fact, he was attempting to develop software to increase his chances of being accepted into a medical school. In dismissing his appeal, the court concentrated on the fact that D had deceived the complainants as to his medical qualifications.¹³⁷

While both the above cases concern D's lack of medical qualifications, a distinction can be drawn: the complainants in *Richardson* were mistaken due to D's deliberate non-disclosure, whereas *Tabassum* actively deceived the complainants. In both cases, the defendants carried out deception in order to use the complainants for their own gain; *Richardson* so that she could continue to practise as a dentist, and *Tabassum* so that he could develop his software. The argument made in this paper is that this distinction is arbitrary, ethically suspect, has no regard for personal autonomy and should not form the basis of sexual offence laws.

A potential objection to this proposal might be that it requires individuals from a sexual minority to disclose intimate personal details regarding their sexual past or sexual orientation. For example, a bisexual man who does not disclose his sexual orientation could be criminalised under the proposed recommendation. Similarly, a post-operative transsexual who fails to disclose this fact could also be criminally liable. It could be argued that on policy grounds non-disclosure of these facts should constitute an exception to the proposal advanced in this article. However, if the primary aim is the protection of sexual autonomy, as this article has argued, distinctions should not be made between different material facts.

Practical steps to protecting sexual autonomy

It has been argued that in protecting sexual autonomy where C's agreement is obtained by deception, active or tacit, criminal law should allow for the potential that any material fact may negate consent by removing the distinction between lying and deceiving. The

133 Ibid [98].

134 It is acknowledged that neither case deals with the Sexual Offences Act 2003.

135 *R v Richardson* [1999] QB 444.

136 *R v Tabassum* [2000] 2 Cr App R 328.

137 Ibid.

deception, lie or mistake must relate to a material fact¹³⁸ and must have induced C to agree to sex. However, the deception need not be directed at C. Similarly, C's mistake in relation to a material fact about D need not be created by D. Since the sheer use of another is morally wrong, D must not only respect C's autonomy but must also take reasonable steps to allow C to exercise her autonomy and ensure that C is free from deceptions and manipulation to provide consent.¹³⁹ An example of a deception which is not specifically aimed at a complainant is where D, who is married, creates a profile on an online-dating website. He 'meets' with C online who explains that she is seeking a long-term relationship and that she does not wish to engage in relationships with married men. They decide to meet in person and, prior to their meeting, D removes his wedding ring. If C agrees to sex, her consent is vitiated by D's deception due to various factors. First, D's representation about his marital status is false and he knows that it is false. Secondly, the deception can take the form of conduct or omission. An omission occurs where D fails to correct C's mistake about a material fact. Thirdly, D's deception, or lie, must be one 'of fact'.¹⁴⁰ This requirement also covers promises made by D which invite reliance upon and which are made in order to induce C into agreeing to sex.¹⁴¹ Fourthly, the deception, unlike a lie, need not be directed at C. This can be achieved either directly or indirectly. An example of indirect deception is where D conveys information to a third party with the intention that the third party will convey the information to C.¹⁴² Fifthly, the deception, lie or mistake must have induced C's agreement. To cover situations where the deception was an inducement which was not actively present in C's mind at the time at which she agreed to sex,¹⁴³ inducement includes circumstances where D deliberately withheld a fact which may be material to C. This requirement imposes a duty on D to disclose information which is material if he reasonably believes that it will influence her agreement.¹⁴⁴ In the context of contract law, English law does not require the representation to take the form of words.¹⁴⁵ Representation can be made by conduct or can be inferred from the facts and circumstances of the case. In sexual relationships, information can be conveyed as much by conduct as by words. Thus, removal of a wedding ring or wearing religious symbols ought to be used as evidence that C was induced by D's deception. Similarly, active concealment or non-disclosure of a material fact ought to negate consent. If a relationship with an insurance company gives rise to *uberrimae fidei*,¹⁴⁶ it seems extraordinary that sexual relationships are prevented from being granted similar status.¹⁴⁷ Criminal law does recognise liability for non-disclosure in the context of fraud, which imposes a duty to 'disclose to another person information which he is under a legal duty to disclose'.¹⁴⁸ No such duty exists in relation to sexual activity between adults of sound mind.¹⁴⁹ Imposing a duty of disclosure and not taking

138 According to the individual complainant, is an essential feature of the sexual activity.

139 Herring (n 77) 32.

140 *People v Evans* (1975) 85 Misc 2d 1088.

141 *Linekar* (n 30).

142 *Commercial Banking of Sydney v RH Brown and Co* [1972] 2 Lloyd's Rep 360.

143 *Horsfall v Thomas* (1862) 1 H & C 90.

144 The *mens rea* requirement for non-consensual sexual offences ensures that D will not be prosecuted when he did not know that C would regard a particular fact fundamental to her consent.

145 *Spice Girls Ltd v Aprilia World Service BV* [2000] EWHC Ch 140.

146 Utmost good faith.

147 Peter Alldridge, 'Sex, Lies and the Criminal Law' (1993) 44(3) Northern Ireland Legal Quarterly 250, 261.

148 S 3 of the Fraud Act 2006.

149 S 34 of the Sexual Offences Act 2003 deals with procuring sexual activity by inducement, threat or deception with a person with a mental disorder.

advantage of C's autonomy in sexual relationships requires accepting that individuals are entitled to engage in a cooperative and mutually beneficial relationship.¹⁵⁰

Conclusion

As shown by the court decisions above, the law does not allow individuals the freedom to act according to their own sexual preferences. The criminal law should protect the right to sexual autonomy and sexual integrity.¹⁵¹ Lying and the broader concept of deceiving have the same potential to negative consent. The method of deception employed should thus be irrelevant, provided the deception or lie relates to a material fact and results in manipulating another's sexual choice. Both lying and deceiving negatively impact on sexual autonomy by limiting options with the consequence that an individual cannot be said to have consented to sex. The issue of materiality is significant, but is essentially a question of fact to be determined in each case as opposed to a generic question of law.

Although this proposal may seem radical, it could in fact be accommodated within the existing law of sexual offences as it does not entail rejecting the definition of consent in s 74 of the Act. Any suggestion to introduce a lesser, distinct offence designed to capture deceptive forms of sexual coercion should be resisted as this obscures a vital principle: a lesser offence ignores the fact that deception intended to limit sexual choice negates consent. The proposed approach is akin to the *Olugboja* direction in that the jury would be required to focus on the state of mind of the individual. Widening the law in the manner suggested surely recognises that all forms of deception have the potential to violate sexual autonomy. Whether any given fact or factor is material is case-specific; so too is the reason why the defendant behaved as he did. It should not be forgotten that the defendant would also have to satisfy the *mens rea* of the offence. Complete autonomy is impossible. However, the concept developed in this article involves recognising that individuals are autonomous beings worthy of respect. Implicit in this is the right not to be deceived. This concept is based on the premise that individuals have legitimate interests capable of being pursued, which others should respect and which the criminal law should protect.

150 Herring (n 77) 32.

151 The difference between the right to sexual autonomy and to sexual integrity is discussed in Lacey (n 35).

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A normative approach to developing reflective legal practitioners: Kant and clinical legal education

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ABSTRACT

This article argues that doctrinal training, which dominates the law curriculum, fails to equip law students with the necessary skills to navigate the complexities of legal practice. To address the limitations associated with the doctrinal method, the article advocates a normative approach to clinical legal education, namely the deontological philosophy of Immanuel Kant. Kantian ethics provides a powerful framework for developing reflective and reflexive practice due to its commitment to the dignity of the individual.

KEYWORDS Clinical legal education; Kant; reflective practice; Schön

Introduction

Schön observed that:

In the varied topography of professional practice, there is a high, hard ground overlooking a swamp. On the high ground, manageable problems lend themselves to solutions through the use of research-based theory and technique. In the swampy lowlands, problems are messy and confusing and incapable of technical solution.¹

Legal professionals face complex and unpredictable situations, and therefore, they require a reflective framework to develop greater empathy with their clients. The current dominant doctrinal method, with its focus on appellate decisions, does not equip law clinic students (“practitioners”) with a suitable methodology to deal with complex legal and human issues encountered in professional practice. The deontological philosophy of Immanuel Kant, on the other hand, provides a powerful framework for developing reflective practitioners in clinical legal education (CLE). Kantian ethics can promote reflective practice by enabling professionals to reflect and learn about their own actions and decisions; their clients; the wider society; and the manner in which social institutions are formed and affect citizens.

This article utilises extracts from law clinic students’ reflective diaries,² compiled as part of their summative assessment at the University of Bristol Law Clinic. The student diary extracts demonstrate that practitioners limit their reflection to the lawyer–client model, and in doing so omit analysing issues such as client autonomy, paternalism, and the role of the state.

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¹Donald A Schön, *Educating the Reflective Practitioner: Toward a New Design for Teaching and Learning in the Professions* (Jossey-Bass 1987) 3.

²The extracts are referenced as “P” followed by the identifying number for anonymity purposes.

The CLE module, at the University of Bristol, is a final-year module comprising three elements: pro bono clinic (students are divided into teams of two per client); a series of one-hour lectures; and two-hour seminars. Practitioners are supervised by academic members of staff who also hold current practising certificates. The summative assessments are two essay-based pieces of coursework: a question designed to engage students in reflective practice; and a topic which tests students' knowledge on CLE-related issues such as ethics, alternative dispute resolution, and access to justice. This article deals with the former assessment where students choose one of the following statements to guide their reflective practice:

- (1) The client is the biggest obstacle to a successful outcome. Critically analyse with reference to your experience in the law clinic.
- (2) Ethical issues are best experienced rather than formally taught. Discuss with reference to your experience in the law clinic.

After the assessments had been graded and moderated, an analysis of the students' work was carried out to determine whether doctrinal training,³ which dominates the law curriculum, promotes reflective practice. This investigation revealed that practitioners were preoccupied with an outcome-focused approach when dealing with their clients. The analysis of the summative assessment also revealed that practitioners were prone to bias towards their clients. To remedy this, a lecture and seminar on Kantian ethics was delivered halfway through the academic year to test whether a normative approach improved reflective practice. There are four main reasons for introducing students to Kantian ethics. First, Kant is the first philosopher to place the concept of "duty" at the centre of ethics. For CLE purposes, this serves two purposes: it is in direct contrast to the outcomes-focused (consequentialist) approach of the Solicitors Regulation Authority (SRA)⁴ Code of Conduct (the Code);⁵ and the Code imposes a duty towards clients but the SRA has neglected to define this term. Secondly, Kant provides a definition of his version of "duty" which requires acting from respect for the moral law. Duty for the moral law is not imposed on individuals, rather it is the expression of pure reason.⁶ This leads us to the third justification: Kant's moral law is reciprocal by virtue of the fact that it is a universal principle applied to all. This allows clinicians to analyse their interaction with their clients, for example by asking themselves whether they too would act on their own advice. Fourthly, Kantian ethics provides clinicians with a cosmopolitan aspect to their clinical experience beyond the lawyer–client model. This dimension allows clinicians to reflect on the duties of the state, for example the rights of migrants.⁷ Extracts from the students' assessments demonstrate the impact of Kantian ethics on their reflective and reflexive practice.

³Doctrinal courses pertain to the subject matter and analysis of the law such as torts, contracts, criminal law, and property law. See also, Emily Grant, "Toward a Deeper Understanding of Legal Research and Writing as Developing Profession" (2007) 27 Vermont Law Review 371, 384.

⁴The regulatory body of solicitors in England and Wales.

⁵Solicitors Regulation Authority, SRA Handbook (2018) <<https://www.sra.org.uk/solicitors/handbook/welcome/pdfcentre/>> accessed 10 June 2019.

⁶Immanuel Kant, *Groundwork of the Metaphysics of Morals* (first published 1785, HJ Paton tr, Hutchinson & Co 1969) 65 [400].

⁷Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (first published 1795, FQ Classics 2007). For a detailed analysis of Kant's cosmopolitan theory see Pauline Kleingeld, *Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship* (Cambridge University Press 2011).

Reflective practice

Reflective practice is the procedure of turning thoughtful practice into a potential learning situation, which may modify and change approaches to practice.⁸ It entails practitioners engaging in the synthesis of self-awareness, reflection and critical thinking.⁹ Reflective practice is a valuable concept in CLE because it has been linked to the integration of theory into practice.¹⁰ Leering suggest that its benefits also include:

Understanding “how to learn,” fostering greater self-directed and lifelong learning, supporting experiential learning, nurturing transformative learning, developing ethical awareness and capacity, reducing law student stress and anxiety, and enhancing cultural competency.¹¹

Donald Schön’s critique of “technical rationality” is applied to CLE to illustrate that the dominant positivist approach does not equip practitioners with the skills and knowledge to become reflective practitioners. According to Schön:

Technical Rationality is the Positivist epistemology of practice. It became institutionalized in the modern university, founded in the late nineteenth century when Positivism was at its height, and in the professional schools which secured their place in the university in the early decades of the twentieth century.¹²

A normative approach in CLE addresses the limitations of the positivist approach. It provides practitioners with a framework for developing reflective practice by allowing them to engage in personal reflection and social critique.

At its most basic level, reflection involves students examining an aspect of their performance, understanding it, and learning from it.¹³ Without reflecting on their clinical experience, students will be left with only a series of experiences which are not linked or contextualised. Reflection, therefore, turns experience into learning.¹⁴ Despite its importance, reflective practice lacks conceptual clarity.¹⁵ The different conceptions of CLE and reflective practice together with the limitations of technical rationality may hinder practitioners from descending into the swampy lowlands.

Technical rationality

In certain professions (for example, law, psychotherapy, social work, and architecture), awareness of complexity, uniqueness, and value conflict resulted in the emergence of “professional pluralism”.¹⁶ This led to professions developing different approaches

⁸Jane Schober, “Frameworks for Nursing Practice” in Susan Hincliff, Sue Norman and Jane Schober (eds), *Nursing Practice and Health Care: A Foundation Text* (2nd edn, Edward Arnold 1993) 324.

⁹Maureen Eby, “Understanding Professional Development” in Ann Brechin, Hilary Brown and Maureen Eby (eds), *Critical Practice in Health and Social Care* (Sage 2000) 52.

¹⁰David Boud, Rosemary Keogh and David Walker, *Reflection: Turning Experience into Learning* (Routledge 1985); Max van Manen, “On the Epistemology of Reflective Practice” (1995) 1 *Teachers and Teaching: Theory and Practice* 33; Jennifer A Moon, *Reflection in Learning and Professional Development: Theory and Practice* (Routledge Falmer 1999); Timothy Casey, “Reflective Practice in Legal Education: The Stages of Reflection” (2014) 20 *Clinical L Rev* 317.

¹¹Michele Leering, “Conceptualizing Reflective Practice for Legal Professionals” (2014) 23 *Journal of Law and Social Policy* 83, 102.

¹²Donald A Schön, *The Reflective Practitioner: How Professionals Think in Action* (Basic Books 1983) 31.

¹³*ibid.*

¹⁴*ibid.*

¹⁵Elizabeth A Kinsella, “Professional Knowledge and the Epistemology of Reflective Practice” (2010) 11(1) *Nursing Philosophy* 3.

¹⁶Schön (n 1) 3.

regarding the central values of the profession, the relevant knowledge and skills required, and competing images of the professional role.¹⁷ The multiplicity of conflicting views poses a dilemma for the practitioner who must either decide between these different approaches to practice, or devise an alternative. Schön argued that there was a crisis in the professions due to professionals lacking the ability to solve problems that are indeterminate. He contends that much professional practice occurs in “indeterminate zones of practice”, which are characterised by uniqueness, uncertainty and value conflict.¹⁸ Consequently, the reflective practitioner does not resolve these “swamp” situations by simply applying formal knowledge or rules. Instead, they must engage in a method which Schön labels “knowing-in-action”, a process in which thinking and doing are invisible and in which it is not possible to make the knowing verbally explicit. Schön contends that “knowing-in-action” constitutes the great bulk of what individuals know how to do in everyday and in professional life.¹⁹ He suggests that usually “knowing-in-action” is sufficient to address situations; however, this method is not always appropriate and can lead to the practitioner feeling puzzled and/or surprised. Faced with such a surprise, individuals can either choose to ignore it and proceed, or they may decide to reflect in either of two ways: they may choose to reflect after the fact (“reflection-on-action”); or they might choose, while still in the situation, to engage in “reflection-in-action”.²⁰

The combination of reflection-in-action and reflection-on-action is an alternative epistemology of practice that lends validity to the “special expertise” or “artistic, intuitive processes” which professionals develop through practice.²¹ The limitation of this knowledge is that it is difficult to explain, given that it is “tacit, implicit in our patterns of action and in our feel for the stuff with which we are dealing”.²² However, tacit knowledge does not always equate to accurate knowledge.²³ Tacit knowledge means that it is unexamined,²⁴ and therefore, has little value in relation to reflective practice.

In terms of equipping CLE practitioners with a framework for engaging in reflection-in-action, we need to understand how Schön incorporates reflection-in-action into ways of viewing reality:

Underlying this view of the practitioner’s reflection-in-action is a constructionist view of the reality with which the practitioner deals - a view that leads us to see the practitioner as constructing situations of [their] practice, not only in the exercise of professional artistry but also in all other modes of professional competence.²⁵

Here, Schön is recognising the subjective construction of the practitioner’s reality.²⁶ This can lead to practitioners focusing on subjective descriptions of events and failing to perceive the legal issue from their client’s point of view. He argues that observation and analysis of

¹⁷ibid.

¹⁸ibid 4–7.

¹⁹ibid 30.

²⁰ibid 244.

²¹Schön (n 12) 49.

²²ibid.

²³Richard K Neumann, “Donald Schön, the Reflective Practitioner, and the Comparative Failures of Legal Education” (2000) 6 *Clinical Law Review* 401, 408.

²⁴Julian Webb, “Where the Action Is: Developing Artistry in Legal Education” (1995) 2 *International Journal of the Legal Profession* 187, 195.

²⁵Schön (n 1) 36.

²⁶Anne Brockbank and Ian McGill, *The Action Learning Handbook: Powerful Techniques for Education, Professional Development and Training* (Routledge 2003) 97.

what competent practitioners do in situations of practice is required, and that learning is best conducted in the “reflective practicum”.²⁷ A practicum is “a setting designed for the task of learning a practice”,²⁸ which occupies the intermediate space between the practice world and the esoteric world of the academy.²⁹ It “embodies particular ways of seeing, thinking, and doing that tend, over time, as far as the student is concerned, to assert themselves with increasing authority”.³⁰ Schön was attempting to deconstruct how professional knowledge and competence are acquired. This enquiry led him to explain how reflective practicums could help integrate theory and practice.³¹ The work of the practicum is accomplished through a combination of the student’s learning by “doing”, interactions with supervisors and peers, and “background learning”.³² CLE is, therefore, a type of practicum, since it aims to bridge the gap between theory and practice. It is submitted that the dominant method of legal education does not equip students to develop into reflective practitioners while they are in the practicum (law clinic). The reason for this is to be found in Schön’s criticism of the professions, including law, for overemphasising the substantive knowledge of a profession:

Technical rationality holds that practitioners are instrumental problem solvers, who select technical means best suited to particular purposes. Rigorous professional practitioners solve well-formed instrumental problems by applying theory and technique derived from systematic preferably scientific knowledge.³³

Consequently, competent CLE practitioners are not first and foremost technical problem solvers, but problem setters. It is through identification of problematic situations encountered in a law clinic that technical problem solving can be achieved. Technical rationality leads to professional practice becoming instrumental problem solving, made rigorous by the applications of scientific theory and technique. While Schön is critical of technical rationality, he does not dismiss science or technique as irrelevant, nor does he argue for the polar extreme.³⁴ Legal practice, including CLE, involves phenomena such as complexity, uncertainty and value conflict. These phenomena do not fit the model of technical rationality. This is mainly due to the doctrinal method prevalent in law schools, in England and Wales, which dominates the curriculum throughout all three years of a law degree. According to Schön, “the dominant view of professional knowledge” in our universities is “the application of scientific theory and technique to instrumental problems of practice”.³⁵ The roots of this dominant view lie in Positivism, “a philosophical account . . . aimed at applying the achievements of science and technology to the well-being of mankind”.³⁶ In relation to legal education and practice, technical rationality encompasses primary sources of law: primary and secondary legislation and case law. Schön correctly argues that legal

²⁷Schön (n 1) 37.

²⁸*ibid.*

²⁹*ibid.*

³⁰*ibid.*

³¹Donald A Schön (ed), *The Reflective Turn: Case Studies in and on Educational Practice* (Teachers College Press 1991).

³²Schön (n 1) 38.

³³*ibid.* 3–4.

³⁴Elizabeth A Kinsella, “Technical Rationality in Schön’s Reflective Practice: Dichotomous or Non-dualistic Epistemological Position” (2007) 8 *Nursing Philosophy* 102, 103.

³⁵Schön (n 1) 30.

³⁶*ibid.* (n 1) 31. For further discussion, see John Gardner, “Legal Positivism: 5½ Myths” (2001) 46 *American Journal of Jurisprudence* 199.

education has prioritised the knowledge of these sources over its application.³⁷ This could be due to the fact that, unlike other professions such as medicine, the purpose of law schools is not simply to prepare students for practice. This raises the question regarding the aim of a law school. A thorough critical examination of the objective of a law degree is beyond the scope of this work. However, for the purpose of this article, legal education serves three main functions. First, to critique and reform laws and legal institutions. Secondly, to train students to become lawyers, judges, and legal academics. Thirdly, to promote the practice in and study of reasoned arguments used to express and resolve disputes.³⁸ To develop reflective practice, CLE ought to incorporate these three functions. In this way, CLE can act as a bridge between theory and practice.

Clients and pro bono

As a teaching method, CLE can integrate social sciences insight into the teaching of law. Practitioners are able to gain an awareness, which is absent in the study of appellate decisions, into the application of the law in the lower courts, government agencies, and dispute resolution procedures. This insight provides an opportunity to reflect on what the law aspires to be and how it is applied in practice. However, without a normative framework for reflection, practitioners might fall into the trap of limiting their reflection to a subjective perspective and only focusing on the lawyer–client relationship. The limitations of technical rationality are compounded by the outcomes-focused (consequentialist) approach of the Code. According to the SRA:

Outcomes-focused regulation concentrates on providing positive outcomes which when achieved will benefit and protect clients and the public. The SRA Code of Conduct (the Code) sets out our outcomes-focused conduct requirements so that you can consider how best to achieve the right outcomes for your clients taking into account the way that your firm works and its client base.³⁹

According to consequentialism, the central issue in an ethical dilemma is to examine the consequences of a particular decision. Rather than provide detailed guidance on specific issues, the Code emphasises general points of principle.⁴⁰ Practitioners are afforded a degree of discretion in its application to the circumstances they face. This degree of discretion could hinder practitioners from descending into the swampy lowlands. Moreover, the Code excludes social and moral questions such as using clients as mere means, acting in the best interests of each client, and the duty of the state.

As the following student comments demonstrate, an outcomes-focused approach limits the scope of reflective practice to the lawyer–client relationship:

³⁷Donald A Schön, “Educating the Reflective Legal Practitioner” (1995) 2 *Clinical Law Review* 231, 235.

³⁸Martha Minow, “Marking 200 Years of Legal Education: Traditions of Change, Reasoned Debate, and Finding Differences and Commonalities” (2017) 130 *Harv L Rev* 2279, 2279.

³⁹Solicitors Regulation Authority, *SRA Handbook* (2018) <<https://www.sra.org.uk/solicitors/handbook/welcome/pdfcentre/>> accessed 10 June 2019.

⁴⁰The current *SRA Handbook* 2011 (version 21), which includes the Code of Conduct and the SRA’s 10 Principles. In November 2019 outcomes-focused regulations will be replaced with the SRA’s Standards and Regulations and the current ten Principles are reduced to seven.

My appreciative attitude towards a client-centred strategy was underscored by the context of my role in the clinic. I felt driven by the desire to achieve a successful outcome for the client, which is reflected by my emotional investment in the cases I was involved in. [P11]

Before beginning my work in the clinic, I believed that financial compensation or victory in court would be indicative of a successful outcome and would prove my worth. [P23]

Adopting a consequentialist approach to reflective practice allows practitioners to promote their client's interests to the exclusion of other concerns such as morality, society, and the practitioners themselves. Consequentialism determines whether an act is morally justified or not based on the consequences it produces.⁴¹

Applying Schön's swamp analogy to pro bono law clinics, in England and Wales, the number of clients is increasing as well as their legal needs. According to LawWorks⁴² December 2017 report, demand for pro bono legal services has never been greater. This is due to changes to legal aid funding introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. As of March 2017, 90 of the 225 clinics across England and Wales were law school-based clinics. Collectively, they dealt with over 18,000 enquiries in the preceding year.⁴³ Law students are now exposed to ethical and moral dilemmas such as who owns the client file,⁴⁴ conflict of interest, client confidentiality and determining when to withdraw assistance.⁴⁵ The CLE "swamp" is made even messier when one takes into account the social and financial vulnerability of clients accessing pro bono legal services.⁴⁶ Legal problems can act to bring about or reinforce characteristics of vulnerability (such as unemployment, relationship breakdown and illness).⁴⁷ This is further compounded by the fact that legal problems beget legal problems. A client who has been unfairly or wrongfully dismissed from work will not only have an employment issue but may also require housing law advice. Thus, practitioners must choose whether to stay on the high ground, where they can solve simple issues according to prevailing standards of rigour or descend into the swamp of important problems and non-rigorous inquiry.⁴⁸ The problems of the high ground appear attractive since their technical solutions appear rigorous. This approach is unsatisfactory in CLE because clients rarely present issues which are simple and straightforward. Practitioners must, therefore, develop the ability to solve problems that are indeterminate or "not in the book".⁴⁹ In other words practitioners must solve client problems which fall outside the categories of theory and technique. If practitioners are to engage competently with problems found in the "swampy lowland", they ought to improvise, invent, and test different strategies of their own devising.⁵⁰

⁴¹Jonathan Herring, *Legal Ethics* (2nd edn, Oxford University Press 2017) 9.

⁴²LawWorks is the operating name for the Solicitors Pro Bono Group, a national charity working across England and Wales.

⁴³LawWorks, "LawWorks Clinics Network Report April 2016 – March 2017" (December 2017) 3 <www.lawworks.org.uk/sites/default/files/LawWorks%20Clinics%20Report%202016-17.pdf> accessed 6 August 2019.

⁴⁴*ibid.*

⁴⁵*ibid.*

⁴⁶According to LawWorks, 82% of clinic clients have income below the minimum income standard, *ibid.* 20.

⁴⁷Nigel J Balmer, "English and Welsh Civil Justice Panel Survey: Wave 2" (Legal Services Commission 2013) 29.

⁴⁸Donald A Schön, *Educating the Reflective Practitioner: Toward a New Design for Teaching and Learning in the Professions* (Jossey-Bass 1987) 3.

⁴⁹*ibid.*

⁵⁰*ibid.* 5.

Positivist and normative traditions in legal education

Evans notes that:

There is a long debate in jurisprudence and legal education between those who regard the law as *written* to be the (entire) law, sufficient unto itself and requiring neither contextual addition in its implementation nor outside overriding objectives for its validity – loosely described as the *positivist tradition* – and those who understand the written word of the law as always just a part of the story of justice and injustice, to which it is accountable – the *normative tradition*.⁵¹

In relation to CLE, the preference found within the positivist approach for regulating solutions to social problems, as opposed to educating about options, may result in social justice collaboration being left “out in the cold”.⁵² A positivist approach is said to focus students’ attention on “what is” rather than “what ought to be” with the result that “black letter law is all the students want to hear”.⁵³ For commentators such as Thornton and Walsh, a positivist approach contributes to an unreflective and somewhat mechanical approach to legal education.⁵⁴ Evans, adopting a similar opinion, argues that “social improvement is a more explicit objective of the normative perspective of the law”.⁵⁵

The reality faced by those who practise law or teach CLE is that the knowledge that seems relevant to the issues they address is often not the same knowledge that is taught in the classroom. The dominant view within legal education, that professional practice is merely the application of a body of knowledge to a practical situation, is unhelpful and inadequate.⁵⁶ One possible side effect of this privileging of source knowledge over practice is academy’s disposition to maintain a positivist approach to the law.⁵⁷ The founders of the modern school of legal positivists were the Utilitarians, in particular Bentham, Austin, and Hart. Legal positivism is “the belief that it is both tenable and valuable to offer a purely conceptual and/or purely descriptive theory of law, in which the analysis of law is kept strictly separate from its evaluation”.⁵⁸ In other words, legal positivists believe that validity of the law depends on its sources, not its merits.⁵⁹ For Schön, the over-allocation of resources to those involved in technical rationality was an inversion of the natural order of things, because the delivery of high-quality work for the client is the reason why we have professions in the first place.⁶⁰ It is not difficult to see how such a doctrine can become the dominant approach within an academy, which is predominantly removed from practice and removed from the individuals affected by the operation of the law.⁶¹

⁵¹Adrian Evans, “Normative Attractions to Law and Their Recipe for Accountability and Self-Assessment in Justice Education” in Frank S Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press 2010) 358.

⁵²*ibid* 359.

⁵³Margaret Thornton, “The Law School, the Market and the New Knowledge Economy” (2007) 17 *Legal Education Review* 1, 17.

⁵⁴*ibid*; Tamara Walsh, “Putting Justice Back into Legal Education” (2007) 17(1) *Legal Education Review* 119.

⁵⁵Evans (n 51) 359.

⁵⁶Anna Copeland, “Reflective Practice: The Essence of Clinical Legal Education” in Adrian Evans, Anna Cody, Anna Copeland, Jeff Giddings, Peter Joy, Mary Anne Noone, and Simon Rice, *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (Australian National University Press 2017) 163.

⁵⁷*ibid*.

⁵⁸Brian Bix, “On the Dividing Line between Natural Law Theory and Legal Positivism” (2000) 75 *Notre Dame L Rev* 1613, 1615.

⁵⁹John Gardner, “Legal Positivism: 5½ Myths” (2001) 46 *American Journal of Jurisprudence* 199, 199.

⁶⁰Schön (n37) 235.

⁶¹Copeland (n 56) 163.

The positivist approach of the doctrinal method and consequentialism may hinder reflective practice by allowing practitioners to forgo reflecting on any normative conflict that may arise and adopt an amoral professional role. By focusing on the outcomes of their legal advice, practitioners risk limiting their reflexive and reflective practice. Fook and Askeland define reflexivity as:

[A]n ability to recognise our own influence – the influence of our social and cultural contexts on research, the type of knowledge we create, and the way we create it ... it is about factoring ourselves as players into the situations we practice in.⁶²

To be reflexive is to examine the limits of one's knowledge, how certain practices and institutions might marginalise groups or exclude certain individuals.⁶³ Practitioners trained predominately in the doctrinal method are likely to focus solely on a successful outcome and omit examining issues such as the role of the state, client autonomy and lawyer paternalism.

Outcomes-focused rules can be contrasted with rule-based approaches and character-based approaches.⁶⁴ An example of the latter is deontology, which holds that certain actions are good or wrong in or of themselves.⁶⁵ According to a deontological approach, a breach of an ethical principle cannot be justified simply by referring to the consequences. It is not suggested that practitioners simply follow rules and disregard the consequences of their actions. A deontological model, grounded in moral autonomy, allows practitioners to enhance their reflective practice by promoting their client's interests and drawing their attention to other concerns such as autonomy, paternalism, and the duties of the state.

Deontology

Acts, according to a deontological model, are morally obligatory regardless of their consequences.⁶⁶ Kant is widely regarded as the leading proponent of the deontological approach.⁶⁷ The importance of Kantian philosophy is highlighted by Waldron:

The philosophical writings of Immanuel Kant continue to exert a powerful influence in legal philosophy. In theoretical discussions of criminal law, the law of property, tort law, and many other areas, Kant's works are widely regarded as an important source of nonutilitarian ideas about distributive, corrective, and retributive justice.⁶⁸

In relation to CLE, consequentialism fails to consider duties owed to various parties other than the client, such as the practitioner providing the advice, third parties, and the role of the state. The implications of neglecting to reflect on duties owed to others is highlighted by Markovits:

⁶²Jan Fook and Gurid A Askeland, "The 'Critical' in Critical Reflection" in Sue White, Jan Fook and Fiona Gardner (eds), *Critical Reflection in Health and Social Care* (Maidenhead Open University Press/McGraw-Hill Education 2006) 45.

⁶³Gillie Bolton, *Reflective Practice: Writing and Professional Development* (4th edn, Sage 2014) 7.

⁶⁴Based on Aristotelian virtue ethics.

⁶⁵Herring (n 41) 13.

⁶⁶William Frankena, *Ethics* (2nd edn, Pearson 1988) 16–17.

⁶⁷Herring (n 41) 13.

⁶⁸Jeremy Waldron, "Kant's Legal Positivism" (1996) 109 *Harvard Law Review* 1535, 1535–36.

Someone who does not grant equal concern and respect to all whom her actions affect denies those whom she fails to consider their equal status as sources of authoritative moral claims, and to this extent she acts immorally.⁶⁹

Duty is a concept which underpins professional codes of ethics in various jurisdictions.⁷⁰ No moral philosopher before Kant had emphasised the notion of duty, and few ideas have greater prominence in his theory.⁷¹

Kantian and reflective practitioners

The clinicians' diaries revealed that they were prone to bias, paternalism, and treating clients as mere means. This approach not only limited their reflection to the lawyer-client model but also had a negative impact on their interaction with their clients. Kantian ethics was used to address these issues. Kantian deontology promotes reflective and reflexive practice by providing a platform for practitioners to question their thought processes, biases, and to cognise their roles in relation to others.⁷² The following demonstrate that clinicians can treat clients for their own gain (treating them as mere means):

Upon re-reading my reflective journal it became apparent that much of what I considered noteworthy centred around what I thought might be useful for a paper I would be writing in the future. My focus at this time did not seem to be entirely on the clients [*sic*] needs. [P8]

Another clinician describes recognising and then abandoning their paternalistic approach in favour of one which treats clients as autonomous individuals:

On reflection, I believe that I adhered to the crucial elements of autonomous decision-making while managing my case. Rather than imposing my paternalistic view on my client, I tried to acquaint them with the pros and cons of particular actions, engaging in a dialogue to help accurate decision-making on their part. [P16]

Kantian deontology allows clinicians to be impartial and address issues of bias:

Applying Kantian ethics has helped me take positive steps to separate my legal advisory character from personal experiences and emotions. After an interaction with one of my supervisors, I found myself rethinking the paternalistic path I had journeyed upon. [P51]

A deontological approach also ensures that clinicians are aware of their own moral autonomy and are not simply "hired guns":

I initially presumed that lawyers were "hired guns" concerned with manipulating under a strictly contractual relationship . . . My ambition for outcome-based personal success was far removed from any sense of objectivity or deontology. [P29]

⁶⁹Daniel Markovits, "Legal Ethics from the Lawyer's Point of View" (2003) 15 *Yale Journal of Law & the Humanities* 209, 222.

⁷⁰American Bar Association (ABA), Model Rules of Professional Conduct; Australian Solicitors' Conduct Rules; Canadian Model Code of Professional Conduct; Israeli Bar Association Rules (Professional Ethics); SRA Code of Conduct in England in Wales.

⁷¹Roger J Sullivan, *An Introduction to Kant's Ethics* (Cambridge University Press 1994) 32.

⁷²Gillie Bolton (n 63) 13.

Applying Kantian ethics to reflective and reflexive practice

Kant labelled the ultimate moral norm the Categorical Imperative (CI).⁷³ Although there is only a single CI, “[a]ct only on that maxim through which you can at the same time will that it should become a universal law”,⁷⁴ he offered different versions or formulae, each with its own particular emphasis.⁷⁵ The first formula, the Formula of Autonomy or Universal Law (FUL), states, “I ought never to act except in such a way that I can also will that my maxim should become a universal law”.⁷⁶ “Maxims” are practical rules that articulate an individual’s intentions.⁷⁷ Kant distinguishes maxims from principles.⁷⁸ A “principle” in Kant’s terminology is described as a “fundamental objective moral law, grounded in the pure practical reason”.⁷⁹ In other words, it is a principle on which all individuals would act if they were purely rational moral agents. Maxims, on the other hand, are “subjective principles of volition ... on which an agent acts as a matter of fact and which determines [their] decisions”.⁸⁰ Subjective maxims, however, can be elevated to the level of objectivity provided they conform to the norm of objectivity, the CI.⁸¹ The intrinsic characteristic of the FUL is that any person can adopt it who acted on the basis of reason rather than desires.⁸² To be an objective norm, the CI must be based on reason alone. For Kant, “[s]ince moral laws have to hold for every rational being as such, we ought rather to derive our principles from the general concept of a rational being as such”.⁸³ A practitioner is, therefore, able to reflect on their moral choice (maxim) by enquiring whether they would desire their choice to be a universal law applicable to all. If they answer in the affirmative, their moral choice or maxim can be applied as a universal law (principle). However, if it cannot be applied universally, then according to the CI, it must be rejected.⁸⁴ The value of universality contained in the FUL⁸⁵ is a negative test for possible or actual maxims.⁸⁶ Accordingly, practitioners cannot claim to be exempt from obligations to which they hold others, nor can they claim, on the basis of their own special interests, permissions which they are unwilling to grant to others. This requirement of universality gives rise to a reciprocity between practitioners and their clients. It instructs practitioners to judge maxims in an objective and detached manner. This method of reflection allows practitioners to determine whether bias or emotions have influenced their decisions. Bias is impermissible, according to the CI imperative, because it cannot be universalised.

The second formula, the Formula of Humanity (FH), requires individuals to “[a]ct so that you treat humanity, whether in your own person or in that of any other, never

⁷³Kant (n 6) 84 [421].

⁷⁴*ibid.*

⁷⁵*ibid.*

⁷⁶*ibid* 67 [402].

⁷⁷*ibid* 66 [400].

⁷⁸*ibid* 77 [413].

⁷⁹Frederick Copleston, *A History of Philosophy: Volume 6 The Enlightenment – Voltaire to Kant* (Bloomsbury 1960) 318.

⁸⁰*ibid* 319.

⁸¹Kant (n 6) 83 [420n].

⁸²*ibid* 84 [421].

⁸³*ibid* 76 [412].

⁸⁴Frederick Copleston, *A History of Philosophy: Volume 6 The Enlightenment – Voltaire to Kant* (Bloomsbury 1960) 320.

⁸⁵Kant (n 6) 91 [429].

⁸⁶Roger J Sullivan (n 71) 46.

simply as a means, but always at the same time as an end”.⁸⁷ By “humanity”, Kant means the power of free rational choice, for “the capacity to propose an end to oneself is the characteristic of humanity”.⁸⁸ He describes an “end” as an object of free choice.⁸⁹ The importance of choice in legal practice is that it presupposes options. Therefore, clinicians can engage with the concept of client consent by ensuring that clients are provided with the necessary options in order to provide their informed consent. The words “at the same time” and “simply”⁹⁰ must not be overlooked when analysing the meaning of this formula. The FH does not forbid individuals from using others as a means. What Kant has in mind when he instructs that a person must never use themselves or others “simply as a means”, is that they must not be used as means to the attainment of ends based on inclinations or to the satisfaction of inclinations.⁹¹ This is an appealing proposition in relation to reflective practice. It personalises the relationship between the practitioner and their client by emphasising a common humanity, despite the nature of the relationship between them.⁹² Thus, using client data, information, and experience for educational purposes is permitted provided clients are not being used simply “as a means”. For CLE purposes, clients are receiving legal assistance, and therefore, are not being used simply as a means. The FH resolves the tension between whether the focus of university law clinics should be access to justice or educational tools.⁹³ Using others as mere means requires an individual to act on a maxim that other individuals (clients) cannot adopt.⁹⁴ Since every rational individual is subject to the same universal moral law, each person possesses an inherent dignity which ought to be respected by other rational individuals (clinicians). There are two further advantages to Kant’s second formula. First, it requires practitioners to consider their own moral autonomy and not merely to act as “hired guns”. Secondly, it allows them to maintain impartiality; respect owed to clients is not based on merit or achievement. The following is an example of a practitioner displaying bias towards their client:

My attempt to approach the case empathetically created difficulties when [the client] mentioned that he “had hit her [his ex-partner] around a bit”. Having spent a significant amount of time talking in detail about my client’s life, I knew that his ex-partner was my age. My mind jumped to how I would feel about an older, somewhat intimidating man being violent towards me, and my attitude towards him became cold. [P75]

Applying the FH ensures that this type of bias can be avoided because clients, even those who are accused of heinous crimes, are owed a duty of respect for being autonomous.⁹⁵ The FH requires practitioners to prioritise the dignity of their clients.

⁸⁷Kant (n 6) 91 [429].

⁸⁸Immanuel Kant, *The Metaphysics of Morals* (first published 1785, Mary Gregor tr, Cambridge University Press 1996) 6:392.

⁸⁹Kant (n 6) 91 [429].

⁹⁰*ibid.*

⁹¹Kant (n 6) 96 [434].

⁹²Agency, contractual or fiduciary.

⁹³Donald Nicolson, “Legal Education or Community Service? The Extra-curricular Student Law Clinic” (2006) 3 *Web Journal of Current Legal Issues* <<http://www.bailii.org/uk/other/journals/WebJCLI/2006/issue3/nicolson3.html>> accessed on 24 September 2019; Frank Dignan, Richard Grimes and Rebecca Parker, “Pro Bono and Clinical Work in Law Schools: Summary and Analysis” (2017) 4 *Asian Journal of Legal Education* 1; Malcolm Combe, “Selling Intra-curricular Clinical Legal Education” (2014) 48 *The Law Teacher* 281.

⁹⁴Onora O’Neill, *Constructions of Reason: Explorations of Kant’s Practical Philosophy* (Cambridge University Press 1990) 138.

⁹⁵Kant (n 6) 114–115 [454–455].

The third formulation of the CI is the Kingdom of Ends (KE), “[a]ll maxims as proceedings from our own making of law ought to harmonise with a possible kingdom of ends as a kingdom of nature.”⁹⁶ Kant defines a “kingdom” as “a systematic union of different rational beings under common laws”.⁹⁷ This definition makes explicit the social dimension of Kant’s conception of autonomy.⁹⁸ Rational beings constitute a kingdom to the extent that their ends comprise a system. In order to conceive such a system, the ends of all rational beings must be mutually compatible and they must constitute a system of shared ends. In other words, it is a community of individuals all acting autonomously by treating themselves and each other “never simply as a means, but always at the same time as an end in himself”.⁹⁹ The KE directs clinicians towards the establishment of a cosmopolitan society, a community of rational individuals whose interactions and goals are governed by reason. A rational being belongs to this kingdom of ends as a “member” whereby they not only make universal laws, but are also themselves subject to those laws.¹⁰⁰ The FUL and the FH provide the framework for achieving this community.¹⁰¹ An example of this cosmopolitan community can be found in Kant’s essay *Towards Perpetual Peace*,¹⁰² which concerns the right of nations to form a loose federation of free states. For CLE purposes, the KE can be used to reflect on broader social issues such as the purpose of criminalising certain behaviours, the moral justification of laws, and the duty of the state towards individuals. As example of how the KE can be applied to CLE is to be found in the Third Article for a *Perpetual Peace*, where Kant suggests the idea of a “cosmopolitan right” to hospitality:

As in the foregoing articles we are dealing here with right and not with philanthropy, and within right, hospitality (hospitable reception) [Hospitalität (Wirtbarkeit)] means the right of a stranger to not be treated with hostility upon arriving in the territory of another. The other can turn him away [abweisen], but not if it leads to his downfall [Untergang]; as long as he behaves peacefully in his place, he cannot be treated with enmity.¹⁰³

Thus, strangers, for example migrants, should be afforded hospitality and not turned away if it may result in their downfall. Kant emphasises the right to visit foreign lands and not to be treated with hostility or violence while there. The KE can be used to engage clinicians with issues surrounding state duties, rights of individuals, and the moral wrong of certain laws.

The response of the Italian government to the recent migrant crisis is applied to CLE to illustrate the practical application of the KE. In June 2019, Italy passed a law to fine any boat rescuing refugees from sea up to €50,000.¹⁰⁴ Those who repeatedly

⁹⁶ibid 98 [436].

⁹⁷ibid 95.

⁹⁸Andrew Reath, *Agency and Autonomy in Kant’s Moral Theory* (Oxford University Press 2006) 175.

⁹⁹Kant (n 6) 95 [433].

¹⁰⁰ibid.

¹⁰¹Carl Hildebrand, “Educating for British Values: Kant’s Philosophical Roadmap for Cosmopolitan Character Education” (2017) 15 *Policy Future in Education* 20, 32.

¹⁰²Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (first published 1795, FQ Classics 2007).

¹⁰³Immanuel Kant, “Toward Perpetual Peace” in Mary Gregor (ed and tr), *Practical Philosophy* (Cambridge University Press 1996) 8:358.

¹⁰⁴DECRETO-LEGGE 14 giugno 2019, n 53 Disposizioni urgenti in materia di ordine e sicurezza pubblica. (19G00063) (GU Serie Generale n 138 del 14-06-2019) (ITL) <www.gazzettaufficiale.it/eli/id/2019/06/14/19G00063/sg> accessed 6 August 2019.

violate the law risk having their boats seized. This law has been criticised¹⁰⁵ for reinforcing the state's powers on immigration and prohibiting non-governmental organisation (NGO) rescue missions in the central Mediterranean. The question for CLE purposes is whether this law can be morally justified when examined under the CI lens? Clinicians were asked to discuss the moral underpinning of this law by applying the three formulae, including Kant's cosmopolitan theory in relation to the rights of migrants. The KE promotes reflexive practice by allowing clinicians to engage with the justifications of the cosmopolitan point of view, such as the interconnectedness of individuals, the consequences of migration, and its impact on immigration clients.

Limitations of Kantian ethics

In relation to reflective practice, the CI is not intended to be applied in all everyday decisions. It should be used not as an alternative but in addition to the other ethical models.¹⁰⁶ The CI does not tell us what we ought or ought not to do, instead, "its value ... lies in putting us in the right attitude, by requiring us to ignore our own particular wishes and to adopt an important point of view".¹⁰⁷ This suggests that once practitioners have been put in the "right attitude", something further is required such as intuition to guide practitioners.¹⁰⁸ Schön includes intuition in his proposed epistemology:

If the model of Technical Rationality is incomplete, in that it fails to account for practical competence in "divergent" situations, so much the worse for the model. Let us search instead for an epistemology of practice implicit in the artistic, intuitive processes which some practitioners do bring to situations of uncertainty, instability, uniqueness, and value conflict.¹⁰⁹

Reflecting on their moral intuition could enhance reflective practice by drawing the practitioner's attention to the fact that they need to articulate, in a rational manner, *why* they think a particular decision is wrong. Reflecting on intuition could indicate to the practitioner that their moral views were not the result of rational thought, but in fact due to emotional responses.¹¹⁰

Conclusion

This article is intended to generate a debate regarding the dominant positivist approach in CLE. However, the arguments in favour of a normative approach can be applied to legal education generally. Applying Kantian ethics to CLE promotes the clinical experience by providing clinicians with a framework to formulate and act from reasons and objective principles which justify their actions to other rational

¹⁰⁵United Nations Human Rights, "Italy: UN Experts Condemn Bill to Fine Migrant Rescuers" <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24628&LangID=E> accessed 6 August 2019.

¹⁰⁶Examples include virtue ethics, utilitarian theory, and feminist ethics.

¹⁰⁷William D Ross, *Kant's Ethical Theory* (Oxford University Press 1954) 34–35.

¹⁰⁸Richard Norman, *The Moral Philosophers: An Introduction to Ethics* (2nd edn. Oxford University Press 1998) 84.

¹⁰⁹Donald A Schön, *The Reflective Practitioner: How Professionals Think in Action* (Jossey-Bass 1983) 49.

¹¹⁰For further discussion on the concept of intuition, see William David Ross, *The Right and the Good* (Oxford University Press 1930); Gregory E Kaebnick, "Reasons of the Heart: Emotion, Rationality, and the 'Wisdom of Repugnance'" (2008) 38 *Hastings Centre Report* 365; Alice Woolley, "Intuition and Theory in Legal Ethics Teaching" (2011) 9 *University of St Thomas Law Journal* 285.

individuals; avoid paternalism and bias by acknowledging the dignity of their clients; and develop the ability to critique practical laws.

The analysis of legal education reveals that the positivist approach of the doctrinal method fails to equip practitioners with the necessary knowledge to develop their reflective and reflexive practice. In the context of CLE, it may hinder practitioners from becoming problem setters. A positivist approach to CLE limits the focus on the law as an “is”, a fact of power and limitation,¹¹¹ rather than an “ought”. It can give the impression that a lawyer’s function is primarily technical and instrumental. The role of Kantian ethics in enhancing reflective and reflexive practice is to provide a framework for evaluating moral considerations and provides a platform to question their own attitudes, values, assumptions, and prejudices. Kantian philosophy promotes reflexive practice by directing practitioners to question political and social structures and identify inconsistencies, rather than merely accepting and applying settled law.

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¹¹¹Stephen L Pepper, “The Lawyer’s Amoral Ethical Role: A Defense, A Problem, and Some Possibilities” (1986) 11 American Bar Foundation Research Journal 613, 624–25.

UNREGULATED IMMIGRATION LAW CLINICS AND KANT'S COSMOPOLITAN RIGHT: CHALLENGING THE POLITICAL STATUS QUO

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Abstract

Unregulated law clinics in England and Wales are prohibited from directly offering immigration advice and assistance. This article argues that this restriction should not be a barrier to teaching immigration law. Kant's duty-based ethics and his cosmopolitan right can provide a useful normative framework for challenging the political status quo in relation to the regulation of law clinics and policies affecting migrants. It is argued that introducing normative values into Clinical Legal Education can address the limitations of the conventional 'hired-gun' model and engender students to a more holistic approach to lawyering. In other words, a model which promotes the causes of third parties.

Keywords: clinical legal education; cosmopolitanism; hired-gun; immigration law; Kant.

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Introduction

Unregulated law clinics in England and Wales are prohibited from directly offering immigration advice and assistance. This article argues that this restriction on the services clinics can offer should not be a barrier to teaching immigration law. Kant's duty-based ethics and his cosmopolitan right can provide a normative framework for challenging the political status quo in relation to the regulation of law clinics and policies affecting migrants. It is argued that introducing normative values into Clinical Legal Education (CLE) can address the limitations of the conventional 'hired-gun' model and engender students to a more holistic approach. In other words, a model which promotes the causes of third parties.

Normative values are concerned with how things 'ought to be' (Schwieler & Stefan Ekecrantz, 2011: 60). In the context of CLE, normative values address questions such as 'what is just and fair?', 'do clinic students owe moral duties to non-clients?', and 'do students have a moral duty to engage in law reform?'. Adopting a values-based approach in CLE can contribute to the development of a 'mature moral identity' and fostering an attribute necessary for effective citizenship (Webb, 2010: 9). The term 'values' tends to have a variety of meanings, for present purposes it is regarded as a particular type of belief about what an individual holds valuable, namely human dignity.

Kant's moral philosophy, which is committed to respecting the dignity of all persons, will be applied to CLE to critique the United Kingdom's (UK) current laws and

policies towards migrants. These policies first entered the political debate in May 2012, when the then Home Secretary, Theresa May, announced the government's aim 'to create, here in Britain, a really hostile environment for illegal immigrants' (Kirkup & Winnett, 2012). The overarching objective was to make life as difficult as possible for migrants whom the Home Office deemed to be potentially illegal. This policy was not limited to controlling immigration through border control but also included an internal approach. According to Webber (2019: 77), the immigration policies have:

[T]he avowed aim of making life impossible for migrants and refugees who do not have permission to live in the UK, and which remove such migrants from the rights to housing, health, livelihood and a decent standard of living, liberty, freedom of assembly and association, family and private life, physical and moral integrity, freedom from inhuman or degrading treatment, and in the final analysis the right to human dignity and to life.

There are two main reasons for using the UK's 'hostile environment' policies as a case-study for developing students' analytical skills. Firstly, unregulated law clinics, unless they are partnered with non-government organisations (NGOs) or immigration lawyers, are prohibited from offering immigration advice and assistance. This prohibition can prove to be a barrier to teaching immigration law and theory. Secondly, ethics of immigration (Carens, 2015) can add value to CLE by providing a framework, in the form of normative ethics, for challenging the political status quo. Although there are various forms of cosmopolitanism, this article will draw on Kant's

theory of cosmopolitanism, the right to hospitality, and his duty-based approach (deontology) to moral decision-making. Deontology is one of several ethical theories² used in CLE. While a CLE curriculum grounded in comparative legal ethics, that includes Kantian philosophy, would better serve the aims of law clinics and CLE, the contribution of Kant's ethics will be the focus of this article.

In the absence of legal obligations, from a student's perspective, towards clients and third parties, Immanuel Kant's theory of ethics, which is the major theory within the deontological tradition (Eberle, 2012: 13), can provide CLE students with a useful framework for identifying their moral duties. Kant's philosophy deals with ethical duties owed by the individual moral agent. He grounds his system upon principles of universality; our moral obligations must be applicable to all people at all times and in similar situations. Kant's critique of the right to hospitality of non-citizens and the duties of the state towards visitors will be applied to the UK's 'hostile environment' policies to develop legal ethics beyond the dominant lawyer-client model found in live-client clinics. This article is based on the premise that there is a need for students to be provided with an ethical framework that promotes respect for the dignity of all individuals, irrespective of their nationality, gender, sexual orientation or any other characteristic.

This article will proceed in seven sections. Section one will argue that the conventional lawyering model, with its value-neutral approach, is inadequate in terms of

² Other ethical theories include consequentialism, ethics of care, intuitionism, and virtue ethics.

promoting normative values. Public interest lawyering, namely cause lawyering, is a more appropriate pedagogic approach for promoting normative values such as duties towards third parties. Sections two and three identify moral cosmopolitanism as the normative framework for enhancing cause lawyering. Section four will examine Kant's deontological ethics and his theory of cosmopolitanism. This section will outline the value of incorporating Kant's concepts of autonomy, respect and dignity to developing the cause lawyering model. Section four will also analyse Kant's cosmopolitan right in order to outline a moral framework for critiquing law and policies affecting migrants. Sections five and six will describe the regulatory framework regarding immigration law and the UK's 'hostile environment' policies. The final section will apply Kant's theory to CLE.

1. Clinical Legal Education and legal ethics

CLE is generally understood to mean the provision of pro bono legal services to real-life clients, under the supervision of academic members of staff (Giddings, 2013). While there is no universally accepted definition of CLE, Giddens (2013: 14) puts forward the following explanation:

Clinical legal education involves an intensive small group or solo learning experience in which each student takes responsibility for legal or law-related work for a client (whether real or simulated) in collaboration with a supervisor. Structures enable each student to receive feedback on their contributions and to take the opportunity to learn from their experiences through reflecting on matters including their interactions with

the client, their colleagues and their supervisor as well as the ethical dimensions of the issues raised and the impact of the law and legal processes.

CLE, as a form of experiential learning, can include a diverse range of teaching methods such as placements, case-studies, and simulations. Consequently, the teaching of law and policies affecting migrants can form part of a CLE curriculum through non-live client models. The value of CLE, as a vehicle for teaching immigration law, is that it not only serves to bridge the gap between theory and practice but can also develop practical skills, 'with the incorporation of the affective domain needed for sensitive and ethical client care' (McAllister, 1997: 3). However, the aim of teaching legal ethics is not to create 'moral whizz-kids' (Hursthouse, 2013: 650), but to provide students with conceptual tools that allow them to address the question: 'how should we respond to this situation?' (Herring , 2017: 4) and more specifically, 'do we owe a moral duty to others?'. With regards to incorporating conceptual tools, such as values, into the curriculum, Webb argues that '[i]f it is to take values seriously, legal education has to become more experiential' (Webb, 2010: 21). This can be achieved through a variety of pedagogies such as CLE, problem-based learning, and simulations. The focus of this article is the role CLE in relation to incorporating normative values.

1.1 The 'hired-gun' model

While a certain amount of guidance for resolving ethical dilemmas can be found in the professional codes of conduct, teaching these rules and duties does little to promote a critical approach to their content (Nicolson, 2018: 88). This article addresses the ethics component of CLE by incorporating a deontological dimension that goes beyond the traditional lawyering model. This aim is achieved through the use of a case-study centred on the UK's immigration law and policies. The analysis of this case-study requires a normative framework, which the dominant conventional lawyering model lacks. Legal advice and assistance in law clinics incorporates both the conventional lawyering model and its alternative: the public interest lawyering model.

Lawyers in the conventional model are considered to be detached professionals. In other words, neutral partisans who are not associated with the morality, causes, or beliefs of their clients (Chen & Cummings, 2013: 274). The 'hired-gun' approach is often associated with lawyers in private practice, where the lawyer, in exchange for a fee, defends a client's rights and puts forward the best possible defence. This is carried out without any consideration on the impact on third parties (Herring, 2017: 29). The hired-gun metaphor promotes a value-neutral model where lawyers act as amoral mouthpieces for their clients and zealously pursue their clients' self-interests (Pearce & Wald, 2016: 601). Defenders of this model view the concept of partisanship as being central to the role of the lawyer (Pepper, 1986: 617-18). According to Fried, a lawyer

must display 'hyper zeal' in pursuing a client's case, even if this might appear to be unethical (Fried, 1976). The hired-gun approach was recently criticised by the Solicitors Regulation Authority (SRA)³ (2018: 3):

[A]lthough solicitors must advance their clients' cases, they are not 'hired guns' whose only duty is to that client. They also owe duties to the courts, third parties and to the public interest'.

However, the SRA omits to offer any guidance on how these competing interests should be balanced or how a lawyer should determine the meaning of 'public interest'.

An alternative model to the 'hired-gun' approach, that has the potential to address the SRA's concerns regarding duties to third parties and to the public interest, is 'public interest lawyering'.

1.2 Public interest lawyering

Generally, a public interest lawyer is one who is alert to something or someone beyond their commitment to their client (Chen & Cummings, 2013: 278). Public interest lawyers embrace a cause which sets them apart from the value-neutral technician who adheres to the conventional model of lawyering. Public interest lawyers who advocate for a cause, such as immigration rights, are driven by a moral commitment (Chen & Cummings, 2013: 279). Cause lawyering, therefore, aims to 'reconnect law and

³ The regulatory body for solicitors in England and Wales.

morality' (Sarat & Scheingold, 1998: 3) by challenging the central activity of the legal profession, namely the provision of legal services in exchange for payment. This is achieved through amending aspects of the social, political, or economic status quo. A normative framework provides students with a conceptual tool to critique law and policies affecting both clients and non-clients. This framework can facilitate the examination of broader issues such as the impact law and social institutions have on individuals and the extent to which laws and policies hinder or promote persons from realising their life goals. Such analysis goes beyond the narrow confines of the conventional lawyering model. A moral framework that can contribute to the theory of public interest lawyering, in CLE, is Kant's theory of ethics and his cosmopolitan right to hospitality.

2. Cosmopolitanism

'Cosmopolitan', derived from the Greek words kosmo and politēs ('citizen of the world'), is a normative ideal used in various disciplines such as education (Papastephanou, 2016), global health justice (Ruger, 2018), moral philosophy (Van Hooft, 2014), and international law (Pierik & Werner, 2010). Cosmopolitanism is distinguished from globalisation which is associated with the global spread of capitalism and a deregulated market society (Litonjua, 2008: 254). Globalisation has been criticised for promoting neoliberal policies (Knyght et al, 2011) that encourage self-interest (Jordà et al, 2010). Cosmopolitanism, on the other hand, promotes the

ideal that every individual, regardless of their citizenship status or other affiliation, enjoys equal moral standing (Brock, 2009: 3). Philosophers from Kant to Jacques Derrida associate cosmopolitanism with hospitality to the stranger. Similar to CLE, there is no universally accepted definition of cosmopolitanism. However, Thomas Pogge (1992: 48) outlines three elements shared by cosmopolitan theories:

First, individualism: the ultimate units of concern are human beings, or persons—rather than, say, family lines, tribes, ethnic, cultural, or religious communities, nations, or states. The latter may be units of concern only indirectly, in virtue of their individual members or citizens. Second, universality: the status of ultimate unit of concern attaches to every living human being equally—not merely to some sub-set, such as men, aristocrats, Aryans, whites, or Muslims. Third, generality: this special status has global force. Persons are ultimate units of concern for everyone—not only for their compatriots, fellow religionists, or such like.

Pogge's definition is useful to CLE because it draws attention to the moral status of a person as an 'ultimate units of concern'. Moral cosmopolitanism, therefore, views all individuals as members of a single moral community and they owe moral duties to all other individuals, irrespective of their nationality, background, or religion. Cosmopolitanism allows students to adopt the view that 'there exists a global community which all people, by virtue of their humanity, are members' (Van Hooft, 2014: 6). Cosmopolitanism, therefore, gives rise to moral duties towards individuals outside our immediate community, such as non-citizens. Moral duties can enhance

CLE in three ways. Firstly, it views 'all humans as worthy of equal moral concern' and advocates 'impartiality and tolerance' (Kleingeld, 1999: 507). Impartiality towards clients may be absent due to the fact that 'unconscious racism and biases often play a role in our everyday decisions' (Lyon, 2012: 758). Thus, incorporating cosmopolitan values into CLE can assist in addressing issues of bias towards clients. This can be achieved through a moral duty-centred approach that promotes self-reflection. Secondly, moral cosmopolitanism provides students with a normative framework for critiquing the content of the professional codes of conduct. Thirdly, it creates a duty towards all persons irrespective of whether they are clients or not. This duty towards clients and third parties can be applied to CLE to engage students in law-reform by providing a 'voice' for those who may not have access to legal representation or who may not be able to access a clinic's services.⁴ Thus, moral cosmopolitanism is closely aligned with the public interest lawyering model. It is necessary to briefly outline Kant's deontological and cosmopolitan theories in order to illustrate their application in CLE.

⁴For a discussion on how CLE students can use casework to inform work on law reform, see Curran (2007).

3. Kant's Ethical Theory

Kant's duty-based approach to moral reasoning is known as deontology, which is derived from the Greek words for deon (duty) and science (or study) of (logos) (Alexander & Moore, 2016). Deontology can be contrasted with consequentialism, an umbrella term, that describes ethical theories that frame morality of actions on the types of consequences produced. Examples of consequentialist theories are utilitarianism, egoism, and nationalism (Cohen, 2004: 6). Deontology, on the other hand, places duty, both to one's self and to others, at the heart of morality. For deontologists, an action is deemed to be morally right or wrong not because of the consequences it produces but because it conforms to a specific moral law or principles. In other words, actions are judged not on the cause or effect they produce but on what our duty demands. To apply Kant's theory of ethics to CLE it is necessary to identify the source of this moral duty and what it entails.

By rejecting the consequences of an action as the basis of morality, Kant viewed reason as the foundation of morality. A moral individual is one who is able to deliberate on, and act upon, valid reason. To determine the right moral reason, Kant formulated the Categorical Imperative (CI) as his supreme principle of morality. At the heart of the CI is the concept of a good will, 'A good will is not good because of what it effects or accomplishes – because of its fitness for attaining some proposed end: it is good through its willingness alone – that is in itself' (Kant, 1948: [4: 394]). A good will relates to an individual's capacity to recognise and to act from a duty to follow the moral law.

A good will is always good regardless of the consequences it produces, whether intended or not, or even if it fails to produce the intended results (Kant, 1948: 17). In the context of CLE, a good will compliments the professional codes of conduct, which are predominantly consequentialist in nature (Madhloom, 2019), by reminding students to reflect on moral duties such as respecting their own autonomy and that of their clients, being mindful of paternalism towards their clients, and holding the state accountable for morally impermissible actions (Madhloom, 2019).

For an action to be morally good it should not only conform to the moral law but must also be done from a duty towards the moral law (Kant, 1948: [4: 390]). To illustrate this point, Kant gives the example of a grocer who refrains from acting dishonestly towards his customers by overcharging them (Kant, 1948: [4: 397]). Kant argues that there is a difference between a grocer whose actions are in conformity of what is expected of him as a seller, but not necessarily done from a duty to the moral law, and one who conducts his business from the intention to act honestly. It is only in the latter case, acting from duty and the principle of honesty, that the grocer's action can be said to have moral worth. Kant expounds on this point by providing another example, which is of direct relevance to law clinics: that of a person who is not inclined to 'help those in distress' (Kant, 1948: [398]). Their action has moral worth where they, out of duty to the moral law, perform acts which benefits those in distress (Kant, 1948: [4:397]). Kant (1948: [4: 398]) contrasts this example with that of a person who is naturally disposed to assist those in distress:

I maintain that in such a case an action of this kind, however right and however amiable it may be, has still no genuinely moral worth. It stands on the same footing as other inclinations – for example, the inclination for honour, which if fortunate enough to hit on something beneficial and right and consequently honourable, deserves praise and encouragement, but not esteem; for its maxim lacks moral content, namely the performance of such actions, not from inclination, but *from duty*.⁵

A person's moral worth, whether a client or not, is not dependent on inclinations or feelings. What drives a person's actions is recognition of duty, rather than the consequences of an action. It is this reasoning which led Kant to reject utilitarianism. The moral worth of an action is not judged by the consequences it produces or intended effect but by the fact that it was motivated by duty. The concept of duty helps shift the focus from the amoral 'hired-gun' approach to a more public interest lawyering model which promotes the examination of our duties towards ourselves, our clients, and society.

Kant's CI raises the question 'why are only acts that are motivated by duty possess moral worth?'. This 'motivational rigorism' (Timmermann, 2009: 58) is a result of Kant's interest in developing an account of ethics that is concerned with a person's character. Clinic students who, out of duty for the moral law, show care for third parties, whom they do not owe any legal duties towards, can be said to have moral worth. Incorporating the concept of a moral duty towards clients and third parties can

⁵ Emphasis in the original. This applies to all subsequent quotes.

promote a critique of law and policies affecting those individuals and groups such as migrants and non-citizens. To determine our duties to the moral law, it is necessary to examine Kant's supreme principle of morality.

4. Kant's supreme principle of morality: The Categorical Imperative

Kant formulated the CI to distinguish between right and wrong actions. The CI is an unconditional command that is binding irrespective of the outcome or whether it serves a benefit, either directly or indirectly, to us personally. Although Kant insists that there only one CI, he provides various formulations of it each with a different emphasis:

1. The Formula of Universal Law: *'Act only on that maxim through which you can at the same time will that it should become universal law'* (Kant, 1948: [4: 421]);
2. The Formula of Humanity: *'Act in such a way that you always treat humanity, whether in your own person or in the person of another, never simply as a means, but always at the same time as an end'* (Kant, 1948: [4: 429]);
3. The Formula of Autonomy: *'the Idea⁶ of the will of every rational being as a will which makes universal law'* (Kant, 1948: [4: 431]; and

⁶'Idea' with a capital 'I' refers to Kant's technical term. An Idea is a rational concept which arises out of our knowledge of the empirical world, yet seem to point to a transcendent realm. Once such Idea is 'the greatest possible human freedom according to laws, by which freedom of every individual is consistent with the freedom of every other' (Kant, 2015: [A316/B372]).

4. The Formula of Kingdom of Ends: 'Act on the maxims of a member who makes universal laws for a merely possible kingdom of ends' (Kant, 1948: [4: 439]).

The various formulations of the CI will be briefly discussed to illustrate their application in critiquing laws and policies affecting migrants.

4.1 The Formula of Universal Law

The CI, according to Kant, is the principle for achieving consistency and universalisation of our maxims. A maxim is a 'subjective principle of action...on which the subject *acts*' (Kant, 1948: n 51). The CI can provide students with a conceptual tool to determine whether their maxim, which underpins their actions, can be applied universally, that is, to everyone including themselves. Maxims are useful in that they identify contradictions (Kant, 1948: [4: 424]):

Some actions are so constituted that there cannot even be *conceived* as a universal law of nature without contradiction let alone *willed* as what *ought* to become one. In the case of others we do not find this inner impossibility, but it is impossible to *will* that their maxim should be raised to the universality of law of nature, because such a will would contradict itself.

There are two types of maxims: those that are contradictory when they are applied, and those that cannot be willed to be universally applied. Kant provides the example of willing a world in which we do not help 'others who have to struggle with great

hardship' (1948: [4: 423]). There is clearly no contradiction in conceiving of such a maxim when applied universally. The maxim is not self-defeating in the same manner that it is possible to envisage such a society. However, *willing* a principle in which we do not help those suffering hardships, such as clients who are unable to access legal assistance, would result in a conflict with itself; there may come a time when we may need help from others, but none would be forthcoming as we could have willed that we do not receive any assistance. Thus, the Formula of Universal Law allows students to reflect on actions beyond the conventional value-neutral lawyer-client model. It promotes reflection on laws and policies that disadvantage certain groups such as migrants.

4.2 The Formula of Humanity

In relation to the second formula, 'humanity' includes the capacity to set ends for oneself (Korsgaard, 1996: 110). This capacity is a feature of a person's freedom, understood as the ability to self-govern. In other words, the freedom to engage in self-directed rational behaviour and to set ends for ourselves (Johnson & Cureton, 2019). To exercise freedom to set ends for oneself (positive freedom) clients must be free from interference such as coercion and deception (negative freedom). Christine Korsgaard writes (1996: 140-141):

According to the Formula of Humanity, coercion and deception are the most fundamental forms of wrongdoing to others – the roots of all evil. Coercion and

deception violate the conditions of possible assent, and all actions which depend for their nature and efficacy on their coercive or deceptive character are ones that others cannot assent to...Physical coercion treats someone's person as a tool, lying treats someone's reason as a tool. That is why Kant finds it so horrifying; it is a direct violation of autonomy.

For Kant (1948: [4: 447]), a free or autonomous individual is one whose motives and actions are in accordance with the moral law. However, it is permissible to use coercion in certain circumstances if the aim is to promote positive freedom (Kant, 1996: [6:231]):

[I]f a certain use of freedom is itself a hinderance to freedom in accordance with universal laws...coercion that is opposed to this (as a *hindering of a hinderance to freedom*) is consistent with freedom in accordance with universal laws...it is right.

The state can limit our freedom provided the purpose is to promote freedom generally, such as criminalising theft and murder. Kant articulates the linkage between rights, freedoms, and equality by stating that the 'civil state' (Kant, 2006: [8:290]) ought to be based on the following principles (Kant, 2006: [8:290]):

1. The freedom of every member of society as a human being.
2. The equality of each member with every other as a subject.
3. The independence of every member of the commonwealth as a citizen.

With regards to freedom, 'the member of the commonwealth, is entitled to this right...as a human being to the extent that the latter is a being capable of rights in general' (Kant, 2006: [8:290]). A 'state' is defined as 'a union of a multitude of human beings under laws of right' (Kant, 1996: [6: 230]). Kant uses 'state' and 'peoples' (Kant, 1996: [6: 312]) synonymously suggests that states and their peoples have the same duties towards migrants that they owe towards their own. Thus, it can be argued that unregulated law clinics owe a duty to third parties. He defines 'right' as 'the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom' (1996: [6: 313]). This 'universal law of freedom' or 'the universal principle of right' maintains (Kant, 1996: [6: 230]):

Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law. or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law'.

Individuals are, therefore, free to act in whatever manner they see fit, provided their actions do not interfere with the freedom of others. A client's ability to set 'ends' for themselves gives rise to the notion of respect in relation to the 'rational choices, the plans, and intentions we and others may form' (Nelson, 2008: 104). Stephen Darwall distinguishes between two types of respect: 'appraisal respect' and 'recognition respect' (Darwall, 1977). Appraisal respect involves a positive appraisal of a person either as a person or in relation to their engagement of a particular enterprise. This type of respect is determined following an evaluation of other individuals to

determine whether the person, when judged by objective standards, has special merit and deserves our respect (Darwall, 1977: 39). The latter refers to the attitude of regard for others which is due to their being persons, and as such, worthy of being respected by virtue of the fact that they are persons deliberating on their actions. Recognition of respect is 'not how something is to be evaluated or appraised, but how our relations to it are to be regulated or governed' (Darwall, 2006: 123). Unlike appraisal respect, recognition respect requires that we demonstrate respect for others not because of our appraisal of them but because we are morally obliged to do so (Allan & Davidson, 2013: 347). In other words, recognition respect does not require fulfilling a standard of evaluation appropriate to the individuals. Darwall's recognition respect captures Kant's notion of respect which must be afforded to every individual (Kant, 1996: [6:464]):

I cannot deny all respect to even a vicious man as a human being; I cannot withdraw at least the respect that belongs to him in his quality as a human being, though though by his deeds he makes himself unworthy of it.

We ought to have recognition respect even for people whom we do not have appraisal respect for. This creates a moral justification for defending the guilty⁷ on the ground that respect is not a matter of degree based on the recipient, for example a client, of our respect having met some standard of assessment (Johnson & Cureton, 2019). This raises the question as to why we are obliged to morally respect every person no matter

⁷ In relation to the ethics of criminal defence, see (Mitchell, 1980); (Markovits, 2003); (Seleme, 2013).

their character or actions. According to Kant, respect towards others is necessary due to their dignity (Kant, 1948: [4: 435]). Sandel (1996: 82) equates dignity with a person's capacity as an autonomous agent to choose their ends for themselves. Following Sandel's interpretation, autonomy presupposes an individual's ability to make choices free from external constraints. In the context of CLE, external constraints on personal autonomy include undue influence from a student advisor as well as laws that prevent people from realising their life goals. The concept of a person's dignity is further explored in Kant's Formula of Autonomy.

4.3 The Formula of Autonomy

Autonomy, Kant (1948: 4: 436) writes, 'is the ground of the dignity of human nature and of every rational nature'. As a human moral creature, what Kant calls 'homo noumenon' (1996: 6: 434), a person exists in the moral realm of dignity. It is this dignity, inherent in every person, that demands respect because 'every man has a legitimate claim to respect from his fellow men and is in turn bound to respect every other' (1996: 6: 462). Kant (1948: [4: 435]) differentiates things which can have a 'price' and can be exchanged for something else, and things with a 'dignity' which are 'exalted above all price' and have no equivalent. Individuals possess unconditional value compared to other things, such as material goods, which can be valued by persons. Clients and third parties are, therefore, not to be valued simply as a means to the ends of others but as ends in themselves by virtue of their dignity. An example of

using a client as means is where a student volunteers in a clinic purely out of self-interest as opposed to altruistic reasons. For Kant (2015: [5:88]), a person's value as a rational being is linked to their autonomy:

A human being alone, with him every rational creature, is an *end in itself*: by virtue of the autonomy of his freedom he is the subject of the moral law...such a being...is to be used never merely as a means but as at the same time an end.

Dignity, as a universal concept, is possessed by every individual due to their autonomy and is grounded in the requirement to treat others, including their own person, 'as ends in themselves' (Bognetti, 2005: 89-90). However, historically, individuals outside one's national borders were not considered to have moral standing (Chadwick & O'Connor, 2015: 26). Individuals with moral standing are those who are considered to be moral agents. For Kant (1948: [4: 435]), a moral agent is one who possesses dignity. Moral agency is essential to being a rational agent (Bowie, 1999: 45). In relation to the concept of rationality, Kant writes (1948: [4: 429]):

Rational nature exists as an end in itself. This is the way in which a man necessarily conceives his own existence: it is therefore so far a *subjective* principle of human actions. But it is also the way in which every other rational being conceives his existence on the same rational ground which is valid also for me; hence it is at the same time an *objective* principle, from which as a supreme practical ground, it must be possible to derive all laws for the will.

This highlights Kant's assertion for the necessity of respecting all rational individuals because rationality is a product of an individual's freedom and enables them to act as moral agents (Kant, 1948: [4: 447]). Freedom permits individuals to act on laws they formulate themselves rather than being subjected to causal laws. Therefore, moral agency is what gives individuals dignity (Bowie, 1999: 45). The concepts of freedom and dignity can be useful analytical tools for critiquing the principle that lawyers must act with independence (SRA, Principle 3) and acting in their clients' best interests (SRA, Principle 7). Taking into consideration a person's freedom and dignity allows students to be mindful of a client's dignity by virtue of them being autonomous persons. This dignity-centric approach to client care may prevent students from being paternalistic when advising their clients. A further advantage of this approach is that it allows students to reflect on the impact of law and policies, which restrict freedom, on persons who are outside their immediate community. This is achieved by incorporating into CLE the concept of a moral community that transcends geographical boundaries, namely Kant's 'kingdom of ends'.

4.4 Formula of Kingdom of Ends

Kant's third formula requires that actions be considered as if their maxims provide a law for a hypothetical 'kingdom' (1948: [4: 433]). A 'kingdom' is 'a systematic union of different rational beings under common laws' (1948: [4: 433]). A kingdom of ends is an ideal community of rational beings living in harmony with one another. Unlike

'humanity', which every person possesses, a kingdom of ends is an ideal which every person should strive to achieve (Hildebrand, 2017: 23). This formula conceptualises Kant's ideal community where the authority that legislates moral laws and norms are binding on everyone. These norms are derived from rational standards accessible to all the community's members and accord with their dignity (Hildebrand, 2017: 23). The Formula of the Kingdom of Ends acts as a domain for the normative framework necessary for a cosmopolitan community. In his essay 'Toward Perpetual Peace' (TPP), Kant argues that, '[t]he growing prevalence of a (narrower or wider) community among the peoples of the earth has now reached a point at which the violation of right at any one place on the earth is felt in all places' (Kant, 2006: [8: 360]). It would seem that Kant anticipated the current climate change (European Commission, 2020a) and refugee crises (European Commission, 2020b) whereby catastrophes in one part of the world may have consequences on other nations (Mader & Schoen, 2019). This can create a realisation in students that they 'are not citizens just of specific nation-states but are also citizens of the world' (Van Hooft, 2009: 4).

4.4.1 Kant's cosmopolitan right

In TPP, Kant (2006: [8: 358]) equates the idea of a 'Cosmopolitan Right' to 'hospitality' which he defines as 'the right of a stranger not to be treated in a hostile manner by another upon his arrival on the other's territory'. Kant (2006: [8: 357]) limits his cosmopolitan right to 'Universal Hospitality'. The use of the word 'universal' implies

that this cosmopolitan right is a type of CI valid for everyone (Saji, 2009: 126). Thus, any person can exercise the right to arrive on any land. However, Kant's cosmopolitanism, which is a right as opposed to philanthropy (Kant, 2006: [8: 358]), is not an absolute right. A stranger can be turned away provided this can be achieved without their death (Untergang) and the stranger must not be treated with hostility, 'so long as he behaves in a peaceable manner in the place he happens to be' (Kant, 2006: [8: 358]). Under this right, non-citizens can claim the 'right of resort', which everyone possesses 'by virtue of the right of common possession of the surface of earth' (Kant, 2006: [8: 358]). The right of resort is merely an entitlement to present oneself in the lands of others. Kant's cosmopolitan right is not 'a right to *make a settlement* on the land of another nation (*ius incolatus*)' (1996: [6: 353]). A non-citizen's right to 'make a settlement' can only be secured through a special contract (Kant, 1996: [6: 353]). Kant elaborates on this conditional requirement by stating that it requires 'a special, charitable contract stipulating that he be made a member of the household for a certain period of time' (Kant, 2006: [8: 358]).

Kant's hospitality model, which is limited to a right to visit (Besuchsrecht) rather than a right to residence (Gastrecht), has been described as being 'inappropriate' (Cavallar, 2002: 323) and 'empty' (Benhabib, 2004: 36). Derrida criticises Kant for providing a restricted right to hospitality that gives rise to a precedent for the special conditions imposed on refugees and asylum seekers (Derrida, 2001). This criticism appears, at first glance, justified when we consider that in relation to a stranger's right to visit, the

state has the authority to refuse entry with respect to non-citizens, and thereby overriding a stranger's right to hospitality. However, Derrida's (2001) reading of Kant, namely the exclusion of asylum seekers in Europe, is unjustified because Kant's laws of hospitality explicitly hold that visitors should not be turned away if it results in their 'death' (Kant, 2006: [8: 358]). Kant's narrow conception of the right to hospitality can be disregarded in relation to CLE because this right which 'pertains...only to conditions of the possibility of *attempting* to interaction with the old inhabitants' (Kant 2006: [8 358]), was primarily aimed at restricting European colonisation (Kant, 2006: [8: 358]; see also Brown, 2-14: 684):

If one compares with this the inhospitable behaviour [sic] of the civilized states in our part of the world, especially the commercial ones, the injustice that the latter show when visiting foreign lands and peoples (which to them is one and the same as conquering those lands and peoples) takes on terrifying proportions.

Kant (2006: [8: 358]) restricts the right of hospitality to visiting other countries. For European states this meant colonisation and 'oppression of the native inhabitants'. Kant's cosmopolitanism was, therefore, mainly concerned with restraining colonial rule and aggression (Kleingeld, 1998: 76). He (Kant, 1996: [6: 353]) attempts to introduce a further limit on European colonialism by excluding from the right to visit 'a right to *make a settlement* on the land of another nation (*ius incolatus*)'. Although Kant did not explicitly mention the rights of refugees and economic migrants, the plight of

refugees in eighteenth-century Europe⁸ is unlikely to have escaped his attention. In an early draft for TPP Kant (cited in Kleingeld, 1998: 78) argues that ‘a ship seeking a port of refuge in a storm, or a stranded group of sailors cannot be chased away from the beach...where he saved himself and sent back into imminent danger...instead, he must be able to stay there until there is a favourable opportunity to leave’. Here, Kant not only anticipates the rights of refugees but also the principle of non-refoulement established in the twentieth century (Kleingeld, 1998: 77; on the rights of refugees, see Goodwin-Gill & McAdam, 2007). Under customary international law and the Convention Relating to the Status of Refugees (1951 and 1967) (the Refugee Conventions), states are prohibited from removing individuals from their jurisdiction when there are substantial grounds for believing that an individual would be at risk of harm upon return, including persecution, torture or other serious human rights violations based on their ‘race, religion, nationality, membership of a particular social group or political opinion’ (Article 33 of the Convention Relating to the Status of Refugees 1951). Using the Refugee Convention as a frame of reference, Kant’s theory of cosmopolitanism ‘has some room for limits on the range of legitimate reasons for rejection’ (Kleingeld, 1998: 77). Thus, a state’s laws, which prevent individuals from exercising their right to hospitality, are discriminatory and contrary to the CI.

As stated previously, a stranger should only be turned away if it can be carried out without causing their death (Kant, 2006: [8:358]). Can the state refuse entry to an

⁸For an account of refugees in eighteenth-century Prussia see Hans Fenske, ‘International Migration: Germany in the Eighteenth Century’ (1980) 13(4) *Central European History* 332.

asylum seeker if this would not result in death on return to their country of origin? Kant's right to hospitality appears to allow such an action on the part of the state. However, Pauline Kleingeld (1998: 76) argues that Kant's term 'Untergang', which she interprets as 'destruction',⁹ can include 'mental destruction or incapacitating physical harm'. It is, therefore, possible to widen Kant's cosmopolitanism to include migrants who would suffer or are at risk of suffering 'destruction', as interpreted by Kleingeld, if they were to be deported. This interpretation of Kant's cosmopolitanism does not imply that states lose their powers to exclude non-citizens. On the contrary, Kant (2006, [8: 359]) himself supported China and Japan in their attempts to limit interaction with European traders. Kant's cosmopolitanism supports state sovereignty in four ways. Firstly, it permits states to limit interaction with non-citizens. Secondly, migrants can be turned away provided this can be achieved without causing their destruction (broadly defined). Thirdly, non-citizens do not have an a priori right to settle, they only have a right to visit. Fourthly, the right to hospitality can be revoked if a migrant fails to behave in a peaceable manner. Kant does not explain what constitutes 'behaves peacefully', but presumably what he had in mind was a visitor adhering to the norms and laws of the host state. Conversely, he limits state sovereignty by requiring a state to fulfil four conditions (Saji, 2009: 127). Firstly, every non-citizen is to be treated equally and without hostility provided they behave peacefully. Secondly, as long as a non-citizen behaves peaceably, they should not be

⁹ In some translations this term is interpreted as 'death'.

forced to conform to the people of the state simply because they have entered the state's territory (Saji, 2009: 128). Thirdly, but unlike the first two conditions which are unconditional, a stranger can enter into a specific contract to '*make settlement in the land of another nation*' (Kant, 1996: [6: 353]). Finally, admission is obligatory if refusal of entry will lead to the individual's destruction.

Kant's cosmopolitanism is a useful analytical tool for teaching immigration law in CLE because it affirms an individual's humanity through respect for their autonomy and the requirement to afford them hospitality, albeit on the condition that an individual behaves peacefully. It provides a framework for recognising that individuals have a moral right to travel within a global community and not to be treated with hostility. Kant's Kingdom of Ends and his theory of cosmopolitanism can develop public interest lawyering by introducing a deontological approach to cause lawyering. Kant's CI can, therefore, provide the foundation of our moral duties towards society and acts as a framework for critiquing the law. To demonstrate the application of Kant's ethics to CLE, it is necessary to provide a brief overview of the current regulatory framework regarding the provision of immigration advice and assistance.

5. Law clinics and regulation of immigration advice and assistance

In England and Wales, the Office of the Immigration Services Commissioner (OISC) regulates the provision of immigration advice and services in the UK. 'Immigration advice' and 'immigration services' are defined in s. 82(1) of the Immigration and

Asylum Act 1999 (IAA 1999). Section 84(2) of the IAA 1999 allows persons to provide immigration advice and services provided they are authorised to practise by a designated qualifying regulator. The SRA, which derives its regulatory authority from the Law Society, is a designated qualifying regulator. Anyone in England and Wales is permitted to offer legal advice, provided they do not 'hold' themselves out to be a qualified person. However, only a qualified person may provide immigration advice or services. A person who offers immigration advice or immigration services in contravention of s. 84 of the IAA 1999 is guilty of a criminal offence. The IAA 1999, therefore, prohibits unregulated university law clinics from offering immigration advice and services. The OISC's Position Statement (2018) justifies this framework of regulation on the grounds that 'those seeking immigration advice and/or services in the UK should receive them from persons who are fit and competent'. However, this argument can apply to law clinic clients generally in that unregulated clinics are permitted to offer legal support to vulnerable clients without the need for regulation. Section 84 of the IAA 1999 could, therefore, be amended to allow unregulated clinics to provide immigration advice and assistance. To apply a cosmopolitan approach to clients and third parties, in CLE, it is necessary to examine the relevant law affecting certain migrants.

6. The United Kingdom's 'hostile environment'

The UK's policies on immigration control were translated into legislation by the Immigration Acts of 2014 (IA 2014)¹⁰ and 2016 (IA 2016).¹¹ The government sought, through the IA 2014, to make it 'harder for illegal immigrants to rent accommodation' (United Kingdom. Parliament, 2014). Sections 22 – 28, inclusive, of the IA 2014 create an obligation on landlords of private rental accommodation to conduct checks for the purpose of establishing that tenants have the 'right to rent'¹² in the UK. Landlords who rent to illegal migrants without conducting these checks will be liable for a civil penalty. In *R (on the application of Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542, the Court of Appeal held the scheme to be compatible with European Convention on Human Rights (ECHR) Article 14¹³ in conjunction with Article 8.¹⁴ The Court upheld the legality of the right to rent scheme that requires landlords to check the immigration status of tenants. Despite finding that the scheme did, to an extent, increase the risk of discrimination, Hickinbottom LJ (*R (on the application of Joint Council for the Welfare of Immigrants) v*

¹⁰ Received Royal Assent on 14 May 2014.

¹¹ Received Royal Assent on 12 May 2016.

¹² Right to rent means simply that the occupier has a right to rent a property in the UK.

¹³ *The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

¹⁴ 1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Secretary of State for the Home Department [2020] EWCA Civ 542, para. 75), delivering the leading judgment, stated:

I am satisfied that, as a result of the Scheme, some landlords do discriminate against potential tenants who do not have British passports, and particularly those who have neither such passports nor ethnically-British attributes such as name. By “as a result of the Scheme”, I mean that, but for the Scheme, the level of discrimination would be less. Almost all of the evidence – notably the evidence from mystery shopping exercises and surveys – points clearly in that direction.

The Court concluded that those who do have a right to rent, but not a British passport, were subject to discrimination based on their nationality. However, the Court highlighted that this discrimination is not a rational or logical outcome of the scheme. According to the Court (*R (on the application of Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542, para. 151), the scheme is a ‘proportionate means of achieving its legitimate objective’ and, therefore, justified.

Section 38 of the IA 2014 also requires temporary migrants to make contributions to the National Health Service (NHS).¹⁵ Uthayakumar-Cumarasamy (2020: 133) criticises this ‘weaponization’ of the UK health service:

‘[H]ostile environment’ policies are designed to be most detrimental to some of society’s most marginalized and vulnerable, such as undocumented migrants and

¹⁵Umbrella term for the publicly-funded healthcare systems of the UK.

unidentified victims of trafficking, creating an underclass whilst more privileged groups continue to benefit from access to healthcare.

The IA 2016 extends the scope of the 'hostile environment' policy by introducing new sanctions on illegal workers, preventing certain migrants from accessing housing, and new measures to deport illegal immigrants.

In April 2013, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into effect. LASPO, which was introduced, inter alia, in response to increasing pressure on the legal aid budget, resulted in funding cuts to legal aid and narrowed the scope and financial eligibility criteria. Three areas of law that have suffered extensive scope cuts as a result of LASPO are housing, welfare benefits and immigration. Consequently, many individuals who would previously have been eligible for legal aid have been unable to gain legal assistance to pursue their cases in court or at a tribunal (Law Works, 2018).

Immigration lawyers have also been the target of the government's immigration policies. The Civil Legal Aid (Remuneration) (Amendment) (Coronavirus) Regulations 2020 (Coronavirus Regulations 2020),¹⁶ which amend the fee regime for legal aid providers, have been criticised for not adequately reflecting the work required by immigration lawyers. According to the Immigration Law Practitioners' Association (ILPA) the new fee regime 'will inevitably deter people from taking on

¹⁶ Came into force on 8 June 2020.

the more complex cases, which require the most work' (ILPA, 2020). The next section will apply Kant's philosophy to CLE.

7. Applying Kantian ethics to CLE

Kant's theory of ethics is a useful analytical tool for enhancing student reflection and analysis of the law for three reasons. Firstly, it is committed, through the CI, to the equal moral worth of rational individuals, regardless of their nationality, religion, or any other characteristic. In other words, individuals are considered 'equal' irrespective of their citizenship and background (Barry, 1998: 145). This ethical framework demands that we show concern not just for our fellow citizens but for all human beings, especially those who are affected by poverty, war, climate change or injustice. Secondly, we have a moral duty to promote a person's autonomy, including our own. Thirdly, students are encouraged to reflect on whether maxims leading to coercive laws and policies that restrict the freedom and autonomy of certain migrants, can be willed to be a universal law.

The University of Bristol's CLE < <http://www.bristol.ac.uk/law/law-clinic/> > programme introduces Kant's theory of ethics to students through lectures that outline the various formulations of the CI. This ensures students gain an awareness of a deontological approach to legal ethics. The emphasis in the lectures is on the dignity and autonomy of all persons, as opposed to focusing solely on clients. Prior to the workshops, students are provided with pre-reading material on cosmopolitanism,

Kant's ethics, the regulation of legal services, and the relevant laws and policies affecting migrants. Seminar questions are designed to promote analysis and critique of the law and policies through a cosmopolitan lens. The starting point of critique of the UK's policies is whether migrants have a moral right to hospitality. As stated above, non-citizens have a moral right to visit and must not be turned away if this would result in their destruction. Students are then asked to examine the impact the IA 2014 and 2016 have on non-citizens' autonomy. Policies that prevent a person from accessing employment, housing, legal advice, and medical care not only prevent her from realising her life goals but also cannot be morally justified according to Kant's theory of cosmopolitanism which creates a right to hospitality.

A deontological approach to legal practice can also draw attention to the fact that certain migrants are prevented from accessing legal advice because of the restrictions placed on unregulated law clinics and the fee structure introduced by the Coronavirus Regulations 2020. Reflecting on the impact of the law on third parties has the potential to enhance students' reflective practice and critical analysis. With regards to developing public interest lawyering in CLE, Kantian's theory of ethics can direct the student's attention to the fact that they, as moral agents, have a role to play in law and policy reform in relation to unjust practices. Kant (2006: [8: 304]) argues that citizens have the right to inform their governments of any injustices and petition for redress and reform. This right ensures that we owe a moral duty not just to clients but also to those who do not fall within the scope of a clinic's work such as asylum

seekers. This creates a moral right, as far as clinics are concerned, to engage in policy reform. A clinic can inform the state of any injustices and petition for reform through partnering with NGOs and immigration law firms.

The University of Bristol's Law Clinic fulfils this moral duty by partnering with Bail for Immigration Detainees (BID) < <https://www.biduk.org/pages/2-about-us> >, an independent charity that exists to challenge immigration detention in the UK. This partnership allows students to apply cosmopolitan theory to assist BID with policy reform and research reports. This facilitates an understanding and appreciation of some of the issues facing migrants. Analysing the issues facing migrants provides students with the opportunity to develop their nascent emotional intelligence (Douglas, 2015) through exposure and analysis of the laws and policies affecting migrants. Thus, even though immigration law is regulated, clinic students can still take an active role in promoting the causes of third parties.

8. Conclusion

This article has demonstrated that unregulated law clinics can engage, albeit indirectly, with immigration clients through a cosmopolitan approach grounded in a duty towards all individuals. Kant's cosmopolitanism theory adds value to CLE by firstly recognising the dignity of both clients and third parties. Secondly, there has been a gradual shift in recent years towards a more social justice-oriented approach in CLE (Nicolson, 2016; McKeown & Ashford, 2018). Kant's CI can contribute to this

approach by introducing a normative framework for students to pursue social and political justice which focuses on the autonomy and freedom of all rational persons. Thirdly, Kant's cosmopolitan right, which refers to 'conditions of universal hospitality' (Kant, 2006: [8: 357]), recognises that individuals ought to be free to move to different parts of the world and, thus, providing a norm for assessing situations which result in oppression, such as barriers to trade and interaction (Nascimento, 2016: 108). Fourthly, cosmopolitanism promotes the ideal that individuals ought to be free from national, cultural, and political biases (Waldron, 1999; Caney, 2005; Nussbaum, 2010). Law students and individuals generally are susceptible to confirmation bias, ego-centric and self-serving biases (Adler, 2005; Eigen & Listokin, 2012; Stark & Milyavsky). This issue of bias in CLE is of particular relevance given that the SRA states that a solicitor is under an obligation to 'act with independence' (SRA, Principle 3). A student's heuristic bias may affect their ability to maintain impartiality and independence towards their client. CLE programmes have been criticised for minimising the importance decision-making skills, namely 'study of the cognitive strategies needed to properly identify and prioritize goals, to process information free of psychological biases that undermine objectivity, and to creatively generate potential solutions to a problem' (Rand, 2003: 733). Kant's cosmopolitanism allows students to address discrimination, whether their own or resulting from a social institution such as the Home Office, towards clients and third parties who happen to be members of a different nationality, ethnicity, or any other form of identity designed to label individuals as members of discreet groups. Fifthly, cosmopolitanism fosters a

moral obligation 'to the worldwide community of human beings' (Nussbaum, 2010: 155). This allows students to reflect on duties beyond those prescribed by the professional codes of conduct: duties towards their clients, the court, and, in limited circumstances, towards third parties. A cosmopolitan moral obligation, on the other hand, provides students with an opportunity to reflect on issues beyond their immediate community, such as climate change, refugee crisis, and the Covid-19 pandemic. Limiting the scope of universalizability to ones' own community or country risks 'educating a nation of moral hypocrites, who talk the language of universalizability but whose universe has a self-servingly narrow scope' (Nussbaum, 2010; 160). Moreover, the Formula of Universal Law creates a moral duty, incumbent on individuals not to act selfishly by disregarding the plight of others. This formula, therefore, promotes public interest lawyering.

Finally, cosmopolitanism can add value to the legal profession beyond CLE. It can develop legal practice by engaging lawyers in three levels of analysis. The first level focuses on an individual's (client, lawyer, or third parties) autonomy and dignity. Second, the organisational level promotes reflection on corporate social responsibility, and the moral permissibility of in-house policies that benefit only a small number of stakeholders in an organisation. The third level concerns duties towards the moral community, be it a law firm, immediate community, or other jurisdiction.

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CHAPTER 8

PROMOTING INTERNATIONAL HUMAN RIGHTS VALUES THROUGH REFLECTIVE PRACTICE IN CLINICAL LEGAL EDUCATION: A PERSPECTIVE FROM ENGLAND AND WALES

Irene Antonopoulos and Omar Madhloom

ABSTRACT

The global Clinical Legal Education (CLE) movement transcends borders as law teachers worldwide try to inculcate law students and future legal practitioners with social justice values. One method of achieving this is through developing reflective practitioners. Kolb, finding common ground in the work of Lewin, Dewey, and Piaget, formulated the four stages in the experiential development of concrete experience, reflective observation, abstract conceptualization, and active experiment. Although Kolb's model is used in legal education literature, students may not be provided with the relevant conceptual tools required to engage in reflective practice. This often results in students providing subjective analysis of their work, which fails to fully contribute to their educational experience. One of the reasons for omitting analytical tools is that reflective practice suffers from a lack of conceptual clarity. According to Kinsella, the "concept remains elusive, is open to multiple interpretations, and is applied in a myriad of ways in educational and practice environments".

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A further issue hindering reflective practice relates to Donald Schön's critique of the positivist approach adopted by law schools.

This chapter will apply a human rights framework to CLE to develop reflective practitioners. The two main reasons for this are, first, human rights as formulated by the Universal Declaration on Human Rights are universal, inter-related, and indivisible and, second, reflection based on these universal human rights values will benefit cross-jurisdictional societies in assisting vulnerable clients affected by emerging implied and direct human rights challenges.

Keywords: England and Wales; experiential learning; human rights; law students; legal education; legal practitioners; policy-makers; reflection; Universal Declaration of Human Rights

INTRODUCTION

In this chapter, we argue that legal education, in England and Wales, which is almost exclusively a national undertaking, is ill-equipped to train students to become global practitioners. Apart from the study of International Law and European Law, legal education focuses primarily on its jurisdiction-specific law and legal institutions. Law is predominantly taught in a manner which excludes normative¹ concepts such as duty, justice, and virtue. This is mainly due to the case method,² which is the dominant approach used in law schools. Christopher Columbus Langdell is credited with introducing the case method in 1870 (Duxbury, 1991, p. 81; Kimball, 2006, p. 192), which replaced the existing approach for the study of law from a book-and-lecture to a system founded on the study of reported appellate opinions using inductive reasoning. However, he did not discover this method (Hall, 1955, p. 99). Keener wrote that:

The teaching of law by the study of cases is but the application to the study of law of a method that has been almost universally accepted in other departments of education. (Keener, 1894, p. 473)

Thus, a judge reaching a decision in a case where the law was in dispute is under no requirement, according to the case method, to consider what the effects of a rule were, or whether the rule was moral or not. This form of judicial reasoning is demonstrated by the following quote from Lord Justice Ward in the case of *Re A (Children)* [2000] EWCA Civ 254:

This court is a court of law, not of morals, and our task has been to find, and our duty is then to apply the relevant principles of law to the situation before us.

This quote highlights that there is no necessary connection between law and morality.

Similarly, in relation to the application of the case method to legal education, the following Criminal Law problem-based question illustrates the absence of normative values in legal education:

Amanda is late for her Criminal Law lecture. As she is rushing out of her flat, she realises that she cannot find her Criminal Law textbook. She notices that her flat mate's Criminal Law textbook on the floor and remembers that her flat mate was away visiting their parents. Amanda decides that her flat mate would not mind if Amanda took their textbook. Discuss Amanda's criminal liability, if any.

This type of scenario is found in substantive law modules such as Contract Law, Tort, and Land Law. The above problem-based question requires the application of case law (previous judicial decisions) and statute (in this scenario section 1 of the Theft Act 1968). The case method requires students to apply previous judicial decisions and reasoning (*ratio decidendi*) to the problem-based question. This scenario shows that the case method fails to provide students with the opportunity to engage in concepts of justice and morality. This model of teaching law constitutes a "corporatised or positivist approach" (Walsh, 2008, p. 123).

There is a risk that students, whose legal education is based on the case method, will resort to applying this positivist approach when dealing with similar facts as the above scenario. The absence of notions of justice (e.g., Rawls' justice as fairness) prevents students and legal practitioners from engaging in values to arrive at substantively just outcomes. The term "values" is used to refer to principles, ideals, standards, which act as points of reference in decision-making or the evaluation of beliefs or actions and are closely connected to personal identity (Halstead, 1996, p. 5). Empirical data show that this positivist approach only addresses the needs of a few students. Some students enter law school with the desire to effect social change (Schwartz, 1980, p. 437). However, some students might not wish to pursue legal careers. Inculcating such students with notions of social justice can provide them with the necessary intellectual nourishment that they need to find satisfaction in their studies (Thornton, 1991, p. 19).

In relation to the suitability of the jurisdiction-specific case method which is devoid of morality and notions of social justice, it is necessary to provide an overview of the impact of globalization on the legal profession and communities generally. The United Nations (UN) has, for more than 15 years now, recognized that "[g]lobalization has increased contacts between people and their values, ideas and ways of life in unprecedented ways" (UNDP, 2004). Globalization is also affecting the practice of the law (Alemanno & Khader, 2018, p. 14). A brief survey of Big Law³ reveals that corporate law firms such as Baker McKenzie, Clifford Chance, DLA Piper, and Kirkland & Ellis have offices on most continents. Alemanno and Khader highlight the international dimension of legal practice:

The transnational judicial dimension of legal practice is today epitomized by the EU, a legal order characterized by a plurality of sources, judicial authorities, and the introduction of new modes of governance that have profoundly shaped the nature and practice of the law. This constellation is further complexified by the numerous agreements concluded by the EU with third countries as well as international organizations (such as the World Trade Organization [WTO]) that entail the operation of dispute settlement mechanisms, or by the existence of legal sources, also operationalized by dedicated judicial bodies, such as the ECHR. (Alemanno & Khader, 2018, p. 16)

Thus, global lawyers are expected to understand the jurisdictional competencies of international courts such as the European Court of Human Rights

(ECHR) and the Court of Justice of the EU (CJEU). The implications of globalization of legal services lead us to conclude that law schools can no longer afford to simply teach the law relevant to their own jurisdiction. Any reform to legal education ought to address the increasing global nature of the profession. As a result of these global changes, law schools should “rethink what type of new knowledge and what type of graduates our future societies need” (Gregersen-Hermans, 2012, p. 24).

In addition to globalization of the legal profession, recently there has been an emergence of legal issues which transcend national jurisdictions, such as the COVID-19 pandemic outbreak as well as climate change and the recent migrant crisis (Fulconbridge & Muzio, 2009, pp. 1335-1360). The National Intelligence Council envisages that by 2025:

[N]ation-states will no longer be the only - and often not the most important - actors on the world stage and the “international system” will have morphed to accommodate the new reality. But the transformation will be incomplete and uneven. Although states will not disappear from the international scene, the relative power of various nonstate actors - including businesses, tribes, religious organizations, and even criminal networks - will grow as these groups influence decisions on a widening range of social, economic, and political issues. (National Intelligence Council, 2009).

It is, therefore, no longer acceptable to teach law in a manner devoid of the complexities of legal practice. In response to changes in the legal profession and the wider world, this chapter will argue that the dominant case method used in law schools, which privileges theory over practice and domestic law over international law, is no longer a viable method for preparing students for a global market. The dominant legal pedagogic method is an inferior mode of academic pursuit (Hutchinson, 1999, p. 302).

Teaching students to identify and address emerging global problems is best understood by viewing globalization to mean world community. In other words, every person and every region are affected by the same threats, and their responses affect us all (Bloch, 2008, p. 113). We argue for the restructuring of the law school curriculum to train students for roles as “policy makers” in society (Lasswell & McDougal, 1943), by inculcating them with universal values. For the purposes of this chapter, the source of these normative values is the Universal Declaration of Human Rights (UDHR).

In addition to exploring the limitations of the case method, this chapter discusses the implications of the proposed new qualification route for aspiring solicitors. We identify the universal values as embodied in UDHR as a normative framework for teaching law students to become global policy-makers. The final section embeds these values, through reflective practice, within a pedagogical movement which transcends national jurisdictions, namely Clinical Legal Education (CLE).

By applying a normative approach to CLE (Madhloom, 2019), students are provided with the opportunity to confront the complex realities of the “law in action” (Pound, 1910). CLE, similar to substantive modules, cannot expose students to all laws. However, CLE may contribute to the denationalization of the law curriculum by teaching students to reflect on what law ought to be through the lens of universal values.

CLE IN ENGLAND AND WALES

The LawWorks Clinics Network recorded 229 active clinics across England and Wales (LawWorks, 2018).⁴ A total of 39,937 clients were given legal advice at a clinic, a 14% increase from the previous year (2016). University law clinics account for 41% of the network, and collectively, they dealt with over 19,000 enquiries. The importance of law school clinics in relation to facilitating access to justice is demonstrated by the fact that they account for 51% of all clients receiving general information, signposting, or referral (LawWorks, 2018, p. 15). Chart 1 sets out the breakdown of volunteers that supported clinics between April 2017 and March 2018.

Chart 1 shows that the largest category of volunteers is students, with 4,632⁵ participating in clinics (LawWorks, 2018). In the UK, over 70% of law schools now provide clinical or pro bono experience to their students. CLE is clearly now mainstream (Duncan, 2016, p. 390). The popularity of university law clinics among student volunteers could be due to the fact that they provide an opportunity to apply theory to practice and enhance student employability through client interaction, the acquisition of soft skills, and case management (McKeown, 2017). Another significant factor is the general need for pro bono legal support, which may have prompted universities to engage in corporate social responsibility through law clinics (Marson, Wilson, & Van Hoorebeek, 2005). The Sentencing and Punishment of Offenders Act 2012 (LASPO) introduced funding cuts to legal aid and narrowed the scope and financial eligibility criteria. This resulted in fewer people gaining access to legal advice and representation in areas such

VOLUNTEER BREAKDOWN

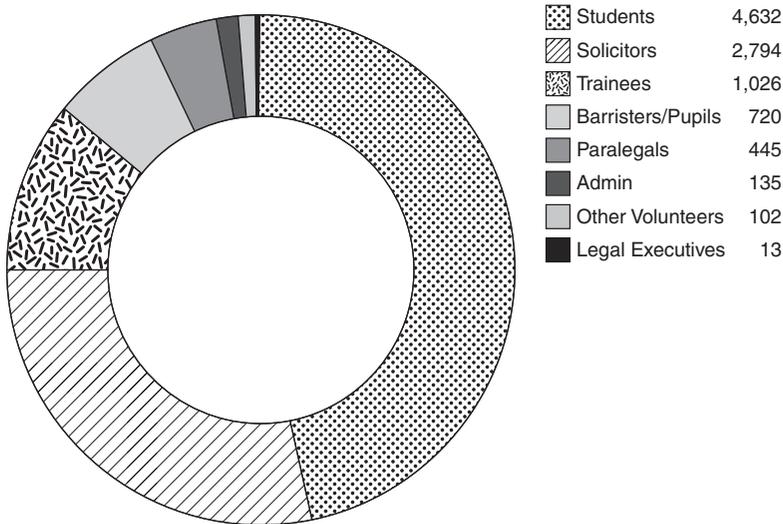


Fig. 1. Breakdown of volunteers that supported clinics between April 2017 and March 2018 (LawWorks, 2018, p.20).

as family, employment, and welfare benefits law. The number of clients provided with early legal advice, including in social welfare law cases covering areas such as debt, benefits, employment, and housing, fell from 573,737 in 2012/2013 to 140,091 in 2016/2017 (Law Centres Network, 2018, p. 4). The most significant impact of this legislation has been in the area of access to early legal advice, especially in social welfare law, tribunal procedures and family law (LawWorks, 2019). Access to justice, according to LawWorks, “is eroding” (Ntephe, 2017). The Equality and Human Rights Commission (EHRC), in their recent work on the impact of legal aid reforms, have referred to the “over-representation of people with certain protected characteristics in areas of law excluded by LASPO” (EHRC, 2018). As a result of an increase in the number of people who are unable to afford professional legal representation, more individuals are relying on pro bono legal assistance. It is, therefore, imperative that clinic students acquire reflective tools to act in the best interest of their clients and to critique the law and political institutions.

CLE is a form of experiential learning. Law schools have long recognized the value of experiential learning techniques such as simulations, moots courts, and mock trials. Experiential learning has been a feature of legal education since medieval times. In England and Wales, formal legal education existed in response to the emergence of the legal profession in the twelfth century. Although the Universities of Cambridge and Oxford offered legal instruction, their curriculum was based on the Roman and canon law and omitted any instruction in common law (Brand, 1992, pp. 143-146). It would appear that this model of education was not utilized to provide the legal education necessary for the emerging profession (Rose, 1998, p. 31). Instead, legal education adopted an experiential approach which involved on-the-job learning and by observing experienced lawyers and judges (Rose, 1998, p. 32). Writing in the fifteenth century, Sir John Fortescue refers to this model of experiential learning as “public stadium,”⁶ which he considered to be intellectually and geographically more well-suited to its educational task than the university (Fortescue, 1997, p. 67). This public stadium appears to be an early form of CLE. However, a version of the case method is the dominant form of legal education in the UK, and until recently ~~was~~ CLE rarely featured in law schools. There are two possible reasons for the prominence of the case method. First, judicial decisions/cases are the law, and therefore, lawyers must be able to extract the law from them (Slawson, 2000, pp. 344-346). While this still holds true in the sense that even statutes require judicial interpretation and, thus, become overlaid with judges interpreting them, it is inadequate as the only teaching method. It fails to provide students with an insight into ~~the~~ public policies which law seeks to serve. Moreover, the case method does not provide students with the necessary skills to determine which evidence⁷ is required to support their client’s case, how to act in their client’s best interests, or how to resolve ethical dilemmas. Second, according to Langdell, “law is considered as a science,” and all the available materials are contained in books dealing with judicial opinions (Langdell, 1871). This positivist approach privileges source knowledge over practice. Legal positivism is the belief that it is both tenable and valuable to offer a purely conceptual theory of law, whereby the analysis of law is kept strictly

separate from its evaluation (Bix, 2000, p. 1615). The English jurist John Austin formulated legal positivism in the following manner:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation. (Austin, 1995, p. 157)

Legal positivists argue that the validity of the law is derived from its source, not its merit (Gardner, 2001, p. 199). It is not difficult to see how such a doctrine can become the dominant approach in law schools, which are rarely concerned with practice and are removed from the individuals affected by legal/political institutions and the operation of the law (Evans et al., 2017, p. 163).

This legal positivist approach is present in the Solicitors Regulation Authority's (SRA) new route to qualification.⁸ In October 2016, the SRA announced a new route for aspiring solicitors: the Solicitors Qualifying Examination (SQE) (SRA, 2016). This overhaul was in response to the Legal Education and Training Review's (LETR) report, which concluded that the current⁹ qualification "provides, for the most part, a good standard of education and training" (LETR, 2013, p. ix), but identified a need for clarity in relation to what is expected of a solicitor at the point of admission and an outline of the level ability expected (LETR, 2013).

The SQE will consist of two stages. Stage 1 (Functioning Legal Knowledge) will be assessed through multiple choice questions. This stage will not require candidates to "call case names or cite statutory authority except where specified," and they "will not be assessed on the development of the law" (SRA, 2017). This seems an unusual decision given that England and Wales operate a common law system which combines not only the passing of legislation but also the creation of precedent through case law. Stage 2 (Practical Legal Skills) will assess skills such as client interviewing and practical legal research (SRA, 2020a). All candidates will need to complete at least two-year full-time (or equivalent) qualifying work experience (SRA, 2020b). The significance of the SQE is that a law degree and the "conversion" Postgraduate Diploma in Law (GDL) will no longer mandate a prerequisite to qualifying as a solicitor. Moreover, the requirement to successfully complete the vocational stage (the Legal Practice Course)¹⁰ has been replaced by the SQE.

We identify three pedagogic limitations associated with the SQE. First, the SQE is underpinned by a doctrinal¹¹ methodology and is focused on the law as "is" rather than what the law "ought" to be (Hume, 1973).¹² This might result in future solicitors lacking analytical and legal reasoning skills leading to a decrease in the value of England and Wales' legal education/qualification, as far as international employers are concerned (Madhloom, 2019). The SQE does not involve the analysis of judicial decisions, gaining an understanding of the development of law and principles, nor is there a requirement to address fundamental questions such as "as should one obey unjust or immoral laws?"

Second, future solicitors' moral and ethical reasoning will be limited to the SRA's Codes of Conduct. The Codes are client centric and as such omit analysis of concepts such as lawyer paternalism, client autonomy, judicial activism, and legal issues outside England and Wales. The third reason, which draws on the first two concerns, relates to the fact that the SQE is not designed to develop reflective

practitioners. The absence of legal theory, normative values, and case analysis suggests that future solicitors risk confining themselves to simply solving legal issues without analyzing the implications of the relevant law and policies.

SOURCING UNIVERSAL VALUES

The skills and knowledge to address global problems are dependent on the attitudes and values that underpin a student's future practice. Being a member of a global community of legal practitioners requires a common desire to respond to global issues and concerns. It has been shown that legal education in England and Wales is lacking in a value-based approach due to its positivist approach. This form of legal education ignores the fact that international documents, such as those of the UN and the European Union, which regulate the training and conduct of lawyers, stress the importance of a value-based approach to professional activities (Office of the High Commissioner for Human Rights, 1990, Article 12; Council of Bars and Law Societies of Europe, 2007).

Recognizing these universal values for the global reflective practitioner requires identifying the source of these universal values. In its Preamble, the UDHR states that:

Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. (UN General Assembly, 1948)

This appears to echo the work of Lasswell and McDougal, who in 1943 argued that the fundamental value of democracy is "the realization of human dignity in a commonwealth of mutual deference" (Lasswell & McDougal, 1943, p. 217). In relation to legal education "the proper function" of law schools is to train students for "policy-making" (Lasswell & McDougal, 1943, p. 206). A pedagogic framework focused on training students to become policy-makers not only ensures that legal education caters those who do not wish to enter the legal profession but also provides the foundations for inculcating students with normative values. According to Schwieler and Ekecrantz:

[N]ormative values are about how things "ought to be." What is just and fair? How should students behave? What is good and bad? What is important? Emotions are associated with teaching, such as feelings of joy, frustration, indifference or satisfaction. (Schwieler & Ekecrantz, 2011, p. 59)

Largely uncontroversial in its provisions, the UDHR creates an accessible introductory framework for students to apply to their studies when reflecting on their own attitudes and practice, thereby introducing normative concepts into the positivist approach associated with the case method. Utilizing the UDHR as a guide for good practice and as a tool for instilling human rights within education is to be found in its preamble:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, ... The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement of all peoples and all nations, to the end that every individual and every

organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms ... (UN General Assembly, 1948, Article 1)

However, the UDHR is not a legally binding document. It omits legalistic language and instead creates a set of moral rights and duties. Despite the lack of legal sanctions for non-compliance with its provisions, the UDHR makes the protection of rights, free from discrimination on any grounds, a priority for all nation-states (Nickel, 1987). The UDHR illustrates that these rights are recognized irrespective of their implementation or non-implementation in national legal systems, but they still remain a normative priority over national laws (Nickel, 1987, p. 3). The UDHR implies that state and non-state actors have duties to protect human rights by establishing “minimal standards of decent social and government practice” (Nickel, 1987, p. 4).

Cho believes that exposing students to the values contained in the UDHR promotes a sense of global citizenship assisting the protection of human rights as they enter their professional lives as practitioners and policy-makers (Cho, 2019). The emergence of Human Rights Education (HRE) signaled the focus on the “educational strategies” to achieve human rights protection (Bajaj, 2011, p. 482). The United Nations Declaration on HRE and Training explains:

Human rights education and training is essential for the promotion of universal respect for and observance of all human rights and fundamental freedoms for all, in accordance with the principles of the universality, indivisibility and interdependence of human rights. (UN Human Rights Council, 2011)

Recognizing that legal education can rely on one set of values implies an assumption over the universality of its application. Questions over the value of human rights law in a world of inequalities (Moyn, 2018), the effectiveness of human rights treaties (Posner, 2014), as well as the perceived universality of human rights (Langford, 2018, pp. 72-73), have been some of the concerns raised by human rights critics. For example, Andreopoulos and Claude explain, there is a perceived attempt by HRE to make education “value neutral” (Andreopoulos & Claude, 1997). The underlying principle of HRE, which is that of ensuring a culture of human rights, can be misconstrued as an attempt to align personal values with universal human rights values (Ahmed, 2018). However, Caney explains that universality can be divided in “universality of scope” and “universality of justification.” The former relates to the application of one value - in this case rights - to all people. The latter relates to the justification of this value (Caney, 2006).

CLINICAL LEGAL EDUCATION

To qualify as solicitors on the SQE route, students will be required to complete at least two years qualifying work experience (SRA, 2020b). This period can be spent in one or more of the following:

- on placement during a law degree;
- working in a law clinic;

- at a voluntary or charitable organization such Citizen Advice or a law center;
- working as a paralegal; and
- on a training contract (SRA, 2020b).

For our purposes, we will focus our analysis on university law clinics. These are a form of experiential learning and can take various forms ranging from providing basic assistance and advice to clients to being incorporated entities that carry out similar activities to law firms but on a pro bono basis. Some clinics provide only online support, while others choose to offer face-to-face support. The student-led client facing model is the common type of university law clinic. Students work on their cases (usually in pairs or small groups) under the supervision of legally qualified academics. In this way, law clinics are similar to university teaching hospitals. Law clinics are a component of CLE. Duncan notes that “[i]n recent decades CLE has moved from a predominantly US phenomenon to one that informs legal education throughout the world” (Duncan, 2016, p. 390). Organizations such as the Global Justice Alliance for Justice Education (GAJE) and the European Network of Clinical Legal Education (ENCLE) have established an international framework devoted to CLE and social justice. In addition to the generic law clinics, the past decade has witnessed the emergence of European Union Law and European Convention of Human Rights specialist clinics. Examples include the University of Bristol’s Human Rights Law Clinic (University of Bristol, n.d.), Columbia University’s Human Rights Clinic (Columbia Law School, n.d.), the EU Rights Clinic in Brussels, and the Women’s Law Clinic of the University of Ibadan (Adelakun-Odewale, 2018). Writing in relation to European legal education, Alemanno and Khader state that:

[L]egal teaching - historically formulistic, doctrinal, hierarchical, and passive (lecture- and textbook-based) - is coming under increasing pressure to reimagine itself as pragmatic, policy-aware, and action oriented (Alemanno & Khader, 2018, p. 4).

However, despite the emergence of a “global clinic movement” (Bloch, 2010), CLE remains a non-essential component of legal education in England and Wales. This could be due to the fact that CLE ranges from a non-assessed module to a module which is integrated into the curriculum and is underpinned by legal ethics, moral philosophy, and jurisprudence.¹³ Unlike other established modules such as Criminal Law, Contract Law, or Tort, there is no universally accepted definition of CLE. According to Grimes, CLE is:

[A] learning environment where students identify, research and apply knowledge in a setting which replicates, at least in part, the world where it is practiced ... It almost inevitably means that the student takes on some aspect of a case and conducts this as it would ... be conducted in the real world. (Grimes, 1996)

Meghdadi and Nasab state that:

Clinical legal education is a course of study combining a classroom experience with representation by students of clients with real cases or projects, under the supervision of a full-time faculty member whose background includes extensive law practice ... Clinical legal education implies a method of teaching that, in most instances, has a social justice dimension. (Meghdadi & Nasab, 2011, p. 3015)

A more comprehensive definition which outlines the different conceptions CLE can take is provided by ENCLE:

Clinical legal education is a legal teaching method based on experiential learning, which fosters the growth of knowledge, personal skills and values as well as promoting social justice at the same time. As a broad term, it encompasses varieties of formal, non-formal and informal educational programs and projects, which use practical-oriented, student-centered, problem-based, interactive learning methods, including, but not limited to, the practical work of students on real cases and social issues supervised by academics and professionals. These educational activities aim to develop professional attitudes and foster the growth of the practical skills of students with regard to the modern understanding of the role of the socially oriented professional in promoting the rule of law, providing access to justice and peaceful conflict resolutions, and solving social problems. (ENCLE, 2019)

The above definitions not only emphasize the experiential and social justice dimensions of CLE but also draw attention to the fact that CLE can accommodate a variety of teaching methods and forms, to which we will add universal human rights values as presented in the UDHR. The above definitions share a commitment to professional attitudes, access to justice, and resolving social issues. These definitions do not define the key terms which underpin their definitions. For example, ENCLE does not define “values,” “attitudes,” and “access to justice.” A further limitation of definitions is the absence of reflective practice. The significance of reflection in CLE is that it turns experience into learning (Murray, 2011, p. 227) and promotes continued professional development.

REFLECTION

It is now universally acknowledged that reflection is a valuable learning tool for students and practitioners to learn effectively from experience (Boud, Keogh, & Walker, 1985, p. 19). However, law students continue to be trained as domestic lawyers, using a predominantly positivist approach which overemphasizes “technical rationality.” According to Schön:

Technical rationality holds that practitioners are instrumental problem solvers. Who select technical means best suited to particular purposes. Rigorous professional practitioners solve well-formed instrumental problems by applying theory and technique derived from systematic preferably scientific knowledge. (Schön, 1987, pp. 3-4)

Because technical rationality is an epistemology of practice rooted in the heritage of positivism, it risks reducing normative questions such as “how ought I act?” to a merely instrumental questions about the means best suited to achieve one’s ends (Schön, 1983, p. 33). The gap between legal education and legal realities appears particularly striking in England and Wales, and in Europe generally, where legal scholars and their universities continue with their historical reluctance to engage in self-reflection (Alemanno & Khader, 2018, p. 2). Therefore, there is a dearth of “soul-searching and thinking” beyond legal texts and lectures (Alemanno & Khader, 2018, p. 2).

Similar to CLE, there is not one universally agreed upon definition of reflection. According to Dewey, “reflective thinking” involves two sub-processes:

- (a) a state of perplexity, hesitation; and (b) an act of search or investigation directed toward bringing to light further facts which serve to corroborate or to nullify the suggested belief. (Dewey, 1910, p. 9)

Thus, CLE involves learning from experience. But how does CLE promote learning from experience? One method is through reflection. Without engaging in reflection, CLE risks being downgraded to work experience (Murray, 2011, p. 227).

What does it mean to engage in reflection? In the context of professions, including law, the capacity to engage in reflective practice is a means of enhancing the quality of the work and prompting learning and development through a continuous reflexive process (McGill & Brockbank, 2004, p. 94). Donald Schön is credited with developing the notion of reflective practice as a means of enhancing a person’s critical and reflective abilities (Cossentino, 2002; Kibble, 1998; Kinsella, 2010; McGill & Brockbank, 2004, p. 94; Mickleborough, 2015). Schön (1982, 1987) was interested in how and when professionals use reflection to build professional knowledge and expertise. Those who teach disciplines tend to create and promote largely propositional knowledge “knowing that” and what Ryle has termed “knowing how” (Ryle, 1949, p. 32). Schön was of the view that such propositional knowledge, on its own, is of limited value for the emerging professional (examples includes lawyers, social workers, nurses, and teachers) (Schön, 1987, p. 22). Limiting student learning to the acquisition of professional knowledge risks limiting their ability to develop into reflective practitioners because propositional knowledge does not take into account the realities and complexities of professional practice (McGill & Brockbank, 2004, p. 94).

Emergent professionals, such as solicitors, enter practice and are effective despite not having had formal training on how to reflect. They develop practical experience and professional knowledge, which includes propositional knowledge acquired to enter their chosen profession (McGill & Brockbank, 2004, p. 94). To engage in their practice areas effectively, an additional element is required. Schön (1987) observes that, traditionally, professional legal education has been based on a model in which practitioners are instrumental problem solvers, rather than problem setters, who select the technical methods best suited to particular purposes:

In the varied topography of professional practice, there is a high hard ground overlooking a swamp. On the high ground, manageable problems lend themselves to solution through the application of research-based theory and technique. In the swampy lowland, messy, confusing problems defy technical solution. (p. 3)

Schön (1983) distinguishes the high ground from the messy indeterminate swampy lowland of professional legal practice. He posited a new epistemology of practice which allows practitioners to enhance their practice while they are engaging in it:

If the model of Technical Rationality is incomplete, in that it fails to account for practical competence in “divergent” situations, so much the worse for the model. Let us search instead for an

epistemology of practice implicit in the artistic, intuitive processes which some practitioners do bring to situations of uncertainty, instability, uniqueness, and value conflict. (p. 49)

Schön's (1987) epistemology of professional practice distinguishes between two types of reflection: reflection-in-action (p. 29), while the actions are taking place - and reflection-on-action (Schön, 1987, p. 36), reflecting after the event. Retrospective reflection allows practitioners to reflect on *their* reflection-in-action and indirectly shape their future actions (Schön, 1987, p. 31). There is a risk that without a framework, students are unable to engage in reflection-in-action due to their limited experience in dealing with clients. Similarly, in relation to reflection-on-action, students might engage in a purely descriptive and/or subjective analysis of their experience.

HRE AND REFLECTION IN PRACTICE

Kreiling (1981) contends that "clinical education should reach beyond skills training to provide students with a method from future learning from their experiences" (p. 284). Without a methodology which can be transferred to the world of professional practice, student experience and law school resources may be squandered by merely providing exposure to an unreflective world of practice (Kreiling, 1981, p. 284). Practitioners who continue to learn through the course of their careers should be more competent lawyers (Kreiling, 1981, p. 286).

Dewey (1944) argues that experience "is whatever conditions interact with personal needs, desires, purposes, and capacities to create experience which is had" (p. 44). Therefore, the value of reflection can also extend beyond a student's own personal development. Teaching through human rights means that diversity, equality, and dignity remain at the center of teaching and learning. This ensures that the student as a future legal professional will live by human rights (Cargas, 2019, p. 297). Reflection allows students to assess the compatibility of their attitudes and behavior with human rights values. This allows students to ~~then~~ set their own roadmap for their future learning and practice. As Cargas (2019) explains, the results of this process are not uniform for all students. This requires a critique of the methods employed and their improvement in order to help students learn to critique their own attitudes and hopefully generate a will to participate in change (p. 297). Aligned with the UN's recommendation that reflective practice should be combined with experiential learning (UNESCO & UN High Commissioner for Human Rights, 2012), CLE provides the vehicle for reflecting on experience. Johnson and Johnson define experiential learning as:

Generating an action theory from your own experiences and then continually modifying it to improve your effectiveness. The purpose of experiential learning is to affect the learner in three ways: (1) the learner's cognitive structures are altered, (2) the learner's attitudes are modified, and (3) the learner's repertoire of behavioural skills is expanded. These three elements are interconnected and change as a whole, not as separate parts. (Johnson & Johnson, 2003, p. 49)

CLE provides a vehicle for reflecting on experiences between the students and their peers, clients, and (global) community. The experiential approach is

illustrated by a model of learning known as the learning cycle (Kolb, 1984). Kolb (1984), building on the theories of Dewey, Lewin, and Piaget (Evans et al., 2017, p. 159), defines learning as “the process whereby knowledge is created through transformation of experience” (Kolb, 1984, p. 38). The Kolb cycle of learning is commonly used to illustrate the differences between concrete experience (doing), reflective observation (thinking), abstract conceptualization (extrapolating), and active experimentation (testing). Although the learner can enter the cycle at any point, Kolb appears to link the cycle to concrete experience, and reflection flows from Kolb’s learning model (Evans et al., 2017, p. 159). However, Kolb’s cycle does not provide guidance on how a learner should engage in reflection, nor which values should underpin a learner’s reflective observation.

Commentators have highlighted the benefit of teaching theory in an integrated manner by arguing that a theoretical underpinning allows students to better understand reflection (Wrenn & Wrenn, 2009). Fook (1991) writes:

In order to understand the idea of critical reflection and the processes involved, it is helpful to explore the main traditions of thinking from which it arises. I have identified four main ones that are involved: reflective practice, reflexivity, postmodernism/deconstruction and critical social theory. These traditions are not mutually exclusive and, of course, share many commonalities. It is helpful to understand some of the basic tenets of each of these traditions in order to build up a more complex understanding of the theoretical underpinnings of critical reflection. (p. 442)

Having discussed the global reach of CLE and the importance of developing practitioners who are able to apply normative values such as those espoused by the UDHR, we will now address how the CLE can incorporate HRE. An understanding of the HRE is particularly important and is defined as:

[A] movement to promote awareness about the rights accorded by the Universal Declaration of Human Rights and related human rights conventions... intended to be one that skills, knowledge, and motivation to individuals to transform their own lives and realities so that they are more consistent with human rights norms and values. (Tibbits & Fernekes, 2010, pp. 87, 93)

However, human rights is offered as an optional module. While other compulsory modules offer an introduction to human rights, such as Land Law, there is little exposure to the normative aspect of human rights unless the student selects a specialized human rights module. This chapter suggests that the CLE curriculum should include an introduction to the UDHR. This introduction will cover the background of the UDHR, its provisions, and its significance to democracy and Human Rights Law, considering the elements of dignity, equality, and social justice. The introduction should inspire law students in identifying the values on which they can rely when reflecting on their interactions with clients.

Embedding human rights within education has been supported by the UN, which suggested the adopting a human-rights-consistent teaching style in order for students to “learn tolerance and respect for the dignity of others and the means and methods of ensuring that respect in all societies” (UN General Assembly, 2005). In addition, the Universal Declaration on HRE and Training pointed to the UDHR as the source of these human rights values. The UN General Assembly clarified that the aim of HRE is ensuring the respect of dignity

in all societies (UN General Assembly, 2005), bringing at the center of HRE, dignity.¹⁴ The Guidelines for National Plans of Action for HRE, suggested that:

Human rights are promoted through three dimensions of education campaigns:

- (a) knowledge: provision of information about human rights and mechanisms for their protection;
- (b) values, beliefs and attitudes: promotion of a human rights culture through the development of values, beliefs and attitudes which uphold human rights;
- (c) action: encouragement to take action to defend human rights to prevent human rights abuses. (UN General Assembly, 1997, 13(c))

The importance of (a) and (b), notwithstanding, CLE can act as a vehicle for influencing future policy-makers' "values, beliefs and attitudes" through a combination of experiential learning and reflection (UN Human Rights Council, 2010, 27(b)(iii)), "promoting the development of the individual - in this case, the future policy-maker - as a responsible member of a free, peaceful, pluralist and inclusive society" (UN Human Rights Council, 2011, Article 4).

CONCLUSION

This chapter argued that CLE should be the vehicle for embedding normative values into legal education through reflective practice. These normative values should derive from a universally recognized moral guide, such as the UDHR, which transcends geographical and cultural boundaries. Knowledge of human rights leads to knowledge for human rights: supporting the development of the students' attitudes and values aims at responding to global problems as global policy-makers in government, law firms, non-governmental organizations (NGOs), or international organizations. However, it is not suggested that this normative approach becomes the sole method for developing global policy-makers; rather, these universal values are used as a point of reference for addressing jurisdiction-specific and global issues.

In relation to implementing our proposed normative framework for reflective practice, students advising law clinic clients would not only address the individual client's legal needs using domestic law but also would reflect on their interaction with the client and the role of the State in terms of limiting or removing the right to a public-funded lawyer. Students should treat the client with respect and do so in an unbiased manner, which should be influenced by the principles found in Articles 1 and 2 (dignity and equality, respectively). This provides a framework for students to address any biases they might have toward their clients. Students might conclude that LASPO is contrary to Article 7 (equal protection of the law), Article 8 (a right to a fair remedy), and Article 10 (right to a fair hearing) of the UDHR.

In real-world practice, problems do not simply present themselves to policy-makers. Instead, they must be constructed from the materials of problematic situations which are puzzling, troubling, and uncertain (Schön, 1983, pp. 39-40). By applying our proposed framework of embedding UDHR into CLE, future

practitioners are trained to become policy-makers by not only solving legal problems based on domestic law but also identifying global threats to human rights.

NOTES

1. By “normative,” we mean what the law ought to be as opposed to what it is.
2. A system of instruction focused upon the analysis of court opinions.
3. An industry term which describes global law firms that employ more than 1,000 lawyers and have offices in different continents.
4. Law Works is the operating name for the Solicitors Pro Bono Group, a charity working across England and Wales.
5. Almost 10,000 individuals volunteered across the Law Works Clinics Network, a 33% increase in the number of volunteers reported in previous year (LawWorks, 2018a).
6. Meaning “a place of study.”
7. In England and Wales, Law of Evidence, whether civil or criminal, is not a compulsory module/unit.
8. The regulatory body for solicitors in England and Wales.
9. The current position is that the SRA and the BSB jointly set out the requirements for the qualifying law degree, and the SRA approves and monitors LPC providers.
10. The Legal Practice Course is a postgraduate degree and is the final vocational stage for becoming a solicitor in England and Wales.
11. Doctrinal or “black letter” methodology refers to a way of conducting research which is focused traditional sources of law such as case law and statutes. It is not concerned with an interdisciplinary approach.
12. The difference between “is” and “ought” was highlighted by David Hume in his *Treatise on Human Nature*: “In every system of morality that I have hitherto met with, I have always remarked that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surprised to find that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last consequence A reason should be given for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it.”
13. At the University of Bristol, the CLE module includes lectures on normative ethics, moral reasoning, and Rawls’ theory of justice.
14. Protecting human rights as a means to protecting dignity entails moral considerations (Lukow, 2018). Associating human dignity with the action of ensuring human rights protection entails a question of universality of justification (Caney, 2006). The attempt to define human dignity could potentially find obstacles within the cultural interpretations of dignity, and such an exercise should remain independent from the overall adoption of the principles of the UDHR (Lukow, 2018).

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Clinical Legal Education and Human Rights Values: A Universal Pro Forma for Law Clinics

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Abstract

This article explores the theoretical foundations for a social justice–centric global law clinic movement. Our starting position is that law clinics, a type of clinical legal education (CLE), are in a unique position to engage in, and potentially promote, social justice issues outside their immediate communities and jurisdictions. To achieve this aim, it is necessary for law clinics to adopt a universal pro forma underpinned by the key concepts of CLE, namely social justice education and promoting access to justice through law reform. We argue that the main features of CLE are aligned with those of the Universal Declaration of Human Rights (UDHR) on issues such as human dignity and social justice. Incorporating UDHR values into CLE serves three purposes. First, it acts as a universal pro forma, which facilitates communication between clinics across jurisdictions, irrespective of their cultural or legal background. Second, it allows clinics to identify sources of global injustices and to share resources and expertise to collectively address injustices. Third, the theoretical approach advocated in this article argues that clinics have a Kantian moral right to engage in transnational law reform.

Introduction

In an increasingly globalized legal profession, which is required to respond to transboundary challenges, legal education should prepare law students to engage with the world around them and not be simply confined to the ‘law in action’ in their own jurisdiction.³ This presents two challenges: identifying the legal barriers to transboundary clinic collaborations and the framework through which students can

³ IRENE ANTONOPOULOS & OMAR MADHLOOM, *Promoting International Human Rights Values Through Reflective Practice in Clinical Legal Education: A Perspective from England and Wales*, 37 in INTERNATIONAL PERSPECTIVES IN SOCIAL JUSTICE PROGRAMS AT THE INSTITUTIONAL AND COMMUNITY LEVELS 109–127 (ENAKSHI SENGUPTA & PATRICK BLESSINGER eds., 2021), <https://doi.org/10.1108/S2055-364120210000037008> (accessed 7 May 2021).

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respond to them. This framework should consist of a universal pro forma, which facilitates the collaboration of clinics in addressing injustices outside their communities and legal jurisdictions. To facilitate collaboration between law clinics, students must be able to communicate through a common ‘language’. Hurwitz identifies international human rights law as this common ‘language’, which enables students to engage with human rights problems caused by globalization such as trafficking and transboundary environmental harms.⁴ This article argues for a universal pro forma to assist clinics to respond to global challenges by connecting human rights as values to the moral duties of law clinics. This pro forma combines the principles of human rights education (HRE) and clinical legal education (CLE), and is underpinned by three main elements: human rights, *sensus communis* and social justice.

This article consists of three parts. Following the introduction, the first section will examine the relationship between HRE and CLE. The second section will argue that the professional codes of conduct for lawyers are generally not fit for the purposes of CLE, especially in relation to transnational or global clinic collaborations. This section argues for a universal pro forma, which is underpinned by the Universal Declaration of Human Rights (UDHR), theories of social justice and Kant’s *sensus communis*. The third section will discuss the application of the proposed universal pro forma in the context of reflective practice.

The Relationship Between Human Rights and Clinical Legal Education

As a form of experiential learning, CLE can promote intellectual inquiry by teaching ‘reflective lawyering, professional judgement and problem-solving skills, ethical lawyering, social justice, a sense of public obligation, and collaboration’.⁵ To this list, a global obligation can be added. However, a universal pro forma is required to facilitate this global obligation. CLE, therefore, consists of four tenets: the acquisition of personal skills and values; providing access to justice; promoting social justice; and developing reflective lawyering. Students gain both hard and soft skills such as drafting, negotiation, advocacy, empathy and resilience.⁶ Incorporating values into CLE, and legal education, generally, helps foster a mature moral identity among students, which is considered to be necessary for effective citizenship.⁷ According to May ‘the self matures by becoming committed to certain values and beliefs as a result of critical reflection, not merely as a result of being socialized to accept certain values and beliefs’.⁸

Bellow⁹ and Kosuri¹⁰ report that CLE can build on the students’ experience in the clinic to facilitate intellectual inquiry. Within this premise, the assimilation of pedagogies in fulfilling a universal pro

⁴ Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT’L L. 505 (2003).

⁵ Margaret Martin Barry et al., *Teaching Social Justice Lawyering: Systematically including Community Legal Education in Law School Clinics*, 18 CLIN. L. REV. 401–458, 401 (2011).

⁶ RANDALL KISER, *SOFT SKILLS FOR THE EFFECTIVE LAWYER* 5 (2017).

⁷ Stephen Wizner, *Is Learning to Think like a Lawyer Enough*, 17 YALE L. & POL’Y REV. 583 (1998); Tamara Walsh, *Putting justice back into legal education*, 17 LEGAL EDUC. REV. 119 (2007).

⁸ Larry May and W. Alton Jones, Professor of Philosophy, Professor of Law and Professor of Political Science, Vanderbilt University. LARRY MAY, *THE SOCIALLY RESPONSIVE SELF: SOCIAL THEORY AND PROFESSIONAL ETHICS* 20 (1996).

⁹ Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology in Clinical Education for the Law Student* 374, in WORKING PAPERS PREPARED FOR THE COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY [CLEPR] NATIONAL CONFERENCE (1973).

¹⁰ Praveen Kosuri, *Losing My Religion: The Place of Social Justice in Clinical Legal Education The Way to Carnegie: Practice, Practice, Practice—Pedagogy, Social Justice, and Cost in Experiential Legal Education*, 32 B. C. J. L. SOC. JUST. 331–344, 338 (2012).

forma serves a global outlook concerning challenges that require an innovative collaboration resolution.¹¹ Viewed as a methodology, CLE can be used to teach not only any of the substantive subjects in the curriculum but also as a vehicle for teaching normative values.¹² HRE, on the other hand, facilitates the ‘shaping of values and advocacy’ by providing students with a conceptual lens to critically analyse their own attitudes.¹³

Law Clinics, Human Rights and Positive Obligations

The creation of a universal law clinic pro forma requires the identification of a single source of values that is codified and recognized at an international level. Free from the challenges of attempting to impose legally binding obligations on states, the UDHR carries significant historical importance.¹⁴ According to Cho, ‘the Universal Declaration of Human Rights should be understood, first and foremost, to be an international political consensus on the moral imperative for a life with dignity for all persons’.¹⁵ From an HRE’s perspective, Hurwitz contends that ‘We have begun to speak a language of global morality. And whether or not one agrees that this morality is universal, the concern for justice inevitably implicates international human rights and international law’.¹⁶ Therefore, the significance of embedding human rights language within teaching methodologies is becoming more evident as human rights problems increase.

University law clinics are, generally, not emanations of the state and, therefore, carry no obligations under human rights law. Consequently, UDHR’s lack of legally binding status allows for a deeper exploration of those duties of individuals towards others. For example, Article 1 of the UDHR presupposes a set of duties held by individuals in ensuring the protection of the rights of another.¹⁷ The commitment to fulfilling the moral duties envisioned by the UDHR is based on the following assumption:

Each agent logically must admit that the sufficient reason or ground on which he or she claims positive rights is that he or she is a prospective purposive agent so that he must accept the generalization that all prospective purposive agents have positive rights to basic well-being. Therefore, he or she must also accept that he or she has positive duties to help other persons attain basic wellbeing when they cannot do so by their own efforts and when he or she can give such help without comparable cost to him or her. When such help is needed by large number of persons, and especially when their needs have institutional roots, such help often requires a context of institutional rules, including the supportive state ... in this way, the duty to act in accord with the positive rights of other persons is rationally justified, so that it is morally right and indeed mandatory to provide help to basic well-being for other persons when they need this help and they cannot achieve their basic well-being by their own efforts, and it can be given without comparable cost to the agent.¹⁸

¹¹ MAY, *supra* note 8 at 20.

¹² Omar Madhloom, *A normative approach to developing reflective legal practitioners: Kant and clinical legal education*, 53 L. TEACH. 416–430 (2019).

¹³ Sarita Cargas, *Fortifying the future of human rights with human rights education*, 18 J. HUM. RIGHTS 293–307, 297 (2019).

¹⁴ Hyo-Je Cho, *Rethinking democracy and human rights education on the seventieth anniversary of the Universal Declaration of Human Rights*, 20 ASIA PAC. EDUC. REV. 171–180 (2019).

¹⁵ *Id.* at 172.

¹⁶ Hurwitz, *supra* note 4 at 508.

¹⁷ Article 1 states that ‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood’.

¹⁸ Alan Gewirth, *Moral Foundations of Civil Rights Law*, 5 J. L. RELIG. 125, 139–140 (1987).

This commitment to duties towards others echoes the deontological approach of Immanuel Kant. Kant distinguishes between two types of duties: perfect and imperfect. The former proscribe specific types of actions, such as lying, while imperfect duties stipulate only a general law or policy, but not the specific type of action required to implement that policy. On perfect duties, Kant claims, ‘I recognise among *perfect duties*, not only outer ones, but also inner’.¹⁹ He also distinguishes between ‘duties towards self and duties towards others’.²⁰ Outer or external perfect duties are duties of right, in that they are coercive duties that apply in a system of laws.²¹ Inner or internal perfect duties are duties to the person and concern an individual’s maxims and behaviours.²² Imperfect duties are relevant for developing a global clinical movement because these duties have wide latitude in terms of their implementation and, as such, afford clinics’ discretion regarding how they fulfil their duty towards helping those in need.

In addition to applying Kant’s concept of duties to CLE,²³ his philosophy provides a moral right in relation to clinics’ engagement in law reform. While Kant advocated the non-anarchic reform of governments, he argues that citizens have the right to inform their governments of any injustices.²⁴ This moral right can be extended to a global collaborative clinic movement in relation to policy reform and human rights advocacy. To promote transnational collaboration, the next section seeks to construct a universal pro forma for CLE.

The Need for a Universal Pro Forma

Regulatory bodies such as the American Bar Association (ABA) and the Solicitors Regulation Authority (SRA) (England and Wales) introduce codes of professional conduct for a number of reasons. A code of conduct may be viewed as an exercise in enhancing the profession’s status and gaining the trust of the general public. A code of conduct is also useful in safeguarding members of a profession by outlining the responsibilities owed to clients. In general terms, a code of conduct provides a set of principles of actions, which must be complied with by members of that profession.²⁵

However, there are various reasons as to why lawyers’ professional codes of conduct are inadequate for the purposes of CLE and promoting international clinic collaborations. First, professional regulatory bodies produce codes of conduct to assist their members in identifying the desirable norms and principles of action.²⁶ In other words, the codes are drafted with a specific professional in mind and are not designed for pedagogic purposes. Second, unauthorized persons, such as clinic students, are generally restricted, by statute, regarding the scope of legal assistance they are permitted to offer clients. For example, law clinics in the Republic of Croatia (or Croatia), when offering free legal aid, are only permitted to provide ‘primary legal aid’, which includes general legal information, legal advice and legal assistance in out-of-court peaceful dispute settlement.²⁷ Third, professional codes apply only to the members of that specific

¹⁹ IMMANUEL KANT, *THE MORAL LAW: KANT’S GROUNDWORK OF THE METAPHYSICS OF MORALS* 422 (1969).

²⁰ *Id.* at 421.

²¹ JAMES SCOTT JOHNSTON, *KANT’S PHILOSOPHY: A STUDY FOR EDUCATORS* 124 (2014).

²² *Id.* at 124.

²³ Omar Madhloom, *Unregulated Immigration Law Clinics and Kant’s Cosmopolitan Right: Challenging the Political Status Quo*, 28 *INT’L J. CLIN. LEGAL EDUC.* 195–243 (2021).

²⁴ IMMANUEL KANT, *AN ANSWER TO THE QUESTION: ‘WHAT IS ENLIGHTENMENT?’* (2013); IMMANUEL KANT, *THE CONFLICT OF THE FACULTIES= DER STREIT DER FAKULTÄTEN* (1992).

²⁵ Nigel G Harris, *Professional Codes and Kantian Duties*, in *ETHICS AND THE PROFESSIONS*, 104 (Ruth F. Chadwick ed., 1994).

²⁶ For a general discussion on the rationale for the need of professional codes of conduct, see *Id.*

²⁷ *Free Legal Aid Act 2013*, Articles 9–11, inclusive.

profession and, therefore, are not binding on non-regulated individuals. By way of example, barristers and solicitors, in England and Wales, are bound by a duty of confidentiality. This duty is crystallized in the Bar Standards Board (BSB) Handbook²⁸ and the Code of Conduct for Solicitors, Registered European Lawyers (RELs) and Registered Foreign Lawyers (RFLs) and of the Code of Conduct for Firms.²⁹ However, clinic students are not bound by this important principle, which has been described by Lord Scott as a ‘central pillar’ of legal ethics.³⁰ Fourth, it is debatable whether a single code of conduct can address the myriad types of legal advice.³¹ Thus, in the same way that an immigration solicitor’s work is vastly different from the solicitor working in a global law firm that represents large business clients, so too is the pro bono work carried out in law clinics different from the work carried out in law firms. The ethical dilemmas encountered in a law clinic are likely to be very different from the dilemmas envisaged by the regulatory bodies (e.g., ABA and the SRA) such as money laundering and duties to the court. Fifth, unlike regulated legal entities, for example law firms whose primary function is profit-making, law clinics are, inter alia, concerned with promoting access to justice and social justice education.³² Although university law clinics and CLE have their roots in providing legal assistance to disadvantaged communities and promoting social justice,³³ there is a school of thought that argues that social justice should not be the sole pedagogic aim of CLE. For Kosuri, ‘Clinical legal education is not the province of any one constituency or ideology’.³⁴ Similarly, Campbell argues that a law clinic is a pedagogic tool to be used to serve not just disadvantaged clients but ‘[i]t also exists to serve the students’.³⁵ Consequently, the proposed pro forma can also be applied to business law clinics that advise business entities, regarding social corporate responsibility and corporate citizenship.³⁶ Sixth, professional codes of conduct reduce ethical behaviour to obeying a set of duties. This is viewed as an inferior form of moral deliberation.³⁷

Influenced by human rights values, derived from the UDHR, a universal pro forma can facilitate the creation of a global law clinic community. Students are able, through this pro forma, to communicate effectively through a shared ‘language’ and objectives, and thereby overcome obstacles such as pluralism and different legal systems. The theoretical underpinnings of this pro forma, which are examined in the next sections, are human rights, *sensus communis* and social justice. These three elements can enhance ethical behaviour through reflective practice.³⁸

²⁸ The Bar Standards Board, *The BSB Handbook* (2020), Core Duty 6, Rule C5 and Rule C15.5.

²⁹ Solicitors Regulation Authority, *The SRA Standards and Regulations* (2019), par. 6.3.

³⁰ *Three Rivers District Council v Governor and Company of the Bank of England* (No. 6), [2005] 1 AC 610 (2005).

³¹ JONATHAN HERRING, *LEGAL ETHICS* 94 (2017).

³² Stephen Wizner, *Is Social Justice Still Relevant The Way to Carnegie: Practice, Practice, Practice—Pedagogy, Social Justice, and Cost in Experiential Legal Education*, 32 B. C. J. L. SOC. JUST. 345–356 (2012); Donald Nicholson, *Our Roots Began in (South) Africa: Modeling Law Clinics to Maximize Social Justice Ends Review Articles*, 23 INT’L J. CLIN. LEGAL EDUC. 87–136 (2016); Ibijoke Patricia Byron, *The Relationship between Social Justice and Clinical Legal Education: A Case Study of the Women’s Law Clinic, Faculty of Law, University of Ibadan, Nigeria*, 20 INT’L J. CLIN. LEGAL EDUC. 563–578 (2014); Anna Cody & Simon Rice, *Teaching social justice in law clinics*, in AUSTRALIAN CLINICAL LEGAL EDUCATION: DESIGNING AND OPERATING A BEST PRACTICE CLINICAL PROGRAM IN AN AUSTRALIAN LAW SCHOOL 97–122 (Adrian Evans et al. eds., 2017).

³³ Frank S. Bloch & Mary Anne Noone, *Legal Aid Origins of Clinical Legal Education*, in THE GLOBAL CLINICAL MOVEMENT: EDUCATING LAWYERS FOR SOCIAL JUSTICE 153–166 (Frank S. Bloch ed., 2010); Richard Wilson, *Training for Justice: The Global Reach of Clinical Legal Education*, 22 PENN STATE INT’L L. REV. 421 (2004); Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access To Justice*, 73 FORDHAM L. REV. 997 (2004).

³⁴ Kosuri, *supra* note 10 at 334.

³⁵ Elaine Campbell, *A dangerous method? Defending the rise of business law clinics in the UK*, 49 L. TEACH. 165–175, 171 (2015).

³⁶ Tobore O Okah-avae, *Clinical Legal Education: a paradigm for business entities*, in THINKING ABOUT CLINICAL LEGAL EDUCATION (Omar Madhloom & Hugh McFaul eds., 2021).

³⁷ Donald Nicholson, *Making lawyers moral? Ethical codes and moral character*, 25 LEGAL STUD. 601–626, 608 (2005).

³⁸ DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1991).

Social Justice

Unlike theories of justice³⁹ found in the works of Aristotle⁴⁰ and Aquinas,⁴¹ social justice is a relatively new concept. Some view it as simply an outgrowth of the public interest law work supporting the poor that began in the early part of the twentieth century.⁴² Jackson⁴³ traces the emergence of the term ‘social justice’ to the discovery of the ‘social’ in industrializing Europe that developed out of the social and political landscapes of laissez-faire capitalism. The first book entitled *Social Justice: A Critical Essay*, was not published until 1900.⁴⁴ Its author, Willoughby, argues that recognition of the sovereignty of the individual reason initiates critical evaluation of social and political institutions.⁴⁵ This critique has, in turn, ‘revealed discrepancies in many places between the ethical ideals currently held, and the social and economic conditions actually existing’.⁴⁶ Thus, social justice can be applied to critique social inequalities, but to do so requires identifying those ‘ethics ideals’ or values. One aspect of Willoughby’s work that is shared by other commentators from this period is the view that society exists as a physical organism.⁴⁷ According to Hobhouse:

[T]he life of society and the life of an individual do resemble one another in certain respects, and the term “organic” is as justly applicable to the one as to the other. For an organism is a whole consisting of interdependent parts.⁴⁸

The concept of society as an organism is found in the work of Comte and Spencer, who both relied on the ‘social organism’ metaphor. Comte viewed a person’s existence connected to their participation in society and ‘although the individual elements of society appear to be more separable than those of a living being, the social consensus is still closer than the vital’.⁴⁹ Spencer, on the other hand, viewed society as an ‘entity’ formed of ‘discrete units’.⁵⁰ A necessary element of society, in the sociological sense, is voluntary cooperation with others.⁵¹ Thus, social justice consists of two concepts. The first involves the notions of the common good, the good of the community, which is prior to the good of the individual. The second notion concerns the inviolable rights of each person ‘over against the state-and even the community’.⁵² For present purposes, where a conflict occurs between the two concepts, the rights of the individual takes priority and should be protected against actions or omissions that seek to promote collective goals.⁵³

In relation to the protection of individual liberty, Spencer states, ‘Every man is free to do that which he wills provided he infringes not the equal freedom of any other man’.⁵⁴ Accordingly, an expectation is

³⁹ Walter Kaufmann, *The origin of justice*, 23 REV. METAPHYS. 209–239 (1969); DAVID JOHNSTON, A BRIEF HISTORY OF JUSTICE (2011).

⁴⁰ THE NICOMACHEAN ETHICS (2009).

⁴¹ SUMMA THEOLOGICA II-II 57 (2000).

⁴² Julie D. Lawton, *The Imposition of Social Justice Morality in Legal Education*, 4 IND. J. L. SOC. EQUAL. 57, 57 (2016).

⁴³ Ben Jackson, *The conceptual history of social justice*, 3 POLIT. STUD. REV. 356–373 (2005).

⁴⁴ WESTEL WOODBURY WILLOUGHBY, SOCIAL JUSTICE: A CRITICAL ESSAY (1900).

⁴⁵ *Id.* at 1.

⁴⁶ *Id.* at 7.

⁴⁷ DAVID MILLER, PRINCIPLES OF SOCIAL JUSTICE 4 (1999).

⁴⁸ LEONARD TRELAWNY HOBHOUSE, SOCIAL EVOLUTION AND POLITICAL THEORY 87 (1911).

⁴⁹ LUCIEN LÉVY-BRUHL & FREDERIC HARRISON, THE PHILOSOPHY OF AUGUST COMTE 337 (1903).

⁵⁰ HERBERT SPENCER, THE PRINCIPLES OF SOCIOLOGY VOL. 1 448 (1898).

⁵¹ HERBERT SPENCER, THE MAN VERSUS THE STATE 174 (1891).

⁵² Michael Novak, *What is social justice*, 21 CAP. U. L. REV. 877, 883 (1992).

⁵³ For more information on this anti-utilitarian view, see JOHN RAWLS, A THEORY OF JUSTICE: ORIGINAL EDITION (2005); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (2013).

⁵⁴ HERBERT SPENCER, JUSTICE: BEING PART IV OF THE PRINCIPLES OF ETHICS 46 (1891).

placed on professionals and professional institutions to ensure that this form of justice is maintained.⁵⁵ Furthermore, a state's responsibility is not confined to protecting citizens 'and punish criminal aggression' against them, it must also 'administer civil justice to the citizen free of cost'.⁵⁶ Spencer's appeal for a free administration of civil justice is necessary, especially in relation to those who lack the resources to pay for legal advice because the ability of a person to protect their legal rights and hold others to their legal obligations is not only a prerequisite to the rule of law but also a fundamental element of social justice.⁵⁷

Two moral obligations can be extrapolated from Spencer's notion of social justice. First, if society consists of 'units' or persons, then it follows that a global society is also composed of these 'units'. In other words, on Spencer's terms, a global society is an 'entity' in which cooperation is an essential element. Thus, there is a moral obligation on clinics to engage in transnational cooperation. Second, there are two interpretations of the state's obligation regarding the free administration of civil justice: the state must have either a free legal aid system, which is accessible to all, or free legal aid is only available to those who satisfy the means test criteria. However, in such a legal aid system, there will inevitably be individuals who do not satisfy the legibility criteria for legal aid and, consequently, will be left without adequate legal representation.⁵⁸ In such situations, we suggest that regulatory restrictions preventing clinics from assisting such clients should be removed.

Drawing on the Kantian right of citizens to inform their governments of injustices, a third moral obligation is identified: clinics' moral duty to engage in law reform⁵⁹ at both the national and global levels. Law clinics provide a 'fertile ground' for the examination, critique and suggestions for reform of legal systems and specific laws and policies.⁶⁰ These educational benefits can be enhanced by adopting a client-centric approach to legal ethics.⁶¹ By examining the 'law in action' from the perspective of the client, students can develop an awareness of the impact of the law on a client's autonomy.

Despite the value of social justice, Hayek argues that those who use the word 'social justice' refer to what the state ought to do.⁶² In other words, it is used to describe a state of affairs, namely situations of inequality, which may be remedied by redistribution.⁶³ Social justice in the context of CLE, however, is said to involve:

[T]he assistance of low-income individuals and communities who cannot afford market rate lawyers or have limited access to them. From there, it ranges from individual client representation on "small" matters and "impact" litigation to collective mobilization of disenfranchised constituencies.⁶⁴

⁵⁵ Alberto Mingardi, *Herbert Spencer on corporate governance*, 2 *MAN ECON.* 195–214, 195 (2015).

⁵⁶ HERBERT SPENCER, *THE PRINCIPLES OF SOCIOLOGY* VOL 2 660–661 (2nd ed. 1891).

⁵⁷ N. J. Balmer, *English and Welsh Civil and Social Justice Panel Survey: Wave 2. Summary Findings*, LEGAL SERVICES COMMISSION: LONDON, UK. 1–79 1 (2013), <http://webarchive.nationalarchives.gov.uk/20130403062222/http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/lsrc-report-csjps-wave-2.pdf> (accessed 11 May 2021).

⁵⁸ Zvonimir Jelinic, *Legal Clinics and Access to Justice in Croatia: Perspectives and Challenges*, 5 *ASIAN J. LEGAL EDUC.* 99–108, 103 (2018).

⁵⁹ See, Liz Curran, *University Law Clinics and Their Value in Undertaking Client-Centered Law Reform to Provide a Voice for Clients' Experiences*, *INT'L J. CLIN. LEGAL EDUC.* 105 (2007).

⁶⁰ *Id.* at 105.

⁶¹ Liz Curran, Judith Dickson & Mary Anne Noone, *Pushing the boundaries or preserving the status quo*, 8 *INT'L J. CLIN. LEGAL EDUC.* 104 (2005).

⁶² VOLUME 2: THE MIRAGE OF SOCIAL JUSTICE IN LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY (2012).

⁶³ Novak, *supra* note 52 at 882.

⁶⁴ Kosuri, *supra* note 10 at 331.

Therefore, social justice in CLE is both a virtue, to be practised by students, and describes a state of affairs in society. Applying this description of social justice globally requires a normative framework that permits clinics, in various jurisdictions, to adopt a similar set of moral values to collaborate with each other in addressing injustices in different communities. Global justice, which can be contrasted with international justice, involves duties towards persons beyond the nation state.⁶⁵ International justice, on the other hand, involves justice between nation states.⁶⁶ For present purposes, global social justice involves assisting persons, irrespective of their nationality, citizenship, religion, gender or any other characteristic, to address injustices inflicted on them by positive or customary laws or policies, directly or indirectly, which conflict with the values contained in the UDHR. Global justice also involves clinics collaborating to establish conditions that promote social change and economic justice. The implied assumption in this framework is that law clinic students adopt a collaborative role with their clients, as equal partners.

Acting as equal partners with their global clients avoids a value-neutral approach and allows students to be mindful of their clients' values and beliefs. Consequently, this method for global justice is composed of two limbs. First, clinics owe a moral duty, which transcends the nation state, to assist persons suffering injustices. Second, this duty consists of respecting and understanding the client's values and perspectives, and assisting them in arriving at the most reasonable choice for that particular client or community. The second element also involves recognition of the fact that injustice can stem from the denial of a person's lived experience, identity and culture.⁶⁷

Access to Justice

A subset of social justice, access to justice, as previously stated, is one of the tenets of CLE.⁶⁸ Access to justice:

[E]nables individuals to protect themselves against infringements of their rights, to remedy civil wrongs, to hold executive power accountable and to defend themselves in criminal proceedings.⁶⁹

Thus, it can be viewed as both a process and a goal and is essential for individuals seeking to benefit from procedural and substantive rights.⁷⁰ Access to justice can include exposure to legal information and education, as well as less formal methods of dispute resolution such as negotiant and mediation.⁷¹

Access to justice is integral to legal ethics because it provides a moral justification for students and pro bono lawyers to assist clients who are unable to obtain legal aid.⁷² In relation to the ethics of access

⁶⁵ HUW L. WILLIAMS & CARL DEATH, *GLOBAL JUSTICE: THE BASICS* 47 (2016).

⁶⁶ *Id.* at 47.

⁶⁷ Nancy Fraser, *Social Justice in an Age of Identity Politics: Redistribution, Recognition and Participation*, in *REDISTRIBUTION OR RECOGNITION?: A POLITICAL-PHILOSOPHICAL EXCHANGE* (Nancy Fraser & Axel Honneth eds., 2020).

⁶⁸ Anna Cody & Frances Gibson, *Teaching Law: The Legal Clinic, The University and Social Justice*, in *AUSTRALIAN CLINICAL LEGAL EDUCATION: DESIGNING AND OPERATING A BEST PRACTICE CLINICAL PROGRAM IN AN AUSTRALIAN LAW SCHOOL* 97 (Adrian Evans et al. eds., 2017).

⁶⁹ *HANDBOOK ON EUROPEAN LAW RELATING TO ACCESS TO JUSTICE*, 16 (2016).

⁷⁰ *Id.* at 16.

⁷¹ CHRISTINE COUMARELOS ET AL., *LEGAL AUSTRALIA-WIDE SURVEY: LEGAL NEED IN AUSTRALIA* 3 (2012).

⁷² Donald Nicholson, *Legal Education, Ethics and Access to Justice: Forging Warriors for Justice in a Neo-liberal World*, 22 *INT'L J. LEGAL PROF.* 51–69, 55 (2015).

to justice, Rawls argues that ‘justice is the first virtue of social institutions’.⁷³ Reflecting on the scope of access to justice allows students to critique the role of social institutions in the distribution of fundamental rights and duties, and the manner in which they determine the advantages from social cooperation.⁷⁴ However, there are two risks associated with law clinics’ altruistic ethos in addressing unmet legal aid needs. First, a reduction in legal funding by the state results in clinics providing assistance to clients who no longer qualify for legal aid. This can result in clinics mitigating the effects of legal aid cuts and potentially encouraging further reduction in legal aid funding. Second, for clients who are no longer eligible for legal aid funding, law clinics are an avenue for access to justice. Empirical evidence suggests that the number of clients accessing law clinics, in England and Wales, is increasing.⁷⁵ This could result in clinics shifting from focusing on the pedagogic aims of CLE to acting as providers of pro bono legal services.⁷⁶

Access to justice, in creating a moral obligation to assist those who are unable to enforce their rights, allows students to reflect on injustices inflicted on individuals. However, focusing on ‘justice’ risks limiting students’ thinking about the conceptions of justice only in terms of formal or procedural conceptions and omitting from their inquiry the harm and suffering caused around the world.⁷⁷ An unjust law can be defined as a valid law, which conflicts with the values by which it is judged.⁷⁸ This idea of applying values to locating injustices is not limited to condemning individual laws, but it can be equally applied to the entire legal system, such as where it is being directed solely to benefitting and furthering the interests of a particular group or repressive towards others.⁷⁹ To locate and address injustice, we need to identify these human rights values.

Human Rights

The underlying principle of HRE, that of ensuring a culture of human rights, can be misconstrued as an attempt to align personal values with universal human rights values.⁸⁰ The criticisms over the breadth of HRE relied on the assumption that it is attempting to make education ‘value neutral’.⁸¹ This is a flawed notion that exists within the law school and has created an inhospitable environment for a discussion over values and morality.⁸² Violations of human rights are now able to affect every member of the global community, and globalization facilitates human rights problems. Therefore, there is a global language of

⁷³ RAWLS, *supra* note 53 at 3.

⁷⁴ *Id.* at 7.

⁷⁵ The LawWorks Law School Pro Bono and Clinics Report 2020 | LawWorks, <https://www.lawworks.org.uk/solicitors-and-volunteers/resources/lawworks-law-school-pro-bono-and-clinics-report-2020> (accessed 7 August 2021).

⁷⁶ Orla Drummond & Grainne McKeever, *Access to Justice through University Law Clinics* (2015), <https://pure.ulster.ac.uk/en/publications/access-to-justice-through-university-law-clinics-3> (accessed 7 August 2021).

⁷⁷ Fiona Robinson, *Global care ethics: Beyond distribution, beyond justice*, 9 J. GLOB. ETHICS 131–143, 131 (2013).

⁷⁸ DENNIS LLOYD, *THE IDEA OF LAW* 131 (1991).

⁷⁹ *Id.* at 131.

⁸⁰ Kayum Ahmed, *Bridging the ‘Values Gap’: Human Rights Education, Ideology and the Global-Local Nexus*, in *CRITICAL HUMAN RIGHTS, CITIZENSHIP, AND DEMOCRACY EDUCATION: ENTANGLEMENTS AND REGENERATIONS* (Michalinos Zembylas & André Keet eds., 2018).

⁸¹ GEORGE J. ANDREPOULOS & RICHARD PIERRE CLAUDE, *HUMAN RIGHTS EDUCATION FOR THE TWENTY-FIRST CENTURY* (1997).

⁸² Julian Webb, *Taking Values Seriously: The Democratic Intellect and the Place of Values in the Law School Curriculum*, in *THE ETHICS PROJECT IN LEGAL EDUCATION* 9–32 (Michael Robertson et al. eds., 2010).

morality, which includes the ‘concern for justice, which inevitably extends to a discussion over protection of human rights’.⁸³

Article 8 of the UDHR provides that ‘Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law’. The notion of ‘justice’ within human rights language is conceived differently across various jurisdictions.⁸⁴ Similarly, ‘access to justice’ falls within a spectrum, ranging from access to a court or tribunal to the ability to pursue effectively remedies through the national justice system in line with human rights standards⁸⁵:

Access to justice means access to a fair, respectful and efficient legal process ... it involves legal protection, legal awareness, legal aid, counsel adjudication and enforcement. There is no access to justice where members of a society (especially marginalised groups) fear the system, see it as alien and do not access it, where the justice system is financially inaccessible, where individuals have no lawyers, where they do not have information or knowledge regarding rights, or where there is a weak justice system.⁸⁶

Within a law clinic setting, the principle of access to justice is aligned with the altruistic and philanthropic objectives of education towards a facilitation of access to justice, in particular, for vulnerable groups.⁸⁷ Kingston argues that alignment of human rights education with clinical legal education can ‘create socially responsible citizens’.⁸⁸

Empirical evidence suggests that there is scope for the inclusion of value-based theories within law school pedagogy settings. Moorhead et al.⁸⁹ provide a detailed examination of the ethical identity of students, relying on measurable indicators of values and moral outlook. Moorhead et al. reached significant conclusions, regarding the development of the ethical identity of students, and recognized the parameters that seem to influence this development (e.g., gender and career aspirations). More importantly, their findings highlight that law schools promote the development of ethical identity, specifically acknowledging the contributing factors of participation in clinical programmes.⁹⁰

The ability of education to develop one’s ethical identity was predicted by the UDHR. Article 26 stipulates that ‘education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms’. The existence of these universal values that should be promoted through education, among other means, is present in the liberal ideas that flourished post-World War II, of a new legal order that aimed at ensuring equality and dignity for all, ignited the development of the instruments necessary to achieve it. Within these instruments, the role of education towards achieving these goals becomes prominent and prescriptive. For example, the United Nations Declaration on Human Rights Education and Training highlights, through Article 2, the significance of human rights education to ‘Education for human rights, which includes empowering persons to enjoy and exercise their rights and to respect and uphold the rights of others’.⁹¹ Education in

⁸³ Hurwitz, *supra* note 4 at 508.

⁸⁴ See, Oluymisi Bangbose, *Access to Justice Through Clinical Legal Education: A Way Forward for Good Governance and Development*, 15 AFR. HUM. RIGHTS L. J. 378–396 (2015).

⁸⁵ *Id.* at 382.

⁸⁶ *Id.* at 382.

⁸⁷ Madhloom, *supra* note 23.

⁸⁸ L. N. Kingston, *Creating a ‘Human Rights Campus’*, 24 PEACE REV. 78–83, 79 (2012).

⁸⁹ R. Moorhead, *The ethical identity of law students*, 23 INT’L J. LEGAL PROF. 235–275 (2016).

⁹⁰ *Id.*

⁹¹ UNITED NATIONS DECLARATION ON HUMAN RIGHTS EDUCATION AND TRAINING (2011).

these formulations is shifted from being a right (right to education) towards becoming the means by which to ensure the protection of human rights.

In a similarly prescriptive way, the United Nations Decade for Human Rights Education reaffirmed that ‘education shall be directed to the full development of the human personality and to the strengthening of respect of human rights and fundamental freedoms’ declared the decade for Human Rights Education.⁹² The Plan for Action for the United Nations Decade for Human Rights Education, 1995–2004 defined human rights education ‘as training, dissemination and information efforts aimed at the building of a universal culture of human rights’.⁹³ Beyond the overarching aims of respecting human rights and safeguarding the ‘sense of dignity’ the Plan also asks for ‘the enabling of all persons to participate effectively in a free society’ through the imparting of knowledge and skills.⁹⁴ Within CLE, the identity of law clinic work is aligned with the assertion made in the Guidelines for National Plans of Action for Human Rights Education, namely that ‘human rights are promoted through three dimensions of education campaigns’, including ‘values, beliefs and attitudes: promotion of a human rights culture through the development of values, beliefs and attitudes which uphold human rights’.⁹⁵

The United Nations General Assembly suggested the introduction of ‘students of all disciplines’ to human rights through teaching styles that are ‘coherent with human rights’ and the empowerment of students by supporting ‘exploration of alternative perspectives and critical reflection’, through experiential learning and practical application of human rights concepts.⁹⁶ Ultimately, embedding HRE within CLE can foster a universal culture of human rights, in which everyone is aware of their own rights and responsibilities in respect of the rights of others, and promoting the development of the individual as a responsible member of a free, peaceful, pluralist and inclusive society.⁹⁷

Sensus Communis

In the *Critique of the Power of Judgment*, Kant presents ‘sensus communis’ as a general faculty for judgement that individuals possess, and where they can relate their own thinking to the potential thinking of others.⁹⁸ Kant contends that there must be a ground for universal communicability, a common sense that operates intersubjectively.⁹⁹ The aim of the *sensus communis* is to underpin the necessity of there being a universally communicable disposition of taste.¹⁰⁰ In relation to transnational law clinic collaborations, intersubjectivity can be facilitated through the values found in the UDHR.

The *sensus communis* is considered coterminous with ‘common human understanding’.¹⁰¹ According to Kant, to develop the faculties of understanding, judgement and reason requires obeying the three

⁹² UNITED NATIONS DECADE FOR HUMAN RIGHTS EDUCATION, A/RES/49/184 (1994).

⁹³ REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS ON THE IMPLEMENTATION OF THE PLAN OF ACTION FOR THE UNITED NATIONS DECADE FOR HUMAN RIGHTS EDUCATION (1996).

⁹⁴ *Id.* at 5.

⁹⁵ GUIDELINES FOR NATIONAL PLANS OF ACTION FOR HUMAN RIGHTS EDUCATION (1997).

⁹⁶ DRAFT PLAN OF ACTION FOR THE SECOND PHASE (2010–2014) OF THE WORLD PROGRAMME FOR HUMAN RIGHTS EDUCATION—NOTE BY THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (2010).

⁹⁷ UNITED NATIONS DECLARATION ON HUMAN RIGHTS EDUCATION AND TRAINING, *supra* note 91, Article 4.

⁹⁸ IMMANUEL KANT, *CRITIQUE OF THE POWER OF JUDGMENT* 5: 293–294 (2002).

⁹⁹ *Id.* at 5:93.

¹⁰⁰ *Id.* at 5:239.

¹⁰¹ *Id.* at 5:293.

maxims of the common human understanding,¹⁰² which together form the conduct of thought: ‘1. To think for oneself; 2. To think in the position of everyone else; 3. Always to think in accord with oneself’.¹⁰³ Kant describes each of these maxims in the following way: ‘The first is the maxim of the unprejudiced way of thinking, the second of the broad-minded way, the third that of the consistent way’.¹⁰⁴ Thinking in an unprejudiced way requires thinking autonomously; thinking in a broad-minded manner involves thinking universally of others in terms of them as ends rather than simply as means; the third maxim involves thinking consistently.¹⁰⁵ The second maxim is to be followed only after we have thought matters through for ourselves. The reason for taking into consideration the views of other achieves two goals. First, it lends one’s deliberation/reflection a pluralistic dimension. Kant defines pluralism, which he distinguishes from egoism, as ‘the way of thinking in which one is not concerned with oneself as the whole world, but rather regards and conducts oneself as a mere citizen of the world’.¹⁰⁶ This cosmopolitan approach is found in Freire’s philosophy of critical pedagogy, which holds that ‘[t]o be human is to engage in relationships with others and with the world’.¹⁰⁷ Second, by taking into consideration the views of others, students can strive to achieve correct or error-free judgement.

To think consistently is a combination of the first two maxims and is only achieved after long and deliberate practice.¹⁰⁸ The third rule of common sense functions to admonish inconsistent thinking if a student were to follow the first two rules but, nevertheless, decided to act inconsistently. A reason for failing to act consistently could be out of self-interest (egoism). Thus, *sensus communis* can be applied to CLE to develop an epistemology of reflective practice, which is underpinned by the values articulated by the UDHR and notions of social justice and access to justice. Having identified the elements of a universal pro forma to aid clinic collaboration, the third section argues that CLE can be enhanced by embedding the proposed pro forma into reflective practice.

Reflective Lawyering

There is not one universally accepted definition of reflection. Instead, theorists have put forward their own definitions:

Active, persistent, and careful consideration of any belief or supposed form of knowledge in the light of the grounds that support it and the further conclusions to which it leads.¹⁰⁹

Reflection is an important human activity in which people recapture their experience, think about it, mull it over and evaluate it.¹¹⁰

¹⁰² A maxim is a subjective of action. For any rule of action that is to be followed, we must examine whether we can will others to always follow it.

¹⁰³ KANT, *supra* note 98 at 5:293.

¹⁰⁴ *Id.* at 5:293.

¹⁰⁵ JOHNSTON, *supra* note 21 at 191.

¹⁰⁶ ROBERT B. LOUDEN, KANT: ANTHROPOLOGY FROM A PRAGMATIC POINT OF VIEW 130 (Annotated edition ed. 2006).

¹⁰⁷ PAULO FREIRE, EDUCATION, THE PRACTICE OF FREEDOM 4 (1974).

¹⁰⁸ JOHNSTON, *supra* note 21 at 191.

¹⁰⁹ JOHN DEWEY, HOW WE THINK 9 (1933).

¹¹⁰ DAVID BOUD, ROSEMARY KEOGH & DAVID WALKER, REFLECTION: TURNING EXPERIENCE INTO LEARNING 19 (1985).

Reflection is about linking one increment of learning to the wider perspective of learning—heading towards seeing the bigger picture.¹¹¹

Experience, therefore, is converted into learning through the process of reflection.¹¹² The value of reflection in CLE is that it allows students ‘to understand how the law is experienced in context and to critique its shortcomings, to support professional identity formation and to develop actionable professional knowledge and expertise’.¹¹³ Professionals encounter a variety of complex and unpredictable situations. Schön relies on the metaphor of a swamp to articulate this fact:

In the varied typography of professional practice, there is a high, hard ground overlooking a swamp. On the high ground, manageable problems lend themselves to solutions through the use of research-based theory and technique. In the swampy lowlands, problems are messy and confusing and incapable of technical solution.¹¹⁴

An awareness of complexity, uniqueness and value conflict in professions may result in ‘professional pluralism’: the development of different approaches regarding the core values of the profession, the relevant knowledge and skills acquired and competing images of the professional role.¹¹⁵ Cultural and professional pluralism can form part of a student’s reflective practice through Kant’s ‘sensus communis’. The multiplicity of views can pose a dilemma for professionals, including clinic students, and they must either decide between different approaches to practice or devise an alternative method.¹¹⁶

Conclusion

In light of a rapidly globalized legal profession and human rights problems, we have argued for the need for communication between law clinics from multiple jurisdictions in order to respond to these human rights issues. Access to justice is identified as a significant human rights concern, to which law clinics can assist through a moral duty to protect the vulnerable in society to achieve global social justice. Seeking inspiration from the wording of the UDHR, this article provides a universal pro forma for law clinics, which embeds the principles of human rights, *sensus communis* and social justice, in facilitating transnational communication and collaboration between law clinics.

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¹¹¹ Phil Race, *Evidencing Reflection: Putting the ‘W’ into Reflection*, ESCALATE LEARNING EXCHANGE (2002), <http://escalate.ac.uk/resources/reflection/> (accessed 1 May 2021).

¹¹² Victoria Murray, *Reflection*, in *A STUDENT GUIDE TO CLINICAL LEGAL EDUCATION AND PRO BONO*, 227 (Kevin Kerrigan & Victoria Murray eds., 2011).

¹¹³ Michele M. Leering, *Perils, Pitfalls and Possibilities: Introducing Reflective Practice Effectively in Legal Education*, 53 L. TEACH. 431–445, 432 (2019).

¹¹⁴ DONALD A. SCHON, *EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS* 3 (1987).

¹¹⁵ *Id.* at 3.

¹¹⁶ DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* 17 (2017).

6 Applying Rawls' theory of justice to Clinical Legal Education in the Republic of Croatia

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This chapter seeks to develop law clinic students' reflection and critique of the law by utilising Rawls' theory of justice to examine social and economic injustices in society. It will be argued that incorporating John Rawls' concept of distributive justice can contribute to the development of Clinical Legal Education ('CLE') beyond the traditional client-centric lawyering model, where the lawyer views their main role as achieving their client's objectives. Rawls' theory will be applied to CLE to reflect on social institutions in the Republic of Croatia, namely the Ministry of Justice and the distribution of primary social goods.

Introduction

One of Clinical Legal Education's ('CLE') primary objectives is to provide professional education in the interests of justice.¹ Law clinics are, thus, in a unique position to provide students with a vantage point from which to examine social and economic injustices in society.² Pro bono legal assistance allows the poorest and most vulnerable people to assert their rights in various legal matters such as marital and custody cases, employment disputes, and landlord and tenant issues.³ Without legal aid many individuals would be unable to navigate the justice system, make informed decisions, and obtain remedies.⁴ Thus, legal aid plays a key role in facilitating access to justice for individuals who lack the financial means to instruct a fee-charging lawyer. However, without an adequately funded legal aid system, law clinics in Croatia face financial challenges regarding the provision of pro bono legal services. Lack of legal aid funding also impacts on CLE because without adequate funding university law clinics will be unable to equip students with the requisite skills to practise law and provide legal aid.⁵ This chapter seeks to develop CLE beyond the traditional client-centric lawyering model, where the lawyer views their main role as achieving their client's objectives. This model leaves little room for considering wider social issues such as justice and morality. The aim of this chapter is to develop student reflection in relation to social institutions in the Republic of Croatia ('Croatia'), namely the Ministry of Justice ('MoJ'), and the distribution of primary

¹ Stephen Wizner, 'The Law School Clinic: Legal Education in the Interests of Justice' (2002) 70 Fordham Law Review 1929, 1935.

² Ibid., 1936.

³ Barbara Preložnjak and Juraj Brozović, 'The financial challenges of clinical legal education: an example from a Zagreb law clinic' (2016) 23(4) International Journal of Clinical Legal Education 136.

⁴ United Nations Office on Drug and Crime, *Global Study on Legal Aid Global* (United Nations 2016), 8.

⁵ Preložnjak and Brozović (n3) 136.

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social goods. John Rawls' principles of justice will be applied to CLE as an analytical tool to critique social institutions involved in the provision of legal aid.

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This chapter is divided into five parts. Part one covers the limitations of legal education in Croatia and importance of funding of university law clinics. This is followed by a discussion on the value of social justice education in CLE. Part three outlines the key elements of Rawls' theory of justice that will be applied to CLE in Croatia. Part four deals with the regulation and funding of university clinics in order to examine their contribution in relation to access to justice. Part five applies Rawls' theory to CLE. The final section outlines some of the limitations of Rawls' theory of justice.

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Clinical Legal Education

Although CLE lacks a universally accepted definition, it has been defined by the European Network of Clinical Legal Education as:

[A] legal teaching method based on experiential learning, which fosters the growth of knowledge, personal skills and values as well as promoting social justice at the same time. As a broad term, it encompasses varieties of formal, non-formal and informal educational programs and projects, which use practical-oriented, student-centered ~~[-sic]~~, problem-based, interactive learning methods, including, but not limited to, the practical work of students on real cases and social issues supervised by academics and professionals. These educational activities aim to develop professional attitudes and foster the growth of the practical skills of students with regard to the modern understanding of the role of the socially oriented professional in promoting the rule of law, providing access to justice and peaceful conflict resolutions, and solving social problems.⁶

In addition to teaching practical skills such as interviewing and drafting legal documents, CLE also promotes social justice. Developing a sense of social justice allows students to identify and challenge injustice and pursue social justice in society. Through CLE, students are made aware of the fact that for some of their clients the law clinic is the only means of access to the justice system. This realisation has the potential to make the student more aware of their responsibility to their client. This heightened sense of responsibility can develop into a feeling

⁶ European Network of Clinical Legal Education, 'Definition of a legal clinic' <<http://encle.org/about-encle/definition-of-a-legal-clinic>> accessed 06 February 2021.

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of social responsibility for the provision of legal services for socially and financially vulnerable clients.⁷ Legal assistance provided through university law clinics not only empowers individuals and communities but also promotes the protection of human rights. Therefore, CLE is a suitable vehicle for promoting social justice values.

As a teaching method, CLE can be contrasted with the dominant doctrinal approach in legal education in Central and Eastern Europe ('CCE'). Legal education in CCE, which includes Croatia, is criticised for its inefficiency ~~and~~ outdated models of teaching which are focused on memorisation rather than on critical analysis.⁸ As a result, Croatian law schools promote the illusion that law is value-free and detached from legal order. However, law is more than simply stating the rules of just conduct. Law is also the means of pursuing government policies and for allocating materials to different groups, usually at the expense of other groups.⁹ Excluding any necessary reference to values, such as justice and morality, risks limiting the scope of legal analysis to a purely positivist approach. The question, therefore, is how to develop CLE so that students are able to reflect on social justice during their clinical experience. The eClinic addresses this question by incorporating Rawls' theory of justice. This methodology allows students to reflect on the distribution of legal aid funds and the extent to which the Free Legal Aid Act 2013 ('FLAA 2013') allows clinics to facilitate access to justice. According to Preložnjak:

By providing general legal information, legal advice and by assisting in the preparation of documents in various types of procedures for individuals with low income, students for the first time during their studies take responsibility for the resolution of actual cases.¹⁰

Despite the numerous advantages of CLE, such as the acquisition of lawyering skills and applying theory to real-life cases, a major challenge faced by law clinics in Croatia is that of sustainability, namely funding and resources. The debate over the costs of experiential education is not new nor is it exclusive to Croatia. Swords and Walwer note that:

⁷ Wizner (n1) 1935.

⁸ Antal Szerletics and Lidia Rodak, 'Introduction: Legal Education in Central and Eastern Europe. Challenges and Prospects' (2017) 7(8) *Oñati Socio-legal Series* 1581, 1585 <<http://ssrn.com/abstract=3087206>> accessed 06 February 2021.

⁹ Suri Ratnapala, *Jurisprudence* (CUP 2017), 390.

¹⁰ Barbara Preložnjak, 'Clinical legal education in Croatia – from providing legal assistance to the poor to practical education of students' (2013) 19 *International Journal of Clinical Legal Education* 373, 376.

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Money issues, circa 1980, dominate the American scene. Legal education is no exception, and within legal education any discussion regarding the pros and cons of clinical programs is apt to precipitate anxious concern about relative costs and financing.¹¹

Croatia faces a similar ‘anxious concern’ due to the fact that primary legal aid has been underfunded since 2010.¹² The main financial source for the cELinic is the law school.¹³ Other costs¹⁴ are funded from the state budget, namely the MoJ and the local community budget (City of Zagreb Grant). Law clinics are permitted to request compensation from the state budget due to their status as providers of legal aid.¹⁵ However, the annual value of budgetary funds allocated for legal aid providers has been constantly decreasing.¹⁶ Consequently, financial challenges directly impact on the quality of work the cELinic is able to offer.¹⁷ Resources are essential not only for the establishment of a clinic but also for its sustainability and the number of clients it can assist. The cELinic has received positive feedback from both students and clients and yet it faces several financial challenges to its future development, as a provider of legal aid. This ‘dysfunctional financing’ system of legal aid has led to the inability to finance 70 per cent% of the cELinic’s projects.¹⁸ The issue of the lack of funding and its impact on providing legal aid will be explored through the lens of Rawls’ theory of social justice.

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Social justice and CLE

An assumption exists in CLE that exposing students to social problems leads to them learning about social justice.¹⁹ Simply engaging with clients with social and legal issues does not necessarily facilitate a critical understanding of the cause of these issues or their impact on

¹¹ Peter de Lancy Swords and Frank K Walwer, *Cost Aspects of Clinical Education, in Clinical Legal Education: Report of the Association of American Law Schools—American Bar Association Committee on Guidelines for Clinical Legal Education* (1980) 133, 133.

¹² Preložnjak and Brozović (n3) 157.

¹³ The law school’s financial assistance includes office space, postage utilities, and student administrators.

¹⁴ These costs include the costs for equipment, promotional materials, field activities, and external outreach projects.

¹⁵ Article 36, paragraph 1, of the Croatian Legal Aid Act (Official Gazette 143/13; CLAA).

¹⁶ Preložnjak and Brozović (n3) 152; European judicial systems Efficiency and quality of justice CEPEJ Studies No. 26 2018 Edition (2016 data), 71 <<https://www.coe.int/web/cepej/special-file-publication-2018-edition-of-the-cepej-report-european-judicial-systems-efficiency-and-quality-of-justice->> accessed 06 February 2021.

¹⁷ Preložnjak and Brozović (n3) 152.

¹⁸ *Ibid.* 158.

¹⁹ Lucy Yeatman, ‘Law in the Community and Access to Justice: Linking Theory and Practice’ in Chris Ashford and Paul McKeown (eds), *Social Justice and Legal Education* (Scholars Publisher 2018), 133.

Verso header

clients' lives.²⁰ It is imperative that students are provided with a framework that promotes consideration of social justice issues such as access to justice, legal aid funding, and the extent to which the regulatory framework promotes access to justice.

Although social justice is a contested term, it is typically taken to denote distributive justice. According to Miller:

When we talk and argue about social justice... we are discussing how the good and bad things in life should be distributed among the members of a human society. When... we attack some policy or some state of affairs as socially unjust, we are claiming that a person, or more usually a category of persons, enjoys fewer advantages than the person or group of persons ought to enjoy (or bears more of the burdens than they ought to bear), given how other members of the society in question are faring.²¹

Similarly, Rawls equates social justice with distributive justice.²² In his seminal work, *A Theory of Justice*,²³ Rawls refers on several occasions to the 'principles of social justice' when articulating his two 'principles of justice'.²⁴ The value of incorporating Rawls' theory of justice into CLE is that he considers 'justice' to be a set of principles that 'provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social co-operation'.²⁵ Justice is placed above all other virtues; the 'right' comes before the 'good'.²⁶ Incorporating considerations of social justice issues allows students to adopt a political dimension²⁷ into their reflective practice that goes beyond individual justice; justice between wrongdoer and claimant is only a partial form of justice.²⁸

Rawls' theory of justice

Rawls is considered one of the most important political theorists of the latter half of the twentieth century. The significance of Rawls' theory of justice is best highlighted by Robert Nozick, one of Rawls' critics:²⁹ 'Political philosophers now must either work within Rawls'

²⁰ Ibid.

²¹ David Miller, *The Principles of Social Justice* (HUP1999), 1.

²² John Rawls, *A Theory of Justice* (OUP1971).

²³ Ibid.

²⁴ Ibid. 54.

²⁵ Ibid. 4.

²⁶ John Rawls, 'The Priority of Right and Ideas of the Good' (1988) 17(4) *Philosophy & Public Affairs* 251.

²⁷ Peter Joy, 'Political Interference in Clinical Programs: Lessons from the U.S Experience' (2005) 8 *International Journal of Clinical Legal Education* 82.

²⁸ A M Honore, 'Social Justice' (1962) 8(2) *McGill Law Journal* 77, 77.

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theory or explain why not?²⁹ After the publication of *A Theory of Justice*, utilitarianism, which holds that morality is based on striving to increase the aggregate level of happiness, could no longer be taken for granted.³⁰ Rawls' theory of justice falls within the social contract tradition. His two principles of justice³¹ and his conception of distributive fairness are rooted in fairness to all citizens of the United States:

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My aim is to present a conception of justice which generalises and carries to a higher level of abstraction the familiar theory of the social contract... In order to do this we are not to think of the original contract as one to enter a particular society or to set up a particular form of government. Rather, the guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established. This way of regarding the principles of justice I shall call justice as fairness.³²

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The above passage, namely 'justice as fairness', captures the spirit of Rawls' theory of justice. For Rawls, justice regulates the distribution of goods throughout society. He considers justice to be 'the first virtue of social institutions, as truth is of systems of thought'.³³ Therefore, the realisation of justice must take priority over any other moral values a society seeks to achieve.³⁴ This suggests that while there may be other virtues of social institutions, they may not be realised at the expense of justice.³⁵ The focus on social institutions, such as the MoJ and universities,³⁶ adds an additional dimension to CLE that goes beyond the lawyer-client model, which considers the main role

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²⁹ Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974), 183.

³⁰ Jon Mandle, *Rawls's A Theory of Justice: An Introduction* (CUP 2009), 3.

³¹ Rawls' principles of justice will be discussed in detail under the sub-heading 'The two principles of justice'.

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³² John Rawls *A Theory of Justice* (22) 11. Emphasis added.

³³ *Ibid.* 3.

³⁴ Tom Campbell, *Justice* (Macmillan Education Ltd 1988), 7.

³⁵ Mandle (n30) 35.

³⁶ University law clinics in Croatia are not separate legal entities. They operate as part of their respective university.

Verso header

of the lawyer is to zealously pursue their client's goals ~~zealously~~.³⁷ Thus, zealous advocacy, which focuses on achieving the desired aims of the client, falls under consequentialism. Utilitarianism is the most influential of the consequentialist theories.

Rawls' theory provides CLE students with a theoretical framework to reflect on the distribution of goods and the effect social institutions have on clients' lives. Distributive justice, or social justice, focuses attention on sharing of benefits and burdens.³⁸ It is important to note, however, that Rawls' theory is not a theory of distributive justice based on needs and wants of individuals or groups:

[T]he principles of justice do not select specific distributions of desired things as just, given the wants of particular persons. This task is abandoned as mistaken in principle, and it is in any case, not capable of a determinate answer.³⁹

His theory of justice allows students to analyse 'the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation'.⁴⁰ The basic structure includes 'the political constitution, the legally recognized forms of property, and the organization of the economy, and the nature of the family'.⁴¹ The basic structure, which is the 'primary subject of justice',⁴² is concerned with inequalities in people's life chances and not on the ultimate outcomes. In other words, by arguing for the basic structure as the appropriate subject for a theory of social justice, Rawls is focusing on the inequalities that affect people's chances in life.⁴³ He writes about people 'born into different positions' and that major social institutions 'favour certain starting places over others'.⁴⁴ According to Rawls, 'deep inequalities' are not only pervasive but also impact on people's 'initial chances in life'.⁴⁵ By focusing on the basic social structure, CLE students are encouraged to identify the inadequacies of the notions of

³⁷ See Charles Fried, 'The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation' (1976) 85(8) *The Yale Law Journal* 1060; David Luban, *The Ethics of Lawyering* (Dartmouth 1994); Michael I Krauss, 'The Lawyer as Limo: A Brief History of the Hired Gun' (2001) 8(2) *The University of Chicago Law School Roundtable* 325; Douglas O Linder and Nancy Levit, *The Good Lawyer: Seeking Quality in the Practice of Law* (OUP 2014), 188.

³⁸ Ratnapala (n9) 407.

³⁹ John Rawls, 'Constitutional liberty and the concept of justice' in Carl J Friedrich and John W Chapman (eds), *Nomos VI Justice* (Atherton Press 1963), 102.

⁴⁰ Rawls *A Theory of Justice* (n22) 7.

⁴¹ *Ibid.*

⁴² John Rawls, *Political Liberalism* (Columbia University Press 1993), 258.

⁴³ Rawls *A Theory of Justice* (n22) 7.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

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justice and desert, and reflect on the inequalities, which impact on a client's life chances, caused by social institutions.

Rawls' assertion that laws and institutions must be reformed or abolished, if they are unjust, is predicated on the assumption that individuals possess 'an inviolability on justice that even the welfare of society as a whole cannot override'.⁴⁶ This criticism of utilitarianism suggests that the overall utility, which social institutions seek to achieve, must not disregard a commitment to justice to the individual. Rawls rejects utilitarianism because 'it does not take seriously the distinction between persons'.⁴⁷ Utilitarianism fails to consider the distinction between persons who are autonomous individuals.⁴⁸ Unlike utilitarianism which is concerned with maximising average utility, Rawls writes, 'the principles of justice manifest in the basic structure of society men's desire to treat one another not as means but only as ends in themselves'.⁴⁹ Rawls' aim was to offer an alternative view to classical utilitarianism, which, in his opinion, dominated discussions of social institutions and policies to such an extent that serious considerations of alternative approaches were excluded.⁵⁰ In relation to CLE, students should be provided with a framework that would not only allow them to reflect on the distribution of wealth and assets but also social goods such as self-respect and freedom of movement. To achieve this aim, the key elements of Rawls' theory of justice will be outlined.

The 'original position' and the 'veil of ignorance'

For Rawls, the principles of justice are those which provide a way of assigning rights and duties in the basic institutions of society and determine the appropriate distribution of the benefits and burdens of social cooperation.⁵¹ The difficulty lies in formulating the principles of justice which should be adopted in society. A measure of agreement in relation to conceptions of justice is necessary for 'a viable human community'.⁵² To arrive at these principles of justice, Rawls draws on social contract theories of John Locke, Immanuel Kant, and Jean-Jacques Rousseau.⁵³ These theorists were working from the starting point that a government can legitimately govern its citizens, provided those citizens granted the government powers.⁵⁴ Unlike previous social

⁴⁶ Rawls, *A Theory of Justice* (n22) 3.

⁴⁷ *Ibid.*, 27.

⁴⁸ Klaus Mathis and Deborah Shannon, 'John Rawls's Theory of Justice' in Klaus Mathis and Deborah Shannon (eds), *Efficiency Instead of Justice? Searching for the Philosophical Foundations of the Economic Analysis of Law* (Springer 2009), 123.

⁴⁹ Rawls, *A Theory of Justice* (n22) 179.

⁵⁰ *Ibid.*, 22.

⁵¹ *Ibid.*, 4.

⁵² *Ibid.*, 6.

⁵³ *Ibid.*, 11.

⁵⁴ Brian H Bix, *Jurisprudence: Theory and Context* (17th edn, Sweet & Maxwell 2015), 96.

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contract theorists, Rawls is not concerned with how to legitimise power but with ~~te~~-shaping political institutions in accordance with principle of justice.⁵⁵

Rawls distinguishes between people's conceptions about justice and their subjective, self-interested views.⁵⁶ What he is seeking to achieve through his social contract theory are mutually agreeable principles of justice.⁵⁷ He asks us to imagine a hypothetical 'original position' to determine the principles of justice.⁵⁸ The original position is used as a method of representation to establish how best to 'realize the values of liberty and equality'.⁵⁹ Rational and mutually disinterested⁶⁰ people in the 'original position' debate the principles of justice behind a 'veil of ignorance'.⁶¹ The 'veil of ignorance' creates a forum whereby the deliberators are prevented from knowing certain facts about themselves such as:

1. Their place in society
2. Social status
3. Fortune in the distribution of natural assets and abilities
4. Intelligence and strength
5. Gender⁶²
6. Religion⁶³ and
7. In what time or place they were living.⁶⁴

The aim is for the deliberators ~~is~~ to avoid the worst conditions they might find themselves in when the veil of ignorance is lifted, and instead choose Rawls' principles of justice. Therefore, they are motivated by rational self-interest to select principles that will allow them the best chance to realise their conception of the good life. By removing the individuality of the deliberators in the original position they will choose a 'maximin' principle. The reasoning behind this term is 'maximum minimorum' or the maximisation of the minimum position.⁶⁵ As rational agents, the deliberators in the original position would choose principles that would guarantee that ~~that~~ the worst condition they might find themselves in, when the veil is removed, is the least desirable of the available options. Such deliberation will lead to Rawls' principles of justice. When the principles of justice are determined, social institutions will be formed to

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⁵⁵ Mathis and Shannon (n48) 121.

⁵⁶ Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (5th edn, OUP 2017), 269.

⁵⁷ Michael Freeman, *Lloyd's Introduction to Jurisprudence* (9th edn, Sweet & Maxwell 2014), 483.

⁵⁸ Rawls *A Theory of Justice* (n22) 12.

⁵⁹ Rawls *Political Liberalism* (n42) 5.

⁶⁰ Rawls *A Theory of Justice* (n22) 17–22.

⁶¹ *Ibid.*, 136.

⁶² Wacks (n56) 269.

⁶³ *Ibid.*, di

⁶⁴ Freeman (n57) 483.

⁶⁵ Rawls, *A Theory of Justice* (n22) 154.

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distribute social primary goods in accordance with these principles.⁶⁶ The next step is to examine the meaning of ‘primary goods’.

Primary goods

Rawls distinguishes between two types of ‘primary goods’: social primary goods and natural primary goods. The former is part of his general conception of justice:

All social primary goods – liberty and opportunity, income and wealth, and the basis of self-respect – are to be distributed equally unless an unequal distribution of any or all of these good is to the advantage of the least favoured.⁶⁷

Injustice, therefore, equates to any inequalities which are not beneficial to all.⁶⁸ Natural primary goods, on the other hand, include health, intelligence, and imagination.⁶⁹ Although the acquisition of natural primary goods is influenced by the basic structure, they do not directly fall under its control because natural primary goods are due to the natural lottery rather than the distribution by social institutions. Aspirations for certain goals do not give individuals a claim on social resources.⁷⁰ Thus, for example, an individual’s preference for luxury cars does not entitle them to claim additional primary goods to realise their ambition.

The two principles of justice

In the original position and behind the veil of ignorance, the deliberators decide upon the two principles of justice:

First principle

Each person is to have an equal right to the most extensive total system of the equal basic liberties compatible with a similar system of liberty for all.

Second principle

Social and economic inequalities are to be arranged so that they are both:

⁶⁶ Perihan Elif Ekmeci and Bena Arda, ‘Enhancing John Rawls’s Theory of Justice to Cover Health and Social Determinants of Health’ (2015) 21(2) *Acta Bioethica* 227, 228.

⁶⁷ Rawls *A Theory of Justice* (n22) 303.

⁶⁸ *Ibid.* 62.

⁶⁹ *Ibid.*

⁷⁰ John Rawls, ‘Social unity and primary goods’ in Amartya Sen and Bernard Williams (eds), *Utilitarianism and Beyond* (CUP 1982), 171.

Verso header

to the greatest benefit of the least advantaged, consistent with the just savings principle;
and

attached to offices and positions open to all under conditions of fair equality of opportunity.⁷¹

Rawls refers to his first principle as the Principle of Equal Liberty and to his second as the Difference Principle. The first of these principles is to be applied in 'lexical'⁷² priority over the second, and the first part of the second principle has lexical priority over its second part. In other words, the deliberators in the original position place liberty above equality because they would not wish to risk their liberty when the veil is 'lifted' and it is revealed that they are among the worst off in society.⁷³ For the same reasons, the deliberators would choose the first part of the second principle.

According to the Principle of Equal Liberty, basic liberties can be constrained for the sake of liberty in two cases:⁷⁴

1. A less extensive liberty strengthens the overall system of liberties shared by all;
2. A less extensive system of equal liberty is accepted by those with reduced liberty.

Basic liberties are:

1. Political liberty (the right to vote and to hold public office);
2. Freedom of speech and assembly;
3. Liberty of conscience and freedom of thought;
4. Personal liberty, which includes freedom from psychological oppression and physical assault and dismemberment;
5. The right to personal property; and
6. Freedom from arbitrary arrest and imprisonment.⁷⁵

These liberties are equal to all because individuals in a just society ought to have the same basic rights.⁷⁶ The Difference Principle, on the other hand, is concerned with distribution of income and assets and the arrangement of institutions in which differences in power and responsibility take place. Inequalities are permissible provided they improve the circumstances of the least advantaged in society. As far as funding of clinics is concerned, Rawls would argue that we should distribute our benefits and burdens in accordance with the Difference Principle. In

⁷¹ Rawls, *A Theory of Justice* (n22) 302. Emphasis in the original.

⁷² Short for 'lexicographical ordering'. A system that completely satisfies a first principle before applying a second principle.

⁷³ Wacks (n56) 271.

⁷⁴ Rawls, *A Theory of Justice* (n22) 302.

⁷⁵ *Ibid.*, 61.

⁷⁶ *Ibid.*

relation to the allocation of resources for education the following passage in *A Theory of Justice* illustrates the significance of the Difference Principle to education:

Now the difference principle is not of course the principle of redress. It does not require society to try to even out handicaps as if all were expected to compete on a fair basis in the same race. But the difference principle would allocate resources in education, say, so as to improve the long-term expectations of the least favored.⁷⁷

Rawls argues that ‘resources for education are not to be allotted solely or necessarily mainly according to their return as estimated in productive trained abilities, but also according to their worth in enriching the personal and social life of citizens, including here the less favoured’.⁷⁸ Although this passage relates to the distribution of educational resources for the benefit of students, it is equally applicable to CLE for two reasons. Firstly, CLE is not simply a teaching method; it facilitates access to justice for clients who lack the financial means to instruct a lawyer. Resources are, therefore, essential to ensure that clinics can continue to represent clients. Secondly, the Principle of Equal Liberty is applicable to both students and clients. It requires that students receive an education that allows them to pursue their own conception of the good. This can be realised through CLE through the acquisition of legal skills gained through the provision of legal aid services to the local community.⁷⁹ In relation to clients, the Principle of Equal Liberty offers an opportunity for individuals to access the justice system and the protection of liberties. To apply Rawls’ principles of justice to the basic structure of Croatian society, namely the MoJ and the funding of university law clinics, the next section will outline the regulation and funding of university law clinics.

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The regulation of law clinics in Croatia

University legal clinics in Croatia are primarily regulated by the Act on Scientific Activity and Higher Education⁸⁰ and the FLAA 2013.⁸¹ The former provides the framework for the implementation of the Bologna Process⁸² and modernisation of the organisational scheme in

⁷⁷ Ibid. 101.

⁷⁸ Ibid. 107.

⁷⁹ Preložnjak and Brozović (n3) 139.

⁸⁰ Official Gazette 123/03, 198/03, 105/04, 174/04, 02/07, 46/07, 45/09, 63/11.

⁸¹ Official Gazette 143/2013 and came into force on 14th January 2014.

⁸² Under the Bologna Process, European governments engage in discussions regarding higher education policy reforms and strive to overcome obstacles to create a European Higher Education Area. For further details see <https://ec.europa.eu/education/policies/higher-education/bologna-process-and-european-higher-education-area_en> accessed 06 February 2021.

Verso header

science and higher education. The latter regulates the type of activities, universities law clinics are permitted to carry out, namely 'secondary legal aid', and provides for university law clinics to apply for public funds from the MoJ.

The first FLAA came into force in 2008.⁸³ The enactment of the FLAA 2008 and the legal standardisation of clinics,⁸⁴ facilitated the establishment of clinics at the University of Split and the University of Zagreb.⁸⁵ Despite reforming access to justice, the shortcomings of the FLAA 2008 came to light after its implementation.⁸⁶ The limitations related to issues concerning practicality and functionality.⁸⁷ As a result, it was modified on two separate occasions. The first took place in 2011 by the Constitutional Court, which annulled several of the provisions of the FLAA 2008. The second revision was the result of the enactment of the FLAA 2013.⁸⁸ The European Commission against racism and Intolerance ('ECCRI'), in 2015, recognised that one of the most significant improvements in the FLAA 2013 was in relation to widening access to 'primary legal aid'.⁸⁹ Reforms to primary legal aid included lowering the means test, and simplifying the overall procedure for obtaining legal aid.⁹⁰ However, the criticisms aimed at FLAA 2008 are also applicable to the FLAA 2013, namely in relation to the funding of legal aid. Without continuous and increased financial support to those institutions providing free legal aid, such as law clinics, the scheme would not function adequately.⁹¹ According to the Report on the European Commission for the Efficiency of Justice ('the Report'), funds spent per capita on legal aid in Croatia were far below that of other European countries.⁹² The Report

⁸³ FLAA (Official Gazette no. 62/2008).

⁸⁴ 'Higher education institutions that conduct university studies in the scientific field of law may, through legal clinics, and in accordance with its regulations, can provide primary legal aid'. See čl. 14. ZBPP'08.

⁸⁵ Preložnjak (n10) 374.

⁸⁶ Zvonimir Jelinić, 'Legal Clinics and Access to Justice in Croatia: Perspectives and Challenges' (2017) 5(1) Asian Journal of Legal Education 99–108, 101.

⁸⁷ Ibid.

⁸⁸ (Official Gazette no. 143/2013). The FLAA 2013 came into force on 1 January 2014.

⁸⁹ ECRI Conclusions on the Implementation of the Recommendations in respect of Croatia Subject to Interim Follow-up adopted on 18 March 2015 6 (CRI/2015/22).

⁹⁰ ECRI Conclusions on the Implementation of the Recommendations in respect of Croatia Subject to Interim Follow-up adopted on 18 March 2015 6 (CRI/2015/22).

⁹¹ ECRI Conclusions on the Implementation of the Recommendations in respect of Croatia Subject to Interim Follow-up adopted on 18 March 2015 6 (CRI/2015/22).

⁹² European Commission for the Efficiency of Justice, European Judicial Systems: Efficiency and Quality of Justice 66–80 (CEPEJ Studies no. 23, Edition 2016, 2014 data). The report is available at <<http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/CEPEJ%20Study%202023%20report%20EN%20web.pdf>> accessed 06 February 2021.

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also raises concerns regarding the decrease in approved public funding applications in relation to legal aid.⁹³

Lack of legal aid funding impacts on the ability of clients to exercise their life choices and to protect their rights. Under European Union and Council of Europe, member states, such as Croatia, are required to take steps to ensure equal access to legal proceedings. This can be facilitated through appropriate legal aid systems.⁹⁴ The right to legal aid ensures effective access to justice for individuals who have insufficient financial means to cover the cost of court fees or costs of legal representation.⁹⁵ Thus, legal aid is more than simply the financial ability to access the justice system. Legal aid allows clients to protect themselves against infringement of their rights, to hold executive and judicial powers accountable, and to defend themselves in civil and criminal proceedings. Without legal aid, injustice may be left unremedied.⁹⁶ Therefore, legal aid funding is crucial to supporting clients who lack the means to afford a lawyer. However, member states, such as Croatia, are free to decide how to meet their legal aid obligations.⁹⁷ This means that there is no obligation on the Croatian government to provide legal aid in all proceedings.⁹⁸ Croatia is permitted to establish selection procedures to determine whether legal aid will be granted in civil cases, on the condition that the selection procedure must not be carried out arbitrarily.⁹⁹ This selection procedure, however, might prohibit certain clients from accessing the justice system.

The Free Legal Aid Act 2013

The status of clinics as providers of legal assistance is recognised by the FLAA 2013 which defines a clinic as ‘an organizational unit of a higher education institution conducting university studies in the scientific field of law which, in accordance with its general acts, provides primary

⁹³ European Commission for the Efficiency of Justice, *European Judicial Systems: Efficiency and Quality of Justice* 66–80 (CEPEJ Studies no. 23, Edition 2016, 2014 data). The report is available at <http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/CEPEJ%20Study%202023%20report%20EN%20web.pdf>; ⁷⁸ also see Eurostat, *Europe 2020 Indicators: Poverty and Social Exclusion* (data from March 2016), http://ec.europa.eu/eurostat/statistics-explained/index.php/Europe_2020_indicators_-_poverty_and_social_exclusion accessed 06 February 2021.

⁹⁴ Council of Europe, Committee of Ministers *Resolution 78(8) on legal aid and advice* (1978) 2 March 1978.

⁹⁵ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to access to justice* (Publications Office of the European Union 2016), 58.

⁹⁶ Jonathan Herring, *Legal Ethics* (2nd edn, OUP2016), 233.

⁹⁷ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to access to justice* (Publications Office of the European Union 2016), 58.

⁹⁸ ECtHR, *A v the United Kingdom*, No. 35373/97, 17 December 2002, [97].

⁹⁹ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to access to justice* (Publications Office of the European Union 2016), 60.

Verso header

legal assistance'.¹⁰⁰ Although clinics in Croatia do not possess separate legal personalities, they do operate within law schools as separate units whose primary function is to provide clients with 'primary legal aid'.¹⁰¹ As of 2017, three out of a total of four law schools offer legal assistance to clients from low socio-economic backgrounds: Zagreb, Split, and Osijek.¹⁰² In these clinics, students provide clients with general legal information, legal advice, and prepare written legal opinions. Students are not permitted to directly represent clients in court proceedings; however, they are permitted to attend court and assist persons who are authorised to represent clients in court.¹⁰³

A key feature of the FLAA 2013 is the availability of public funds to law clinics.¹⁰⁴ The FLAA 2013 provides that '[f]unds for organizing and providing legal assistance shall be provided in the state budget...and from the funds of bodies of local and regional self-government units, as donations and other revenues in accordance with the law'.¹⁰⁵ Croatian law schools, as public institutions of higher education, receive funding from the state budget. However, the amount of funds allocated for the provision of legal aid appears to decrease every year.¹⁰⁶ This is problematic in terms of individuals being able to protect their rights and pursuing their life choices.

FLAA 2013 consolidates various provisions relating to the form and scope of the provision of legal aid.¹⁰⁷ The purpose of legal assistance is 'the effective realization of legal protection and access to court and other public bodies under equal consideration'.¹⁰⁸ The FLAA regulates, inter alia, the types and scope of free legal aid ('legal aid'), beneficiaries of legal aid, procedure and conditions for obtaining legal aid, and legal aid providers.¹⁰⁹ Article 4 paragraph 5 defines a 'legal aid provider' to be 'an office, a licensed association, a higher education institution and a lawyer who provide[s] legal assistance in accordance with this Law'. The FLAA 2013 distinguishes between two types of legal aid: primary and secondary.¹¹⁰ The latter includes:

a general legal information

¹⁰⁰ Article 4, para 8, FLAA 2013.

¹⁰¹ Jelinic (n86) 105.

¹⁰² Ibid. 106.

¹⁰³ Art 16 Para 2 of the Ordinance of study. See:

https://www.pravo.unizg.hr/oldwww2018/fakultet/propisi/pravilnik_o_studiju.

¹⁰⁴ Article 36, para 1, FLAA 2013.

¹⁰⁵ Articles 35, FLAA 2013.

¹⁰⁶ Ministry of Justice Free Legal Aid website: <https://pravosudje.gov.hr/besplatna-pravna-pomoc/6184> accessed 26 January 2021.

¹⁰⁷ Jelinic (n86) 103.

¹⁰⁸ Article 3, FLAA 2013.

¹⁰⁹ Article 1, FLAA 2013.

¹¹⁰ Article 8, FLA 2013.

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- b legal advice
- c filing submissions before public authorities, the European Court of Human Rights and international organizations in accordance with international treaties and rules of procedure for those bodies
- d representation in proceedings before public bodies
- e legal assistance in out-of-court amicable settlement of the dispute.¹¹¹

Primary legal aid can be provided in any legal matter:

- a if the applicant himself does not have sufficient knowledge and ability to exercise his right
- b if the applicant is not provided with legal aid under specific rules
- c if the application is not manifestly ill-founded and
- d if the applicant's material circumstances are such that the payment of professional legal assistance could jeopardize the dependency of the applicant and the household members.¹¹²

Secondary legal aid, on the other hand, focuses on representation in judicial proceedings and includes the following:

- a legal advice
- b making submissions in the process of protecting the rights of workers before the employer
- c making submissions in court proceedings
- d representation in court proceedings
- e legal assistance in the amicable settlement of the dispute.

(2) Secondary legal assistance also includes:

- a exemption from court costs
- b exemption from court fees.¹¹³

The distinction between the two forms of legal aid places a restriction on the level of assistance clinics are permitted to offer. It is difficult to justify this distinction particularly in circumstances where CLE students are supervised by lawyers.

Applying Rawls' theory of justice to CLE

CLE can be enhanced by incorporating analysis of the issues surrounding the funding of legal aid and law clinics. The application of Rawls' theory of justice to social institutions, such as the MoJ and universities, involves the following steps:

1. Reflecting on whether legal aid should be a primary social good;
2. In the 'original position' and behind the 'veil of ignorance' students consider the principles of justice; and
3. Critique the FLAA using the principles of justice.

Legal aid as a primary social good

Rawls did not include access to legal aid as a social primary good and, thus, a subject of fair distribution. However, there are three reasons for including legal aid as a primary social good.

Firstly, in relation to Rawls' theory of justice, legal aid provides an opportunity for individuals

¹¹¹ Article 9, FLAA 2013.

¹¹² Article 10, FLAA 2013.

¹¹³ Article 12, FLAA 2013.

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to access the justice system to protect their primary goods and facilitates the realisation of the fundamental rights and freedoms listed in the Principle of Equal Liberty. Secondly, including legal aid protects clients who are unable to afford legal representation from the negative consequences of natural lottery and the vicissitudes of life. Thirdly, the Difference Principle commands that goods are distributed for the benefit of the less fortunate members of society. Therefore, resources ought to be allocated to ensure that university clinics are able to provide legal assistance to clients with limited financial means.

The original position and the veil of ignorance

The next step in relation to applying Rawls' theory to CLE is for students to imagine themselves in the 'original position' behind the 'veil of ignorance'. The latter serves as an analytical tool to reflect on the role of social institutions such as the MoJ. The Difference Principle provides that any inequalities which emerge, in terms of legal aid funding, should only be tolerated in so far as they benefit the least advantaged.¹¹⁴ Thus, Rawls' theory promotes an egalitarian approach to CLE and prioritises the well-being of those clients who are worse off in terms of their financial ability to access justice.

Rawls' theory of justice and the FLAA 2013

The final stage involves students reflecting on the adequacy of the FLAA 2013 in terms of the scope of statutory legal assistance clinics are permitted to offer. This raises the question of whether clinics should be allowed to offer secondary legal aid to their clients. Individuals who do not have the financial means to engage a fee-paid lawyer are limited in their options in terms of accessing the justice system. The scope of primary legal aid restricts the level of assistance clinics are able to provide to their clients. A further issue is that the means-based eligibility criteria may cause difficulties for clients who do not pass the eligibility test under the FLAA 2013, but at the same time these clients may not have the financial means to meet the anticipated costs of resolving their legal issue(s).¹¹⁵ As a result, individuals may not be able to protect their primary social goods or realise their life choices. The problems caused by distinguishing between primary and secondary legal aid are further compounded by the reduction of state funds available to clinics. It is, therefore, not difficult to conclude that the FLAA 2013 fails to promote access to justice.

¹¹⁴ Campbell (n34) 87.

¹¹⁵ Jelinic (n86) 104.

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Limitations of Rawls' theory of justice

While Rawls' theory of justice, as formulated in the book of that name, continues to have significant impact, it has attracted a number of criticisms.¹¹⁶ Firstly, Michael Sandel argues that Rawls' account of the original position and its descriptive premises suffer from ambiguity.¹¹⁷ For example, it is not clear why those who are not in the 'original position' should accept and adopt principles chosen by those who were.¹¹⁸ Rawls' assertion that the conditions and constraints of the 'original position' provide a model of procedural fairness, which renders it acceptable by everyone, does not provide an adequate justification. The 'original position' also fails to address the issue of bias in relation to the fair selection of the principles. Milton Fisk states that it is impossible to separate individuals from their material circumstances:

The thoughts one takes an interest in defending are one's own rarely in more than the sense that one is willing to defend them... They are... inculcated by institutions. And these institutions are strengthened by people defending these very thoughts.¹¹⁹

Similarly, GA Cohen criticises Rawls' reliance on the 'original position' on the grounds that it renders the principles of justice dependent on non-moral factors which are themselves misguided.¹²⁰

Secondly, Rawls' Difference Principle is insufficiently egalitarian. For Marxists such as Cohen, equality has a prominent place in their conception of social justice and, therefore, the income and wealth enjoyed by members of a society should be equal. Socialist egalitarians, on the other hand, do not believe in strict equality but follow Rawls' Difference Principle, which states that social and economic inequalities are 'the greatest benefit of the least advantaged'. For Rawls, the Difference Principle is 'an agreement to regard the distribution of natural talents as a common asset and to share in the benefits of this distribution whatever it turns out to be'.¹²¹

¹¹⁶ Brian Barry, *The Liberal Theory of Justice: A Critical Examination of the Principal Doctrines in A Theory of Justice by John Rawls* (OUP1973); Thomas W Pogge, *Realizing Rawls* (Cornell University Press 1989); Amartya Sen, 'Amartya, 'Human Rights and Capabilities' (2005) 6(2): Journal of Human Development 151; Nussbaum, Martha, *Frontiers of Justice: Disability, Nationality, Species Membership* (Belknap Press 2006).

¹¹⁷ Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press 1982), 24–46.

¹¹⁸ Thomas Nagel, 'Rawls on Justice' in Norman Daniels (ed.), *Reading Rawls: Critical Studies on Rawls' Theory of Justice* (SUP 1975), 1; Ronald Dworkin, 'The Original Position' in Norman Daniels (ed.), *Reading Rawls: Critical Studies on Rawls' Theory of Justice* (SUP 1975), 16.

¹¹⁹ Milton Fisk, 'History and Reason in Rawls' Moral Theory' in Norman Daniels (ed.), *Reading Rawls: Critical Studies on Rawls' Theory of Justice* (SUP 1975), 53.

¹²⁰ G A Cohen, *Rescuing Justice and Equality* (2008).

¹²¹ Rawls *A Theory of Justice* (n22) 101.

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Verso header

Cohen doubts whether the Difference Principle ‘justifies any significant inequality’.¹²² He contends that the Difference Principle should be based on equality, because social inequalities harm the worse off.¹²³

Thirdly, Rawls views natural talents as a ‘collective asset’ to be distributed in a manner whereby ‘the more fortunate are to benefit only in ways that help those that have lost out’.¹²⁴

Nozick, in his book *Anarchy, State, and Utopia*, which offers a libertarian alternative to Rawls’ theory, writes, ‘individuals have rights, and there are things no person or group may do to them (without violating the rights)’.¹²⁵ Thus, to regard a person’s natural assets as common property is contrary to deontological liberalism’s defence of the inviolability of the individual.¹²⁶

Fourthly, Rawls’ theory, which views primary social goods as ‘metrics of justice’,¹²⁷ is faulted on the grounds that it fails to take into account individuals with disabilities. The parties in the ‘original position’ imagine themselves to be free and equal and measure well-being in terms of an index of primary social goods. Due to the fact that relative well-being is measured in terms of income and wealth,¹²⁸ ‘natural disability is no basis for any sort of compensation in the Original Position’.¹²⁹ This suggests that the needs of people with disabilities will be not be provided for. An alternative approach, advanced by Amartya Sen and Martha Nussbaum, is known as the capabilities approach. According to Sen:

[T]he primary goods approach seems to take little note of the diversity of human beings... If people were basically very similar, then an index of primary goods might be quite a good way of judging advantage. But, in fact, people seem to have very different needs varying with health, longevity, climatic conditions, location, work conditions, temperament, and even body size... So what is involved is not merely ignoring a few hard cases, but overlooking very widespread and real differences.¹³⁰

¹²² G A Cohen, ‘Incentives, Inequality, and Community’ in Grethe B Peterson (ed.), *The Tanner Lectures on Human Values* (UUP 1992), 178–179. Emphasis in original.

¹²³ Ibid.

¹²⁴ Rawls, *A Theory of Justice* (n22) 179.

¹²⁵ Nozick (n29), ix.

¹²⁶ Ibid., 228.

¹²⁷ Ingrid Robeyns and Harry Brighouse, ‘Introduction: Social primary goods and capabilities as metrics of justice’ in Ingrid Robeyns and Harry Brighouse (eds), *Measuring Justice Primary Goods and Capabilities* (CUP 2012), 6.

¹²⁸ Other primary social goods having been distributed equally.

¹²⁹ Harry Brighouse, ‘Can Justice as Fairness Accommodate the Disabled?’ (2001) 27(4) *Social Theory and Practice* 537, 537.

¹³⁰ Amartya Sen, ‘Equality of What?’ in S McMurrin (ed.), *The Tanner Lectures on Human Values* (UUP and CUP 1980), 215–216.

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Thus, an individual with a disability would not have a claim to additional resources, no matter how severe their disability, under Rawls' two principles of justice. Sen argues that the focus should be on individuals' capability to function.¹³¹ When outlining the type of society to which the Difference Principle applies, Rawls states that he:

[S]hall assume that everyone has physical needs and psychological capacities within the normal range, so that questions of health care and mental capacity do not arise. ... The first problem of justice concerns the relations among those who in the everyday course of things are full and active participants in society and directly or indirectly associated together over the whole span of their life. Thus the difference principle is to apply to citizens engaged in social cooperation; if the principle fails for this case, it would seem to fail in general.¹³²

The physical and mental capabilities of each individual in society (to which Rawls intends his theory to apply) are all 'within the normal range' which permits each individual to become an active participant in society. Thus, Rawls' theory is unable to accommodate individuals with severe mental and physical disabilities.¹³³ To address this limitation in Rawls' theory, Nussbaum's capabilities approach focuses on fundamental human entitlements which should be respected and implemented by all governments 'as a bare minimum of what respects for human dignity requires'.¹³⁴ Thus, Nussbaum is able to extend her theory of justice to those with physical and mental disabilities because the capabilities approach starting point is the conception of the individual as a social animal 'whose dignity does not derive entirely from an idealized rationality'.¹³⁵

Conclusion

The pedagogic objectives of CLE are to teach students to employ legal skills and legal theory, to meet individual and social needs, as well as revealing how law either subverts or enhances public welfare and social justice.¹³⁶ However, without the relevant conceptual analytical tools, students are unable to convincingly critique whether a certain law promotes or hinders welfare

¹³¹ Amartya Sen, 'Justice: Means Versus Freedoms' (1990) 19 *Philosophy and Public Affairs* 111, 112.

¹³² John Rawls, *A Theory of Justice* (revised edition) (HUP1971/1999), 83–84.

¹³³ Robeyns and Brighouse (n127) 4.

¹³⁴ Nussbaum, *Frontiers of Justice Disability, Nationality, Species Membership* (n116) 70.

¹³⁵ Martha Nussbaum, 'Capabilities and Disabilities: Justice for Mentally Disabled Citizens' (2002) 30(2) *Philosophical Topics* 133, 135.

¹³⁶ Wizner (n1) 1935.

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and social justice. Unlike utilitarianism, Rawls' theory of justice aims to constitute a system to ensure the fair distribution of primary social goods.

By incorporating Rawls' theory of justice into CLE, students are able to analyse issues beyond the lawyer-client model. These issues include commercial acumen in terms of the importance of funding of pro bono services, the significance of pro bono services to low-income clients with regards to protecting their rights and bringing claims, and the relationship between legal aid and access to justice. Thus, Rawls' principles of justice provide a useful analytical tool for enhancing reflective practice. The value of applying Rawls' theory to CLE is three-fold. Firstly, students, as rational individuals, are able to reflect on the principles of justice and apply these principles to the legal aid system in Croatia or any other jurisdiction. Secondly, examining social institutions enhances reflective practice beyond the lawyer-client model; students are able to assess whether the current system of legal aid protects the primary goods of their clients. Thirdly, Rawls' theory of justice combines the entitlement of human choice with a concern for clients who are worse off.

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Part 2 Chapter 2

Public interest lawyering and cosmopolitanism: a model for teaching immigration law

Omar Madhloom¹

Word count: 4,877

Introduction

This chapter seeks to incorporate cosmopolitan values into clinical legal education (CLE) in order to enable students to become more than simply transactional lawyers. ‘Cosmopolitan’, derived from the Greek words kosmo and politēs (‘citizen of the world’), is a normative ideal used in various disciplines including education (Papastephanou, 2016), global health justice (Ruger, 2018), moral philosophy (Van Hooft, 2014), and international law (Pierik & Werner, 2010). However, there is a dearth of literature applying cosmopolitan values to CLE. Cosmopolitanism promotes the ideal that every individual, regardless of their citizenship status or other affiliation, enjoys equal moral status (Brock, 2009: 3). Philosophers from Kant to Derrida associate cosmopolitanism with hospitality to the stranger. Thus, cosmopolitanism can be a valuable conceptual pedagogic framework for teaching immigration law in CLE.

In the context of CLE, this chapter aims to address the following questions: Is there a moral duty on law clinics to engage in policy reform? Can and should law clinics engage in immigration law despite, as in some jurisdictions like the UK, being prohibited from advising or otherwise acting for immigration clients? This chapter identifies how and why such clinics can engage students with immigration law and also take part in policy reform. It will integrate cosmopolitan values into CLE providing students with a normative framework for critiquing immigration law. The central aim is to inculcate future lawyers with a moral concept that draws attention to duties towards third parties namely non-citizens. A cosmopolitan approach is

examined in this chapter with the intention of showing how students can be encouraged and even empowered to engage in public interest lawyering.

There are three reasons for applying cosmopolitanism to CLE. First, cosmopolitanism, Kant's right to hospitality, is premised on a moral duty towards non-citizens. Secondly, cosmopolitanism's commitment towards third parties can assist in promoting public interest lawyering and, thus, provides an alternative to the 'hired-gun' approach implicit in much of the practicing legal world. Thirdly, it allows all law clinics to teach immigration law despite possible restrictions on directly assisting immigration clients.

These three reasons promote a pedagogy advocated by Lasswell and McDougal who argued that 'the proper function' of law schools is to train students for 'policy-making' (Lasswell & McDougal, 1943: 206). According to them, a lawyer, even when not directly engaged in effecting change, is 'the one indispensable adviser of every responsible policy-maker of our society' (Lasswell & McDougal, 1943: 208). Exposing students to policy reform not only promotes public interest lawyering but also enhances student employability by providing them with analytical skills to respond to personal, domestic and even global issues such as climate change, refugee crises, and the Covid-19 pandemic. This chapter therefore focuses on developing students in the public interest context and, here, in relation to immigration law.

Clinical legal education and the regulation of immigration advice and services

In England and Wales, anyone is permitted to offer legal advice, provided they do not expressly state or infer that they are a qualified, licensed and/or insured legal practitioner (principally a barrister or a solicitor) unless, of course, they are so qualified in which case they are regulated by relevant legislation and codes of conduct. This is known as 'holding out' and it is a criminal offence to do so if one does not hold such qualifications.² Thus generally, university law clinics are able to engage in pro bono work despite not being regulated entities. Rules may, of course,

vary from one jurisdiction to another. However, this does not mean that unqualified individuals, such as students, can offer legal advice and assistance in any area of law. The Legal Services Act 2007³ (LSA) places restrictions on the type of legal work that can be carried out and by whom. Section 12 of the LSA sets out six specific legal services activities, referred to as ‘reserved legal activities’, that only those who are authorised, can carry out. Lawyers carrying on these activities are regulated by the approved regulator, primarily the Solicitors Regulation Authority (SRA) and the Bar Standards Board (BSB).

In relation to immigration clients, the Office of the Immigration Services Commissioner (OISC) regulates the provision of immigration advice and services in the United Kingdom (UK). ‘Immigration advice’ and ‘immigration services’ are defined in s. 82(1) of the Immigration and Asylum Act 1999 (IAA 1999). Section 84(2) of the IAA 1999 allows persons to provide immigration advice and services provided they are authorised to practise by a designated qualifying regulator such as the SRA or BSB. Only a qualified person may provide immigration advice or services.⁴ A person who offers immigration advice or immigration services in contravention of s. 84 of the IAA 1999 is guilty of a criminal offence. Thus, clinic students are restricted from offering immigration advice and services. Similarly, unregulated law clinics are prevented from offering immigration advice and services. A qualified practising lawyer can provide such services in a clinic but only in his or her name. Students may assist such a person.

The OISC’s Position Statement (2018) justifies this ban the ground that ‘those seeking immigration advice and/or services in the UK should receive them from persons who are fit and competent’. However, this prohibition restricts access to justice for vulnerable immigration clients who may be unable to secure help elsewhere, The restrictions on who can provide immigration services coupled with the cutbacks (in England and Wales) in public funding

(Legal Aid and state support for the not-for-profit sector) mean that many people are effectively denied access to a lawyer in immigration and asylum cases (see also Chapter 2.3).

Section 84 of the IAA 1999 could be amended to allow unregulated clinics to provide immigration advice and assistance. In the interim, unregulated law clinics have three options available to them in terms of engaging their students with immigration law. They can partner with immigration law firms with students gaining immigration law experience through externships. Another route for clinics is to register with the SRA as an Alternative Business Structure (ABS).⁵ In basic terms, an ABS is a law firm that is permitted to have non-lawyer ownership and management (Campbell, 2014; Aulakh & Kirkpatrick). By registering as an ABS⁶ a clinic is treated as a separate legal entity from its university and its clinicians are employees of the ABS rather than by the host university (Thomas et al, 2018: 17). A third is to adopt a theoretical approach to teaching immigration law and policy reform. This can be achieved by going it alone or partnering with immigration/refugee non-governmental organisations (NGOs) and charities such as Amnesty International, Bail for Immigration Detainees (BID), and Refugee Action. At first glance the third option might appear to resemble the first alternative, especially in relation to NGOs that are OISC accredited to provide immigration services. However, not all NGOs are OISC accredited.

Here clinic students focus on research and policy reform rather than providing immigration advice and services to individuals. The results can be shared with others, such as partner organisations, in developing knowledge and understanding and possibly shaping policy.

The issue of duties towards individuals, who are unable to access legal services, including law clinics, raises two normative questions: What is the moral basis for such duties? How far should these duties extend? These questions will be addressed with the aims of developing public interest lawyering among students volunteering in unregulated law clinics. The remainder of

this chapter will focus on how the University of Bristol Law Clinic (UBLC), an unregulated clinic, has integrated immigration law into its CLE curriculum despite not providing immigration advice and services. To meet its pedagogic aims of educating clinic students to act in the public interest, the UBLC has opted to train students to become policy-makers through public interest lawyering.

CLE and public interest lawyering

The term ‘public interest law’ entered the legal lexicon in the United States in the 1960s to describe a movement that utilised litigation to promote a political agenda with the aim of protecting and expanding the rights of disadvantaged groups, while also seeking to protect collective interests, such as environmental protection (Chen & Cummings, 2013: 5). Thus, some lawyers choose to devote their careers to promoting a version of the public good through various means such as representing individual clients, pursuing specific causes, or both (Gordon, 2011; Chen & Cummings, 2013: 4). Although public interest law is a contested term, Nan Aron (1989, 3) proffers the following definition:

Public interest law is the name given to efforts to provide legal representation to interests that historically have been unrepresented in the legal process. philosophically, public interest rests on the assumption that many significant segments of society are not adequately represented in the courts...or the administrative agencies, because they are either too poor to defuse to obtain legal representation in the marketplace.

A public interest lawyer is one who is attentive to something or someone beyond their commitment to their client (Chen & Cummings, 2013: 278). Unlike the conventional portrayal of a value-free lawyering model, public interest lawyering provides students with a moral commitment to advocate for causes, such as immigration rights, that reach beyond the

traditional lawyer-client model. Cause lawyering aims to ‘reconnect law and morality’ (Sarat & Scheingold, 1998: 3) by challenging the central activity of the legal profession, namely the provision of legal services in exchange for payment. This is achieved through amending aspects of the social, political, or economic status quo.

The limitations of the conventional lawyering model were recently highlighted by the SRA. Solicitors were reminded that they are not merely ‘hired guns’ whose only duty is to their clients. According to the SRA Chief Executive, Paul Philip, ‘[solicitors] also owe duties to the courts, third parties and to the public interest. It is important for solicitors to recognise their wider duties and never to rationalise misconduct on the mistaken basis that their only duty is to their client’ (SRA, 2018b). However, the SRA omitted to provide a definition of ‘public interest’.

CLE and the concept of ‘public interest’

In political philosophy and political theory, public interest suggests a ‘type of commonality or common characteristic between and among citizens’ (King et al, 2010: 957). This definition excludes non-citizens, such as asylum seekers and other migrants and is, therefore, limited in its scope in terms of providing a basis for locating an unregulated clinic’s duties towards immigration clients. An alternative definition is supplied by Michael Harmon (Harmon, 1969: 485), who argues that public interest is ‘the continually changing outcome of political activity among individuals and groups within a democratic political’. Harmon’s conception of the public interest suggests a utilitarian approach to policy decisions. Public interest lawyering that is underpinned by utilitarian theory risks prioritising public opinion on issues such as immigration. Utilitarianism is part of broader philosophical approach where ‘normative properties depend on the consequences’ (Sinnott-Armstrong, 2019).

Public interest and utilitarianism

Classical utilitarianism, represented by Jeremy Bentham, John Stuart Mill, and Henry Sidgwick, holds that moral individuals must strive to increase the general level of social happiness. Utilitarianism has the advantage of providing a method of determining the net utility of one action over disutility of others. Actions can be weighed against the net utility and in the light of available alternatives (Nicolson & Webb, 1999: 24). Despite providing a simplistic system of calculation, the difficulty of measuring the objective value of social goods risks allowing one section of society to impose their views on others, as is demonstrated perhaps by apparent commonly held public views on migrants and immigration.

A recent report (Blinder & Richards, 2020) analysing public opinion in the UK reveals that the British public distinguishes between different types of migrants, showing a preference for the highly skilled over unskilled migrants. Respondents also expressed a preference for migrants from certain countries such as Australia over others, for example Nigeria and Pakistan (Blinder & Richards, 2020). Applying a utilitarian approach to immigration policies that caters British attitudes towards certain migrants can lead to hostile and discriminatory policies.⁷ Utilitarianism shows insufficient respect for equality and liberty (Nicolson & Webb, 1999: 27), and, therefore, fails to promote public interest lawyering. A rival ethical theory to consequentialism is deontology. A deontological approach to CLE is examined below to determine its feasibility in promoting public interest lawyering.

Public interest and deontology

Deontology, derived from the Greek words for deon (duty) places obligation, both to one's self and to others, at the heart of morality (Alexander & Moore, 2016). For deontologists, an action is deemed to be morally right or wrong not because of the consequences it produces but due to

its conformity to a specific moral law or principle. A fundamental feature of deontology is the principle that a breach of a deontological principle such as lying to a client, cannot be considered only by reference to the consequences. In other words, actions are judged not on the cause or effect they produce but on what our duty demands. An example that illustrates the difference between consequentialism and deontology in CLE might be a student advisor who, following the professional codes of conduct, acts in the best interest of their client (SRA, 2020: Principle 7) by focusing on the outcomes of their client's case. This approach mirrors the conventional lawyering model which the SRA has warned against (SRA, 2018a). A deontologist, on the other hand, might take into consideration the impact of the client's instructions on third parties (Eberle, 1989).

A difficulty which deontologists face is explaining what the principles are and their origin (Herring, 2018: 16). A further limitation relates its rigid adherence to deontological principles, regardless of the consequences. An example of this rigidity would be a scenario where a student, volunteering in a law clinic, is asked by the police about the whereabouts of a client. In a regulated clinic, the clinic (or more accurately the supervising lawyer) would be bound by the professional codes of conduct which include a duty of confidentiality. However, a committed deontologist would demand that the student should tell the truth despite the consequences of breaching client confidentiality. Regardless of these limitations, I suggest that deontology can be a useful framework for promoting public interest lawyering in relation to teaching immigration law.

Immanuel Kant is widely regarded as a leading exponent of this moral approach to decision-making. What makes Kant's ethical position attractive for present purposes is his fundamental principle which states that we must never use others simply as a means to an end (Kant, 1948: [4: 429]). For Kant, respect towards others is necessary due to their dignity (Kant, 1948: [4: 435]). Michael Sandel, adopting a Kantian approach, equates dignity with a person's capacity

as an autonomous agent to choose ends for themselves (Sandel, 1996: 82). Autonomy, according to Kant, involves individuals acting in accordance with reason, which is universally accessible (Kant, 1948: 4: 436). A Kantian approach, with its commitment to the moral law, dignity, and autonomy, provides an alternative to the conventional lawyering model, where the lawyer offers options among which the client chooses with minimal intervention from the lawyer, who then zealously pursues the client's aims. A Kantian lawyering model, on the other hand, involves the lawyer guiding the client through the various options while taking into consideration the client's values and the impact of the client's decision on others who may be affected. An example of this would be a government legal advisor who has been instructed to advise on immigration policies which restrict certain migrants from entering the UK and to create a 'hostile environment' for migrants in the UK. A lawyer adopting the conventional model would act as instructed and disregard impact on migrants. This can be contrasted with a Kantian approach where morally consideration must be taken of the impact of such laws might have on the dignity and autonomy of migrants.

With regards to developing public interest lawyering in CLE, we can draw on Kant's argument (2006: [8: 304]) that citizens have the right to inform their governments of any injustices and petition for redress and reform. Kant's philosophy, therefore, not only assists CLE in addressing the SRA's warning against the prevalence of the 'hired gun' approach, but it can also provide an analytical tool for critiquing UK immigration laws towards non-citizens, namely undocumented migrants. Let us now turn to Kant's theory of cosmopolitanism.

Kant's theory of cosmopolitanism

In 'Toward Perpetual Peace' (TPP), Kant (Kant, 2006: [8: 358]) equates the idea of a 'Cosmopolitan Right' to 'hospitality' which he defines as 'the right of a stranger not to be treated in a hostile manner by another upon his arrival on the other's territory'. Kant's cosmopolitanism, which is a right as opposed to philanthropy (Kant, 2006: [8: 358]), is not an

absolute right. A stranger can be turned away provided this can be achieved without their death (Untergang) and the stranger must not be treated with hostility, ‘so long as he behaves in a peaceable manner in the place he happens to be’ (Kant, 2006: [8: 358]). Under this right, non-citizens can claim the ‘right of resort’, which everyone possesses ‘by virtue of the right of common possession of the surface of earth’ (Kant, 2006: [8: 358]).

Although Kant did not explicitly mention the rights of refugees and economic migrants, the plight of refugees in eighteenth-century Europe⁸ is unlikely to have escaped his attention. In an early draft for TPP Kant (cited in Kleingeld, 1998: 78) argues that ‘a ship seeking a port of refuge in a storm, or a stranded group of sailors cannot be chased away from the beach... where he saved himself and sent back into imminent danger... instead, he must be able to stay there until there is a favourable opportunity to leave’. Here, Kant not only anticipates the rights of refugees but also the principle of non-refoulement established in the twentieth-century (Kleingeld, 1998: 77; on the rights of refugees, see Goodwin-Gill & McAdam, 2007). Thus, Kant’s cosmopolitanism can be a useful analytical tool in CLE and legal ethics generally, because it affirms an individual’s humanity through respect for their autonomy and the requirement to be afforded hospitality, albeit on the condition that an individual behaves peacefully. It provides a framework for recognising that individuals have a moral right to travel within a global community and not to be treated with hostility.

With such a philosophical framework in mind let me now turn to learning and teaching the law affecting migrants.

Applying Kant’s ethics in the teaching, learning and migration context

The CLE module at the University of Bristol (UB) is an assessed final-year option. The learning outcomes of the module are:

- The ability to understand and summarise theoretical positions

- The ability to compare and contrast different theoretical positions
- Understand the application of law in practice and demonstrate an ability to effectively communicate with clients, lawyers and non- lawyers
- The ability to construct a coherent argument defending a position
- Understand the application of law in practice and demonstrate an ability to effectively communicate with clients, lawyers and non- lawyers
- Appreciate and apply alternative methods of dispute resolution
- Demonstrate an awareness of the advocacy techniques appropriate for national tribunals and courts;
- Demonstrate an ability to bridge the gap between the academic study of law and the practical application of law

In addition to advising UB law clinic (UBLC) clients, CLE students are taught through a combination of lectures and two-hour seminars. The module is assessed through coursework whereby students select one essay from a choice of eight. The aim the coursework is to assess the students' ability to reflect on and critique legal and ethical issues that may underpin their experience of the application of the law. The fact that the UBLC does not offer live-client immigration advice and services should not be a barrier to inculcating students with cosmopolitan values. The advantage that CLE has over other substantive and optional subjects/modules/units is that it is a form of experiential learning capable of being adapted to the pedagogic aims of both the module and the students' wider studies. According to Brayne et al (1998: 16), CLE seeks to develop students' critical and contextual understanding of the law and its impact on people's lives. The authors contend that CLE should not be viewed as 'an end in itself but a means by which the law and the legal process can be understood.' (Brayne

et al, 1998: 2). Thus, CLE can be added to the other pedagogies found in law schools such as Langdell's case method, comparative, and socio-legal studies (Thomas et al, 2018: 6). Although CLE lacks a universally accepted definition, Neil Gold (Gold, 2000: 12) writes:

CLE is not a single method or approach to learning lawyering. It knows no jurisdictional boundaries, nor is it culturally limited in its application. It may be adapted to need, environment, context, time and purpose as a complement or supplement to variety of formats for legal education. It can also stand on its own as a powerful methodology - for learning.

In other words CLE has 'educational, public interest, and employability benefits' (Thomas, 2018: 7). At the UBLC, the public interest element is incorporated into the CLE module through lectures on legal ethics. The students are then provided with the opportunity to develop their critical and contextual understanding of the law through a hypothetical scenario based on the UK's government's 'hostile environment' which aims 'to create, here in Britain, a really hostile environment for illegal immigrants' (Kirkup & Winnett, 2012). Students are presented with the following:

You are a lawyer for the UK government and you have been instructed to advise the government on its policy to create a hostile environment for illegal immigrants. The principal objective is to make life as difficult as possible for migrants whom the Home Office deems to be potentially illegal. To create such an environment, the government seeks to deny essential services, such as housing, medical care, employment, and access to justice, to those deemed to be illegal migrants. The government is confident that such policies will resonate with the majority of voters and could help it win the next general election.

How should you advise the government?

A lawyer adopting the conventional lawyer/client approach would act in their client's best interest with limited, if any, consideration of the impact of the proposed policies on migrants in general. A consequential analysis reveals that the proposed immigration policies could result in the government winning the general election. Moreover, a utilitarian would conclude that such policies can potentially promote general 'happiness' in society due to the public's negative attitudes towards illegal migrants. What the conventional model fails to consider is any moral duty the lawyer may have towards migrants.

Cosmopolitanism, on the other hand, views all individuals as members of a single moral community and they owe moral duties to all other individuals, irrespective of their nationality, background, or religion (Brock, 2009: 3). This approach allows students to adopt the view that 'there exists a global community which all people, by virtue of their humanity, are members' (Van Hooft, 2014: 6). The proposed policies are aimed at using illegal migrants as a means, rather than ends in themselves, to win the next election. A cosmopolitan lawyer would conclude that the policies negatively impact on migrant's autonomy and dignity and may advise the government against pursuing such policies.

Conclusion

This chapter has shown that moral cosmopolitanism is closely aligned with the aims of public interest lawyering and can serve as a vehicle for teaching immigration law, despite the regulations preventing some law clinics from offering immigration advice and services. By giving rise to moral duties towards individuals outside our immediate community, cosmopolitanism creates a sense of duty towards third parties and helps address the limitations of the conventional lawyering model. Kantian's ethics is useful to training students in policy reform because of the right citizens, including CLE students, have in relation to informing their

governments of any injustices and to petition for redress and reform on behalf of clients and third parties.

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² The University of Law is the first academic institution to be It is an offence under section 20 of the Solicitors Act 1974 for an unqualified person to act solicitor. <https://www.legislation.gov.uk/ukpga/1974/47/part/I/crossheading/unqualified-persons-acting-as-solicitors>

³ <https://www.legislation.gov.uk/ukpga/2007/29/contents>

⁴ 'Immigration advice' and 'immigration services' are defined in s. 82(1) of the Immigration and Asylum Act 1999.

⁵ Part 5 of the LSA.

⁶ In England and Wales, only three university law clinics are operating as an ABS: the University of Law <https://www.lawgazette.co.uk/practice/university-of-law-granted-abs-status-to-offer-legal-services/5047932.article>; Nottingham Law School at Nottingham Trent University <https://www.ntu.ac.uk/c/legal-advice-centre/client-area>; Sheffield Hallam University <https://www.shu.ac.uk/about-us/academic-departments/law-and-criminology/about-us/hkc-law-clinic>

⁷ For an analysing of the UK's immigration policy and the creation of a 'hostile environment' towards certain migrants, see (Goodfellow, 2019); (Webber, 2019); (Uthayakumar-Cumarasamy, 2020).

⁸ For an account of refugees in eighteenth-century Prussia see (Hans, 1980).

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A Kantian moral cosmopolitan approach to teaching professional legal ethics



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A Kantian moral cosmopolitan approach to teaching professional legal ethics

By Omar Madhloom*

Abstract

This article argues that given the globalisation of legal education and legal services, professional legal ethics should incorporate not only a cosmopolitan dimension but also sentiments such as compassion, respect, and sensitivity for human suffering. Inspired by the philosophy of Immanuel Kant and his theory of education, this article seeks to address some of the limitations of the professional codes of conduct for barristers and solicitors, in England and Wales, by applying a moral cosmopolitan approach to the teaching of professional legal ethics. This normative approach is underscored by a commitment to moral duties to persons irrespective of their nationality, gender, religion or any other defining characteristic. These duties include promoting client autonomy and engaging in law reform. This article also argues that Clinical Legal Education programmes are an appropriate methodology for teaching moral cosmopolitan ethics.

Keywords: Autonomy; Cosmopolitanism; Kantian ethics; Professional legal ethics.

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1. Introduction

Globalisation has not only witnessed the growth of international trade, but also a rise in immigration, the proliferation of the legal market,¹ pro bono services,² and legal education.³ One of the effects of globalisation is that lawyers, regardless of their geographical location, are likely to be dealing with clients from different parts of the world. The teaching of professional legal ethics should, therefore, prepare future lawyers for cosmopolitan legal practice.⁴ Ethics may be defined as the application of moral philosophy to addressing questions of right and wrong.⁵ Inspired by deontological ethics, this article seeks to equip law students to deal with an interconnected and globalised world by incorporating Kantian moral cosmopolitanism (KMC) to the teaching of professional legal ethics for barristers and solicitors, in England and Wales.

In general terms, cosmopolitanism is the idea that moral obligations are owed to all human beings, irrespective of race, gender, nationality, or any other defining characteristics.⁶ Martha Nussbaum, in her influential essay on cosmopolitan education, asserts that moral ideals of justice and equality are best served by a commitment to cosmopolitanism which holds that a person's 'allegiance is to the worldwide community of human beings'.⁷ Consequently, future barristers and solicitors should be taught to be cognizant of moral duties owed to third parties. It will be argued that KMC is a useful conceptual tool for interpreting and expanding the duties contained in the codes of professional conduct for barristers and solicitors. This article also

¹ Alberto Alemanno and Lamin Khadar, 'Introduction' in Alberto Alemanno and Lamin Khadar (eds), *Reinventing legal education: how clinical education is reforming the teaching and practice of law in Europe* (Cambridge University Press, 2018), 1.

² Scott L Cummings et al (eds), *Global Pro Bono: Causes, Context, and Contestation* (Cambridge, 2021).

³ Simon Chesterman, 'The Globalisation of Legal Education' [2008] *Singapore Journal of Legal Education* 58; Christopher Gane and Robin Hui Huang (eds), *Legal Education in the Global Context: Opportunities and Challenges* (Routledge, 2017); Joan Squelch and Duncan Bentley, 'Preparing law graduates for a globalised world' (2017) 51(2) *The Law Teacher* 2.

⁴ John Flood, 'Legal Education in the Global Context: Challenges from Globalization, Technology and Changes in Government Regulation' (Legal Services Board, 2011) < http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/lsb_legal_education_report_flood.pdf > (accessed 15 July 2021).

John Flood and Peter D Lederer, 'Becoming a Cosmopolitan Lawyer' (2012) 80 *Fordham Law Review* 2513; Antonios E Platsas, 'A Cosmopolitan Ethos for our Future Lawyers' (2015) 1 *Law Journal of the Higher School of Economics* 150.

⁵ Derek Sellman, 'Why teach ethics to nurses?' (1996) 16(1) *Nurse Education Today* 44, 44.

⁶ Garrett Wallace Brown and David Held, 'Editor's Introduction' in Garrett Wallace Brown and David Held (eds), *The Cosmopolitanism Reader* (Polity Press, 2010), 1.

⁷ Martha C Nussbaum, 'Patriotism and Cosmopolitanism' in Joshua Cohen (ed), *For Love of Country: Debating the Limits of Patriotism* (Beacon Press, 1996), 4.

contends that Clinical Legal Education (CLE) programmes are an appropriate methodology for teaching KMC.

This article will proceed as follows: after the introduction, part 2 provides a brief outline of the main elements of Kant's philosophy and theory of education. Part 3 discusses the professional codes of conduct for barristers and solicitors and highlights their limitations in relation to moral cosmopolitan education. Part 4 examines the teaching of professional legal education at both the undergraduate and postgraduate level. Parts 5 and 6 examine Kant's theory of ethics in order to construct a moral cosmopolitan framework to supplement the professional codes of conduct. Part 7 argues that CLE are an appropriate methodology for teaching KMC values.

2. Kant and cosmopolitan moral education

There are three broad themes which render Kant's philosophy compatible with the teaching of professional legal ethics. The first is linked to his moral philosophy, while the other two are found in his theory of education. The first concept relates to the idea of autonomy which underpins Kant's moral theory. Prior to Kant, autonomy had been strictly a political term. He was, thus, the first philosopher to import this concept into ethics.⁸ For Kant, morality can only arise from freedom.⁹ Complete freedom is only possible where it is not influenced by 'non-self-determined causes' such as external pressures, for example lawyer coercion, or internal causes, such as a person's personal preferences or inclinations.¹⁰ Freedom, in this strong sense, is autonomy of the will, as opposed to heteronomy, which is the subjection to any determination from either external or internal sources.¹¹ Thus, on Kant's account and drawing on Rousseau,¹² subjection even to the will of God is heteronomy, not freedom.¹³ The concept of autonomy can play an important role in legal ethics by reminding lawyers to treat clients as autonomous individuals and allowing them to reach their own decisions.¹⁴ Heteronomy can also be a useful

⁸ Immanuel Kant, *Groundwork of the Metaphysics of Moral* (first published 1785, HJ Patton tr, Hutchinson & Co 1969) [4: 432]; Michael Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 9th edn 2016), 103.

⁹ *Ibid*, [4: 447]

¹⁰ *Ibid*, [4: 452]. 'Inclination' refers to impulses, including instincts and appetites. See, Robert B Loudon, *Kant's Impure Ethics: From Rational Beings to Human Beings* (Oxford University Press, 2002).

¹¹ *Ibid*, [4: 441]

¹² Jean-Jacques Rousseau, *The Social Contract, A Discourse on the Origin of Inequality, and A Discourse on Political Economy* (Classic Books International, 2010).

¹³ Lloyd L Weinreb, *Natural Law and Natural Justice* (Harvard University Press, 1987), 95.

¹⁴ Andrew Boon and Jennifer Levin, *The Ethics and Conduct of Lawyers in England and Wales* (Hart, 2008), 183.

conceptual tool as it can direct lawyers to be cognizant of pressures impacting on a client's ability to make autonomous decisions.

The second feature relates to Kant's question: 'How then, are we to seek [moral] perfection, and from whence is it to be hoped for?'. His answer is: 'From nowhere else but education'.¹⁵ Although Kant's educational theory is primarily aimed at children, its main tenets are applicable to legal education by virtue of the fact that his objective was to develop moral character:

One must also pay attention to moralization. The human being should not merely be skilled for all sorts of ends, but should also acquire the disposition to choose nothing but good ends. Good ends are those which are necessarily approved by everyone and which can be the simultaneous ends of everyone.¹⁶

Kant's theory of education contains not only a cosmopolitan dimension but also shares a similar aim with professional legal ethics: the cultivation of ethical/moral character.¹⁷ For Kant, pedagogy is either physical or practical.¹⁸ The latter, which is concerned with cultivating personality,¹⁹ consists of: skill, discretion, and morality.²⁰ Skill, is a necessary for the cultivation of talent. Discretion and morality both relate to developing a 'good character'.²¹ Discretion requires self-control because it involves using others for one's own ends. This constraint is necessary to avoid using others as mere means. To develop one's moral character, Kant writes, '[o]ne should give children some pocket money with which they could help the needy, and then one would see whether they are compassionate or not'.²² Moral education involves fostering compassion in students. Kant's advice regarding giving children pocket money to nurture compassion may be interpreted to mean that he supports the idea of providing students with opportunities, grounded in practical experience, to develop their sense of compassion. Third, the concept of duty underscores the professional codes of conduct for

¹⁵ Immanuel Kant, *Lectures on Ethics* (Peter Heath and Jerome B Schneewind eds, Cambridge University Press, 1997), [27:471].

¹⁶ Immanuel Kant, 'Lectures on pedagogy' in Robert B Louden (ed), *Anthropology, History, and Education* (Cambridge University Press, 2007), [9: 450].

¹⁷ Gerald J Postema, 'Moral Responsibility in Professional Ethics' (1980) 55 *New York University Law Review* 63; Kathleen S Bean, 'A Proposal for the Moral Practice of Law' (1987) 12 *Journal of the Legal Profession* 49; Donald Nicolson, 'Making lawyers moral? Ethical codes and moral character' (2005) 25(4) *Legal Studies* 601.

¹⁸ Kant (n 16) [9: 455].

¹⁹ *Ibid.*

²⁰ *Ibid.*, [9: 486].

²¹ *Ibid.*

²² *Ibid.*, [9: 486 - 487].

barristers and solicitors, for example duty of confidentiality, duty to avoid conflict of interest, and the duty to act in the best interest of the client. Kant's educational theory involves instilling students with a sense of duty, which is divided into duty to oneself and duty towards others. The latter requires '[r]everence and respect for the rights of human beings'.²³ Kant argues that it is essential that students are given the opportunity to 'put [reverence and respect] into practice'.²⁴ Thus, practice-oriented education is an essential element of Kant's theory of moral education. The next section will examine the professional codes of conduct and highlights some of their limitations in relation to moral development.

3. The professional codes of conduct for barristers and solicitors

The legal profession, in England and Wales, is divided into two main branches: barristers and solicitors. Barristers are regulated by the Bar Standards Board's (BSB),²⁵ while the Solicitors Regulation Authority (SRA)²⁶ is responsible for the regulation and education of solicitors. The BSB's role includes setting out the education and training requirements for becoming a barrister and setting the standards for professional conduct in the BSB's Handbook.²⁷ The Handbook includes the Code of Conduct, which contains the ten core duties (CDs) that underpin the BSB's regulatory framework, and the conduct rules (rCs), which are designed to supplement the CDs. The codes of professional conduct for solicitors are in The SRA's Standards and Regulations. These provide two codes of professional conduct: a code for law firms and a code for solicitors.²⁸ The Standards and Regulations also stipulate the seven Principles, which are 'the fundamental tenets of ethical behaviour' which solicitors must uphold.²⁹ In the event of a conflict between the Principles, those that safeguard the wider public interest (Principles 1 and 2), take precedence over an individual client's interest (Principle 7).³⁰

²³ Kant (n 16) [9: 489].

²⁴ Ibid.

²⁵ Bar Standards Board, 'Welcome to the BSB' < <https://www.barstandardsboard.org.uk/> > (accessed 15 July 2021).

²⁶ Formed by the Legal Services Act 2007.

²⁷ Bar Standards Board, 'The BSB Handbook' < <https://www.barstandardsboard.org.uk/for-barristers/bsb-handbook-and-code-guidance/the-bsb-handbook.html> > (accessed 15 July 2021).

²⁸ Solicitors Regulation Authority, *SRA Standards and Regulations 2019* (The Law Society 2020). Also available online: Solicitors Regulation Authority, *SRA Standards and Regulations* < <https://www.sra.org.uk/solicitors/standards-regulations/> > (accessed 15 July 2021).

²⁹ Solicitors Regulation Authority (n 28).

³⁰ Ibid.

In its 2018 report entitled *Balancing duties in litigation*, the SRA warned solicitors they are not ‘hired guns’³¹ whose only duty is to their client; solicitors also owe duties to the courts, third parties and to the public interest.³² The report highlights incidents where solicitors have engaged in improper or abusive litigation such as taking unfair advantage of unrepresented parties, misleading the court, or acting for clients whose cases are weak or unwinnable. The report also found that some solicitors pursued their own interests at the expense of their clients. KMC, with its commitment to autonomy and dignity, can address some of the concerns raised in the SRA’s report. Although the Handbook and the Standards and Regulations provide guidance on ethical behaviour, they suffer from various limitations.

2.1 The limitations of the professional codes of conduct

The teaching of professional legal ethics is intended to prepare future lawyers to address ethical dilemmas such as conflict of interest (CD6; paragraphs 6.1 – 6.2 of the Standards and Regulations), acting with integrity (CD 3; Principle 5), and acting in the best interest of their client (CD2; Principle 7). Although these dilemmas can be resolved by following the professional codes, there are various limitations associated with the sole reliance on the professional codes of conduct. First, they ‘will only help develop the sensitivity and judgment to recognise possible breaches of the rules and how to apply them’.³³ Second, a common aim of professional codes is to outline the norms of professional practice. They outline, inter alia, the obligations owed to clients, general ethical principles, and advice on how these principles may apply in a practical context.³⁴ Thus, breach of the SRA’s Principles and/or duties owed to clients, such as the duty of confidentiality, can result in disciplinary action brought against the law firm and the lawyer. The professional codes are, therefore, primarily concerned with censure and maintaining the public’s trust, rather than promoting moral reasoning. Third, professional codes are drafted to protect the ‘ideal of the lawyer as an adversarial advocate’.³⁵ However, the adversarial approach not only encourages moral neutrality but also privileges the

³¹ Monroe H Freedman, ‘The Lawyer as a Hired Gun’ in Allan Gerson (ed), *Lawyers’ Ethics: Contemporary Dilemmas* (Transaction Inc, 1980), 63; Ted Schneyer, ‘Some Sympathy for the Hired Gun’ (1991) 41(1) *Journal of Legal Education* 11.

³² Solicitors Regulation Authority, *Balancing duties in litigation* (2018) < <https://www.sra.org.uk/risk/risk-resources/balancing-duties-litigation/> > (accessed 15 July 2021).

³³ Donald Nicolson, ‘Teaching and learning legal ethics: what, how and why?’ in Richard Grimes (ed), *Re-thinking Legal Education Under the Civil and Common Law: A Road Map for Constructive Change* (Routledge, 2017), 88.

³⁴ Jonathan Herring, *Legal Ethics* (2nd edn, Oxford University Press, 2016), 40 – 41.

³⁵ Scott R Peppet, ‘Lawyers’ Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism’ (2005) 90 *Iowa Law Review* 475, 479.

interest of the client.³⁶ A possible consequence of privileging client's interest is that students may be trained to adopt a 'hired-gun' approach. However, as stated in *Balanacing duties in litigation*, solicitors also owe duties to the courts, third parties and to the public interest.³⁷ Fourth, using the codes of conduct to teach professional ethics, without a 'coherent theme or explicit moral philosophy',³⁸ limits the resolution of ethical problems to the application of the rules contained in the codes. Professional codes are, therefore, limited in their application to 'easy cases'. Moral philosophy can enhance the scope of the codes of conduct by promoting ethical decision-making and a cosmopolitan ethos.

Fifth, professional codes generally set out the minimum requirements of ethical behaviour.³⁹ However, prescribing a set of norms is not the same as providing a framework for guiding the lawyer's conduct. Promoting professional legal ethics among students and lawyers should require more than simply positing a set of minimum standards of behaviour. Lawyers ought to be taught to address situations which are either not included in the codes of ethics or included but are ambiguous. An example of the latter is the duty to act in the best interest of the client (CD2; Principle 7). Lawyers, for example, must decide whether to act in a manner that promotes client autonomy or adopt a paternalistic approach. This may contribute to inconsistent behaviour on the part of the lawyer. Moreover, owing to the fact that autonomy and paternalism are complex philosophical terms, students should be given guidance in relation to interpreting these concepts. Finally, given the globalisation of the legal profession, it is debatable whether the codes of conduct can address ethical issues in the international arena, such as local customs and the values and expectations of clients in different jurisdictions.⁴⁰ One approach to addressing the limitations of the Handbook and the Standards and Regulations is to incorporate KMC into the teaching of legal ethics.

4. Teaching professional legal ethics in England and Wales

Currently, students who wish to qualify as barristers or solicitors must successfully complete three stages. The first involves the completion of either a law degree or the Graduate Diploma

³⁶ César Arjona, 'Amorality explained: Analysing the reasons that explain the standard conception of legal ethics' (2014) 4 Ramón Llull Journal of Applied Ethics 51, 59.

³⁷ Solicitors Regulation Authority (n 32).

³⁸ Seow Hon Tab, 'Teaching legal ideals through jurisprudence' (2009) 43(1) *The Law Teacher* 14, 20.

³⁹ Jonathan Herring (n 34) 7.

⁴⁰ Laurence Etherington and Robert Lee, 'Ethical Codes and Cultural Context: Ensuring Legal Ethics in the Global Law Firm' (2007) 14(1) *Indiana Journal of Global Legal Studies* 95, 97.

in Law (GDL).⁴¹ This is then followed by a vocational programme: the Bar Professional Training Course (BPTC) for barristers, or the Legal Practice Course (LPC) for solicitors. The final stage is the apprenticeship: a one-year pupillage for barristers or working as a trainee-solicitor for two years.

Despite Economides and Roger's recommendation to the Law Society that legal ethics should be mandatory in undergraduate law degrees, the teaching of legal ethics is not a compulsory part of the law degree or the GDL.⁴² It is, however, included as part of the BPTC and the LPC, albeit in a limited way.⁴³ The teaching of ethics on the vocational courses is predominantly concerned with the application of the professional codes to hypothetical scenarios. There is, therefore, scope for the teaching of legal ethics to be enhanced by engaging students with a philosophical framework that promotes moral decision-making through experiential learning. Absent from the teaching of legal ethics on the vocational stages are important concepts, which inform legal practice, such as autonomy, as well as academic critique of the dominant professional norms and the moral responsibility of lawyers. Students, during the vocational courses, are assessed on whether their response to an ethical issue is one which is within the codes of conduct. Nicolson argues that teaching ethics at this stage is 'too late' because students would have already been exposed to ethics, legal practice, and professional roles, albeit in an unstructured way.⁴⁴ Nicolson concedes that in the absence of empirical research, it is difficult to buttress this claim.⁴⁵ The next section examines key elements of Kant's philosophy and theory of pedagogy and their significance to legal ethics.

5. Kant's deontological ethics

Kant's commitment to the concept of duty, irrespective of the consequences, makes him the quintessential deontologist.⁴⁶ Actions, for Kant, have moral worth when they are performed from a duty to the moral law. To illustrate this point, he provides the example of a grocer not overcharging his customers.⁴⁷ If the grocer's honest actions were done out of self-interest and

⁴¹ The GDL is a stepping-stone for non-law graduates who wish to qualify as either barristers or solicitors.

⁴² Law Society, *Preparatory Ethics Training for Future Solicitors* (Law Society, 2009), 3.

⁴³ Lisa Webley, 'Legal ethics in the curriculum: Correspondent's report from the United Kingdom' (2011) 14 *Legal Ethics* 132.

⁴⁴ Donald Nicolson, 'Education, education, education: Legal, moral and clinical' (2008) 42 *The Law Teacher* 145, 148.

⁴⁵ *Ibid*, 149.

⁴⁶ Norman Bowie, 'A Kantian Approach to Business Ethics' in Thomas Donaldson, Patricia H Wehane and Margaret Cording (eds), *Ethical Issues in Business: A Philosophical Approach* (Prentice Hall, 7th edn 2002), 62.

⁴⁷ Kant (n 8) [4: 397].

not out of a sense of duty to the moral law, then such actions are not truly moral in the Kantian sense. This strict test for determining moral actions can be seen in a second example provided by Kant: that of a person who is not inclined to help those in distress.⁴⁸ If this person performs an action benefitting those facing hardships out of duty to the moral law, then their action has moral worth. Conversely, one might help others because ‘they find an inner pleasure in spreading happiness...and can take delight in the contentment of others’.⁴⁹ Such actions are described as not possessing ‘genuinely moral worth’.⁵⁰ Although this might appear peculiar at first, on closer examination, why should a person’s moral worth be dependent on what nature or circumstances have endowed them with accidentally? Take for example a client with limited financial means who is being threatened with a notice of eviction. A lawyer may desire to help such a client because of subjective reasons, rather than out of duty to the moral law, such as a commitment to access to justice. This can be contrasted with a client charged with various criminal offences and who is rude and aggressive towards their lawyer. One may be less sympathetic towards the criminal/aggressive client than the client being threatened with eviction. However, if out of duty to the moral law, the lawyer displays care and respect towards the criminal client, then their actions are said to have moral worth.

In his *Metaphysics of Morals*, Kant presents a taxonomy of duties which he divides into juridical duties and ethical duties.⁵¹ The former can be coercively enforced by external means such as civil and criminal law. Juridical duties are not relevant for present purposes because the focus of this article is on the moral conduct of the individual as opposed to enforcing ethical behaviour through external mechanisms. Ethical duties, on the other hand, must not be externally enforced, as this would violate the rights of the person coerced.⁵² Certain moral endowments, such as the feelings of respect, self-esteem, and love for other human beings, are the ‘*subjective conditions*’ of morality.⁵³ A person must constrain themselves to follow these obligations through their own reason and motives, established a priori from rational capacities.⁵⁴ Kant distinguishes between two types of ethical duties: perfect and imperfect.

⁴⁸ Ibid, [4: 398].

⁴⁹ Ibid, [4: 398].

⁵⁰ Ibid, [4: 398].

⁵¹ Allen Wood, ‘Duties to Oneself, Duties of Respect to Others’ in Thomas E Hill (ed), *The Blackwell Guide to Kant's Ethics* (Wiley-Blackwell, 2009), 229.

⁵² Ibid

⁵³ Immanuel Kant, *The Metaphysics of Morals* (first published 1797, Mary Gregor ed, Cambridge University Press, 1996), [6: 399 – 6: 403].

⁵⁴ Wood (n 51) 229.

Perfect duties prescribe a specific type of prohibition/omission and do not permit discretion. Imperfect duties, on the other hand, stipulate only a general objective, they do not dictate the specific type of action by which that objective is realised.⁵⁵ Unlike perfect duties, imperfect duties permit discretion in their implementation. Kant provides four examples in relation to perfect and imperfect duties: (1) the duty to refrain from suicide; (2) the duty to abstain from making false promises; (3) the duty to develop our talents; and (4) a duty to help those facing hardships.⁵⁶ Duties (1) and (2) are perfect duties because they do not permit discretion. Duties (1) and (2) are also negative duties because they prohibit the stipulated actions. Duties (3) and (4) are imperfect positive duties, and unlike perfect duties allow for discretion in their implementation. For example, lawyers are able to fulfil their duty of beneficence (4) by taking part in pro bono activities. In relation to the duty of beneficence, Kant states, ‘[t]his is, however, merely to agree negatively and not positively with *humanity as an end in itself* unless every one endeavours also, so far as in him, to further the ends of others’.⁵⁷ A general duty of beneficence should be understood as a duty to engage in pro bono work to assist individuals and marginalised groups in the realisation of particular ends they have freely set for themselves.

Kant’s duty to others is not confined to the imperfect duty of beneficence. He divides our duties to others ‘as human beings’ into two categories, the duties of ‘love’ and the duties of ‘respect’.⁵⁸ Although he calls them ‘duties of love’, Kant does not mean that they are duties to have specific feelings towards others. Instead, these should be thought of as duties to act towards others in certain ways.⁵⁹ Failure to fulfil duties of love amounts to ‘lack of virtue’.⁶⁰ Thus, lawyers have a general duty towards clients regardless of how they may feel about them. This abstraction of specific sentiments towards others does not mean that students and lawyers should be discouraged from nurturing certain feelings:

It is therefore a duty not to avoid the places where the poor who lack the most basic necessities are to be found but rather to seek them out, and not to shun

⁵⁵ Kant (n 8) [4:421].

⁵⁶ Ibid, [4:42 - 423]

⁵⁷ Ibid, [4:430]. Emphasis in the original.

⁵⁸ Kant (n 53) [6:448].

⁵⁹ Ibid, [6:449].

⁶⁰ Ibid, [6:464].

sickrooms or debtors' prisons and so forth in order to avoid sharing painful feelings one may not be able to resist.⁶¹

Thus, students should participate in programmes such as pro bono services and CLE to develop emotions such as sympathy and, as stated previously, compassion. Kant's ethics, therefore, require students and lawyers to seek places where people are suffering and in need of help, not only to develop a sense of sympathy, but also to fulfil the duty of benevolence. The purpose of acquiring such attitudes is not 'a duty to share the sufferings' of others; it is 'a duty to sympathize actively in their fate'.⁶² According to Kant, a person has a duty to 'cultivate the compassionate natural (aesthetic) feelings in [themselves]' in order to 'make use of them as so many means to sympathy based on moral principles and the feeling appropriate to them'.⁶³ Kant classifies 'sympathy' into two categories. The first, '*humanitas practica*', the capacity to share the feelings of others, is useful in terms of promoting the happiness of others.⁶⁴ The second type of sympathy, '*humanitas aesthetica*', involves the sharing of other's feelings but does not necessarily give rise to practical actions.⁶⁵ Thus, the former should be cultivated to promote the duty of beneficence in legal ethics. Sympathy is 'one of the impulses that nature has implanted in us to do what the representation of duty alone would not accomplish'.⁶⁶ This can be interpreted to mean that sympathy can strengthen a lawyer's duty towards others. Alternatively, Guyer suggests that what Kant has in mind is that individuals' natural inclination to sympathy can act as a conceptual tool to direct what actions need to be taken to fulfil one's 'imperfect' duty of benevolence.⁶⁷ Wispé defines sympathy as 'the heightened awareness of another's plight as something to be alleviated'.⁶⁸ Thus, sympathy can serve as a mechanism for relating to others by giving rise to an affinity between two parties.⁶⁹ Developing a sense of affinity involves students imagining themselves to be affected by the same hardships as those affecting their clients and/or marginalised groups. Emotions, such as sympathy, can function

⁶¹ Ibid, [6:457]. See also Sherman, Nancy, *Making a Necessity of Virtue Aristotle and Kant on Virtue* (Cambridge University Press, 1997), 145.

⁶² Kant (n 53) [6:457].

⁶³ Ibid.

⁶⁴ Ibid, [6:456]

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid, [6:457].

⁶⁸ Lauren Wispé, '*The distinction between sympathy and empathy: to call forth a concept, a word is needed*' (1986) 50(2) *Journal of Personality and Social Psychology* 314, 314.

⁶⁹ Anthony Kronman, 'Practical Wisdom and Professional Character' (1986) 4(1) *Social Philosophy and Policy* 203, 213–16.

as a ‘pair of moral eyes’⁷⁰ that permit lawyers to see where their moral obligations arise. However, Kant warns that sympathy can give rise to:

[Individuals] flattering themselves with a spontaneous goodness of heart that needs neither spur nor bridle and for which not even a command is necessary and thereby forgetting their obligation, which they ought to think of rather than merit’.⁷¹

Those who are in a self-congratulatory state of mind may imagine themselves as so good-hearted that they do not require the ‘yoke’ of duty.⁷² In relation to duties of respect, namely those ‘duties to one’s fellow human beings arising from the respect due to them’, Kant has in mind obligations not to be arrogant towards others and not to defame or ridicule them.⁷³ The Kantian lawyer must be modest, dignified, and humane,⁷⁴ even to clients who have been charged with or are guilty of serious criminal offences.⁷⁵ Kant’s justification for imposing a duty of respect is that arrogance, defamation, and ridicule are ‘contrary to the respect owed to humanity as such’.⁷⁶ Failure to show respect owed to ‘every human being as such is a vice’.⁷⁷ According to Guyer, duties of respect are perfect rather than imperfect duties.⁷⁸ They are not only expressed as negative duties, in the sense they must be avoided, but also allow no room for ‘judgement or latitude’.⁷⁹

Professional legal ethics can also be enhanced by drawing on Kant’s philosophy regarding the duty to engage in law reform. According to Kant, citizens have the right to inform their governments of unjust practices that require reform.⁸⁰ This right suggests that states have a correlative duty to promote this right.⁸¹ However, he does

⁷⁰ Paul Guyer, *Kant and the Experience of Freedom* (Cambridge University 1993), 389.

⁷¹ Immanuel Kant, *Critique of Practical Reason* (Mary Gregor tr, Cambridge University Press, 2nd edn 2015), [5:85].

⁷² *Ibid.*

⁷³ Kant (n 53) [6:456 - 458].

⁷⁴ *Ibid.*, [6:462].

⁷⁵ *Ibid.*, [6:463].

⁷⁶ *Ibid.*, [6:466].

⁷⁷ *Ibid.*, [6:464].

⁷⁸ Paul Guyer (n 95) 256.

⁷⁹ *Ibid.*

⁸⁰ Kant (n 53) [6:321].

⁸¹ Immanuel Kant, ‘An Answer to the Question: What is Enlightenment?’ (first published 1784, Penguin, 2009); Immanuel Kant, *The Conflict of the Faculties: Der Streit Der Fakultäten* (first published 1798, Mary J Gregor trans, University of Nebraska Press, 1979).

not explicitly argue that citizens have a duty to exercise their right to inform their governments of injustices and petition for redress.⁸² This oversight on Kant's part is immaterial because it is implicit in his theory of beneficence that a person has an imperfect duty to assist others. Moreover, given Kant's cosmopolitan ethics, it can be argued that an English or Welsh lawyer's moral right to inform a government of injustices is not restricted to the United Kingdom.

Kant's commitment to duty to the moral law led him to reject consequentialist theories such as utilitarianism. This raises the question of 'How do we determine our duties to the moral law?'. To answer this question, we need to examine Kant's supreme principle of morality.

6. Kant's supreme principle of morality

Kant formulated the categorical imperative (CI) as the supreme principle of morality: 'All imperatives command either *hypothetically* or *categorically*'.⁸³ The CI can be distinguished from a hypothetical imperative (HI). A HI can be expressed as follows: 'If a person wills an end and certain means are necessary to achieve that end and are within his power, then he ought to will those means'.⁸⁴ A HI typically begins with an 'If...' or contains an 'if': 'If you want to do well in your law degree, then attend all your lectures'. The obligation to attend one's lectures is dependent on the objective to do well in the exams and, hopefully, secure employment in a law firm. A CI, on the other hand, is an unconditional and binding command irrespective of whether it confers, directly or indirectly, any benefits. The CI is not tainted by any conditional desires. Instead, it simply commands 'Do X and let the consequences be what they may'.⁸⁵ Although there is one CI, also known as 'the imperative of morality',⁸⁶ Kant puts forward various versions of it. The most common formulations are:

1. 'Act only on that maxim through which you can at the same time will that it should become a universal law'⁸⁷

⁸² Guyer (n 70) 290.

⁸³ Kant (n 8) [4: 414]. Emphasis in the original.

⁸⁴ Thomas E Hill, 'The Hypothetical Imperative' (1973) 82(4) *The Philosophical Review* 429, 429.

⁸⁵ Kant (n 8) [4: 416].

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, [4: 421]. Emphasis in the original.

2. Act in such a way that you always treat humanity, whether in your own person or in the person of another, never simply as a means, but always at the same time as an end.⁸⁸
3. A rational being belongs to the kingdom of ends as a *member*, when, although he makes its universal laws, he is also himself subject to these laws.⁸⁹

Each of these formulae will be examined in the relation to the teaching of legal ethics.

6.1 The first formula

When examining the first formula, which concerns the form of the CI, it is important to focus on the term ‘maxim’. There is an assumption that whenever a person acts, they have a reason or an intention for the action;⁹⁰ for example, a student decides that volunteering in a pro bono centre will increase their employment prospects. The student’s reason for volunteering is subjective and conditional on their desire to secure a job in a law firm. This example falls under the definition of a HI. The first formula, however, requires individuals not to act on maxims other than those that could at the same time become universal law. This ensures that subjective principles of action (maxims) comply with the demands of duty. Unlike the HI, the CI does not depend on an ‘if’; the volunteering in this example is done for its own sake and not for the sake of some further (subject or self-interested) end. Similarly, complying with the duty of confidentiality (CD 6; Paragraph 6.3 of the Standards and Regulations) should be done out of a sense of duty to the client rather than simply because it is stated in the codes of conduct. What the first formula does not address, however, is what makes an action right. It simply informs individuals of what may happen if everyone, including themselves, acted according to their maxims. The first formula allows students to reflect on their proposed actions by asking: ‘What if everyone acted this way?’. It asks them to imagine a world where their decisions were a law for everyone to follow and whether they would be willing to live in such a world.⁹¹ The emphasis is not on what an individual would want or find acceptable but what they can will or intend ‘as a universal law’. Intuitively speaking, universalising one’s maxims reveals cases of unfairness, deception, and cheating.⁹² The first formula raises the following question: why

⁸⁸ Ibid, [4: 429]. Emphasis in the original.

⁸⁹ Ibid, [4: 433]. Emphasis in the original.

⁹⁰ Katrin A Flikschuh, ‘Kant’ in David Boucher and Paul Kelly (eds), *Political Thinkers from Socrates to the Present* (Oxford University Press, 3rd edn 2017), 456.

⁹¹ Kant (n 8) [4:424].

⁹² Christine M Korsgaard, *Creating the Kingdom of Ends* (Cambridge University Press, 1996), 92.

should individuals be concerned about making exceptions for themselves? The answer is to be found in Kant's second formula.

6.2 The second formula

Kant's second formula is concerned with the content of the CI and, as a result, provides the standard of what amounts to a morally right action.⁹³ 'Humanity'⁹⁴ refers not just to humankind in the biological sense⁹⁵ but also to an individual's capacity to freely set their own ends.⁹⁶ An important consequence of placing a special value on a client's capacity to set and rationally pursue their own values, is that it allows them to freely 'pursue their own life plans subject only to the constraint that others be allowed a similar freedom'.⁹⁷ A rational person, in the Kantian sense, is one who can set their own ends and can autonomously act on them.⁹⁸ When advising clients, lawyers are not only to respect the client's capacity to make plans but also respect (within legal limits) the plans they make (CD 2; Principle 7).⁹⁹ This entails a client's decision being free from manipulation and coercion. It is because an individual can set their ends and autonomously follow those ends that they have worth and should be respected.¹⁰⁰ According to Kant, an individual's free will is what gives them dignity and unconditional worth.¹⁰¹ A person's dignity has an 'unconditional and incomparable worth'.¹⁰² Kantian ethics possess an important feature which can enhance the teaching of legal ethics, namely, all clients are ends in themselves and deserving of respect, because any person 'can measure [themselves] with every other being of this kind and value [themselves] on a footing of equality with them'.¹⁰³ This obligation can direct lawyers to be attentive to the principle that they 'cannot deny all respect to even a vicious man...even though by his deeds he makes himself unworthy of it'.¹⁰⁴ Kantian ethics can enhance the professional codes of conduct in relation to acting with independence (CD4; P3), acting in ways that encourage diversity (CD8; P6), and acting in the

⁹³ David Daiches Raphael, *Moral Philosophy* (Oxford University Press, 1981), 56.

⁹⁴ Kant often uses 'rational being' and 'humanity' interchangeably.

⁹⁵ Paul Guyer, *Kant* (Routledge, 2006), 186.

⁹⁶ Kant (n 53) [6:392].

⁹⁷ Thomas E Hill Jr, 'Humanity as an End in Itself' (1980) 90(1) *Ethics* 84, 96.

⁹⁸ Kant (n 8) [4:428].

⁹⁹ William Nelson, 'Kant's formula of humanity' (2008) 117(465) *Mind* 85, 96.

¹⁰⁰ Christine Korsgaard, 'Kant's formula of humanity' (1986) 77(1-4) *Kant Studien* 183, 122-123.

¹⁰¹ Kant (n 8) [4: 435]. Emphasis in the original.

¹⁰² *Ibid*, [4:436].

¹⁰³ Kant (n 53) [6:435].

¹⁰⁴ *Ibid*, [6:463].

best interest of the client (CD2: P7). Focusing on client autonomy and dignity can also play a role in assisting lawyers to address heuristic bias.¹⁰⁵

6.2.1 Client autonomy

Kant's moral theory has been described as an 'Appeal to Autonomy'.¹⁰⁶ Actions, according to Kant, that are carried out from duty to the moral law demonstrate the autonomy of the person. He claims that '*Autonomy* is...the ground of the dignity of human nature and every rational nature'.¹⁰⁷ Kant's idea of autonomy does not refer to self-determination in the juridical sense.¹⁰⁸ An autonomous action is a free action because it is directed by reason and not by desire or inclinations.¹⁰⁹ Freedom, for Kant, is displayed when a person acts according to the duty to the moral law, the CI. For Kant, 'a free will and a will under moral laws are one and the same thing'.¹¹⁰ In other words, freedom is exercised when an individual acts according to duty to the moral law and not according to their desires. These moral duties are determined by reference to the CI.

Autonomy for Kant is grounded in both dignity and respect.¹¹¹ O'Neill describes Kant's conception of autonomy as, 'a matter of adopting law-like principles that are independent of extraneous assumptions that can hold only for some and not for other agents'.¹¹² This notion of autonomy is based on reason rather than on what the individual desires. In the context of professional legal ethics, O'Neill's principled autonomy approach rejects lawyer behaviour such as coercion, deception, and manipulation. The value of this form of autonomy is that it must be based on principles to which everyone could consent.¹¹³ An autonomous lawyer, in the Kantian sense, is one whose actions are free from emotions and inclinations. This can aid a lawyer in reflecting on whether their advice to their client is, for example, tainted by emotions

¹⁰⁵ Concerning the issue of lawyer bias, see Ian Weinstein, 'Don't believe everything you think: Cognitive bias in legal decision making' (2002) 9 *Clinical Law Review* 783; Laura A Kaster, 'Improving Lawyer Judgment by Reducing the Impact of "Client-Think"' (2012) 67(1) *Dispute Resolution Journal* 56; Debra Chopp, 'Addressing cultural bias in the legal profession' (2017) 41 *New York University Review of Law & Societal Change* 364.

¹⁰⁶ Christine Korsgaard, 'The normative question' in Christine M Korsgaard (ed), *The Sources of Normativity* (Cambridge University Press, 1996), 19.

¹⁰⁷ Kant (n 8) [4:436]. Emphasis in original.

¹⁰⁸ *Ibid.*, [4:440].

¹⁰⁹ Alan J Kearns, 'A Duty-Based Approach for Nursing Ethics & Practice' in P Anne Scott (ed), *Key Concepts and Issues in Nursing Ethics* (Springer, 2017), 18.

¹¹⁰ Kant (n 8) [4: 447].

¹¹¹ J B Schneewind, 'Autonomy for Kant' in Oliver Sense (ed), *Kant on Moral Autonomy* (Cambridge University Press, 2013), 158.

¹¹² Onora O'Neill, 'Autonomy: The Emperor's New Clothes' (2003) 77(1) *Proceedings of the Aristotelian Society*, Supplementary Volumes 1, 16.

¹¹³ Onora O'Neill, *Autonomy and Trust in Bioethics* (Cambridge University Press, 2002), 73 – 95.

towards their client. Following Kant's concept of autonomy, there is no obligation on a lawyer to follow a client's instructions if such instructions are based on desires or inclination. However, a lawyer's role is not to impose their morality on their clients. Lawyers should enable their clients to achieve their ends, within legal limits.¹¹⁴ An alternative conception of autonomy is put forward by Beauchamp and Childers:

To respect an autonomous agent is, at a minimum, to acknowledge that person's right to hold views, to make choices, and to take actions based on personal values and beliefs. Such respect involves respectful *action*, not merely a respectful *attitude*... It includes, at least in some contexts, obligations to build up or maintain others' capacities for autonomous choice while helping to allay fears and other conditions that destroy or disrupt their autonomous actions. Respect, on this account, involves acknowledging decision-making rights and enabling persons to act autonomously, whereas disrespect for autonomy involves attitudes and actions that ignore, insult, or demean others' rights of autonomy.¹¹⁵

Respecting a client's autonomy should not equate to a lawyer acting as a 'hired-gun'. A client-centric model also entails respecting a person's dignity. According to Freedman:

One of the essential values of a just society is respect for the dignity of each member of that society. Essential to each individual's dignity is the free exercise of his autonomy. Toward that end, each person is entitled to know his rights with respect to society and other individuals, and to decide whether to seek fulfilment of those rights through the due process of law.¹¹⁶

Freedman's client-centric model can be expanded to include the client's rights as well as any moral or legal duties the client might have towards others. This requires being mindful of Mill's account of liberty: 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good,

¹¹⁴ Thomas L Shaffer and Robert F Cochran Jr, 'Four Approaches to Moral Choices in Legal Representation' in Thomas L Shaffer and Robert F Cochran Jr (eds), *Lawyers, Clients, and Moral Responsibility* (West Publishing Co, 2002), 16.

¹¹⁵ Tom L Beauchamp and James F Childress, *Principles of Biomedical Ethics* (Oxford University Press, 5th edn 2001), 63. Emphasis in original.

¹¹⁶ Monroe H Freedman, *Understanding Lawyers' Ethics* (Matthew Bender, 1990), 57.

either physical or moral, is not a sufficient warrant'.¹¹⁷ This principle, also known as the 'harm principle',¹¹⁸ can be applied to the lawyer-client relationship to protect the wider public interest¹¹⁹ and third parties. For example, where it transpires that the intention of a vexatious client is to cause emotional or financial harm to the other party, the harm principle can help inform the lawyer to provide the client with additional options such as alternative dispute resolution. However, the harm principle does not mean that the lawyer should behave in a paternalistic manner. KMC, therefore, rejects lawyer dominance and paternalistic behaviour.

6.3 The third formula

Kant's third formula, which connects the first two formulae of the CI, holds that individuals should act as if they were members of an ideal kingdom of ends in which they were both subject and sovereign at the same time. Persons within this moral community ('kingdom') are members of a possible social order,¹²⁰ whereby each member makes moral decisions. freedom of each person acknowledged and consistently respected by all the members of this community.¹²¹ This denotes reciprocal relationships between persons.¹²² Morality, therefore, includes one's commitment to others.¹²³ Moral behaviour conceived in this way highlights the idea of interdependence and may prevent future lawyers from acting only as 'hired guns' who zealously pursue their clients ends, irrespective of the consequences on third parties. By accepting that every person has the ability to make choices and decisions, the third formula provides a form of equality for all (CD 8; Principle 6).¹²⁴ By asking individuals to imagine themselves to be equal members of a moral community, Kant's theory of ethics is described as 'ethics of democracy' because '[i]t requires liberty (allowing everyone to decide for himself), equality..., and fraternity (think of yourself as a member of a moral community)'.¹²⁵

¹¹⁷ John Stuart Mill, *On Liberty* (first published 1859, Cambridge University Press, 2012), 22.

¹¹⁸ Nils Holtug, 'The Harm Principle' (2002) 5 (4) *Ethical Theory and Moral Practice* 357.

¹¹⁹ Solicitors Regulation Authority (n 32).

¹²⁰ Barbara Herman, 'A Cosmopolitan Kingdom of Ends' in Andrews Reath, Barbara Herman and Christine M Korsgaard (eds) *Reclaiming the History of Ethics: Essays for John Rawls* (Cambridge University Press, 1997), 187 – 213.

¹²¹ Kant (n 8) [4: 433].

¹²² Christine M Korsgaard, *Creating the Kingdom of Ends* (Cambridge University Press, 1996), 188 – 222.

¹²³ John Paley, 'Virtues of autonomy: Kantian ethics of care' (2002) 3 *Nursing Philosophy* 113, 135.

¹²⁴ David Daiches Raphael, *Moral Philosophy* (Oxford University Press, 1981), 57.

¹²⁵ *Ibid*

6.3.1 A moral cosmopolitan approach to legal ethics

For Kant, the kingdom of ends acts as a nexus to his cosmopolitan political community.¹²⁶ According to Fine, Kant's conception of cosmopolitanism right is 'widely viewed as the philosophical origin of modern cosmopolitan thought'.¹²⁷ Kant defines cosmopolitanism as 'as the womb in which all original predispositions of the human species will be developed'.¹²⁸ Kant's cosmopolitanism deals with the cultivation of a global community within which every person can develop their human capacities.¹²⁹ Although influenced by the Stoics,¹³⁰ Kant's conception of moral cosmopolitanism was in response to a world which he believed had become interconnected to the point where 'the violation of right at any one place on the earth is felt in all places'.¹³¹ For present purposes, moral cosmopolitanism is applied to the teaching of professional legal ethics to foster a sense of moral obligations to the universal human community.¹³²

Kant's conception of cosmopolitanism, however, is 'limited to conditions of universal hospitality', a right not to be treated with hostility when visiting foreign lands.¹³³ This notion of cosmopolitanism is essentially a combination of Kant's second and third formulae. Kant's moral community can be extended to include obligations towards others in the global community.¹³⁴ Within this ethical community, human beings are 'ultimate units of concern' entitled to equal consideration regardless of their citizenship, nationality, or any other characteristic.¹³⁵ According to Appiah, cosmopolitanism also requires a second limb: individuals should be mindful of each other's differences and 'there is much to learn from these

¹²⁶ Immanuel Kant, 'Toward Perpetual Peace' in Mary J Gregor (ed), *Practical Philosophy* (Cambridge University Press 1996), [8: 341 – 386].

¹²⁷ Robert Fine, 'Kant's theory of cosmopolitanism and Hegel's critique' (2003) 29(6) *Philosophy & Social Criticism* 609, 609.

¹²⁸ Immanuel Kant, 'The idea of a universal history with a cosmopolitan aim' in Robert B Loudon (ed), *Anthropology, History, and Education* (Cambridge University Press, 2007), [8: 28].

¹²⁹ *Ibid*, [8: 22]

¹³⁰ Olav Eikeland, 'Cosmópolis or Koinópolis?' in Marianna Papastephanou (ed), *Cosmopolitanism: Educational, Philosophical and Historical Perspectives* (Springer, 2016), 26.

¹³¹ Immanuel Kant, 'Toward Perpetual Peace: A Philosophical Sketch' in Pauline Kleingeld et al (eds), *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (Yale University Press, 2006), [8: 360].

¹³² Flood and Lederer (n 4) 2514.

¹³³ *Ibid*, [8: 357 - 358]. For an application of Kant's right to hospitality in CLE, see Omar Madhloom, 'Unregulated Immigration Law Clinics and Kant's Cosmopolitan Right: Challenging the Political Status Quo' (2021) 28(1) *International Journal of Clinical Legal Education* 195.

¹³⁴ Nussbaum (n 7) 4.

¹³⁵ Thomas Pogge, 'Cosmopolitanism and Sovereignty' (1992) 103(1) *Ethics* 48, 48.

differences'.¹³⁶ Recognising cultural, religious, or language differences can act as a reminder to students and lawyers that they ought to take seriously the values and beliefs of their clients. Cosmopolitanism conceived of these two limbs provides an avenue for lawyers to be conscious of their clients' values and 'lived experience'.¹³⁷ Awareness of such differences can be beneficial to various aspects of the lawyering process such as interviewing, negotiating, and strategizing.¹³⁸

This section has outlined key concepts, in Kant's philosophy, concerning the cultivation of a cosmopolitan moral character. The next section argues that CLE is an appropriate methodology for teaching KMC.

7. KMC and CLE

Unlike professional codes of conduct, CLE can act as a methodology¹³⁹ for bridging the gap between theory and practice.¹⁴⁰ CLE includes, but is not limited to, pro bono legal activities.¹⁴¹ For present purposes, CLE incorporates a variety of experiential methods such as live-client clinics,¹⁴² Street Law,¹⁴³ mootings,¹⁴⁴ and client interviewing and counselling.¹⁴⁵ In general terms, experiential education involves connecting real-life to learning through the

¹³⁶ Kwame Anthony Appiah, *Cosmopolitanism: Ethics in A World of Strangers* (Penguin Books, 2007), xiii; Carole Silver, 'Getting Real about Globalization and Legal Education: Potential and Perspectives for the U.S. Symposium: The Future of the Legal Profession' (2013) 24 *Stanford Law and Policy Review* 460.

¹³⁷ Rhonda V Magee, 'Legal Education and the Formation of Professional Identity: A Critical Spirituohumanistic - Humanity Consciousness – Perspective' (2007) 31(3) *New York University Review of Law & Social Change* 467.

¹³⁸ Andrea A Curcio et al, 'Educating Culturally Sensible Lawyers: A Study of Student Attitudes About the Role Culture Plays in The Lawyering Process' (2012) 16(1) *University of Western Sydney Law Review* 100, 105.

¹³⁹ Gary Bellow, 'On Teaching Teachers: Some Preliminary Reflections on Clinical Education as Methodology' (1973) *Clinical Education for the Law Student* 375; Neil Gold, 'Why not an International Journal of Clinical Legal Education?' (2000) 1 *International Journal of Clinical Legal Education* 1, 12.

¹⁴⁰ Rachel Dunn, Victoria Roper and Vinny Kennedy, 'Clinical legal education as qualifying work experience for solicitors' (2018) 52(4) *The Law Teacher* 439, 444.

¹⁴¹ See LawWorks, *The LawWorks Law School Pro Bono and Clinics Report 2020* (LawWorks, 2020) < www.lawworks.org.uk/solicitors-and-volunteers/resources/lawworks-law-school-pro-bono-and-clinics-report-2020 > (accessed 15 July 2021). According to LawWorks, 'pro bono has now become a mainstream part of legal education, as well as law schools' wider community engagement'.

¹⁴² Linden Thomas et al, *Reimagining clinical legal education* (Hart Publishing, 2018).

¹⁴³ Richard Grimes, David McQuoid-Mason, Ed O'brien and Judy Zimmer, 'Street Law and Social Justice Education' in Frank S Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2010) 225–40.

¹⁴⁴ Andrew Lynch, 'Why Do We Moot - Exploring the Role of Mooting in Legal Education' (1996) 7 *Legal Education Review* 67; Alisdair A Gillespie, 'Mooting for Learning' (2007) 5(1) *Journal of Commonwealth Law and Legal Education* 19.

¹⁴⁵ David A Binder and Susan C Price, *Legal Interviewing and Counseling: A Client-Centered Approach* (West Academic, 1977); Laurie Shanks, 'Whose Story Is It, Anyway - Guiding Students to Client-Centered Interviewing through Storytelling' (2008) 14 *Clinical Law Review* 509.

process of reflection.¹⁴⁶ Nicolson contends that live-client clinics are ‘an excellent and viable means of assisting in the process of moral character development’.¹⁴⁷ Although live-client clinics have an advantage over other forms of experiential learning, by virtue of the fact that students are dealing with ‘live’ cases, KMC can be taught using any form of experiential learning because it is concerned with applying moral education in a practical context. In addition to promoting social justice¹⁴⁸ and developing reflective practice,¹⁴⁹ CLE can foster empathy and compassion because it ‘puts the emotional content back into law’.¹⁵⁰ Thus, Kant’s duty of respect, compassion, and sympathy can be taught through CLE programmes. CLE has also been said to act as a vehicle for ethics-focused learning,¹⁵¹ inculcating students with human rights-based values,¹⁵² and promoting moral decision-making.¹⁵³ CLE is, therefore, an appropriate vehicle for promoting the values espoused by KMC. In the context of medical education, moral reasoning:

¹⁴⁶ David A Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (Pearson Education, 2015).

¹⁴⁷ Ibid, 145. See also Steven Hartwell, ‘Moral Development, Ethical Conduct and Clinical Education’ (1990) 35 *New York Law School Law Review* 131; Stephen Wizner, ‘The Law School Clinic: Legal Education in the Interests of Justice’ (2002) 70 *Fordham Law Review* 1929.

¹⁴⁸ Wizner (n 147); Ibijoke Patricia Byron, ‘The Relationship Between Social Justice and Clinical Legal Education: A Case Study of The Women’s Law Clinic, Faculty of Law, University of Ibadan, Nigeria’ (2014) 20(4) *International Journal of Clinical Legal Education* 563; Donald Nicolson, ‘“Our roots began in (South) Africa”: modelling law clinics to maximise social justice ends’ (2016) 23(3) *International Journal of Clinical Legal Education* 87; Chris Ashford and Paul McKeown (eds), *Social Justice and Legal Education* (Cambridge Scholars, 2018); Anna Cody, ‘Reflection and clinical legal education: how do students learn about their ethical duty to contribute towards justice’ (2020) 23(1-2) *Legal Ethics* 13.

¹⁴⁹ Michele Leering, ‘Conceptualizing Reflective Practice for Legal Professionals’ (2014) 23(5) *Journal of Law and Social Policy* 83; Cecilia Blengino et al, ‘Reflective Practice: Connecting Assessment and Socio-Legal Research in Clinical Legal Education’ (2019) 26(3) *International Journal of Clinical Legal Education* 54.

¹⁵⁰ Philip Plowden, ‘Clinical legal education: theory, practice and possibilities’ (2004) online: UK Centre for Legal Education < <https://ials.sas.ac.uk/ukcle/78.158.56.101/archive/law/resources/teaching-and-learning-practices/plowden/index.html> > (accessed 15 July 2021). See also Ann Juergens, ‘Practicing what We Teach: The Importance of Emotion and Community Connection in Law Work and Law Teaching’ (2005) 11 *Clinical Law Review* 413; Sarah Buhler, ‘Painful Injustices: Encountering Social Suffering in Clinical Legal Education’ (2013) 19(2) *Clinical Law Review* 405, Sarah Buhler, ‘Troubled Feelings: Moral Anger and Clinical Legal Education’ (2014) 37(1) *Dalhousie Law Journal* 397.

¹⁵¹ Donald Nicolson, ‘Legal education, ethics and access to justice: forging warriors for justice in a neo-liberal world’ (2015) 22(1) *International Journal of the Legal Profession* 51; María L Torres-Villarreal and Diana R Bernal-Camargo, ‘Learning legal ethics in the law clinics: “one hundred thousand housing law” for offences against minors’ (2019) 22(1) *Legal Ethics* 1.

¹⁵² Mohammad Mahdi Meghdadia and Ahmad Erfani Nasabb, ‘The role of legal clinics of law schools in human rights education; Mofid University legal clinic experience’ (2012) 31 *Procedia - Social and Behavioral Sciences* 275; Irene Antonopoulos and Omar Madhloom. ‘Promoting international human rights values through reflective practice in clinical legal education: a perspective from England and Wales’ in Enakshi Sengupta and Patrick Blessinger (eds) *International Perspectives in Social Justice Programs at the Institutional and Community Levels* (Emerald Publishing, 2021), 109 – 127.

¹⁵³ Norman Redlich, ‘The Moral Value of Clinical Legal Education: A Reply’ (1983) 33 (4) *Journal of Legal Education* 613; Nicolson (n 44); Anna Cody, ‘Reflection and clinical legal education: how do students learn about their ethical duty to contribute towards justice’ (2020) 23 (1 – 2) *Legal Ethics* 13.

[P]romotes a consideration of patients on an individual level and the adoption of a holistic approach to their care. The resultant concordance of doctor and patient may increase the likelihood of mutually satisfactory decisions, patient compliance and beneficial clinical outcomes.¹⁵⁴

The benefits of moral reasoning can also apply to CLE and legal practice, as both the medical and the legal profession value, *inter alia*, the concept of patient/client care. However, professionals should not impose their personal opinions about a given situation.¹⁵⁵ Instead, they ought to depart from their personal frames of reference to achieve a better empathic understanding of their clients.¹⁵⁶ KMC, which rejects paternalism, can contribute to the moral education by directing students to be attentive to any inclinations that may impact on their decision-making. KMC also involves being cognizant of the client's values and characteristics. The value of using experiential learning as a vehicle for teaching KMC is due to it being 'universally effective as a structure and philosophy of teaching and learning'.¹⁵⁷ Although Kant's work predated CLE,¹⁵⁸ his philosophy and theory of pedagogy are relevant for present purposes due to his commitment to experiential learning and moral education.

8. Conclusion

This article has argued that the teaching of professional legal ethics can be enriched by adopting a holistic approach informed by KMC. The juxtaposition of the professional codes of conduct with the suggested KMC model can direct students to possess more self-awareness of their actions and to ensure that client autonomy is not undermined. Respecting client autonomy, under KMC, entails the lawyer ascertaining the client's values, cultural background, and any other material information relevant to client. KMC also provides moral duties, namely obligations towards individuals outside one's immediate community or jurisdiction. This

¹⁵⁴ Sebastian Sheehan et al, 'Why does moral reasoning not improve in medical students?' (2015) 6 *International Journal of Medical Education* 101, 101.

¹⁵⁵ Miguel Ricou and Silvia Marina, 'Ethical Issues and Challenges in Psychological Practice and Research' (2020) 13(1) *Psychology in Russia: State of the Art* 2, 6.

¹⁵⁶ *Ibid.*

¹⁵⁷ Richard J Wilson, 'Theory and Clinical Legal Education' in Richard J Wilson (ed), *The Global Evolution of Clinical Legal Education More than a Method* (Cambridge University Press, 2017), 137.

¹⁵⁸ The earliest reference to CLE in the United States is William V Rowe, 'Legal Clinics and Better Trained Lawyers-A Necessity' (1917) 11 *Illinois Law Review* 591. Jerome Frank, 'Why Not a Clinical Lawyer-School?' (1933) 81(8) *University of Pennsylvania Law Review* 907 is widely cited in terms of the conceptual origins of CLE in the United States. Outside the United States, a Russian professor, Alexander Lyublinsky, proposed a law clinic component modelled on the medical training, Alexander Lyublinsky, 'About Legal Clinics' [1901] *Journal of Ministry of Justice (Rosja)* 175. See also Richard J Wilson, 'Training for Justice: The Global Reach of Clinical Legal Education' (2004) 22(3) *Penn State International Law Review* 421, 421.

allows students to engage and reflect on global issues such as the social and economic turmoil caused by the Covid-19 pandemic. Thus, KMC provides cosmopolitan obligations to distant suffering and injustices. Although Kantian ethics involves the abstraction of inclinations from one's moral deliberations, KMC incorporates sentiments, such as sympathy and compassion, because they can foster 'cosmopolitan emotions' and increase sensitivity for human suffering.¹⁵⁹

Beyond legal education, KMC can be applied to legal ethics on three levels. First, law practices can be viewed as moral communities consisting of staff, clients, and other stakeholders, whereby each person in this community has a moral relationship to everyone else.¹⁶⁰ With regards to duties towards clients, a lawyer who views this moral community as merely a means to achieving their own ends, is acting contrary to the second formula. The second level concerns duties owed to the moral community within a law practice's geographical location and/or jurisdiction. The third level provides a moral justification for lawyers to engage in the provision of pro bono services to clients outside their legal jurisdictions.

¹⁵⁹ Andrew Linklater, 'Distant Suffering and Cosmopolitan Obligations' (2007) 44 *International Politics* 19, 27 citing Andrew Linklater, 'Emotions and World Politics' (2004) 2 *Aberystwyth Journal of World Affairs* 71.

¹⁶⁰ Norman Bowie, *Business Ethics: A Kantian Perspective* (Cambridge University Press, 2nd edn 2017), 82-129.