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Contributors' guide

Criteria for acceptance of a refereed article

The primary criterion is: is this a work that through description, analysis and critical reflection adds to our understanding of clinical legal education and is of interest to an international audience? Contributions of an interdisciplinary nature that link clinical legal education and the relevant higher education and professional development literature are welcome.

This is a criterion that cuts both ways – very UK-orientated (or US-orientated) pieces might have merit but may be so introverted as to lack the international element – other papers might cover something which is of such interest to an international audience as to be worthy of publication. The best papers will often be rooted in a specific local experience – but will be able to draw that into a larger theoretical context that has wide relevance across jurisdictions.

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Foreword

Welcome to issue 13 of the International Journal of Clinical Legal Education. This is the first issue of the journal under the current editorship and I would like to pay tribute to Professor Philip Plowden, my predecessor and driving force behind the IJCLE, its associated conferences and the development of a vibrant international clinical community. Philip has become Dean of the School of Law at Northumbria University but remains heavily involved in clinic including not only continuing his clinical teaching but contributing to conferences, symposia and other scholarly activities.

In this edition

When reading through the proofs of the articles for this edition the theme that struck me was *diverse notions of lawyering*. The three main articles reveal the rich diversity of approaches to the role of the lawyer and the lawyering process. We see the lawyer as agent of social change, as moral activist and as zealous advocate of individual client interests. Together these articles serve to reinforce the need when educating students to be aware of the plethora of potential professional roles and to understand one's own professional and ethical compass and the influence this is likely to have on student lawyers.

In the first article **Professor Nekima Levy-Pounds and Artika Tyner** explain how they seek to integrate the principles of Ubuntu into their clinical curriculum so as to train law students to become agents of social change. They describe Ubuntu as a sense of interrelatedness; of society's need for love, peace and justice. Their conception of lawyering is all encompassing and they urge clinics to focus students' minds on uncomfortable realities of prejudice, oppression and inequality and to begin to address the potential role of the lawyer in alleviating these wrongs. The paper challenges the traditional view of the lawyer as an amoral mouthpiece for advancing individual rights. They propose a more communitarian approach to the lawyering process. They outline how their clinic encourages students to think outside the box – to problem solve, collaborate with stakeholders and participate in meetings of grassroots and civil rights organisations to use their legal skills to benefit those from disadvantaged backgrounds. They introduce the idea of the student as participant observer – going out into the communities served by the clinic and engaging with the needs of the underserved. Their view of the clinic as a start point for development of students as agents of social change will not be attractive to everyone but it is a broad, expansive and ambitious view of the potential role of the lawyer and that clinicians have the ability to influence students in a positive way to work for social emancipation.

In the second article **Ross Hyams** asks a basic but fundamental and ultimately intractable question, "what sort of lawyer do we want students to be"? He posits that mainstream legal education has proved to be poor at inculcating elements of professionalism such as autonomy, judgment and commitment to lifelong learning. He argues that clinics are well placed to nurture professionalism in students but acknowledges the elusive nature of the concept. He outlines a range of different approaches to lawyering and believes that clinicians should be aware of this range and in particular their own approach so that students will understand the context of the messages they are being

given. He concludes that teaching professionalism remains very challenging for supervisors and often confronting for students but that clinic provides the best opportunity to achieve this. Finally, he offers Atticus Finch of "To Kill a Mockingbird" as a role model for inculcating a sense of professional responsibility in their students, praising his compassion, tolerance, perspective, courage, wisdom and belief in the role of the courts as the great levellers of society. Clinicians: get down to the library and borrow a copy.

In the third article **Professor Genevra Brown** recognises the symbolic and cultural power of the paradigm of innocence on a micro and macro level. On the micro level she observed in her students a natural inclination towards the client who unequivocally claimed her innocence and away from an equivalent client with more ambiguous instructions. As a public defender, Professor Brown advanced the principle of zealous representation for all clients regardless of innocence or guilt and attempted to inculcate this within her own students. On a macro level, the article tracks the attractiveness of the innocence paradigm to policy makers and legislators and summarises criminal appeal reforms that have focused on factual innocence and away from constitutional violations. While acknowledging the social, legal and educational contribution of Innocence Projects she is uneasy that the notion of innocence has a tendency to dominate the legal and educational landscape and argues that quality representation should never be reduced to essentialist standards of guilt or innocence.

In the Clinical Practice section I am delighted to present **Dr Izabella Kraznicka's** detailed and highly interesting examination of the Polish legal framework and the success story of clinic in recent years together with ongoing challenges to integrate clinic into the curriculum to ensure a sustainable future. Laurence Donnelly provides an analysis of the slow development of clinical legal education in Ireland, recognising that the clinical method has not caught the imagination of the academy in the way it has elsewhere. However, using the National University of galway as a case study, he shows how clinic may continue to develop and become more accepted as a mainstream method of educating law students. Finally, **Angela Macfarlane** and **Paul McKeown** offer 10 "lessons" from the no doubt scores that they learned in their first year as new clinicians, having joined a university law clinic directly from legal practice and with no prior teaching experience. Their insights should be helpful to other new (and perhaps some not so new) clinical supervisors. In particular, I would like to emphasise the last lesson: enjoy!

Kevin Kerrigan

Editor

The principles of Ubuntu: Using the legal clinical model to train agents of social change

Professor Nekima Levy-pounds Esq
and
Artika Tyner Esq[1]

For the past few decades, the legal clinical model has been used as a tool to teach law students the art of practising law.[2] Typically, this model focuses on providing law students with an opportunity to work with clients and to handle legal cases in a safe environment, and often in slow motion.[3] Although the legal clinical model has a number of advantages in assisting students to safely transition from law students to lawyers, it falls short in stressing the importance of using the law as a tool to achieve social justice within our society. The purpose of this paper is to propose that the legal clinical model be revamped to train law students to become not just lawyers, but agents

1 Professor Nekima Levy-Pounds is the Director of the Community Justice Project (CJP) and Artika Tyner is a Clinical Law Fellow at the University of St. Thomas, School of Law, Minneapolis, Minnesota. Through the CJP, students can integrate the University of St. Thomas' mission into their Clinic experience as they work for justice and reconciliation. Following the sub-Saharan African ideology of Ubuntu, clinical students focus on creating systemic changes that will further humanitarian goals. The CJP strives to build bridges with community stakeholders and to work collaboratively to address problems in distressed communities. Students conduct research and propose practical solutions to longstanding injustices, such as police brutality and racial disparities in the criminal justice, educational and juvenile justice systems.

2 See *Clinical Anthology: Readings for Live Client Clinics* (Susan L. Kay *et al*. eds., Anderson Pub. Co., 2003) (clinic programs were introduced during the late 1960s as an alternative to case-book law teaching).

3 Clinic models offer the skills based training necessary for the practise of law. Many clinics provide an opportunity for students to engage with real clients in role as legal representatives. "Under the supervision of an attorney, students enrolled in clinics have actual clients with real problems. Many clinics provide legal assistance to those who cannot otherwise afford an attorney, helping to solve landlord-tenant disputes, settle domestic conflicts or defend against criminal charges. In these cases, the students often represent their client's interests in a courtroom or at an administrative hearing. Other clinics are non-litigation in nature. In these clinics, student may work in areas such as community economic development, small business representation, appellate advocacy and legislative advocacy." *How to get Real World Experience while in Law School*, Newsweek, http://ejwguide.newsweek.com/chapters/hands-on.htm (last visited May 30, 2008).

of social change.[4] Although we hope this article will be of relevance to a broad international audience, the critique focuses mainly on legal education in the United States.

In order to more effectively train the next generation of leaders and advocates for social justice, law schools and other academic institutions must be willing to implement innovative teaching strategies that offer hands-on learning experiences and opportunities to more fully develop problem solving skills.[5] A recent report entitled, "Educating Lawyers: Preparation for the Profession of Law,"[6] published by the Carnegie Foundation ("Carnegie Report"), highlighted the need for a more integrated approach to law teaching that draws upon innovative teaching techniques: The premise being that "legal education should seek to unite the two sides of legal knowledge: formal knowledge and experience of practice." While the legal clinical model has been utilized in many law school programs to teach law students practical skills, this model could be taken to the next level by implementing an overt focus on social justice lawyering. Clinic professors may prepare law students to address the needs of under-served communities by incorporating the sub-Saharan African philosophy of Ubuntu into the course curriculum. Ubuntu draws upon a relational worldview by recognizing the universal bonds and sense of interrelatedness of humanity[7] by challenging lawyers to use their legal skills to promote social good and further humanitarian goals. Archbishop Tutu characterizes a person with Ubuntu as "available for others and to know that you are bound up with them in the bundle of life, for a person is only a person through other persons. And so we search for this ultimate attribute and reject ethnicity and other such qualities as irrelevancies."[8] By applying the principles of Ubuntu, law students will be prepared to serve as agents of social change in their local communities and society at large.

Part I of this Article will outline the pressing need to empower law students to lead and persevere in the face of societal injustice. It will also provide a framework for promoting social justice by

4 The philosophy of training students to be agents of social change is based upon the instructional pedagogy of Dean Charles Houston. Dean Houston trained his students to use the law as an instrument to further social justice. He taught that "a lawyer's either a social engineer or he's a parasite on society." A social engineer was a highly skilled, perceptive, sensitive lawyer who understood the Constitution of the United States and knew how to explore its uses in the solving of "problems of … local communities" and in "bettering conditions of the underprivileged citizens." Charles Hamilton Houston Institute, http://www.charleshamilton houston.org (last visited Feb. 5 2008).

5 The Clinical curriculum should challenge students to think critically and ethically while promoting social good. Professor Gerald Lopez characterizes the traditional legal curriculum as unchallenging. "Unchallenged by a place that had no idea about, and apparently little interest in, how to draw on interdisciplinary knowledge that bears on both understanding and doing something to fight social, political, economic, and legal marginalization." Gerald P. López, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice,* 5 (Westview Press 1992).

6 *Educating Lawyers: Preparation for the Profession of Law*, The Carnegie Foundation for the Advancement of Teaching, (Jossey-Bass, 2007) http://www.carnegiefoundation.org/files/elibrary/EducatingLawyers_summary.pdf (last visited June 9, 2008).

7 Former President Nelson Mandela recognized the inevitability of "mutual interdependence" in the human condition that "the common ground is greater and more enduring than the differences that divide." Anders Hallengen, *Nelson Mandela and the Rainbow of Culture*, http://nobelprize.org/nobel_prizes/peace/articles/mandela/index.html (last visited June 12, 2008).

8 Desmond Tutu, *The Rainbow People of God: The Making of a Peaceful Revolution*, 125 (Doubleday 1994).

integrating principles of servant leadership and Ubuntu into the legal clinical model curriculum.[9] Part II will offer a model curriculum and practical methods for using the legal clinical model to empower law students to lead and serve in under-served communities. Part III will provide examples of student-led initiatives that have promoted social justice in under-served communities. Part IV concludes the findings of this Article that the legal clinical model may be further developed to train future leaders and promote the furtherance of social justice.

Part I. The Call to Servant Leadership and Application of Principles of Ubuntu

In order to take the legal clinical model to the next level, law schools must be willing to go in a new direction. The current structure of legal education, at least in the United States, is woefully inadequate in developing lawyers whose focus is on achieving social justice and who are passionate about using the law as a tool to address the needs of the poor and the disenfranchised. This notion of servant leadership is markedly absent from the law school curriculum, even though it helps to form the basis of the ideal attorney/client relationship. Based upon Robert K. Greenleaf's essay entitled *Servant as Leader*, a servant leader is one who places the needs of others above his own needs.[10] He describes the process of servant leadership that "begins with the natural feeling that one wants to serve, to serve first. Then conscious choice brings one to aspire to lead."[11] The key priority is serving first and then leading. The lawyer as servant leader acts with humility and respect by simply asking the questions: How can I be of service? How can I, as an attorney, utilize my gifts and talents to serve communities and further the legal profession's commitment to service?

Notable examples of lawyers as servant leaders include, former President of South Africa Nelson Mandela[12] and Justice Thurgood Marshall.[13] Both men exemplified the moral courage, strength and passion for social justice[14] that members of our profession should aspire to cultivate. These

9 Principles of servant leadership and Ubuntu create a framework for developing a relational worldview. This worldview provides law students with the tools to promote "social solidarity." "Achieving social solidarity means that members of the society once again begin to recognize each other as fellow human beings and begin to share a concern in the common welfare and well-being of each other. Social Solidarity makes sense because only by ensuring the security, safety and well-being of other people can we hope to secure our own security, safety, and well-being." Tim Murithi, *African Approaches to Building Peace and Social Solidarity*, 6(2) African J. on Conflict Res. 9, 14 (2006).

10 Robert K. Greenleaf, *The Servant as Leader*, 7 (Greenleaf Center, 1991).

11 Robert Greenleaf, *Robert K. Greenleaf Center for Servant-Leadership* at http://www.greenleaf.org (last visited Mar. 12, 2008).

12 Nelson Mandela studied law at the University of the Witwatersrand and obtained his law degree from the University of South Africa in 1942. Mandela spent 27 years in prison due to his efforts to dismantle the South African apartheid. Nelson Mandela, *One Nation, One Country*, xi (Phelps-Stokes Institute for African, African-American, and American Indian Affairs, 1990).

13 Thurgood Marshall was instrumental in the drafting of the constitutions of Ghana and Tanzania. He was also counsel for the landmark case of *Brown v. Board of Education*, which led to the desegregation of U.S. schools. In 1967, Thurgood Marshall was appointed to the U.S. Supreme Court. Thurgood Marshall Supreme Court Justice, *Biography,* http://chnm.gmu.edu/courses/122/hill/marshall.htm (last visited Mar. 12, 2007).

14 Establishing a working definition of social justice is an integral part of examining the role of attorneys and evaluating teaching methods. Social justice has been characterized as the process of remedying oppression, which includes "exploitation, marginalization, powerlessness, cultural imperialism, and violence." Pamela Edwards & Sheila Vance, *Practice and Procedure: Teaching Social Justice through Legal Writing*, 7 Berkeley Women's L.J. 63 (2001).

servant leaders fought relentlessly in the trenches for justice, peace, and the furtherance of humanitarian goals by waging combat through the use of their legal skills.

This idea of servant leadership is in stark contrast to the implicit and sometimes explicit message that is often given in a law school environment, where one's own need to pay off student loans and to live a comfortable lifestyle is placed above the importance of using one's legal talents to benefit those who face oppression and disenfranchisement. Because of the failure of law schools to explicitly articulate the responsibility to use the law as a tool to help those less fortunate, law students, generally speaking, abandon this responsibility when it conflicts with their desire for worldly comfort. Even when law students are passionate about social justice, they are encouraged to work within the parameters that have already been defined within the profession, such as serving as a public defender or legal aid lawyer, even though opportunities to correct wide-scale legal injustices are often diminished within these positions, primarily due to limited resources and time constraints. Such wide-scale legal issues may include racial disparities within the adult and juvenile criminal justice systems, the prevalence of police misconduct and brutality in poor communities of color, and the reintegration challenges facing people with criminal histories. Although poor communities of color are disparately impacted by these issues, they are least likely to receive adequate assistance in addressing such problems.

The severity of the problems facing poor communities, coupled with the funding and resource issues faced by public service organizations, means that law schools are in a prime position to use legal talent and resources to resolve some of our nation's most challenging problems. Law schools in general, and law school clinical programs in particular, have the ability to help shape legal minds and to prepare law students to serve the community in a more holistic manner.

In addition to strengthening the leadership capabilities of law students, there is also a dire need to foster a more meaningful commitment to public service. Through the study of Ubuntu, law students are encouraged to focus on ministering to the needs of others through the utilization of their legal skills which reinforces the concept of servant leadership by focusing on "serving first." The study and application of principles of Ubuntu requires a shift in cultural perspectives related to the concept of community from the Western ideas of individual autonomy[15] to the focus on the collectivist and communal nature of African culture.[16] In relation to the practice of law, Ubuntu focuses on the "interrelatedness" of the human experience that requires each person to use his/her gifts and talents to better society. The concept of Ubuntu was also encompassed in Rev. Martin Luther King, Jr.'s vision of "interrelatedness." King characterized life as follows: "In a real sense all life is inter-related. All men are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly."[17]

15 Professor Dirk Louw characterizes Western society as competitive and individualistic. "Individual interest rules supreme and society or others are regarded as nothing but a means to individual ends. This is in stark contrast to the African preference for co-operation, group work or shosholoza ("work as one," i.e. team work)." Dirk Louw, *Ubuntu and the Challenges of Multiculturalism in post-apartheid South Africa*, http://www.phys.uu.nl/~unitwin/ubuntu.doc (last visited Sept. 1, 2008).

16 According to Human Rights Advocate Ahmed Sirleaf II, "Ubuntu focuses on the essence of commonality that binds all together." Sirleaf suggests that cultures began to globalize; hence by applying Ubuntu to clinical education African philosophical theories will be transported across national borders and cultural groups to promote social justice. Telephone Interview with Ahmed Sirleaf II, The Advocates for Human Rights Program Associate, Liberian Truth and Reconciliation Commission (June 4, 2008).

17 Martin Luther King, *The American Dream*, http://www.indiana.edu/~ivieweb/mlkad.html (last visited Sept, 1, 2008).

The principles of Ubuntu encompass the sense of "interrelatedness" that addresses the societal need for love, peace, and justice. By embracing principles of Ubuntu, law students are trained to recognize the power that a law degree provides in creating access to justice, protecting the rights of those marginalized, and shaping public policy. According to Archbishop Desmond Tutu:

> *…a person with Ubuntu is open and available to others, affirming of others, does not feel threatened that others are able and good, for he or she has a proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed.*[18]

The clinic course curriculum can provide law students with the tools to become an agent of social change and cognizant of their responsibility to work towards the greater good of society. This responsibility requires being an advocate for justice, fairness, and equity. The 1997 South African Governmental White Paper for Social Welfare asserts:

> *The principles of caring for each other's well-being…and a spirit of mutual support…Each individual's humanity is ideally expressed through his or her relationship with others and theirs in turn through a recognition of the individual's humanity. Ubuntu means that people are people through other people. It also acknowledges both the rights and responsibilities of every citizen in promoting individual and societal well-being.*[19]

By incorporating the principles of Ubuntu into the clinic curriculum, law students are reminded that they can be the change they hope to see in the world.[20] Historically, lawyers have been pioneers in leading social change in various arenas: namely, political, social, and economic. Experience has shown us that, "the law can be an incredible vehicle for social change and lawyers are at the wheel."[21] Our law degrees provide us with the ability to create social change through our power to build, restore, and transform communities. Legal educators play an integral role in giving more focused attention "to the actual and potential effects of the law school experience on formation of future legal professionals."[22] Clinic professors have the opportunity to guide law students in the process of becoming agents of social change.

With these ideals in mind, we created the Community Justice Project ("CJP") at the University of St. Thomas School of Law in Minneapolis, Minnesota. Throughout this paper, we will provide a brief description of the CJP, the curriculum that we created, along with a synopsis of some of the current initiatives that we have implemented through the CJP. We believe that the CJP serves as an ideal model which can be replicated by other clinic programs and community outreach organizations to develop lawyers into servant leaders and effective agents of social change.

18 Tutu, *supra* note 10 at 125.

19 Department of Welfare, Private bag X901, Republic South Africa, August 1997, http://www.welfare.gov.za/Documents/1997/wp.htm (last visited June 19, 2008).

20 "We need to be the change we wish to see in the world." Mohandas Gandhi as quoted in "Arun Gandhi Shares the Mahatma's Message" by Michel W. Potts, in *India – West* [San Leandro, California] Vol. XXVII, No. 13 (Feb. 1, 2002) p.A34.

21 "Hillary Clinton on a Law Career in Public Service," *Newsweek*, http://www.msnbc.com/id/14269839/site/newsweek/print/1/displaymode/1098/ (last visited June 7, 2007).

22 Carnegie Report at 10.

Part II. Instructional Practices: CJP Class Readings, Group Discussion, Observation

An integral step in preparing law students to become agents of social change is to deliberately and strategically incorporate principles of social justice into the legal clinical curriculum and programming. Recently, the Carnegie Report highlighted this need by identifying that the key challenge of legal education is "linking the interests of legal educators with needs of legal practitioners and with the public the profession is pledged to serve."[23] Clinic professors can aid in this training by engaging law students in ongoing dialogue about social justice issues, exposing students to the diverse life experiences of community members, and encouraging them to use the law as a tool to promote justice and social change.

With these goals in mind, the curriculum of the CJP was designed to be thought-provoking, challenging, and enlightening. The training materials are used to transform the students into agents of social change during their clinical experience and beyond.

A. CJP Approach to Community Lawyering

The CJP curriculum is based upon a model of community lawyering that focuses on working collaboratively within an interprofessional setting, empowering marginalized populations, and providing leadership training for aspiring attorneys. The community lawyering model focuses on holistic advocacy. Further, the community lawyer addresses the root cause of the social problems in under-served communities; instead of focusing merely on resolving a legal issue. The model is a client-centered approach that answers questions such as: What support is needed to remedy the legal issue and promote community-building? How can similar circumstances be prevented in the future? How can the community benefit from an interprofessional model of partnership with counseling services provided by social work and psychology professionals?

These principles are taught through a variety of course materials, which include historical texts, local media sources, and philosophical readings. The diverse array of readings provides students with the tools to effectively advocate at a grassroots level, one community at a time. At its core, the CJP encourages students to reappraise what it means to be a lawyer.

The process of community lawyering used by the CJP begins with an invitation from the community. The community should welcome the community lawyer into the community. CJP received its invitation from the St. Paul National Association for the Advancement of Colored People (NAACP) to address quality of life issues of the African American community. The next step is the immersion process which uses the principles of ethnography. During this process, the community lawyer becomes a participant observer. The community lawyer must become immersed in the community so gaining a deeper understanding of the root causes of the legal and social issues. For instance in our Clinic, CJP students gain hands-on experience by reading a community newspaper, court observations, organizing community town hall forums, and spending time at a local coffee shop meeting with community members. Through these experiences, our students gain cross-cultural competence skills and establish a positive rapport with the community. The next step takes place during the problem solving phase. In this phase, the community lawyer works with the community in planning steps to achieve the community's goals. The key focus is on

23 Carnegie Report at 4.

collaboration. The community lawyer uses a variety of skills at this stage such as fact investigation, writing as advocacy, critical thinking, reflective listening, negotiation, and mediation. The final stage is implementation. This is the process of empowering the community. The community lawyer works with the community to help it realize its power and protect its legal rights. Although the community lawyer performs a key galvanizing role, overall, this is a community-led initiative.

i. Utilization of an Interprofessional Approach

Traditionally, lawyers work independently to resolve legal challenges that clients face. However, each client may also have a myriad of extra-legal issues ranging from psychological to social issues. The interprofessional model can offer a paradigm shift by focusing on holistic lawyering. "Holistic lawyering is analogous to holistic medicine. Just as a holistic medical provider treats all aspects of a patient suffering from a particular medical illness, a holistic lawyer addresses the whole person and not just a client's particular legal issue."[24] The practice of holistic lawyering requires collaboration with other problem-solvers in various professional roles rather than overlooking the benefits of an interprofessional approach.[25]

This is the case especially when working with under-served communities in high-need areas since a legal problem may also be coupled with a need for case management[26] due to the absence of economic development and revitalization efforts in the community. Psychological services[27] may also be needed based upon traumatic life experiences suffered from living life in the margins of society. CJP students work collaboratively with psychology and social work students as they strive to meet the needs of underserved communities while gaining practical real-world experience and cultural competency skills.[28] One such example is the joint efforts of social work and CJP students in addressing the achievement gap in the local public school system. Students served on an advisory board that brainstormed methods to improve the quality of education received by African-American students in Saint Paul, Minnesota and methods to bridge the achievement gap.

ii. Empowerment of Communities

Agents of social change must also empower the communities served by aiding in the fight against injustice. Community members should play a fundamental role in addressing the community's needs. This goal is obtainable when attorneys become sensitive to the needs of the community and overcome the tendency of taking over the community's problems. CJP students are encouraged to

24 Innovations in the Delivery of Legal Services: Alternative and Emerging Models for Practicing Lawyer, American Bar Association (2002).

25 López, *supra* note 5 at 37.

26 Social Work Services provides comprehensive client case management. Case managers develop extensive knowledge on a variety of issues affecting clients, such as housing, transportation, food support, linkages to English language classes, job training and other education programs. Case managers provide much needed emotional support to clients embroiled in difficult legal issues. University of Saint Thomas Interprofessional Center available at http://www.stthomas.edu/ipc/about/IPC_Collaboration.html. (last visited July 1, 2008).

27 Psychological assessments are a frequent request from both external referral sources and the Center's legal professionals. Request range from a simple screening to a comprehensive psychological report to be used for treatment plan development, educational, and vocational planning or for informing a legal process. *Id*.

28 The Community Justice Project is a part of the Interprofessional Center for Counseling and Legal Services. This is a joint effort by the School of Law, the Graduate School of Professional Psychology (a division of the College of Applied Professional Studies), and the University of St. Thomas/College of St. Catherine School of Social Work. *Id*.

prevail over this inclination by being responsive to the needs of the community. The role of the community lawyer and common lessons and pitfalls are discussed and examined through the study of Lucie White's *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*.[29]

The process of community empowerment through social justice lawyering is exemplified in Professor White's case study of the Driefontein community.[30] The study focused on the process of a South African community that successfully organized to combat subordination with the aid of a lawyer and community organizer who followed a model of change-oriented lawyering.[31] Within a change-oriented lawyering model, a lawyer engages in a mutual learning process while helping a community to appreciate the full measure of its own power.[32] The learning process began when the lawyer received an invitation from the village to aid in resisting government mandated removal from its community to designated homelands.[33]

The lawyer and organizer utilized an interprofessional approach in addressing the community's needs. Their goal was to empower the community to overcome both the current and even future challenges. "The villagers did not hand their problems over to the lawyer, who then acted for them. Rather the lawyer and organizer worked with the villagers to help them gain power."[34] One such example is when the organizer assisted the community in creating social services. This included the creation of legal and health clinics to improve the accessibility of social services. The community also used performance arts as a form of cultural expression and political resistance. The village women performed a play about the proposed removal through African movement and dance. This example illustrates how the lawyer and organizer helped the community members identify and cultivate their strengths.[35]

As illustrated in the case of Driefontein, lawyers in partnership with other professionals can play an integral role in empowering communities. Once a community has realized the full potential of its power, community members are likely to be prepared to address future social, political, or legal matters more effectively.

iii. Leadership and Problem Solving Skills Development

The foundations of leadership principles are developed through the reading of *The Servant as Leader*, related lecture, and classroom discussions. During this lecture, students are challenged to identify the characteristics of the servant leader and discover ways to incorporate the principles of servant leadership into their professional identities.[36] Students also complete a servant leadership inventory which aids them in identifying their leadership capabilities and then working to develop those qualities.[37] Leadership principles that are outlined in Paulo Friere's *Pedagogy of the Oppressed* are also discussed during class and incorporated into the legal training. For example, CJP students draw upon the lessons learned by Freire as he fought to increase access to education for oppressed

29 1988 Wis. L. Rev. 699 (1988).

30 *Id.*

31 *Id.*

32 *Id.* at 767.

33 *Id.* at 706.

34 *Id.* at 737.

35 *Id.* at 725.

36 Sample discussion questions include, but are not limited to: Who is the servant leader? How can the leadership crisis be characterized? What are practical ways to be a servant leader? Does legal education foster leadership growth and potential?

37 University of Nebraska, Becoming a Servant Leader: Do you have what it takes?, http://www.ianrpubs.unl.edu/epublic/live/g1481/build/g1481.pdf (last visited Feb. 5, 2008).

groups in Brazil.[38] One key lesson that CJP students learn is that they must engage in a mutual learning process[39] in order to effectively serve the needs of the community. According to Freire, "revolutionary leaders cannot think without the people, nor for the people, but only with the people."[40] This mutual learning process can be enhanced by building trust within the community and respecting its members. "The people must find themselves in the emerging leader, and the latter must find themselves in the people."[41] Freire also highlights the importance of engaging in dialogue with community members in order for lawyers serving as agents of social change to develop a shared vision for the future. "Dialogue is the encounter between men, mediated by the world, in order to name the world."[42] Through the dialogue process, relationships can be formed between community members and lawyers. The foundation of these relationships is recognizing the interrelatedness of the human experience and understanding that "common ground is greater and more enduring than the differences that divide."[43]

Integral to the training of agents of social change is the development of creative problem solving techniques.[44] Professor Levy-Pounds' motto is "think outside the box and reshape it." In essence, students must dare to be bold in the face of injustice and show commitment to creating equal access to justice. One such example is the exploration and practical application of restorative justice principles. CJP students are required to read Howard Zehr's *The Little Book of Restorative Justice* as a foundational text on the theory of restorative justice.[45] This text challenges students to contrast the punitive nature of the traditional American criminal court system with the transformative power manifested through various restorative justice models.[46] After reading the text, CJP students are able to identify the benefit of restorative justice practices of "putting things right" by focusing on the harm to and needs of all participants (victims, offenders, and community

38 "Freire was a pioneer in promoting the universal right to education and literacy as part of a commitment to people's struggle against oppression." Paulo Freire, *Cultural Action for Freedom*, 1 (Harvard Educational Pub. Group; 2000 ed. Edition, Penguin, 2006). Freire sought to empower those who were illiterate by enabling them to become oriented with the world around them through civic engagement. This orientation process recognized their humanity through the integration into the very fabric of society and gave them the freedom to change the future. *Id*. at 14.

39 "They must understand how to educate those with whom they work, particularly about law and professional lawyering, and, at the same time, they must open themselves up to being educated by all those with whom they come in contact, particularly about the traditions and experiences of life on the bottom and at the margins." Lopez, *supra* note 5, at 37.

40 Paulo Freire, *Pedagogy of the Oppressed*, 112 (New York, 1970).

41 *Id*. at 144.

42 *Id*. at 69.

43 Anders Hallengren, *Nelson Mandela and the Rainbow Culture*, http://nobelproze.org/cgi-bin (last visited June 25, 2008).

44 An integral element of problem solving is creating a strategic plan of action. When reflecting upon his prior chairmanship of the Washington State Bar Association, Bill Gates Sr. highlights the need for lawyers to develop problem solving skills. "The essence of civil work is problem-solving: the city needs a zoo, our schools need to pass a levy, foster children deserve a better shake. There are thousands of problems, virtually none of which are going to be rectified without organized citizen involvement." "Bill Gates Sr. on Public-Service Law, *Newsweek*, http://www.msnbc.msn.com/id/15385956/site/newsweek/ (last visited June 5, 2007).

45 CJP students are also required to read Kay Pranis, *Face to Face: Spaces for Reflective Community Dialog* to gain a deeper understanding of the healing power of restorative justice, specifically sentencing circles, http://www.corr.state.mn.us/rj/publications/facetoface.htm (last visited Feb. 5, 2008).

46 Restorative justice takes a holistic approach by addressing the needs of victims, encouraging offenders to take responsibility, and involving those affected by an offense in the process. Howard Zehr, *The Little Book of Restorative Justice* (Good Books, 2002).

members), addressing obligations of each, using an inclusive and collaborative process, and involving all stakeholders.[47] CJP students also receive hands-on experience in applying these principles. Through the Restorative Justice Project,[48] CJP students are able to help create a sense of community, bring all participants together and extend an invitation for dialogue and healing.

CJP students also participate in restorative justice circles as community members. In this role, CJP students serve as community participants by expressing the concerns of the community related to promoting social welfare, upholding civil rights and liberties, and ending police brutality. The benefit of students' involvement in circle processes are numerous and far-reaching.

B. Community News – Insight News

In order to become more culturally competent and to gain a deeper understanding of the needs of the community being served, CJP students are required to read the weekly edition of *Insight News* and discuss the current events in class. Insight News is a local journal for community news, business, and the arts. The mission of Insight News is "to inform, instruct and inspire."[49] *Insight News* lives its mission by offering a wide array of articles that identify and address the diverse needs of the African American community in the Twin Cities. The weekly edition includes articles ranging from historical perspectives on race to emerging civil rights issues that impact the local African American community.[50]

During weekly class discussions, students share the stories in *Insight News* that caught their attention. One such example was *Insight News*' coverage of the national mortgage crisis.[51] *Insight News* covered this story from the onset of the crisis by offering firsthand accounts of the impact of foreclosure on the community, interviewing legislators, and tracking the related predatory lending bill.[52] These stories enabled students to gain a deeper understanding of the mortgage crisis phenomenon. It also inspired students to initiate their own efforts in the community. CJP students, along with student representatives of the Lawyers' Council for Social Justice[53] canvassed communities in North Minneapolis (which has a high concentration of poor African-Americans) and provided information on protection against predatory lending and foreclosure.[54] CJP students also played an active role in hosting and participating in a law school-sponsored forum on mortgage fraud.[55]

47 *Id.* at 19.

48 CJP students have played an integral role in the formation of a restorative justice project. In collaboration with the Saint Paul City Attorney's Office and Saint Paul Police Department, a restorative justice project has been created that will address the racial disparities in the charging of Obstructing of Legal Process (OLP). This project created an opportunity for a dialogue related to community/police tension and offers the possibility of aiding in the healing of these relationships.

49 *Insight News*, (Minneapolis) available at http://www.insightnews.com/ (last visited Feb. 5, 2008).

50 Examples include: *Public Hearing on the Enforcement of Human Rights and Civil Rights* and *Two Powerful Images that Can Free your African Mind*.

51 *ACORN calls for freeze on foreclosure*, Insight News (Minneapolis), Aug. 31, 2007.

52 *Bush proposals to help those at risk of home loans foreclosure needs a dose of scrutiny*, Insight News (Minneapolis), Sept. 17, 2007.

53 This group was started in 2006 by a first year law student, Sonia Laird, at the University of St. Thomas School of Law.

54 Insight News also published articles that focused on the needs of the North Minneapolis community. *Conversations on Managing the Mortgage Crisis in North Minneapolis, Insight News (Minneapolis)*, Feb. 8, 2008.

55 See *Mortgage Fraud Forum*, University of Saint Thomas School of Law, http://www.stthomas.edu/ethicalleadership/research/conferences/mortgage%20fraud%20forum1.html

C. Small Group Discussions and Setting Ground Rules

The CJP course curriculum is designed to be discussion-based and interactive. In order to reach this goal, students must feel free to express themselves in a safe and respectful learning environment. This sense of safety is created by setting ground rules for discussion. The first rule is being respectful by acknowledging that each member of the group has a different "life lens," which is shaped by personal life experiences, faith journey, culture, heritage, upbringing, and/or socioeconomic status. In addition, everyone must trust that the ideas and opinions expressed in class are meant to create a deeper understanding, promote development, and foster transformation and growth. All members of the class must also agree that the class discussion will be kept confidential in order to build trust and strengthen interpersonal relationships.

It is also paramount that students express a willingness to grow and explore.

For instance in the Marginalized Populations class series,[56] students examine the social construction of race in America and the history of the civil rights movement. These class discussions are typically very intense since students are addressing issues like institutionalized racism, poverty, and human rights violations.

This leads to the next rule that students must also be open to being challenged and stretched in their ways of thinking. Collectively, CJP students embark on a learning journey together and must be willing to explore differing views. Personal attacks are not allowed, but ideas are challenged and questioned. Through this dialogue process, CJP students grow immensely and their worldview evolves as they become agents of social change.

D. Court Observations

We have found that nothing is more invaluable than gaining firsthand experience in the community being served. CJP students are required to complete five hours of court observation, which includes three hours of adult criminal court and two hours of juvenile court. They observe court room dynamics, examine procedural fairness, and collect demographical information. After their visit, students draft and submit a memorandum related to their experiences. Students are also encouraged to perform a police ride-along, which consists of accompanying police officers as they perform routine duties in the local community. In addition, students are required to attend and observe a community conferencing session. This allows students to gain a deeper understanding of restorative justice practices.[57]

56 The Marginalized Populations lecture is a two-part class series. Marginalized Populations Part One focuses on cultural competence in the practice of law. This includes the examination of gender, ethnic, cultural, and socioeconomic classifications. The class reading consists of *In God's Image*, *Pastoral Letter on Racism* authored by Archbishop Harry J. Flynn, http://www.osjspm.org/racism.htm, Racial Disparity Initiative- Council on Crime and Justice, http://www.crimeandjustice.org/Pages/Publications/Articles/INCREASING%20DIVERSITY_COMMENTARY_06_10_02.pdf and the viewing of Poverty USA Video clip, http://www.nccbuscc.org/cchd/povertyusa/tour2.htm

Marginalized Populations Part Two focuses on the needs of juveniles in distressed communities. The class readings consist of *Building Blocks for Youth*, http://www.buildingblocksforyouth.org/advocacyguide.html.

57 The community conferences are facilitated by Restorative Justice Community Action, Inc., online at http://www.rjca-inc.org (last visited Jun. 19, 2008).

E. Reflective Essays

Educational theory supports the notion that the formula for learning begins with experience plus reflection. The process of learning is about "action, reflecting, adjusting and acting again."[58] CJP students are encouraged to become reflective learners. Throughout the semester, students complete reflective exercises, which include drafting essays, journaling, and participating in small group discussions. This process of reflection allows students to discover methods for merging their personal identity and professional identity without the need to compartmentalize views and perspectives. "Using alternative approaches in legal writing teaches the value of both the legal voice and the personal voice, especially the voice of 'outsiders'."[59] As both the legal and personal voices emerge, students are encouraged to write reflective essays or journal entries that explore their worldview as it evolves throughout their educational and professional development. This approach enables students to identify how their life experiences have shaped the way that they view the concept of social justice. Additionally, students are encouraged to evaluate whether this view has changed based upon class discussions, volunteer experience, and participation in clinical programming.

Part III. Description of Current CJP Initiatives

Through the CJP, we have implemented a number of community-based initiatives that seek to address some of the underlying issues that impact poor communities of color. Some of our current initiatives include the development of a reintegration and prevention program for African-American boys and men in Saint Paul, an evaluation of the civilian review complaint process for alleged victims of police misconduct and brutality, and a community awareness program to educate youth and their parents about the impacts of involvement in the juvenile justice system. Each program is unique and requires the cooperation of local city government, the police department, the city attorney, the public school system, and the community in order to be successful. There follows a brief description of the scope of each project and its expected outcome.

A. Reintegration Initiative: Brotherhood Inc.

Our goal is to create a reintegration program that will assist young people from poor communities in becoming upwardly mobile. We have had several meetings with the Saint Paul City Attorney's Office, the Saint Paul Mayor's office, a representative from the Saint Paul Police Department, and the Saint Paul NAACP regarding the disparate rate of involvement of poor African-American youth within the juvenile justice system. The decision was made to go beyond discussing these issues and to actually do something that will benefit the youth in question, and society at large. The CJP agreed to take the lead in preparing a proposal for consideration by stakeholders.

The first step was to identify an appropriate program model. We chose Homeboys Industries out of Los Angeles as the model because of the high quality and effectiveness of the program. In order to gather accurate information, two students from the CJP flew to Los Angeles, California to visit

58 Nelson Mandela Institute, available at http://www.mandelainstitute.org.za/liberation.aspx (last visited June 25, 2008).

59 Mahoney, Calmore, Wildman, *Teachers' Manual to Accompany Social Justice: Professionals, Commuities and Law Cases and Materials* 4 (West Publishing Company, 2003), citing Edwards and Vance.

Homeboy Industries and to interview members of their staff.[60] Following their visit, the students prepared an extensive report examining the feasibility of implementing a similar program in Saint Paul. In February, 2008, the proposal was submitted to the Mayor of Saint Paul, along with representatives from various foundations within the state of Minnesota. This was the birth of Brotherhood Inc., a comprehensive reintegration and prevention program that will offer a social enterprise and integrated social services for young African-American boys and men who have had contact with the criminal justice system. Most recently, the CJP has formed a partnership with a local neighborhood development corporation to bring the vision of Brotherhood, Inc. to fruition.

B. Evaluation of Civilian Review Process

Based upon concerns raised by the Saint Paul NAACP and members of the African-American community in Saint Paul, the CJP decided to examine the complaint process that is used to evaluate grievances by alleged victims of police brutality and misconduct. The goal of the project is to uncover hidden biases and gaps in the process that need to be addressed in order to ensure that justice occurs for those filing complaints. CJP students interviewed members of the Police Civilian Review Commission and examined the appropriateness of the forms that are used to report grievances for clarity and readability, as well as the means by which the public may obtain complaint forms. The results of the students' inquiry, research and investigation was a written report that includes recommendations for improving the process and increasing access to justice. CJP students also prepared sample forms for adoption by the Police Civilian Review Commission to both simplify and clarify the process.

C. Community Awareness Program (CAP)

Recent reports indicate that children of color are substantially over-represented in the juvenile justice system.[61] Once children become involved in the juvenile justice system, there are a number of collateral consequences in place which prevent both their successful reintegration into society and, for those living in under-served communities, their opportunities for upward mobility. In response to this growing issue, the CJP set out to create awareness amongst youth and their families in the Twin Cities by developing the curriculum for the Community Awareness Program (CAP).

Through CAP, CJP students go out to local public schools with a high concentration of poor children of color and into the community to conduct presentations related to children and the law. The scope of the presentations includes the impacts of truancy violations, petty theft, school fights, and loitering on one's ability to find future employment, housing, and to gain college admission. Children and their parents are also advised on current trends in the law, such as: how a youth in possession of a BB gun may be charged with a felony; and an explanation of the lifetime bar on obtaining certain types of employment licenses through the Minnesota Department of

60 CJP students, Dan Olson and Luis Verdeja, visited Homeboy Industries on Nov. 1, 2007. They conducted interviews of staff members, Peer Navigators and Homeys. They also toured the Homeboy Industries and Homegirl Café.

61 The 2007 *America's Cradle to Prison Pipeline Report* highlights the following statistics: A Black boy born in 2001 has a 1 in 3 chance of going to prison in his lifetime; a Latino boy a 1 in 6 chance; and a White boy a 1 in 17 chance. Black youth are about four times as likely as their White peers to be incarcerated. Black youth are almost five times as likely to be incarcerated as White youth for drug offenses. Children's Defense Fund, available at http://www.childrensdefense.org/site/DocServer/CPP_report_2007_foreword.pdf?docID=5062 (last visited Jun. 19, 2008).

Human Services for commission of certain types of crimes. The goal of the project is to create awareness amongst children and families who, statistically speaking, are more likely to come into contact with law enforcement. Our hope is that preventative education, such as is offered through CAP,[62] will result in fewer children becoming involved in the juvenile justice system.

As illustrated above, our goal is to use the law as a tool to effectuate change on behalf of under-served communities. Many of the residents of these communities are over-represented within the criminal justice system, yet are under-served and often receive inadequate legal assistance.[63] Through the CJP, we strive to find gaps within the system that are detrimental to the community and to offer recommendations for improvement.

Law students benefit immensely from their involvement in CJP initiatives as they are encouraged to "think outside of the box," engage in problem-solving, collaborate with various stakeholders in local government and the community, participate in meetings of grassroots and civil rights organizations, and use their legal skills to benefit those from disadvantaged backgrounds. Working on CJP projects has the added advantage of empowering law students to understand the importance of giving back to the community and the great responsibility that comes with having an advanced degree – a responsibility that is often under-emphasized throughout the law school experience. Finally, by meeting with, collaborating with, and speaking on behalf of the community, law students become more culturally competent and able to interact with people from a variety of racial and ethnic backgrounds and socio-economic levels.

Part IV. Conclusion

Due to the pervasive presence of societal injustices and the threat to human and civil rights, the time has come for the legal clinical model to do more than just teach students to become lawyers, and begin training them to become agents of social change. This requires innovative teaching strategies that focus specifically on the furtherance of social justice initiatives. A curriculum that focuses on principles of Ubuntu should be used as the foundation for developing each student's leadership capabilities and reinforcing a more meaningful commitment to service. Ubuntu "affirms a higher notion of what it means to be human. It suggests that all people, and communities of people, are a source of power and creativity. It is an affirmation of the possibilities of the human spirit, and the power of authentic human-to-human engagement."[64] This higher notion is the ideal commitment of the legal profession to create access to justice, promote fairness, and ensure equity for the poorest members of our society. Clinical professors play an indispensable role in training the next generation of agents of social change and thus should be willing to place a much-needed emphasis on social justice issues in the clinical curriculum.

62 CAP utilizes a leadership model to train students. The student participants are encouraged to be leaders in the community by becoming informed citizens and advocating for justice.

63 Presently, there is a need to increase access to justice. "[…] our justice system is predicated on the assumption that when there is a dispute, all parties will be represented by lawyers who will protect their clients' interests and help their clients navigate the complex legal system. In this sense, lawyers are the gatekeepers to justice. Unfortunately, the most vulnerable members of our society are the least able to afford legal services and are unable to access justice. Law schools have an important role to play in solving the access to justice problem." How to identify the professors and administrators who will support and inspire, Newsweek, http://ejwguide.newsweek.com/chapters/faculty.htm (last visited May 30, 2008).

64 Nelson Mandela Institute, available at http://www.mandelainstitute.org.za/ubuntu.aspx (last visited July 1, 2008).

"On teaching students to 'act like a lawyer': What sort of lawyer?"

*Ross Hyams**

Teaching professionalism is a challenge for educators in any course of professional education. It is also often very confronting for students. In legal education, both students and teachers can find the concepts foreign because of the focus on analytical and logic skills and the lack of application to 'real life' requirements of legal practice.

This paper investigates the intersection of clinical teaching and professional responsibility. It investigates the issue of teaching students to "act like a lawyer" and asks the fundamental question: "*What sort of lawyer do we want students to act like?*" In presenting this paper, it is accepted that, certainly in Australia, about 50% of law graduates end up in non-legal practicing, but related professions[1] – and thus an approach to teaching needs to be developed which deals with this reality.

Why do lawyers call themselves members of a 'legal profession'? Theoretically, the common features of what makes a group of lawyers in any society a profession can be broken down into the following:

1. Licensing or accreditation requirements that set minimum educational requirements for entry (a law degree and any associated professional qualifications) and ongoing training requirements (continuing professional development).
2. High levels of training and intellectual skill.
3. A significant degree of autonomy and the exercise of high degrees of personal judgment.
4. A commitment to the interests of a substantial social value – the medical and nursing profession serve the interests of health, while the legal profession serve the interests of justice.

If these attributes are fundamental to the nature of a 'legal profession', are current law students being educated with the aim of educating these qualities?

Accreditation requirements indicate an ability to engage in and a commitment to life-long learning. Legal educators must ask themselves whether this is currently being inculcated in law students. Are students being shown self-directed learning practices in their undergraduate years? How much are they being 'spoon fed'? Are they being equipped with any tools for ongoing self-directed learning?

The second aspect, that of intellectual skill, definitely appears to be on the legal education agenda.

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1 Vignaendra S, 'Australian Law Graduates' Career Destinations' (1998) The Centre for Legal Education, Department of Employment, Education, Training and Youth Affairs, 21.

Law school certainly does attempt to sharpen students' intellectual skills by teaching them logic, analysis, synthesis, argument, deductive and inductive reasoning. This is being done quite well, according to the U.S. Carnegie Report, which indicates that within months of arriving at law school, students are able to show developing skills in legal argument, precise language and application of legal rules.[2]

The training aspect is less convincing and it depends what is meant by 'training'. Are students adequately trained for practice? In this writer's opinion they are not, but clinical legal education certainly attempts to lead the way in the training of practical legal skills such as interviewing, negotiation, letter writing and basic advocacy. It can be forcefully contended that, at its most basic, clinical legal education has managed to build up credibility in these areas.

The third aspect – the qualities of autonomy and personal judgment, are difficult to measure. It is questionable whether these skills are being taught well in law school and this issue will be returned to later.

Finally, there is the issue of commitment to the interests of a substantial social value. Do students leave university with an understanding of what this means? Bound up in this concept is both knowledge and appreciation of ethical issues and an understanding of professional conduct or professionalism.

So – what is professionalism? At first instance, it must be decided what it is not. It is not simply the rules of professional conduct as set out in that particular jurisdiction.[3] Parker and Evans call professional conduct rules 'the law of lawyering' and state that such rules are helpful in guiding behaviour, but do not provide any guidance regarding lawyers' values or help a person make choices about what sort of lawyer one should be.[4]

Noone and Dickson set out their minimal requirements for a legal practitioner to be considered professionally responsible as follows:

1. The practitioner fulfils the duties attached to a fiduciary relationship
2. The person is competent in the work they perform
3. S/he communicates often, openly and clearly with their client
4. S/he does not encourage the use of law to bring about injustice, oppression or discrimination
5. S/he identifies, raises and discusses ethical issues with current/potential clients
6. S/he seeks to enhance the administration of justice; and actively engages in serving the community.[5]

Three further requirements can be added to augment this list:

a) The lawyer should be able to work in an autonomous way – in an independent, self- sufficient and self-directed fashion.

2 William Sullivan *et al* (2007) *Educating Lawyers: Preparation for the Profession of Law*, Carnegie Foundation for the Advancement of Teaching, Jossey-Bass, Stanford. Observation 1.

3 Parker C and Evans A, *Inside Lawyers Ethics*, Cambridge University Press, Melbourne, 2007, 4.

4 *Id.*

5 Dickson J & Noone M.A, *Teaching Towards a new Professionalism: Challenging Law Students to Become Ethical Lawyers* (2001) 4(2) Legal Ethics 127 at 144.

b) The lawyer should be able to exercise judgment – not only relating to how to resolve a client's problems, but reflective judgment of their own behaviour and actions.

c) S/he should have an ongoing commitment to lifelong education – over and above that which is required by continuing professional development points. This requires two things – first, an understanding that good lawyering and professionalism requires an ongoing process of understanding personal limitations and a commitment to remain fresh, innovative and knowledgeable in professional work. Second, it requires the tools to put this understanding and commitment into action.

It is this author's contention that these three additional requirements are not being inculcated well by mainstream undergraduate teaching. Clinical legal education can and should focus on these requirements and clinicians may be fostering these aptitudes implicitly, but it is possible to be more explicit in mentoring clinical students in these qualities. If clinicians wish to tackle the issue of teaching their students how to behave, rather than simply think, like lawyers then the discussion needs to also deal with teaching professionalism in a generic sense. Are clinical legal educators committed to teaching students to "act like a lawyer"? What sort of lawyer is meant by this? How do clinicians see the profession and their role within it? Are clinicians teaching students to be litigators, advisers, problem solvers, advocates or resolvers of conflict? Or perhaps all of these?

Parker and Evans[6] posit four possible approaches to lawyering styles. This is a helpful paradigm for clinicians in deciding how to approach clinical pedagogy. The first type of lawyer is the **adversarial advocate**.[7] This is the traditional approach to lawyering – one that highlights a lawyer's duty to the client to pursue the client's interests vigorously within the bounds of the law. This is governed by legality, not by morality or any further social duty or responsibility and adheres to the written rules of professional conduct.

The other approaches they suggest are:

The responsible lawyer:[8] This position posits that lawyers, as officers of the court and trustees of the legal system, must see themselves as having an overriding duty towards maintaining the institutions of law and justice in their best possible form. For a responsible lawyer, personal moral beliefs are irrelevant – this type of lawyering looks at the ethics inherent in their role as an officer of the court and in the legal system itself.

Of course, the downside of this approach is that by taking a "responsible lawyering' approach, the lawyer may be in conflict with the need to appropriately serve the client's interests. In professional conduct rules, this approach is often in tension with the traditional advocate approach and the debate is often "How does the lawyer balance the duty to the court against the duty to the client?" This approach is fairly conservative, as it operates within the current legal rules and frameworks and does not critique the current institutions of law.

The moral activist:[9] This posits that lawyers should follow their own ethical standards about what it means to do justice. This type of lawyering states that one cannot escape moral culpability for actions by retreating into the limitations imposed by the above two categories. The downside of moral activism is it neglects the tenet that everyone in society is entitled to legal representation no matter what the lawyer thinks of the cause. It prescribes no particular duty to the law or the legal

6 Parker and Evans, note 3 at 21–37

7 Parker and Evans, note 3 at 24.

8 *Ibid* at 26.

9 *Ibid* at 28.

system and indeed encourages lawyers to challenge it. It also places the individual lawyer's value system and commitment to justice (as perceived by that particular lawyer) above the duty to the client. Sometimes it is criticised as being just a demonstration of a lawyer's ego.

Ethics of care:[10] This is concerned with personal and relational ethics. It is particularly concerned with preserving or restoring relationships and avoiding harm. It sees relationships as more important than the institutions of the law or social ideas of justice and ethics. Arguably, this approach has three consequences:

- It encourages lawyers to take a more holistic view of clients and their problems.
- The ethics of care emphasizes dialogue between lawyer and client and a participatory approach to lawyering.
- It encourages non-adversarial resolutions in order to preserve relationships, if possible.

Legal educators, especially clinicians, don't have to teach students to be specifically one or other of the above. However, it is vital that clinicians are aware of the different approaches to lawyering that are being taught and modelled. Clinicians must have a clear idea of what their approach to lawyering is so that clear messages can be provided to students.

Clinicians' pedagogic responsibility

Other clinical scholars have written about clinicians' ability (or duty) to teach legal ethics within a clinical framework.[11] Ten years ago Goldsmith and Powles[12] raised this issue in the context of their contention that law schools and the legal profession itself had been derelict in their duty to promote ethical awareness and a sense of professional duty.

They stated: "*Without question, law schools in Australia have not done enough to promulgate and promote more substantive conceptions of legal competence and professional responsibility*".[13]

Goldsmith and Powles did not limit their discussion to the integration of ethics into clinical legal education or the wider undergraduate curriculum. They called for law school curricula to be developed which will "find and operationalise methods for greater professional self-awareness"[14]. They suggested the development of interdisciplinary methods and materials in order to create a wider pedagogy of professional responsibility[15]. This thinking can be taken one step further. Clinicians have the unique opportunity to develop clinical pedagogy and to mentor students in a range of broad and fundamental professional skills which can enhance them in their future careers, whether they remain in the law or not.

Accordingly, clinic may be seen as an opportunity to mold a student's entire approach to their future professional career. The question as to whether this is an appropriate use of clinic will be dealt with later in this discussion.

10 *Ibid* at 31.

11 See Curran L, Dickson J & Noone M A (2005) *Pushing the Boundaries or Preserving the Status Quo? Designing Clinical Programs to Teach Law Students a Deep Understanding of Ethical Practice* 8 International Journal of Clinical Legal Education 104.

12 Goldsmith A & Powles G *Lawyers Behaving Badly: Where Now in Legal Education for Acting Responsibly in Australia* in K Economides (ed), Ethical Challenges to Legal Education and Conduct (Oxford, Hart Publishing, 1998).

13 *Ibid* at 2.

14 *Ibid* at 15.

15 *Ibid* at 14.

Clinicians would mostly agree that law cannot be taught in a vacuum – many legal educators are drawn to teaching clinic because of a dissatisfaction with the case method of teaching – the disaffection and tedium that law students suffer through this form of teaching is often obvious and palpable[16], as many students realise that the way they learn law has little connection with human transactions in the real world.

Legal education is extremely efficient in its ability to teach students analytical and logical reasoning[17] and not for a moment is it suggested that learning these abilities is irrelevant or unimportant. However, law school has traditionally not been very good at integrating knowledge and skills well with subsequent stages of a professional career.[18] This is an old complaint and has been the subject of other writing.[19] Clinic, however, prides itself on the ability to integrate 'black letter' legal knowledge with real life situations and provide students with a context for a deeper understanding and application of legal knowledge.

However, clinic has a broader mandate than just the integration of practical legal skills with knowledge of the law. Clinicians can (and should) take on the mantle of teaching for lifelong learning, which includes the three additional requirements of a professional which have already been enumerated above – autonomy, judgment and a commitment to lifelong education.

Current post graduation traineeship systems are too 'hit and miss' to rely on this training to occur after a law graduate joins the workforce – and further, if a large number of law graduates don't join the profession, they do not have access to whatever traineeship system exists for those entering a legal career. They are expected to walk into a professional occupation understanding what is required to behave professionally with no previous instruction whatsoever. Accordingly, the next part of this paper will identify these skills of professionalism and offer some proposals as to how they might be taught in a clinical environment.

Autonomy

There has been a great deal of scholarly writing about individuals' self-perceptions of autonomy. DeCharms[20] describes the dichotomy of individuals' feelings of being either "origins" (that is, people who felt their behaviour is determined by the own choosing) or "pawns" (those who feel their behaviour is determined by external forces beyond their control).[21] More recently, Ryan and Deci's work[22] has modified this dichotomy into a graded theory of internalization – the more internally valued a behaviour is and the more it is internally regulated, the more the individual perceives themselves as acting autonomously.[23]

16 *Clinical Buddies: Jumping the Fact-Law Chasm* in Naylor B and Hyams R (Eds) *Innovation in Clinical Legal Education: Educating Future Lawyers — Monograph No 1* (2007) Alternative Law Journal.

17 Sullivan *et al*, note 2.

18 Boon A & Whyte A *Looking Back: Analysing Experiences of Legal Education and Training* (2007) 41 The Law Teacher 169, 182.

19 See for example Martin J & Garth B *Clinical Education as a Bridge between Law School and Practice: Mitigating the Misery* (1994–1995) 1 Clinical L. Rev. 443.

20 DeCharms, R *Personal Causation: The Internal Affective Determinants of Behaviour* (1968) New York: Academic.

21 *Ibid* at 273–274.

22 Ryan R M & Deci E (2000) *Self –determination and the facilitation of intrinsic motivation, social development and well being* 55 American Psychologist 68–78.

23 Stefanou C, Perencevich K, DiCintio M & Turner J *Supporting Autonomy in the Classroom: Ways teachers Encourage Student Decision Making and Ownership* (2004) 39(2) Educational Psychologist 97–110 at 98.

In a clinical setting, the concept of autonomy involves law graduates being able to work independently and be self-directed in tackling and completing tasks without direction or supervision. It requires self-insight into how a project is broken down into sub-tasks and how work loads and time limits are managed. To a certain extent legal educators have an expectation that this is an attribute learnt by law graduates by the mere fact that they have managed the requirements of studying a law degree. However, it cannot be expected that students will simply learn the skill to act autonomously by implication or osmosis.

If it can be accepted that learning is an "active, self-constructed and intentional process"[24] then this process can be explicitly assisted by supporting students' journey towards autonomous learning and action. Black & Deci, writing in the field of science education, describe this as taking the students' perspective, acknowledging their feelings and providing them with "pertinent information and opportunities for choice, while minimizing the use of pressure and demands."[25]

Further, clinicians can promote students' attainment of autonomy by supporting their intrinsic motivations to learn skills and progress their casework competently – this can be done by being less directional in the approach to problem solving, by encouraging initiative and showing that the tasks that students are undertaking are valued.[26]

Judgment

Lawyers and other professionals are constantly called upon to make judgments – not only in relation to the tactics and techniques in solving client problems, but also self-judgment: Did I handle that matter well? How could I have done it better? Was I effective in the way I interviewed/negotiated/advocated?

Sampford and Blencowe point out that lawyers make judgments on a daily basis for clients on a variety on matters not limited to legal issues.[27] This will include judgments relating to time constraints, economic factors and emotional issues such as a client's ability to cope with litigation and how extended conflict may affect a client's complicated personal or business relationships. Eberle suggests that lawyers (and, it can be added, other professionals) must show "sound judgment, practical wisdom, a process of imagination, careful deliberation, and intuitive comprehension."[28] The CLEA Best Practice Report[29] provides a comprehensive list of "good lawyer" traits gleaned from various scholarly writings – the skill of judgment is a regular inclusion in these lists.

It is this writer's opinion that there would little controversy over the fact that it would be a positive attribute for law graduates to be able to demonstrate good judgment skills, but the issue remains as to how this elusive quality is to be taught. It is essential for students to learn more than just legal or technical judgments based on win/lose scenarios. In this regard clinical teachers can borrow

24 *Id*.

25 Black A E & Deci E L (2000) *The effect of instructors' autonomy support and students' autonomous motivation on learning organic chemistry: a self determination theory perspective* 84 Science Education 740 at 742.

26 Stefanou, note 19 at 100.

27 Sampford C & Blencowe S *Educating Lawyers to be Ethical Advisers* in Economides, Kim (ed), *Ethical Challenges to Legal Education & Conduct*, (Hart Publishing Oxford 1998) at 319.

28 Eberle E J *Three Foundations of Legal Ethics: Autonomy, Community, and Morality* (1993) 7 Georgetown Journal of Legal Ethics 89 at 123.

29 Stuckey R et al *CLEA Best Practice Report* (2007) Clinical Legal Education Association U.S.A. at 51–54.

from some of the concepts inherent in the notions of therapeutic jurisprudence. The 'fathers" of this notion, Winick and Wexler, describe therapeutic jurisprudence as "having a more humanistic orientation, seeking to lessen the excessive adversarialness of lawyering, trying to improve client well-being generally".[30]

The interdisciplinary nature of therapeutic jurisprudence, with its focus on a consideration of the emotional and psychological welfare of those who come into contact with the legal and justice system, is an ideology that should be quite familiar to a clinical teacher. By necessity, clinicians usually attempt to solve client problems without recourse to litigation as often clinical clients cannot afford the time, expense and emotional strain associated with court proceedings.

Further, clinicians are not limited by fee considerations and are able to take a broader and more holistic approach to their clients' problems, which may not be available to a lawyer working in a "fee for service" environment. Clinicians are also often influenced by their students' idealistic views and their enthusiasm in attempting to assist a client above and beyond the resolution of the immediate problem which the client presented to the clinic. Many clinical teachers have practised in this fashion for years, without realising that they are actually incorporating therapeutic jurisprudence in their approach to practice.

Thus, clinicians can embrace these concepts explicitly in their approach to clinical pedagogy. Therapeutic jurisprudential methodology can be modeled to students so that they can form an appreciation that real lawyering goes beyond technical judgments based on dry and logical analysis. Students working in a clinic should be allowed and encouraged to take into account therapeutic and non-therapeutic consequences for clients.

The second aspect of this equation is the skill of self-judgment and reflective lawyering. The best known work on reflective learning by professionals is by Schön who created the term "reflective practitioner"[31] In order for student reflection to occur, some basic pre-requisites must be met. Primarily, students must be put into situations which are outside their normal range of experiences,[32] so that they find themselves reacting to a novel situation which, in essence, requires some "de-briefing" and will thus trigger the reflective process.

For anyone who has ever worked in a clinical legal environment, it will be obvious that clinic students find themselves in such situations almost on a daily basis. The environment of the clinic itself is usually outside their life experience and presents challenges to them, before they have even had the opportunity to set eyes upon a client. Clinical legal education provides the perfect laboratory for action and reflection. The reflective process can be encouraged in various ways and will often happen as a by-product of clinical work – by informal peer discussion or by the more formal supervisor-led dialogue.

The best way to harness the powerful tool of reflection is to require the writing of reflective journals to provide a structured format for the development and nurturing of meaningful and considered student reflection. It compels students to tackle their clinical experience in a critical and more profound manner – as Ogilvy succinctly describes it:

30 Winick B & Wexler D *The use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Clinic* 13 Clinical L. Rev. (2006–2007) 605 at 607.

31 Schon, D *The Reflective Practitioner: How Professionals Think In Action* (1983) New York: Basic Books.

32 Rogers R *Reflection in Higher Education: A Concept Analysis* (2001) 26 (1) Innovative Higher Education 37 at 42.

> *"Through writing about what and how they are studying, students can move from superficial comprehension to employing critical thinking skills in their engagement with the material."*[33]

Reflective journals or learning diaries are becoming widely used educative tools in clinical legal settings. In Australia, many University law faculties have introduced them in recent years as a compulsory part of their clinical law courses.

In many clinical programs, both in Australia and elsewhere, they are a "hurdle" requirement to passing the unit – that is, the required number of diary entries must be provided by the student in order to satisfy the journaling requirement of the unit, but often no further assessment is made of their content. In a small number of clinical units, the actual substance of the journal entries are assessed and a numeric mark given for the work.

There are opposing points of view for and against providing a numeric mark to students in relation to the actual content of the journal entries. Discussion regarding this follows later in this paper.

Ongoing commitment to lifelong education

Clinicians are well situated to encourage an understanding in our students that legal education does not cease when they graduate. Clinic is an excellent location to model the commitment to be up to date in law and procedure. It also requires self-knowledge and honesty about areas of knowledge and skills. A professional not only knows what they know, they know what they don't know and how to go about remedying this lack of knowledge. This applies to both information and skills. A good legal professional understands the limits of their knowledge in specific legal areas, but also their skills' limitations and has the honesty and integrity to ameliorate the situation when able to do so.

Lifelong learning skills are bound up with the ability to be self-reflective. Claxton[34] believes that the skill of life long learning requires resilience, resourcefulness and reflection. He states:

> *"Lifelong learning demands...the ability to think strategically about your own learning path, and this requires the self-awareness to know one's own goals, the resources that are needed to pursue them, and your current strengths and weaknesses in that regard… You have to able to monitor your progress; if necessary even to measure it; to mull over different options and courses of development; to be mindful of your own assumptions and habits, and able to stand back from them and appraise them when learning gets stuck; and in general to manage yourself as a learner – prioritising, planning, reviewing progress, revising strategy and if necessary changing tack."*[35]

The UK Dearing Report, (the reports of the National Committee of Inquiry into Higher Education) a series of major reports into the future of Higher Education in the United Kingdom published in 1997, proposed that higher education needed to re-direct its efforts in order to create a situation in which "an effective strategy will involve guiding and enabling students to be effective learners, to understand their own learning styles, and to manage their own learning".[36]

33 Ogilvy J *The Use of Journals in Legal Education: A Tool for Reflection* (1996) Clinical Law Review (3) Fall 55.

34 Claxton G (1999) *Wise up: the challenge of lifelong learning* (London: Bloomsbury) at 180.

35 *Ibid* at 14.

36 *Report Of The National Committee Of Inquiry Into Higher Education* 1997 (Dearing Report) Paragraph 8.15.

The report states that implementation of such a strategy is as not only directly relevant to enhancing the quality of student learning while in higher education, but also to equipping them to be effective lifelong learners. The report called for resourcing to be re-directed so that staff can be less concerned with simple class contact and more engaged in the management of students' learning, using a range of appropriate strategies.[37]

Why clinic?

Why is clinic the appropriate place to teach professional responsibility? The immediate response is – if not clinic, where else? Large classes with one lecturer to 150, 100 or even small group teaching of 50 students does not provide opportunities to model, discuss or even simulate professional responsibility. However, the assumption that clinic is the best place to do this needs to be challenged. Can we just assume that a 'problem first' approach is a useful pedagogy for learning professional responsibility? Arguably, the smaller and more personal teaching ratio in clinic makes it an ideal venue; the immediate and pressing needs of real clients throws up endless possibilities for the demonstration and development of skills required to learn professional responsibility.

However, many clinical teachers have an intrinsic belief that a student will learn certain skills, including how to act professionally, simply by seeing a real client with a legal problem and then having to deal with it on an ad hoc basis. There is perhaps a belief that these skills will develop instinctively from having to find a solution to that problem 'on the run'. Certainly, it is possible to learn this way,[38] but this concept of "learning by osmosis" must be tested as it is not necessarily the best way to learn professional skills.[39]

Bergman argues that many clinicians assume that this form of clinical training affects students' abilities to practise law in a positive fashion.[40] However, he questions this approach and advocates a pedagogy of discrete lawyering skills which allows for repetition and refinement – a 'selected skills' approach[41] which assists the student to develop professional responsibility. Bergman's position challenges the assumption that clinical work is a superior system of skills teaching and is also better at providing students with concepts of professional responsibility.[42]

One resolution to this may be the ability for clinics to enhance the "hit or miss" aspect of clinical work by running a thorough, detailed and sophisticated seminar or tutorial program alongside the live-client work in order to support and expand the legal skills learnt in the clinical environment. Arguably, values awareness and professional conduct cannot be taught in one seminar or tutorial - many clinical scholars would argue that it must be taught pervasively across the entire law school curriculum. However, this does not absolve the clinician of the responsibility to also provide a pedagogical basis for tackling both ethical issues and wider issues of professional responsibility in a more formal classroom setting, especially whilst students are undertaking the clinical program and these issues are relevant and immediate.[43]

37 *Ibid* at 8.18.

38 Sylvester C *et al* (2004) *Problem-Based Learning and Clinical Legal Education: What Can Clinical Educators Learn from PBL?* 4/6 International Journal of Clinical Legal Education 39.; Stuckey (2007), Ch 5: *Best Practices for Experiential Courses*.

39 Evans A & Hyams R *Independent Evaluations of Clinical Legal Education Programs: Appropriate Objectives and Processes in an Australian Setting* (2008) Griffith Law Review 13.

40 Bergman P, *Reflections on US Clinical Education* (2003) 10(1) International Journal of the Legal Profession 109 at 113.

41 Evans & Hyams, note 39 at 14.

42 *Id*.

43 Evans & Hyams, note 39 at 15.

Further, setting time aside (and if necessary, reducing the client in-take in order to do so) to "workshop" a discussion with the students relating to issues of professional responsibility which have arisen from the day's clinical work on a regular sessional basis, is a way to expose students to these issues in a pervasive and explicit way, rather than just hoping that students will simply absorb the important lessons of how to behave in a professional, ethical and responsible fashion.

The way forward

1. Assessment Issues

It is one thing to accept the pedagogical rationale for teaching professional responsibility. It is quite another to presume that a fair, transparent and defensible assessment tool can be created for measuring the outcomes of such teaching.

The Clea Best Practice Report can provide some guidance in this area. It states:

> *"Outcomes should be measurable. It is self-defeating to state an outcome which cannot be assessed. At the same time, it is important not to be bound by the expectations of objective decimal-place accuracy. In this context, "measurable" means 'a general judgment of whether students know, think, and can do most of what we intend for them.'"*[44]

However, attempts to teach professional responsibility to our students loses much of its pedagogical value if not assessed. As Stefani points out,[45] academics are becoming increasingly aware that assessment of a student's learning should not be based solely on the student's ability to create a "product" but on the learning process itself. That is, clinicians should be assessing their students' ability to learn, as well as testing the outcomes of what has been learnt.

In a clinical environment, supervisors are not just marking students on their ability to write a document or to create a winning piece of advocacy. The students' ability to learn legal and administrative processes is also being assessed, as well as their capacity to be creative, to make decisions and a myriad of other skills which cannot be simply measured as a "product". Students can and should be assessed on the journey itself, not on the end result or product.

2. Feedback

The feedback provided to the student when assessing their developing self evaluation skills and their increasing understanding of professionalism is itself a valuable pedagogical tool. Students will pay much more attention to work that is being graded – they will treat it more seriously and, in this increasingly competitive era, will strive to better their marks if only for the pragmatic reason of ensuring their academic transcript will be read favourably by potential employers.

However, the motivation for wanting to achieve better results is, in this author's opinion, irrelevant. Marks equal incentive and motivation. Educators can utilise that motivation to their students' advantage by insisting that reflective work is assessable and by providing feedback on the process to the students in order to increase their skills as insightful learners. Graded assessment provides a structure for feedback – an essential ingredient in the learning process. For feedback to be a useful pedagogical tool, it must be timely and frequent, transparent, honest and structured. It

44 Stuckey R *at al*, note 29 at 49.

45 Stefani L *Assessment in Partnership with Learners* (1998) Assessment and Evaluation in Higher Education 23(4) 339 at 344.

must follow a set of paradigms which is common to all students undertaking the assessment task, and it must relate to the assessment criteria provided to the students.

Feedback is a much more straightforward process when supervisors have a structure in which it can be housed. Grading criteria provide that basic structure. Thus, feedback need not be a "free-form" process in which the supervisor comments in a capricious and unstructured way on the students' journey to understanding notions of professionalism. The use of grading means that the supervisor can relate feedback comments directly to the grading criteria. This provides a format for the supervisor and thus reduces the time consuming demands of the feedback process. More importantly, however, it provides the students with a way of measuring their progress in the learning exercise. They should be able to relate their supervisor's responses directly to a set of unambiguous criteria that was provided to them at the commencement of the unit.

3. Enhancing clinicians' teaching skills

To take this thinking forward, practical ways to enhance clinical teaching in this area must be investigated. Curran, Dickson & Noone have already made a compelling appeal for better training for clinical staff.[46] They were writing about training in the teaching of ethics and their comments are just as apposite to training in generic professional skills, not only for clinicians to hone their own skills, but in how these skills can be modelled and taught to other adult learners. This is necessary in order to develop agreed strategies between clinicians as to the focus of the clinical program and to how much emphasis is being put on the development of these skills. To a certain extent, an agreed assessment regime will determine this focus, but clinicians need to be consistent in their attitude to students and the prominence being made of these issues.

Assessment issues need to be clarified, resolved and promulgated to students. Thus, if the learning goals of the clinic are going to focus on issues of professionalism, this needs to be reflected in the published learning objectives and descriptions provided to students about the clinical units on offer. Unfortunately, many students will merely give the learning goals a quick perusal before launching themselves into their clinical work. Accordingly, supervisors should spend some time individually with each student explaining this methodology at the commencement of the clinical unit. This is certainly a time consuming process, but it will ultimately benefit both student and supervisor in the long term.

4. Course design

Finally, course design needs to be investigated. It may be that better and wider classroom content is required to support a focus on professionalism. This will require a concomitant reduction in casework load and brings to the fore the continuous delicate balancing act that clinics must struggle with, between their role as educational facilities and centres of client service delivery. This area of discussion is an important one, but outside the scope of this paper. However, this author contends that clinics cannot take on additional areas of student learning without having to re-assess the requirements that are placed on the students' shoulders. If clinicians wish to emphasise the importance of students learning skills of professionalism, then adequate time must be allowed in the formal clinical classroom curriculum and in the supervisor/student relationship to allow both formal (classroom) instruction and informal discussion to take place. At its most basic, the emphasis of the clinic may need to be restructured so that the number of clients that are seen in a

46 Curran, Dixon and Noone, note 11 at 12.

given week is reduced, or the seminar/classroom component of the units undergoes a renewal and change of focus.

Conclusion

The literature of legal education does not appear to provide one over-arching pedagogical theory for clinical education[47] and similarly there is some lack of clarity in both the pedagogy of teaching professional responsibility and its assessment. Teaching professionalism remains very challenging for supervisors and is often confronting for students. Students are often unfamiliar with its requirements because of the focus in much of their legal education on logical and analytical thinking and not on wider generic skills. This author believes clinicians have the perfect opportunity to teach professionalism to law students – the appropriate skills and ideological commitment are also required to successfully respond to this challenge.

Perhaps clinicians can use the much loved Atticus Finch of "To Kill a Mockingbird" fame as a role model for inculcating a sense of professional responsibility in their students. Atticus is a moral beacon in this novel and single handedly guides his children to virtue in a racist and unjust society, treating them with respect and as semi-autonomous individuals capable of insight and judgment.

He attempts to teach them both compassion and tolerance, inviting them to climb inside a person's skin and walk around in it, in order to understand another's perspective. He treats everybody with respect regardless of their socio-economic background, skin colour or class. He is courageous and wise and an avid believer in the role of courts as the great levellers of society.[48] In many ways, he is the ultimate model of legal professional responsibility. A worthy clinical objective may be to consistently model, inculcate and inspire such professional behaviour in clinic students – but ideological commitment and the appropriate pedagogical tools are required in order to do so.

47 L Morton, J Weinstein, M Weinstein *Pedagogy: Not Quite Grown Up: The Difficulty of Applying Education Model to Legal Externs* (1999) 5 Clinical Law Review 469 at 493.

48 Dare T *"The Secret Courts of Men's Hearts", Legal Ethics and Harper Lee's To Kill a Mockingbird* in K Economides (ed), *Ethical Challenges to Legal Education and Conduct* (Oxford, Hart Publishing, 1998) at 43.

Deconstructing Innocence: Reflections from a Public Defender: Can student attorneys accept the paradigm of guilt and continue zealous representation?

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Introduction

I am a true believer.[1] I was a public defender for nine years and represented thousands of guilty defendants without guilt or emotional angst. The public defender credo is to give zealous representation without consideration for the innocence or guilt of the client.[2] As a clinical

1 See Minna Kotkin, *Creating True Believers: Putting Macro Theory Into Practice*, 5 J. Clinical L Rev. 95 (1998). Kotkin argues that Clinical teachers should employ macro theory in their teaching methodology to introduce the idea of "critical lawyering as an over-arching paradigm that will imbue students with skills and a solid theoretical foundation." See also Damon Centola, Robb Willer and Michael Macy, *The Emperor's Dilemma: A Computational Model of Self-Enforcing Norms*, 110 Am. J. Soc. 4 (2005). The authors describe the true believer as one who believes in the enforcement of a social norm, (in my case, the quality of representation has not defined the guilt or innocence of the client) and the enforcement of the norm is done for the right reason. They note it is better not to comply with the norm than create the illusion of sincerity. As the authors note, "true believers reserve special contempt for imposters." *Id*.

2 See Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 Harv. L. Rev. 1239 (1993); Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 Mercer L. Rev. 443 (1999).

instructor I must impart ethical and diligent representation to my students.[3] I found, however, when discussing cases during our weekly case rounds the paradigm of innocence would inevitably become a question for the student attorney. The students imputed guilt and innocence to be mutually exclusive.

Imparting the ethical component of criminal defense – to be competent in having legal knowledge, skill and thoroughness of preparation – to the students was a job I was thoroughly prepared to teach. I found, however, that beyond ethical considerations of representing clients, I needed to deconstruct innocence.[4] I wanted to present to students a paradigm that guilt or innocence is secondary to servicing the needs of the client and protecting the client's rights through the maze of a convoluted and dispassionate court system.[5] Creating a dialogue that evolved from loaded terms such as guilt, truth or innocence and creating representation where the focal point became servicing the needs of the client became my goal.

This article examines the impact and the importance of the innocence movement and the unintended effects on criminal defense representation. Part I examines the impact of innocence in my juvenile clinic. Part II proceeds to examine the paradigm of the innocence movement and its

3 See, e.g., Steven Hartwell, *Moral Development, Ethical Conduct and Clinical Education*, 35 N.Y.L. Sch. L. Rev. 131 (1990); Robert D. Dinerstein, *Clinical Scholarship and the Justice Mission*, 40 Clev. St. L. Rev. 469 (1992); Fren Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 Clinical L. Rev. 37 (1995); Minna J. Kotkin, *The Law School Clinic: A Training Ground for Public Interest Lawyers in Educating for Justice: Social Values and Legal Education* 129 (Jeremy Cooper & Louise G. Trubek eds., 1997).

4 The concern for the innocent being falsely convicted in the American criminal justice system is a well documented issue. My concern is that the state of being innocent overshadows client-centered representation. See, e.g., Brandon Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55 (2008) (reviewing the empirical study conducted to determine how people who were ultimately exonerated were handled by the American criminal justice system); Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 Cal. L. Rev. 1585, 1590-91, 1644 (2005) (describing impact of wrongful convictions on criminal trials and investigations); Brandon Garrett, *Aggregation in Criminal Law*, 95 Cal. L. Rev. 383, 449-50 (2007) (exploring systemic reform efforts in courts and innocence commissions aiming to remedy wrongful convictions); Brandon Garrett, *Innocence Harmless Error, and Federal Wrongful Conviction Law*, 2005 Wis. L. Rev. 35, 82-85, 99-110 (describing possible transformative effect of wrongful conviction cases on underlying criminal procedure rules); Daniel S. Medwed, *Innocence Lost… and Found: An Introduction to The Faces of Wrongful Conviction Symposium Issue*, 37 Golden Gate U. L. Rev. 1, 1 (2006) (introducing symposium); Richard A. Rosen, *Reflections on Innocence*, 2006 Wis. L. Rev. 237 (introducing symposium and discussing *Criminal Justice in the Age of Innocence*).

5 See generally, Mary Jo Eyster, *Analysis of Sexism in Legal Practice: A Clinical Approach*, 38 J. Legal Educ. 183 (1988) (discussing the problems of sexism and strategies used to address the problems); Shelley Gavigan, *Twenty-Five Years of Dynamic Tension: The Parkdale Community Legal Services Experience*, 35 Osgoode Hall L.J. 443, 467 (1997) (discussing anti-racism skills); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 Stan. L. Rev. 1807 (1993); Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client Centered Counseling*, 27 Golden Gate U. L. Rev. 345, 348 (1997) (exploring how race neutral-training of interviewing and counseling skills may lead to continued marginalization of clients of color); Michelle S. Jacobs, *Full Legal Representation for the Poor: The Clash Between Lawyer Values and Client Worthiness*, 44 How. L.J. 257 (2001) (explaining how law students engage in value ranking); Michelle S. Jacobs, *Clinical Essay: Legitimacy and the Power Game*, 1 Clinical L. Rev. 187 (1994) (confronting the belief of many clinical instructors that supervisory relationships should be characterized by co-operative, equal, non-hierarchical organization); Rose Voyvodic & Mary Medcalf, *Advancing Social Justice Through an Interdisciplinary Approach to Clinical Legal Education: The Case of Legal Assistance of Windsor*, 14 Wasg. U. J.L. & Pol'y 101 (2004).

impact on the criminal justice system. Part III examines the rise of Innocence Projects and the effect on clinical legal education. Part IV deconstructs the importance of innocence and the substantive and procedural problems with innocence. Part V concludes the article with an assertion of the importance of zealous representation regardless of innocence or guilt.

I. A Question of Innocence

In my juvenile justice clinic, we began to represent two juvenile females who were both charged with prostitution.[6] Both girls, Jill and Dana, denied the charges at the initial hearing.[7] I paired a student attorney and a student social worker to represent both girls. I immediately noticed an affinity the student attorney and the social worker had for Jill. Jill vehemently denied the charges. Jill spoke softly with a slight southern drawl and was the model of courtesy. Dana was more of an enigma. She was not forthcoming. Dana was not so emphatic in her denials but she refused to enter an admission to a prostitution charge. During case rounds we discussed the similarities and differences of Jill's and Dana's cases.

Assumptions were immediately being made about Jill. The students created a narrative of a run-away whose mother abandoned her and who was being exploited by a dangerous boyfriend and possible pimp.[8] The police detained Jill for being a minor in a casino in the company of a man they presumed was her pimp. Dana did not have a narrative. The students reviewed the police reports. Undercover vice detectives brought Dana and her teenaged companion to a hotel room and arrested both of them after drinks and conversation. Dana's exploitation was ambiguous as was her innocence.

The moral ambiguity in Dana's case was compounded by her refusal to accept plea bargains. The magistrate would only accept an admission to the charge or a trial.[9] We were going to have to try

6 The treatment of teenaged prostitutes by the adult criminal or juvenile delinquency system motivated the students to keep our clients from being a party in the system any longer than necessary. For further discussion see Geneva O. Brown, *Little Girl Lost: Las Vegas Metro Police Vice Division and the Use of Material Witness Holds Against Teenaged Prostitutes*, 57 Cath. U. L. Rev. 471 (2008).

7 The names are changed to protect the confidential status of juvenile clients.

8 I would be remiss to dismiss the importance of narrative in representing clients but the students' narrative emphasized innocence. See e.g., Sarah Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 Harv. Women's L.J. 217 (2003) (describing how lawyers must address race and class issues of battered woman for effective representation); Leigh Goodmark, *Telling Stories, Saving Lives: Battered Mothers' Testimony Project, Womens' Narratives and Court Reform*, 37 Ariz. St. L.J. (2005) (describing the methodology, finding and conclusions of the Battered Mothers' Testimony Project); V. Puslani Enos, Lois Kanter, *Who's Listening: Introducing Students to Client-Centered, Client-Empowering and Multidisciplinary Problem Solving In a Clinical Setting*, 9 Clinical L. Rev. 83 (2002) (describing the use of listening abilities of students involved in the Boston Medical Center Domestic Violence Project); John B. Mitchell, *Narrative and Client Centered Representation: What is a True Believer to do When His Two Favorite Theories Collide*, 6 Clinical L. Rev. 85 (1999); John B. Mitchell, *Why Should Prosecutors Get the Last Word*, 27 Amer. J. Crim. L. 139 (2000) (examines why a system that is constructed to favor the defendant gives the last word to the state); Patricia Puritz & Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Specialized Paradigm for Juvenile Defense Practice*, 45 Fam. Ct. Rev 466 (2007) (describing how juvenile defense attorneys must challenge racial, class and gender injustices in the juvenile system).

9 The constitutional rights of juvenile defendants are a continuing cause for concern. For more on juvenile rights see Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 Fla. L. Rev. 577 (2002); Cecilia Espenoza, *Good Kids, Bad Kids: A Revelation About the Due Process Rights of Kids*, 23 Hatings Const. L.Q. 402 (1996).

a case with a less than innocent client. The district attorney could not prove Jill was a prostitute and the court dismissed the petition. Was Jill any more innocent than Dana was guilty? The students became frustrated with representation because they did not know if Dana was a child lured and entrapped by vice detectives or if she was a provocative child-woman who went to a hotel room with strange men prepared to have sex in exchange for money.[10]

Reflecting on case rounds involving Jill and Dana's cases, I garnered that they wanted to know if either was innocent. We would discuss the weight of the evidence which was greater against Dana than Jill. In general, the students attempted to decipher culpability from police reports and their own investigations. After meetings with the clients, the defense team drew their conclusions. In both cases, the reports varied from Jill and Dana's version of events. The defense team embraced Jill's innocence while Dana's innocence was, at best, inconclusive. Dana received quality representation but the defense team was not enthralled.

When we discussed cases, a greater zeal was given to Jill's defense. Jill's case took on a greater urgency than Dana's. We had to win Jill's case. She was innocent. Dana's case meant a trial with seasoned and sullied Vice Squad detectives testifying about our worldly client's sexual conversation. Dana was more than likely guilty. Why did she insist on having a trial?

As a former public defender, I understood how one felt compelled by the urgency of representing innocent clients.[11] No defense attorney wants to see an innocent person convicted of a crime. Nevertheless, as a public defender, I vowed zealous representation no matter the status of the client. Diligence is expected in representing any client.[12] Zealous representation is a matter of

10 Representing teenaged prostitutes can be a complex task. Dana was the composite of both the exploited child-woman and the worldly teenaged prostitute. See Magnus Seng, *Child Sexual Abuse and Adolescent Prostitution: A Comparative Analysis*, 24 Adolescence 665 (1989).

11 See, e.g., Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. Chi. L. Rev. 931, 932-34 (1983); John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 U. Pa. L. Rev. 88, 88-90 (1977); Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 Cornell L. Rev. 1361, 1382-86 (2003); Josh Bower, *Punishing the Innocent*, 156 U. Pa. L. Rev. 1117 (2008); John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 Emory L.J. 437, 444-52 (2001); Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 Am. Crim. L. Rev. 1363, 1364-71, 1384 (2000); Kenneth Kipnis, *Criminal Justice and the Negotiated Plea*, 86 Ethics 93, 97–100 (1976); Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 Suffolk U. L. Rev. 1, 42 (2001); David Lynch, *The Impropriety of Plea Agreements: A Tale of Two Counties*, 19 Law & Soc. Inquiry 115, 132 (1994); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 Hastings L.J. 957, 986-90 (1989); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. Legal Stud. 43, 52 (1988); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 Yale L.J. 1979, 1992 (1992); Abbe Smith, *Defending the Innocent*, 32 Conn. L. Rev. 485, 494 (2000); Katherine J. Strandburg, *Deterrence and the Conviction of Innocents*, 35 Conn. L. Rev. 1321, 1336 (2003); Fred C. Zacharias, *Justice in Plea Bargaining*, 39 Wm. & Mary L. Rev. 1121, 1151-55 (1998).

12 See ABA Ctr. for Prof'l Responsibility, Model Rules of Prof'l Conduct R. 1.3 (Diligence in the Client-Lawyer Relationship). "A lawyer shall act with reasonable diligence and promptness in representing a client." See also Michelle Craven & Michael Pitman, *To the Best of One's Ability: A Guide to Effective Lawyering*, 14 Geo. J. Legal Ethics 983. *Contra* Anita Bernstein, *The Zeal Shortage*, 34 Hofstra L. Rev. 1165 (2006).

personal choice.[13] My philosophy in the juvenile clinic was that innocence did not matter but quality representation did.

I did not want the student attorneys or social workers becoming emotionally or morally invested in innocent clients. They would extend more time and energy to the Jills of the world when the Danas are in true need of zealous representation. I inquired of the team why was innocence more compelling? I redirected the team to the idea that the more compelling case may be a teenaged prostitute who is guilty and who may have contemplated sex with strange men in hotels. Such cases are representative of girls who come from abusive, dysfunctional backgrounds and needed extra care. Innocence could not become more important than the need for client-centered representation. I was in a quandary as to why innocence dominated case round discussions and the defense team focus. Why had innocence become the lynchpin of receiving zealous defense? The rise of the importance of innocence in criminal defense has a tragic history.

II. Innocence Paradigm

Circumstances in the State of Illinois came to underpin the importance of the innocence movement. Illinois exonerated more death row inmates than they executed since the death penalty was reinstituted in 1977.[14] Anthony Porter was two days from being executed by the state of Illinois for a double murder but was eventually exonerated by the Gov. George Ryan.[15] Gov. Ryan

13 I define zealous representation as the ability to give quality representation to any client no matter what the charge or whether the client maintains his or her innocence or is guilty of the crime(s) charged. See also Sylvia Steven, *Whither Zeal? Defending Zealous Representation*, 65 Or. St. B. Bull. 27 (2005). Stevens laments the lack of the requirements of zealous representation by the ABA Model Rules of Professional Conduct and the Oregon State Bar rules. *Id*. Stevens defines zealous representation as "doing your best and being dogged in pursuit of the client's aims within the bounds of the law and the ethical rules. It is compatible with civility and courtesy and, in my humble opinion, the highest manifestation of professionalism." *Id*. at 28.

14 In 1972, the U.S. Supreme Court held in *Furman v. Georgia*, 408 U.S. 238 (1972), the imposition of the death penalty was arbitrary and inconsistent and violated the Eighth and Fourteenth Amendments of the U.S. Constitution. A moratorium against the death penalty remained in effect until the 1977 decision in *Gregg v. Georgia*, 428 U.S. 153 (1976), that reinstated the use of the death penalty after states addressed the problems of arbitrary and capricious imposition.

15 See also David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. Ill. U. L. Rev. 91, 94 (2000). See Ken Armstrong & Steve Mills, *Ryan Suspends Death Penalty*, Chi. Trib., Jan. 31, 2000, at 1; *Death Penalty Panel Is No PR Stunt*, Chi. Trib., Apr. 8, 1999, at 18 ("The universal recognition—by all three branches of state government, plus a legal group—that there's something wrong with the death penalty process is a crucial and welcome step toward needed reform."); *Death 'System' Does Not Work*, Cap. Times (Madison, Wis.), Feb. 8, 1999, at 2C (reporting the call by the *Chicago Tribune* and the *Chicago Sun-Times* and legislators from both parties for a moratorium on executions in Illinois); Ray Long, *Revamp Likely in Process for Death Penalty*, Chi. Trib., May 18, 1999, at 20 (describing Illinois lawmakers as "scrambling to agree on how to revamp the state's death penalty procedures following several high-profile cases in which innocent men were released from Death Row"); Rick Pearson & Gary Washburn, *A Change of Heart on Execution Cases: In the Wake of Pressure After Anthony Porter's Release, Both Gov. Ryan and Mayor Daley Now See Serious Flaws in the Death-Penalty Process*, Chi. Trib., Feb. 11, 1999, at 1 (noting that "the actions [of proposing reforms] by two law-and-order conservative Republicans add up to a political acknowledgment that the public's confidence in the death penalty has been shaken"); Don Thompson, *Republicans Back Death Penalty Study*, Chi. Daily Herald, Mar. 24, 1999, at 9 ("Two law-and-order suburban representatives plan today to join the push for a moratorium and study of what's wrong with the way Illinois administers the death penalty."). Anthony Porter's case, which resulted in his release on his own recognizance from death row on February 5, 1999, and the subsequent vacating of his murder convictions on March 11, 1999, Daniel Lehmann, *Porter Cleared of '82 Murders*, Chi. Sun-Times, Mar. 12, 1999, at 8, is both a horror story and a fairly representative

proceeded to place a moratorium on administration of the death penalty in Illinois and removed all inmates from death row.[16] Gov. Ryan's decision gave impetus not only to death penalty opponents but to the innocence movement. Barry Scheck and Peter Neufeld began the first Innocence Project at Cordozo Law School at Yeshiva University in 1992.[17]

The Innocence Project represented a different model than traditional clinics. The focus was on the claim of innocence and innocence that could be proven through DNA testing.[18] The Innocence Project client generally had exhausted criminal appeals.[19] The Innocence Network has assisted in freeing at least 218 wrongfully convicted persons since its inception, 16 from death row.[20]

(*15 cont.*) exemplar of a wrongful conviction, remarkable only for the success with which the miscarriage of justice was ultimately addressed. As in so many other cases, Porter's innocence was demonstrated by dedicated individuals outside of the criminal justice and court systems. See Jim Allen, *Ex-Prisoner Praises Students Who Helped Free Him*, Chi. Daily Herald, Feb. 6, 1999, at 9 (quoting Northwestern University journalism professor David Protess saying, "'[T]he system was forced from the outside to recognize its injustice.'").
Porter was convicted of a 1982 double murder. See Pam Belluck, *Convict Freed After 16 Years on Death Row*, N.Y. Times, Feb. 6, 1999, at A7. His case went through the state and federal courts' direct appeal and post-conviction review processes from the time of his conviction until March 1998. In September 1998, "two days before Mr. Porter was to be executed, his lawyers won a stay while a court considered a motion that Mr. Porter, who has an I.Q. of 51, was not competent enough to be put to death." Belluck, *supra*, A7. The extent of Porter's mental incapacity was only discovered at that late date because Porter's trial counsel had neither the experience nor the funding to investigate his case properly. Ken Armstrong, *Bar Urges Changes in Capital Cases: Reforms Proposed To Give Defendants Better Trial Resources*, Chi. Trib., Feb. 27, 1999, at 1 (describing Porter's trial attorney's financial inability "to do much, if any, pretrial investigation"). Therefore, "he [did not] establish[] that his client was mentally retarded – and thus without the requisite level of responsibility to merit the death penalty." *Reforming Illinois' Death Penalty*, Chi. Trib., Mar. 17, 1999, at 22.
"After that, [Northwestern University journalism professor David] Protess, who each semester assigns his class murder cases to re-investigate, gave his students the Porter case." Belluck, *supra*, at A7. These students, assisted by Professor Protess and a private investigator, thoroughly reinvestigated the case and discovered major discrepancies in the accounts of the murders, a confession by the main prosecution witness "[saying] he had been pressured during hours of questioning by the police to implicate Mr. Porter," and finally confessions from the actual murderer's wife and then the now-confessed murderer himself, Alstory Simon, exonerating Porter. Belluck, *supra*, at A7.
Although the Illinois authorities never investigated any other suspect for the murders, see Eric Zorn, *A Few Words Come to Mind for Death Row System*, Chi. Trib., Feb. 9, 1999, at 1, Porter "maintained his innocence ever since the day of his arrest," through the course of over sixteen years in prison and a full array of capital appeals terminating with the Supreme Court's denial of certiorari on federal habeas corpus in March 1998. John Carpenter & Alex Rodriguez, *'I'm Free': Wrongly Convicted of Double Murder, Porter off Death Row*, Chi. Sun-Times, Feb. 6, 1999, at 1; see also *Porter v. Gilmore*, 118 S. Ct. 1343 (1998) (denying petitions for rehearing on denial of certiorari).
Governor George Ryan pardoned Porter of the double murder on March 19, 1999, to assist in a claim for compensation for wrongful imprisonment from the state. See *Governor Pardons Ex-Inmate Porter*, Chi. Trib, Mar. 20, 1999, at 5. Alstory Simon eventually pleaded guilty to the double murder. See Tom Ragan, *Years After Death Row, Travesty, Killer Gets Due*, Chi Trib., Sept. 8, 1999, at 1. On September 20, 1999, prosecutors finally dropped armed robbery charges against Porter, stemming from the same night as the double murder for which Porter was convicted to death. See Monica Davey, *Porter at Last Free of All Charges: Wrongly Sentenced To Die, He Awaits 2nd Pardon*, Chi. Trib., Sept. 21, 1999, at 1.

16 See *Governor Ryan Halts the Death Penalty Calls for Study of State's Messed-Up System*, Chi. Trib., Feb. 8, 2000; *Governor Commutes All Death Sentences*, Chi. Trib., Jan. 11, 2003.

17 See Innocence Project, at http://www.innocenceproject.org/about/Mission-Statement.php [hereinafter Innocence Project](last visited Sept. 29, 2008).

18 *Id.*

19 *Id.*

20 The Innocence Project detailed that there are 220 post-conviction exonerations in United States' history with the average falsely convicted person serving a twelve-year sentence. Seventeen falsely convicted persons received death sentences before being exonerated. Innocence Project at http://www.innocenceproject.org/know/.

III. Innocence in Clinical Legal Education

In many jurisdictions Clinical education has become invaluable in training law students for the essentials of law practice.[21] In the United States Clinical education is now an essential component of legal education. The Innocence projects have expounded on the clinical education model. Students have life changing experiences representing men and women exonerated after spending decades in prison and in some cases on death row. The Innocence Project has wielded great influence on clinical education.[22] In particular, Keith Findley details the skills students develop in

21 See *Legal Education and Professional Development—An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. Sec. Legal Educ. & Admissions To The Bar. Xi, http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html#B.%20Overview%20of%20the%20Skills%20and%20Values%20Analyzed [hereinafter MacCrate Report]. The report analyzes the fundamental lawyering skills essential for competent representation. It begins with two analytical skills that are conceptual foundations for virtually all aspects of legal practice: problem solving (Skill § 1) and legal analysis (Skill § 2). It then examines five skills that are essential throughout a wide range of kinds of legal practice: legal research (Skill § 3), factual investigation (Skill § 4), communication (Skill § 5), counseling (Skill § 6), and negotiation (Skill § 7). The statement next focuses upon the skills required to employ, or to advise a client about the options of litigation and alternative dispute resolution (Skill § 8). Although there are many lawyers who do not engage in litigation or make use of alternative dispute resolution mechanisms, even these lawyers are frequently in a position of having to consider litigation or alternative dispute resolution as possible solutions to a client's problem, or to counsel a client about these options, or to factor the options into planning for negotiation. To accomplish these tasks, a lawyer needs to have at least a basic familiarity with the aspects of litigation and alternative dispute resolution described in Skill § 8. Skill § 9 identifies the administrative skills necessary to organize and manage legal work effectively. This section reflects the perception that adequate practice management skills are an essential precondition for competent representation of clients. Finally, Skill § 10 analyzes the skills involved in recognizing and resolving ethical dilemmas. *Id*.

22 See Keith A. Findley, *The Pedagogy of the Innocent: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 Clinic L. Rev. 231 (2006) [hereinafter Findley, *Pedagogy*]; Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Inncence: Five days to Execution, and other Dispatches from the Wrongly Convicted* (2000); George H. Ryan, *Report of the Governor's Commission on Capital Punishment* (Apr. 15, 2002), http://www.idoc.state.il.us/ccp/ccp/reports/index.html; *Innocence Commission for Virginia, A Vision for Justice* (2005), available at http://www.icva.us/; Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 Law & Hum. Behav. 9 (1998); Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations, Special Report*, NW. U. Sch. L., Center on Wrongful Convictions (Summer 2004); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 991 (2004); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim. L. & Criminology 429 (1998); Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. Pub. Int. L.J. 719 (1997); Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions*, 32 Loy. U. Chi. L.J. 337 (2001); Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Study Commission To Study Wrongful Convictions*, 38 Cal. W. L. Rev. 333 (2002); Michael J. Saks et al., *Toward a Model Act for the Prevention and Remedy of Erroneous Convictions*, 35 New Eng. L. Rev. 669 (2001); Sharone Levy, *Righting Illinois' Wrongs: Suggestions for Reform and a Call for Abolition*, 34 J. Marshall L. Rev. 469 (2001); Steven Clark, *Procedural Reforms in Capital Cases Applied to Perjury*, 34 J. Marshall L. Rev. 453 (2001); Michael J. Saks & Jonathan J. Koehler, *What DNA "Fingerprinting" Can Teach the Law About the Rest of Forensic Science*, 13 Cardozo L. Rev. 361 (1991); George Castelle, *Lab Fraud: Lessons Learned*, The Champion, May 1999 at 12; Scott Bales, *Turning the Microscope Back on Forensic Scientists*, 26 Litig. 51 (2000); U.S. Dep't of Justice, Office of Justice Programs, National Institute of Justice, A Report from the National Commission on the Future of DNA Evidence, *Postconviction DNA Testing: Recommendations for Handling Requests* (1999), http:/www.ojp.usdoj. gov/nij/pubssum/177626.htm.; Rob Warden, *The Snitch System*, NW. U. Sch. L., *Center on Wrongful Convictions* (Winter 2004-2005), available at http://www.law.northwestern.edu/wrongfulconvictions/documents/SnitchSystemBooklet.pdf; Daniel Givelber, Meaningless Acquittals, *Meaningful*

representing clients in wrongful conviction cases:

> *"Innocence projects offer particularly good opportunities for learning about the importance of facts; about the importance of being skeptical, vigilant, and thorough; about ethics, values, and judgment; and about the criminal justice system itself – from obtaining a critical perspective on legal doctrine to a critical understanding of 'the law in action,' that is, how the criminal justice system actually works, and how it might be made to work more effectively and fairly."*[23]

The valuable work of Innocence Projects can be measured by the many reforms instituted in the criminal justice system after highlighting the plight of the wrongfully convicted.[24] The media has also become a key player in the portrayal of the wrongfully convicted person. The American public can watch in real time as a prison releases a wrongfully convicted man or woman after decades of imprisonment.[25] The portrayals of release are emotional and they strike a chord with the American public. The cases, the narratives and the images of the innocent leave an effect on our collective psyche. An unintended consequence however may be the focus on the importance of innocence.

(*22 cont.*) *Convictions: Do We Reliably Acquit the Innocent?*, 49 Rutgers L. Rev 1317 (1997); Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, Wis. L. Rev. 35 (2005); Stanley Z. Fisher, *Convictions of Innocent Persons in Massachusetts: An Overview*, 12 B.U. Pub. Int. L.J. 1 (2002); Myrna Raeder, *What Does Innocence Have To Do With It? A Commentary on Wrongful Convictions and Rationality*, Mich. St L. Rev. 1315 (2003); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. Rev. 125 (2004); Richard A. Rosen, *Reflections on Innocence*, Wis. L. Rev. 237 (2006); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, Wis. L. Rev. 291 (2006); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, Wis. L. Rev. 399 (2006); Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, Wis. L. Rev. 479 (2006); Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, Wis. L. Rev. 541 (2006); Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, Wis. L. Rev. 615 (2006); Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, Wis. L. Rev. 645 (2006); Rodney Uphoff, *Convicting the Innocence: Aberration or Systemic Problem?*, Wis. L. Rev. 739 (2006).

23 See Findley, *Pedagogy*, *supra* note 22, at 241. Findley quotes Dean Ken Davis in describing "law in action" as the concept of the legal educational philosophy at the University of Wisconsin Law School. As Dean Davis has explained, Wisconsin has a tradition of focusing its scholarship and teaching on "law in action," the concept that "in order to truly understand the law, you need not only to know the 'law on the books,' but also to look beyond the statutes and cases and study how the law plays out in practice." Dean Davis has written, "'Law in Action' reminds us that no matter how interesting or elegant the theory or idea, we always need to ask, 'Why should this matter to people in the real world?'" Kenneth B. Davis, *Law in Action: The Dean's View*, available at www.law.wisc.edu/Davislawinactionessay.htm at 1.

24 See Innocence Project, *supra* note 17, available at http://www.innocenceproject.org/fix/False-Confessions.php. The Innocence Project reports that the recording of interrogations reduces the likelihood of false confessions. The Supreme Courts of Alaska and Minnesota have declared that, under their state constitutions, defendants are entitled as a matter of due process to have their custodial interrogations recorded. In 2003, Illinois became the first state to require by law that all police interrogations of suspects in homicide cases must be recorded. Police departments in Broward County (Florida) and Santa Clara County (California), among others, have begun to record interrogations without a law requiring them. Proactive policies like these have been adopted because the practice benefits police and prosecutors as well as innocent suspects. *Id*.

25 See Elliot C. McLaughlin, *Convicted by Doodles, Masters Is Freed by DNA*, Jan. 25, 2008, available at http://www.cnn.com/2008/CRIME/01/22/masters.case/index.html#cnnSTCText

IV. Deconstructing Innocence

Fundamental Question

Has the emphasis on innocence of late created a category of clients that have been deemed more worthy of zealous representation? No one deserves greater representation than does the wrongfully convicted who did not receive it and paid the costs with their freedom. The Illinois Commission on the death penalty cited inadequate representation as one of the major problems of how the innocent become convicted of crimes they did not commit.[26] The potential problem becomes the emphasis on the person who was wrongfully convicted and not on the system that allowed an innocent person to be convicted.

The narratives of the wrongfully convicted persons are riveting.[27] Spending decades in prison and potentially having exhausted all appellate remedies, the Innocence Project has been the only hope for many. The Innocence Project has also been the catalyst for criminal justice reform.[28] Critics however, note that the focus on innocence in the media and government creates an unintended consequence of innocence being the exclusive reason for reform or zealous representation.[29] Innocence can be a dual-edged sword. The focus on innocence brought needed attention to a troubled system but it has also been used as a gate keeping function in federal courts. The focus on innocence created procedural and substantive problems. The courts and Congress used innocence as a procedural bar and severely limited access to grant habeas review in the name of innocence. Innocence has a profoundly negative impact on non-innocence substantive issues such as justification defenses and constitutional violations.

The Procedural Problem and The Original Innocence Movement

Carol Steiker and Jordan Steiker extrapolate that the first innocence movement began after the Warren court introduced expansive treatment of collateral federal review of state court convictions as a vehicle for the consideration of all federal constitutional claims in a federal

26 *George H. Ryan, Governor, Report of the Governor's Commission on Capital Punishment*, 108 (Apr. 15, 2002), http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_07.pdf. See also Ken Armstrong and Steve Mills, *The Failure of the Death Penalty in Illinois, Part 2: Inept Defenses Cloud Verdict* (Nov. 15, 1999), http://www.chicagotribune.com/news/specials/chi-991115deathillinois2,0,721147.story.

27 See Jim Dwyer, Peter Neufeld & Barry Scheck, *Actual Innocence: Five days to Execution and Other Dispatches from the Wrongfully Convicted* (2000).

28 The Innocence Project has a series of priority issues that would assist in fixing the system including: eyewitness identification, false confessions, DNA testing access, evidence preservation, forensic oversight, innocence commissions and exoneree compensation. Innocence Project, http://www.innocenceproject.org/fix/Priority-Issues.php. The Innocence Project also assisted in federal legislation, the Justice For All Act of 2004, Public Law 108-405,108th Congress. The purpose of the Act is to protect crime victims' rights, to eliminate the substantial backlog of DNA samples collected from crime scenes and convicted offenders, to improve and expand the DNA testing capacity of federal, state, and local crime laboratories, to increase research and development of new DNA testing technologies, to develop new training programs regarding the collection and use of DNA evidence, to provide post-conviction testing of DNA evidence to exonerate the innocent, to improve the performance of counsel in state capital cases, and for other purposes. Available at http://www.govtrack.us/congress/billtext.xpd?bill=h108-5107.

29 See infra notes 30–48. See also Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55 (2008); Daniel Medwed, *Innocentrism*, 2008 U. Ill. L. Rev. 1549 (2008); Andrew M. Siegel, *Moving Down the Wedge of Injustice: a Proposal for Third Generation Wrongful Conviction Scholarship and Advocacy*, 42 Amer. Crim. L. Rev. 1219 (2005).

forum.[30] Paradoxically, actual innocence became a narrowing avenue for appellate review in reaction to the Warren Court.

The Supreme Court guided by Justices Burger and Rehnquist limited the substantive scope of federal habeas review.[31] The Court emphasized innocence as a limiting criterion.[32] The Court precluded re-litigation of Fourth Amendment claims rationalizing that it would impede claims rather than promote the accuracy of criminal verdicts.[33] The Court proceeded to preclude "new" constitutional claims and allowed only narrow exceptions.[34] Lastly, the Court relaxed the standard for finding constitutional errors. The Court allowed findings of harmless on habeas review, determining that only truly grievous constitutional wrongs—conviction of the innocent being the paramount case—should be corrected on habeas.[35]

Congress added legislation to the first innocence movement by amending the federal habeas statute in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[36] Congress crafted an innocence exception that relied exclusively on factual innocence.[37] The law required that the petitioner prove such factual innocence by "clear and convincing evidence" as opposed to the previous and more lenient "more likely than not" evidentiary standard.[38] The use of factual innocence as the essential factor for review established two governmental paradigms: 1) acknowledgement of innocent persons being convicted and 2) the use of factual innocence to limit

30 Carol Steiker & Jordan Steiker, *The Seduction of Innocence: The Attraction and Limitation of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. Crim. L. & Criminology 587, 609 (2005) [hereinafter Steiker & Steiker]. The authors note that in response to the Warren Court's incorporation of the criminal procedure provisions of the Bill of Rights, its expansive reading of those provisions, and its liberal approach toward the availability of federal review of state court convictions, the Burger and Rehnquist Courts moved in the 1970s and 1980s to craft rules of constitutional adjudication in the criminal process to focus on truth-seeking rather than vindication of constitutional rights per se. *Id*.

31 *Id*. citing *Wainwright v. Sykes*, 433 U.S. 72 (1977) (excuse for petitioner's failure to comply with state procedural rule must meet "cause and prejudice" standard rather than "deliberate bypass" standard of *Fay v. Noia*, 372 U.S. 391 (1963)); *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (applying "cause and prejudice" standard to failure to develop the facts underlying claim) (overruling *Townsend v. Sain*, 372 U.S. 293 (1963)); *McCleskey v. Zant*, 499 U.S. 467 (1991) (applying "cause and prejudice" standard to new claims not presented in previous petition); *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (applying "cause and prejudice" standard to successive claims raising grounds identical to grounds heard and decided on the merits in a previous petition).

32 The authors note that the Court in *McCleskey v. Zant*, *Murray v. Carrier* and *Kuhlmann v. Wilson* decisions crafted a narrow "miscarriage of justice" exception to the "cause and prejudice" requirement, allowing petitioners to raise successive claims, repetitive new claims, or defaulted claims if they made a colorable showing of actual innocence of the underlying crime. See *McCleskey v. Zant*, 499 U.S. 467 (1991) (repetitive new claims); *Murray v. Carrier*, 477 U.S. 478 (1986) (defaulted claims); *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (successive claims); see also *Sawyer v. Whitley*, 505 U.S. 333 (1992) (crafting an even narrower "innocent of the death penalty" miscarriage-of-justice exception).

33 Steiker & Steiker, *supra* note 30, at 610, citing *Stone v. Powell*, 428 U.S. 465 (1976) (denied granting relief based on Fourth Amendment claim litigated at trial).

34 *Id*., citing *Teague v. Lane*, 489 U.S. 288 (1989)(barred relief based on state rule that was not established during the state decision).

35 *Id*., citing *Brecht v. Abrahamson*, 507 U.S. 619 (1993)(relaxed the constitutional standards for harmless error from beyond a reasonable doubt to whether error had substantial and injurious effect).

36 *Id*. at 611, citing Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C.).

37 28 U.S.C. § 2244(b)(2)(B)(ii).

38 Steiker & Steiker, *supra* note 30, at 610, citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986). The Court imposed a "clear and convincing" standard of proof only on defendants seeking to show that they were ineligible for the death penalty, rather than innocent of the underlying offense. See also *Sawyer*, 505 U.S. at 336.

all other claims including those of a constitutional nature. Steiker and Steiker postulate that judicial and legislative re-calibration of federal habeas corpus relief was part of a larger movement to accurate determination of guilt or innocence which became the only value in constitutional criminal procedure.[39]

Congress and the federal courts used innocence to limit access of defendants to the courts. A study completed by the U.S. Department of Justice reiterates Steiker and Steiker's findings. The implementation of the AEDPA reduced the number of evidentiary hearings granted based on habeas petitions by half.[40] Using innocence as the impetus for change had a chilling effect in capital habeas cases.[41]

Substantive Problems with Innocence

The emphasis on factual innocence undermines traditional approaches to criminal defense. The focus on wrongful convictions creates what Margaret Raymond quantifies as a "supercategory of innocence".[42] Factual innocence is elevated over other categories of innocence.[43] At trial, the jury must determine whether there is sufficient evidence to determine guilt.[44] The defendant does not bear the burden of proving factual innocence or the legally presumed innocence guaranteed by the constitution.[45] The cultural and legal focus on factual innocence may lead juries to conclude that evidence short of factual innocence does not justify an acquittal.[46]

The constitutional rights of defendants will become secondary to innocence determinations. The focus on innocence subverts the concern criminal defense litigators have about protecting defendants' constitutional rights and launching challenges to illegal search and seizures.[47] Constitutional claims of guilty defendants lack the visceral appeal of innocence claims.[48]

V. Conclusion

The innocence movement has proven invaluable in bringing attention to a myriad of problems in the criminal justice system. The revelation and poignant freeing of wrongfully convicted persons has influenced legislative and court reforms. Criminal defense attorneys and prosecutors are being held to more stringent standards. The innocence movement has revolutionized clinical legal education as well. Student attorneys engage in life altering cases and in instances such as Anthony

39 Steiker & Steiker, *supra* note 30, at 612.

40 Nancy King, Fred Cheesman, & Brian Ostrom, *Executive Summary: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus cases Filed by State Prisoners under the Antiterrorism and Effective Death Penalty Act of 1996*, Nat'l Inst. Just., Office of Justice Programs, U.S. Dep't of Justice, Aug. 21, 2007, at 5.

41 See Todd E. Pettys, *Killing Roger Coleman: Habeas, Finality and the Innocence Gap*, 48 Wm. & Mary L. Rev. 2313 (2007) (discussing the innocence gap created in habeas procedures – a gap between the amount of exculpatory evidence sufficient to thwart finality of habeas petition versus the amount of exculpatory evidence sufficient to persuade a federal court to forgive petitioners procedural mistakes and review based on the constitutional merits).

42 Margaret Raymond, *The Problem with Innocence*, 49 Clev St. L. Rev. 449, 457 (2001).

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 See Medwed, *supra* note 29, at 1556,citing Linda J. Skitka & David A. Houston, *When Due Process Is of No Consequence: Moral Mandates and Presumed Defendant Guilt or Innocence*, 14 J. Int'l Soc'y Just. Res. 305, 323 (2001) (presenting results of empirical studies from psychologists that suggest people tend to disregard due process values when they believe they know the defendant to be guilty or innocent).

48 *Id.*

Porter's case actually save peoples' lives. As the students learn to engage in a flawed system they also need to grasp that some clients are guilty. Quality representation should never be reduced to essentialist standards of guilt or innocence. Zealous representation should never be married to the importance of innocence. The flaws in the criminal justice system that convict the innocent also taint the guilty. Jill and Dana represent a cautionary tale of the attractiveness of innocence. I diligently guard against being seduced by innocence. Innocence should never replace the foundations of zealous representation. Jill and Dana deserved engaged and zealous student attorneys no matter their status.

Clinical Practice

Legal Education and Clinical Legal Education in Poland

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The aim of this paper is to present the existing legal education system and development of clinical legal education in Poland. The first part briefly introduces the general Polish higher education system including the implications of the Bologna Process and other challenges for the law faculties as higher education institutions. It then focuses on the five different apprenticeships necessary to obtain license to practice law in Poland. The second part deals with the study program and teaching methods used at Polish law faculties. It argues that the present system does not meet the requirements of the contemporary legal job market as students are not, as a rule, exposed to practical aspects of legal problems and leave law school without training in the necessary skills. The third and most extensive part is dedicated to the legal clinics operating in Poland. Some statistical data is presented on legal clinics (i.e. numbers of students, teachers, cases etc.). This part also discusses basic clinical methodology instruments used in Polish clinics. Finally it describes the establishment of the Polish Legal Clinics Foundation (Foundation), its goals, tasks, challenges and achievements.

I. Higher Education System in Poland

Institutions of Higher Education

The first Polish law school dates back to 1364 when the present Jagiellonian University was established as the oldest university in Poland and second oldest in Central and Eastern Europe. As Z. Gostynski and A. Garfield write: "Over the centuries Poland developed a system of legal education which was similar to that offered in other European civil law countries. The period of socialist rule in Poland did not change the general contours of this system. Instead, it modified the system, especially in terms of curriculum and career opportunities. When Poland emerged from Communist rule in 1989, its system of legal education continued largely intact."[1] Before 1989, under the old rules, the system comprised only state institutions, the sole exception being the non-state Catholic University in Lublin. In 1990, the new Act on Schools of Higher Education laid

1 Z. Gostynski, A. Garfield: Taking the other road: Polish legal education during the past thirty years, 7 Temp. Int'l & Comp. L.J. 243, 1993, p.253.

down rules for establishing non-state institutions of higher education, whose number has been steadily growing since then.[2]

According to the current Law on Higher Education, a public higher education institution is an institution established by the State as represented by a competent authority or public administration body. A non-public higher education institution is an institution established by a natural person or a corporate body other than a corporate body administered by national or local authorities.[3] There may also be distinguished two types of higher education institutions. The first group includes university-type institutions offering studies in the humanities, sciences, medical sciences, economics, pedagogy, the arts, and military studies. The second group includes professional institutions which educate students in specific professional areas and prepare them for practising a profession.[4]

The Bologna Process and Legal Education

A European Higher Education Area (EHEA) based on international cooperation and academic exchange is the main goal of the Bologna Process and one of the proposed reforms provides for "readable and comparable degrees organized in a three-cycle structure (e.g. bachelor-master-doctorate)".[5]

There are five levels of higher education established in the Polish system, fulfilling the standards of the Bologna Process: one undergraduate (first-cycle) program, two graduate (second-cycle and long-cycle) programs, one doctoral (third-cycle) program and one postgraduate (non-degree) program.[6]

Legal education is one of a very few fields of studies which departed from a stage-oriented assumptions of the Bologna Process and it constitutes a uniform five-year study program classified as the long-cycle one that is open to applicants holding a secondary school leaving certificate (matura exam), providing specialist knowledge in a specific area of study as well as preparing for creative work in a profession. Graduates are granted master level titles (magister) based on the completion of the curriculum and final diploma examination where students defend their master thesis.[7]

There has recently been discussion over whether to change the final diploma examination. Under present circumstances the fifth year students attend the master seminars conducted by professors and write master papers under their supervision. Two major issues have been heavily criticised – one, that due to the high number of students it often happens that one professor supervises more than 10–15 master papers at the same time (the number varies in different schools and reaches up

2 Taking legal education as an example, there are total of 16 state schools with law faculties, 12 of them existed before 1990. After the reform the number of non-state law schools has grown to reach total of 13 non-state institutions where legal education can be obtained. Data based on the 2008 Law Faculties Ranking of "Gazeta Prawna" (Polish daily legal newspaper).

3 Art. 2 of The Act of July 27, 2005 – Law on Higher Education, Official Journal 2005, nr 164, position 1365.

4 Classification by the Ministry of Science and Higher Education: http://www.eng.nauka.gov.pl

5 See the official website of the Bologna Process: http://www.ond.vlaanderen.be/hogeronderwijs/bologna/

6 Art. 2 of The Act of July 27, 2005 – Law on Higher Education, Official Journal 2005, nr 164, position 1365.

7 For more information on professional titles and academic degrees in the Polish educational system see the information of the Bureau for Academic Recognition and International Exchange at http://www.buwiwm.edu.pl/educ/index.htm

to 30 or even 40). As a consequence, students' research is often incomplete and the papers are not properly prepared and reviewed, which leads to the second critical argument – a masters thesis should engage more methods than the simplest "copy-paste-cite" one.

The Bologna Process encouraged European schools to introduce the European Credit Transfer System (ECTS) which is a student-centered system based on the student workload required to achieve the objectives of a program. In the frame of ECTS, every legal course is assigned a number of credits reflecting the amount of work necessary to meet the course's requirements. There is minimum standard of ECTS points required to pass each semester as well as the ECTS grading system allowing for easy recognition of students' achievements by different European institutions.[8]

How a student becomes a lawyer

The Polish legal education program consists of a five year curriculum discussed below, but law school graduates with a masters degree are not licensed to practice in any legal profession. In order to practice law, following graduation they have five different traineeships to choose from, depending on whom they want to become in the future: a judge, an advocate, a legal advisor, a public notary or a prosecutor. The provision of legal advice and representation of parties before the court can be performed by advocates or legal advisors.[9] It takes a state entrance exam to be admitted to the advocate's or legal advisor's traineeship (aplikacja) which lasts three years and ends with a final, usually two- or three-day, exam. Positive results in the exam opens the door to practice and the professional associations.[10]

II. What and how a law student studies at school

Study program example

Every Polish law faculty has the right to arrange its own study program. The Ministry of Science and Higher Education issues "educational standards" for every major (law, administration, biology, architecture etc.) taught at higher education institutions. The standards will provide the number of ECTS points required, the number of semesters and hours within the semester to be taught and basic requirements of the content of education (i.e. what kind of courses should be offered in a law school). Law faculties follow those standards while scheduling their own curricula.

It is commonly accepted that the five – year legal program is theory-oriented. Taking a program of one of the law faculties as an example,[11] the lack of any practical courses is easily noticed. The first

8 More on European Credit Transfer System: EU Education and Training at http://ec.europa.eu./education/programmes/socrates/ects/index_en.html

9 Functions of both professions are very similar today. Advocates provide full scope of legal service, while legal advisors can not take criminal law cases.

10 In 2005, following the judgment of the Constitutional Tribunal of Poland on the Admission to the Advocates' and Legal Advisors' Traineeships, a new law on admission to legal profession was introduced which abolished the exclusive control of access to legal professions for law graduates by professional associations (similar to bar associations). As a consequence, the entrance and final exams are now state exams (these used to be organized by local associations and the number of admitted candidates was often lower than 10 per year). It also opened up the possibility of obtaining a license to practice (based only on the final state exam) for persons holding a PhD in law or for persons who performed legal services for five years in an unqualified status.

11 This is an example of a study program offered since 2007 at the Faculty of Law, University of Bialystok – the home school of the author of this article. It may be found at: www.prawo.uwb.edu.pl. Other Polish faculties follow the same standards. Although the rules and particular components vary, the lack of practice-oriented courses is a national problem.

year law students have their schedule already planned and they take the following courses: Jurisprudence, History of Polish Law, Common History of Law, Legal Logics, Roman Law, Denomination Law, Economics, Sociology (or Legal Ethics), Computer Science, Foreign Language, Latin Legal Terminology and Physical Education. Obligatory courses during the second year include: Constitutional Law, Administrative Law, Civil Law (part 1), Criminal Law, and Intellectual Property Law. Third and fourth year comprises: Civil Law (part 2), Criminal Proceedings, Administrative Proceedings, Civil Proceedings, Theory and Philosophy of Law. The fifth year is dedicated to the master seminar, however between year II and V, each student completes other courses, so the number of ECTS points equals 60 per year and has to include an additional 11 courses in the program such as: Political and Legal Doctrines, Labor Law, Law of the EU, Public International Law, Tax Law etc. In addition there are 10 specialized courses (15 hours each) required during the fourth and fifth year in accordance with the student's master seminar. There are only two two-week internships included in the study program which each student has to take during the fourth and fifth year.

Teaching forms and methods

Every major course in Polish law schools has two forms of teaching. Once a week all students in a particular year meet to listen to 90 minutes of a regular *lecture* conducted by the professor in a given field of law. Once a week groups of students (the number of students is different in every law school but on average there are 20–30 students in one group) meet to work in a 90 minute class conducted by teaching assistants or lecturers. The idea behind such a division was to enable students to listen to a full time lecture and then work on some practical aspects of the same legal problems in class.[12] Unfortunately, quite often those forms are not very productive. Lectures can consist of nothing but reading chapters from books and classes of going over those chapters and discussing them. During the fourth and fifth year students attend master *seminars*. They are usually smaller groups of 10–15 students working under supervision of the professor on the preparation of the final master thesis.

Most popular teaching methods at Polish law schools include: lectures (nowadays, also with power point presentations), class discussions, working with codes and legal acts (not so often with court judgments).

It must be emphasized however, that the situation, at least in some law schools, has been improved as more new teaching techniques are introduced and students have a chance to participate in moot court simulations, workshops on legal analysis and legal writing etc. A lot of credit in this respect goes to the legal clinics where new ideas are widely and successfully implemented to make sure law graduates leave the school with some practical preparation for their future profession.

III. Clinical legal education: a decade of struggle and satisfaction

Development of CLE in Poland

The idea of clinical legal education was brought to Poland from the United States and quickly gained a big group of supporters. In 1997 the first legal clinic was established with the financial

12 In most Polish law schools lectures are not obligatory but classes are. Students have to obtain a passing grade in class to be able to take a final course exam. This is however, not a rule at all faculties, sometimes both lectures and classes are not mandatory.

support of the Ford Foundation at the Jagiellonian University in Krakow. Soon other clinics opened at Warsaw University (also based on the Ford Foundation's support) and the University of Bialystok (based on the financial support of the ELSA – European Law Students' Association and the law school's funds).[13] Within ten years the idea of clinical legal education has become popular among students and some faculty members. It was not always easy to establish a new clinic at a law school and convince the authorities it was an excellent opportunity for the students to get a sense of law in practice while still studying the codes.[14] It was even more difficult to convince the national associations of advocates and legal advisers that clinics would not compete with them. It took much effort by many students and supporters of the CLE idea to reach today's numbers – there are presently 25 legal clinics operating at every public school and most private schools.[15] All of them are in some way included in the study programs, as an optional course, internship or student activity. Most of the programs also include the legal clinic in the ECTS system. At some faculties (in Warsaw, Krakow, Bialystok, Opole or Lodz) clinics have already become integral parts of the school's structure in form of an institute, chair or laboratory.[16]

Students involved in the clinical program are divided into sections dealing with particular fields of law (civil, criminal, administrative, refugee, etc.). One legal clinic usually comprises several sections (there are for example eight sections at the Warsaw University clinic, seven sections at the University of Bialystok), so students are exposed to different fields of law within one program. Each section is supervised by at least one teacher, a member of the faculty, sometimes together with a practitioner. There are two students assigned to each case. The legal opinion is always given in writing and explained to the client. This assistance is of course free of charge and clinics accept only clients who can not afford professional legal advice.[17]

Legal clinics:statistical data

The Legal Clinics Foundation issues an annual statistical summary of Polish legal clinics' work and that data represents the scope of clinical activity throughout the country. During the academic year 2006/2007[18] there were a total of 9399 cases submitted to legal clinics out of which 2327 (25%) were civil law cases. There were 1302 students and 197 teachers working in the clinics. On average then, one teacher supervised the work of six students and one student handled seven cases.

13 More on the history of the Polish legal clinics' development see: Legal Clinics Foundation website at:www.fupp.org.pl

14 Polish law students have very limited options when it comes to providing legal assistance to clients in courts and they may not represent them. For more information concerning legal assistance in Poland see: L. Bojarski: The aim of legal clinics [in:] The Legal Clinic. The Idea, Organization, Methodology, C.H. Beck Warsaw 2005, p.19–33. An on-line version of the publication available at the Legal Clinics Foundation's website: http://www.fupp.org.pl/down/legal_clinic.pdf

15 The 2008 Law School Ranking by Gazeta Prawna quoted above, for the first time included legal clinic as a ranking criterion. Moreover, the Deans of the winning law faculties emphasized clinical programs as valuable priorities of their law school's policies.

16 More on the organizational forms of legal clinics in Poland in the light of the Bologna Process: R. Golab: *Institute of clinical legal education – answer to the challenges brought to European schools by the Bologna Process*, KLINIKA 2008, nr 4 (8), p.18–23.

17 The structure of the clinic and sections as well as the procedure required when providing legal advice by students is extensively explained in: *The Legal Clinic. The Idea, Organization, Methodology*, C.H. Beck Warsaw 2005.

18 This summary is available in the power point presentation at the Legal Clinics Foundation's website: http://www.fupp.org.pl/down/prezentacja_2006-2007_eng.ppt. It is based on data collected from 24 legal clinics, as the other one was just opened recently and the data from last academic year are not published yet.

Naturally, Polish legal clinics vary in size having between 20 to 120 students enrolled into the course and between 3 and 20 teachers working with students. Bigger clinics therefore handle somewhere between 500 and 1000 cases per year and smaller ones between 40 and 300. Civil law cases are most often submitted to legal clinics followed by criminal law cases (2012 in the 2006/7 academic year), family law cases (1180), labor and unemployment law (992), inheritance law (817), housing law (591), administrative law (421), refugee and foreigner law (398), financial law (106), social aid (50), health care (31), violence against women (29), disabled (15), NGO (14) and 416 other legal problems.

In 49% of cases the legal problem required only a short explanation and opinion which took one or two meetings with the client and the case lasted up to two weeks. 41% of the cases required several meetings and the case lasted between two weeks and two months. Only 9% of cases lasted up to one year and 1% – longer than a year. 83% of the clinical clients had not obtained any professional legal advice before coming to the clinic.

Teaching in a legal clinic

As legal clinics became very popular in Polish law schools, it was necessary to extend the understanding of clinical legal education and make sure that the social mission did not set aside the educational goal of the clinical programs. As F. Zoll and B. Namyslowska observe, there are two fundamental aspects to the clinical teaching method: its effectiveness as a method of learning comprehensive legal skills in a relatively short period of time, and the social education aspect which transpires through the fact that the student lends assistance to people of modest means thus realizing how the institutions of the state function wherever professional legal assistance does not reach.[19]

Polish law professors who became supervisors in legal clinics had little or no idea of how to effectively use the real client and real legal problem and build the teaching instruments around them. The role of the supervisor was and still is in many cases reduced to the function of watching over the students' activities and ensuring that they do not make any mistakes from the legal point of view, that their opinions include correct provisions and quote appropriate articles.[20]

Many projects have been carried out to improve the situation and to "teach the teachers" how to use their time with students in the clinic to help develop necessary lawyering skills: legal analysis and reasoning, communication, negotiation, factual investigation, problem solving etc. With the financial support of several institutions some clinical teachers visited legal clinics in the USA[21]; observed teaching methods used there and brought them back to try at their schools. Many conferences and workshops have been organized by the Legal Clinics Foundation but also by the clinics themselves, dedicated to different aspects of clinical teaching. There are also a couple of books published by one of the largest legal publishers in Poland, introducing the clinics and promoting clinical education (some of them are available to download from the Foundation's

19 F. Zoll, B. Namyslowska: *The methodology of clinical teaching of law* [in:] *The Legal Clinic. The Idea, Organization, Methodology*, C.H. Beck Warsaw 2005, p.186.

20 *Id*, p.187.

21 The Legal Clinics Foundation also worked out a scholarship program for clinical teachers. Each year the Kosciuszko Foundation sponsors one representative from a Polish legal clinic who particiapates in the fellowship program arranged by PILI at Columbia University in New York.

website).[22] Additionally, clinical teachers can publish articles and share their experience in the "Klinika" magazine published by the Foundation and communicate through a group e-mail list created specially for clinical teachers.

The Legal Clinics Foundation

Within just a few years of the first legal clinic being established in 1997, the clinical idea spread throughout the country and in 2001 fourteen new programs were opened at different schools. At that moment it was important to arrange some future planning to consolidate the clinical objectives and also to create a common platform for communication and experience exchange among Polish clinics. At the turn of 2001 and 2002 the decision was made to establish a Legal Clinics Foundation which presently operates under the institutional financial support of the Batory Foundation and Polish-American Freedom Foundation. In December 2001 three representatives from Polish legal clinics were invited to participate in a study visit to the Republic of South Africa, where the clinical teaching program had been successfully developing for the past 30 years.[23] The trip resulted in the devising of a strategy for the development of the Polish legal clinics program based on the experience of the Republic of South Africa, and consequently in the establishment of the Legal Clinics Foundation which would take on the duty of strengthening the present clinical structure and shape the future of the clinical movement in Poland. The idea was not only to ensure the financial stability of the clinics, but also to constitute a forum which would bring together the efforts to enhance the clinics' position in the academic and legal community, and would search for a formula to inscribe legal clinics into the Polish legal system.[24]

According to its Statute,[25] the Legal Clinics Foundation's goals include: 1) financial support of the legal clinics' activity and other programs of practical legal education; 2) elaboration and promotion of the legal clinics' activity standards; 3) elaboration and propagation, of the legal regulations and drafts of legal regulations covering legal clinics' activity.

The structure of the Foundation consists of the Council of the Foundation (Council), Board of the Foundation (Board), and Advisory Board.

The Council consists of the academies having legal clinics operating according to the standards and accredited by the Foundation and other subjects supporting the Foundation's activity. It holds the executive power as it appoints the Board and approves financial plans and activity projects proposed by the Board.

22 The first Polish book dedicated to the clinics which has been quoted many times in this article has been translated into English and is available at the Foundation's website: The methodology of clinical teaching of law[in:] *The Legal Clinic. The Idea, Organization, Methodology*, C.H. Beck Warsaw 2005. Other guides include: I. Mulak, M. Szeroczynska: *How to teach lawyers a good communication with clients*, CH Beck Warsaw 2006, L. Bojarski, B. Namyslowska – Gabrysiak: Moot court as a teaching method, CH Beck Warsaw 2008.

23 The visit was designed and organized by the Public Interest Law Initiative (PILI) affiliated with the Columbia University in New York and financed by the Ford Foundation. The Study Visit Report was published in the conference materials of the Fifth Annual Colloquium on Clinical Legal Education which was held in Warsaw on November 15–16, 2002. The English version is available at the Founadtion's website: http://fupp.org.pl/down/legal_clinics_rpa.doc More on the origins of the Legal Clinics Foundation: F. Czernicki: *The Legal Clinics Foundation – the creation, the objectives and an outline of activities* [in:] *The Legal Clinic. The Idea, Organization, Methodology*, C.H. Beck Warsaw 2005, p.209–221.

24 *Id*, p.209–210.

25 The Statute of the Legal Clinics Foundation along with other documents is available in English at the Foundation's website: http://www.fupp.org.pl/index_eng.php?id=statute

The Board consists of five members elected for a two year term and it manages the affairs of the Foundation and represents the Foundation. It carries out the everyday work of the Foundation by searching for resources for the planned activities, coming up with new projects, communicating with the clinics etc. The present Board consists of the President and four other members representing different universities.

The Advisory Board is appointed by the Council and sits as a consultative and advisory body. It includes persons whose competence and authority are essential to the Foundation's activity. At the moment the Advisory Board among others includes the Polish Ombudsman, President of the Constitutional Tribunal, President of the National Council of Advocates and some foreign representatives from PILI, the Catholic University of America in the USA or the Association of University Legal Aid Institutions Trust in the Republic of South Africa.

To meet the goals included in its Statute, the Foundation has undertaken a great number of tasks and carried out different projects aiming at the improvement of the clinical environment. There are three main fields of the Foundation's activity: 1. financial support for the clinics based on the standardization of clinical programs, 2. improvement of the clinical programs on administrative and educational level, 3. promotion of *pro bono* work in the Polish legal community.

The first field, dealing with financial support, requires constant search for possible sponsors and organization of grant competitions for the clinics. It has been the rule that only clinics which meet the set of standards set by the Foundation can apply for financial support.[26] Those grants allowed the clinics to obtain all the necessary equipment, hire secretaries and cover other needs. The Foundation also obtained a great deal of support from the Beck Publishing House which donated legal information software and basic legal literature to every clinic. There have also been some donations of equipment from several law firms located in Warsaw.

The second field is dedicated to a wide range of tasks and projects including the national and international conferences, workshops, seminars and training for the clinical students and teachers, publishing activity of the Foundation described above, co-operation with the Ombudsman of the Republic of Poland, cooperation with law firms and associations of legal corporations, constant exchange of information and clinical *know-how*, responding to the needs and ideas presented by the clinics, implementation of new programs such as Medical Clinic, Mediation Clinic, NGO Clinic etc. In addition, the Foundation is fully engaged in the work on the new law on access to legal assistance and works towards the legal clinics being incorporated into the new system.

The third field reaches beyond the strict clinical movement. The Foundation's mission is to inculcate the idea of *pro bono* work deeper into the Polish legal community. The annual Pro Bono Lawyer contest aims to promote the issue of involvement of lawyers in *pro publico bono* work and

26 There are 11 standards covering the clinical functions and tasks securing that a legal clinic: provides reliability of its services, assures the supervision of faculty teachers over the students, assures the necessary confidentiality of its services, assures the protection of the documents submitted by the clients; legal clinic odes not accept original copies of the documents, establishes secretary office according to the scope and characteristics of its activity, informs the client in written about the rules of the clinical services, carries out a qualifying procedure regarding their clients which is to assure that the client can not afford payable legal advice, sets, according to the proper rules of law, information system about the clients which is to guarantee minimal risk of the conflict of interests, is obligated to conclude an insurance contract on the liability for damages, the guarantee amount can not be lower than 10,000 EURO, submits to the Foundation information on the activity and that legal advice is free of charge.

the title of the Pro Bono Lawyer is awarded to a person providing free of charge and voluntary legal services to other persons, social organizations or institutions. The newest project – Pro Bono Clearinghouse – started in January 2008 and aims to create a network of collaborators, including law firms and NGOs, with the Centrum Pro Bono as the coordinating centre, to deal with the issues of free of charge legal support.[27]

Clinical legal education in Poland can serve as an example of a success story. All the initial problems have been overcome and the initial lack of interest or even distrust has turned into a great deal of engagement and extensive use of clinical teaching methodology. Based on the recently published data, there are around 60,550 students at Polish law schools. Every year around 1,300 (2%) of them participate in clinical programs and this number will grow as the program develops.

There are of course more challenges ahead. Clinics should become integral parts of the university structures and thus be incorporated into the schools' budgets. A lot has still to be done to improve the teaching process and convince more law professors that this is actually one of the most effective ways to educate future lawyers, both in the legal and social aspects of each case and each client.

The Bologna Process provides an opportunity for introducing practical approaches into traditional legal education.[28] Clinical methodology has a chance to become better recognized and more frequently used in other European law schools. It is possible only if European and international cooperation between clinical associations and institutions continues to grow and deepen.

27 The project is sponsored by the Polish-American Freedom Foundation. More information: http://www.centrumprobono.pl/en/

28 L. Hovhannisian: *Clinical Legal Education and the Bologna Process*, PILI Papers, nr 2, December 2006, p.6.

"Irish Clinical Legal Education *Ab Initio*: Challenges and Opportunities"

*Lawrence Donnelly**

I. Introduction

This article details the incipient efforts of one Irish university law school, the National University of Ireland, Galway (NUI Galway), in the field of clinical legal education. While clinical legal education, which began in the United States some fifty years ago, has made significant advances throughout the rest of the common law world, it remains at a very early stage in Ireland.[1] In fact, Irish efforts in the field to date more closely resemble what is known in the United States as the "externship model" of legal education, rather than what are commonly identified as law clinics in other jurisdictions.[2] And for a variety of reasons that will be touched upon later in this article, the law school clinic is unlikely to develop here to the same extent it has elsewhere. As such, this article explores what *Irish* clinical legal education currently looks like and what it might look like in the future.

It begins with some background on and consideration of legal education in Ireland, then, using NUI Galway as a case study, details the emergence of skills teaching in the curriculum and the consequential increase in participation in moot court competitions and in student scholarly output. The article next examines the establishment, organisation and maintenance of a placement programme for final year law students. In so doing, it reflects on what has worked and what has not at NUI Galway from the perspectives of the clinical director, placement supervisors and students. The article concludes with some realistic, yet sanguine, observations as to what future clinical legal education has in Ireland.

* B.A., J.D. Attorney at Law. Lecturer & Director of Clinical Legal Education, School of Law, National University of Ireland, Galway. Both because of the author's background and the breadth of relevant scholarly work on the topic published there, much, though not all, of the material referenced herein is from the United States. The author would welcome feedback at larry.donnelly@nuigalway.ie from colleagues in jurisdictions with more advanced clinical programmes.

1 NUI Galway and University College Cork are the sole universities who have a dedicated "clinical person" and the University of Limerick has an internship programme for all of its students, not just those studying law.

2 See Elliott Milstein, *Clinical Legal Education in the United States: In-House Clinics, Externships, and Simulations,* 51 Journal of Legal Education 375 at 380 (2001).

II. Irish Legal Education: Historically and Today

Unlike other jurisdictions such as the United States, law is taught as an undergraduate subject at Irish universities.[3] This, of course, has myriad consequences for its teachers and students. For students, "[L]aw is not a particularly difficult subject (apart, perhaps, from the rule against perpetuities!), but its study benefits greatly from maturity and some experience of the world. Even the brightest seventeen-year old – and many of those who study law at University are the brightest students in the country -- will find it difficult to grasp the broader social and economic contexts of judicial decision-making."[4] Generally speaking, teachers simply cannot expect the same level of interest, participation and passion from undergraduate law students and their approach to teaching is likely to reflect that.[5] The pros and cons of both models have been discussed previously and the question of which is superior is open to debate.[6] Suffice it to say that the undergraduate model of legal education utilised in most of the common law world is as unlikely to change as the American regime of postgraduate legal education. Moreover, proliferation in the different types of Irish law degree programmes (law and business, law and language, etc.) and the fact that one needn't necessarily undertake a university law degree to become a lawyer militate against a "one size fits all" system and allow for a good deal of flexibility.[7]

Traditionally, Irish university law schools employed practitioners, as well as full-time academics, to teach substantive law modules to students.[8] This has long been a prominent feature of legal education in the United States, where even the top law schools recognise the value of bringing in sitting judges and practising lawyers to teach their students.[9] These courses often prove the most popular and well-rated offerings among students. As of late, however, the Irish universities have moved away from employing part-time or adjunct lecturers.[10] In hiring new personnel, there seems to be little or no merit seen in practice experience; the letters Ph.D. behind a candidate's name tend to trump all other considerations. An evaluation of the wisdom behind this move (though quite dubious in this author's mind) lies beyond the scope of this piece, but one of its inherent

3 See Paul O'Connor, *Legal Education in Ireland*, 80 Michigan Bar Journal 78 at 78 (2001).

4 See William Binchy, *The Irish Legal System*, 29 International Journal of Legal Information 201 at 216 (2001).

5 See Brook Baker, *Teaching Legal Skills in South Africa: A Transition from Cross-Cultural Collaboration to International HIV/AIDS Solidarity*, 9 Legal Writing: The Journal of the Legal Writing Institute 145 at 147, 149 (2003) ("students took a regime of full-year, huge lecture courses (200-500 students in a class) in which they passively took notes").

6 See William Twining, *Rethinking Law Schools*, 21 Law and Social Inquiry 1007 at 1009–1012 (1996) (describing the strengths and weaknesses of undergraduate and postgraduate legal education).

7 See William Binchy, *The Irish Legal System*, 29 International Journal of Legal Information 201 at 216–217 (2001).

8 See Paul O'Connor, *Legal Education in Ireland*, 80 Michigan Bar Journal 78 at 78 (2001).

9 See David Hricik, *Life in Dark Waters: A Survey of Ethical and Malpractice Issues Confronting Adjunct Law Professors*, 42 South Texas Law Review 379 at 382 (2001) ("Current American Bar Association ("ABA") accreditation standards encourage law schools to 'include experienced practicing lawyers and judges as teaching resources to enrich the educational program.'"). See also James Stewart, *The MoonLighters – Extracurricular Work by Law Professors Is Source of Controversy*, The Wall Street Journal, 1 March 1984 (noting that Harvard Law School employs both practitioners and scholars as teachers).

10 See Paul O'Connor, *Legal Education in Ireland*, 80 Michigan Bar Journal 78 at 78 (2001).

consequences is that the emphasis in the teaching of substantive law modules has veered very much toward the theoretical.[11]

Yet at the same time, a cognisance of the need for "early intervention" practical skills education has emerged in the Irish university law schools. Competition, first for entry and then for employment as either a solicitor or barrister, is extremely difficult and law graduates are now expected to have well-developed practical skills in addition to theoretical knowledge.[12] To this end, all the universities now offer some form of formalised training in legal analysis, research and writing; whether as a stand alone module, in a legal systems course or as a part of a substantive law offering.

The university law schools are eschewing the practical and embracing the academic in their hiring practices. The professions and the students are crying out for more of the former.[13] It is in the context of these two incongruous trends that clinical legal education is developing in Ireland.

III. The Clinical Experience at NUI Galway as a Case Study

A. Practical Legal Skills Module

Much to the credit of the Faculty of Law at NUI Galway and largely at the urging of senior academics who had been exposed to legal education practice in other jurisdictions, a Visiting Fellow from the United States was invited annually to teach a one semester (12 week) module in legal analysis, research and writing to all students starting in the early 1990s. Naturally, the Visiting Fellow's legal ability and capacities for teaching and cross-cultural engagement varied from year to year, as did the learning experience for the students. To ensure that students would have a consistent experience, after two successful years as a Visiting Fellow, I was appointed in a permanent capacity.

The module, entitled Legal Methods & Research, focuses on developing the *sine qua non* lawyering skills: how to read, analyse and interpret case law and statutes; how to find relevant primary and secondary legal sources, using both traditional and computer-assisted research methodologies; and how to write clear, concise and sophisticated prose. The module's overarching purpose, inextricably intertwined with all facets of skill development, is to expand each student's capacity for critical thought, i.e., to make her think like a lawyer. It is a required subject for all students studying law at NUI Galway.

11 *Ibid*. at 79 ("In Ireland, the primary objective of academic legal education is intellectual formation in the law through the acquisition of analytical and research skills while professional legal education is more vocational and directed toward practice issues. This is not to suggest an overly rigid dichotomy, but rather a difference in ethos and emphasis."). See generally James Dolin, *Opportunity Lost: How Law School Disappoints Law Students, the Public, and the Legal Profession*, 44 California Western Law Review 219 (2007) (discussing a similar trend in the United States).

12 See John O'Keeffe, *Why Our Barristers Are Just Like Taxi Drivers*, The Irish Independent, 6 April 2008 (noting the barriers to entry and real competition in the legal profession).

13 See James Dolin, *Opportunity Lost: How Law School Disappoints Law Students, the Public, and the Legal Profession*, 44 California Western Law Review 219 at 241–242 (2007) ("But while the professorate may be quite happy with the academic slant in law school, students are not. Students come to law school to be trained as lawyers, not as academics. On a personal level, I frequently hear from my students about the irrelevance of what they learn, especially in the third year. Many express a deep desire for more practical skills such as how to handle clients, how to draft basic transactional documents, and how to operate a law office."). Many of my students who have been through the clinical placement programme at NUI Galway make very similar comments. See *infra*.

The module is akin to, though far less rigorous than, the required research and writing course for all first year law students in the United States. It is examined by means of continuous assessment. A series of brief, discrete assignments testing students' writing, analytical, research and citation abilities culminates in a longer written project in which students are required to integrate the skills the module seeks to engender. The module, traditionally taught over the course of one semester, has now been expanded to a full year for students in the Bachelor of Civil Law (B.C.L.) degree programme, i.e., our flagship law programme from which most graduates seek entry into the professions.

The module has proven quite successful in that the students who engage with it fully develop solid research, writing and analytical skills which inure to their benefit immediately on exams and essays in substantive law subjects. The two central problems with it, however, are: 1) some students feel that it is not a "real" law subject and, perhaps even more troubling, their sentiments are, to some extent, shared by colleagues; and 2) from a teaching and correcting perspective, it is extremely labour intensive, especially in a university setting where the premium is on research and publication output. Despite these issues, the vast majority of our students emerge well versed in practical legal skills. Successful completion of Legal Methods & Research is an absolute requirement for further participation in our clinical programme and my own informal, empirical research indicates that those who perform best in the module are typically the students who have contributed to the initial successes of our clinical legal education programme.

B. Moot Court Participation and Student Scholarship

An immediate consequence of this emphasis on developing practical skills for our students has been expanded participation in moot court competitions – in individual modules, in intra-university competitions, national competitions and international competitions. For the first time, first year students in two of our law degree programmes (the LL.B. and B.C.L.) now have mooting exercises as assessed components of one of their modules. Moreover, the student law society now elects a moot court officer who, with the support of various members of academic staff, fosters and encourages the participation outside the course curriculum of students in a wide variety of moot court competitions within the university and in a national competition among the universities, Blackhall Place (trainee solicitors) and King's Inns (erstwhile barristers). NUI Galway students also compete annually in a national moot court competition conducted in the Irish language.

Individual staff members work with teams of students who have participated successfully in moot court competitions at European and international levels as well. In addition to traditional mooting, these competitions also require that students perform extensive legal research and draft lengthy legal memoranda in support of their position. As such, they have proven extremely valuable learning experiences for participants.

Another welcome result of our efforts in skills training, though perhaps not a traditional component of the clinical experience, has been a substantial and heretofore unseen growth in student scholarship. While participation in a student law review or journal has long been a prized feature of the American law student experience, it has only recently come into prominence on this side of the Atlantic. The *Galway Student Law Review* has become a vibrant outlet for our students' scholarly interests and is available not only on our own dedicated website, but also on the fully searchable database of the prestigious American online legal publisher, Hein on Line, with whom

we recently contracted.[14] Additionally, our students – both undergraduates and postgraduates – have had a number of articles published in peer-reviewed national and international law reviews and journals.[15] Again, while not technically under the rubric of clinical legal education, this proliferation of student scholarship is a particularly noteworthy development, given that a number of our graduates do not go into the legal professions, but pursue careers in which the independent initiative, critical thinking capacity and research and writing ability they have demonstrated in becoming published authors are invariably prized traits.

While the benefits of moot court competitions and student publications are manifest, some challenges remain. As for the former, it remains a relatively small number of students who participate in various competitions. An increase in the involvement of academic staff and an allocation of academic credit for those students spending long hours preparing for and taking part in moot court competitions might go some way toward increasing the number of participants. A somewhat converse weakness afflicts the realm of student scholarship. The editorship of the *Galway Student Law Review* remains almost entirely the responsibility of its faculty advisors. It would be highly desirable for much of this task to devolve to students working to produce the Review, similar to the American model. They should then be entitled to academic credit for the extensive time and effort this would entail. But the long term sustainability of undergraduate editorial control remains open to question and the quality of the finished product would almost certainly fluctuate from year to year depending upon interest and ability levels.

3. Clinical Placement

Having advanced classroom skills teaching and increased participation in extracurricular legal activities, I began to examine the feasibility of a clinical placement programme for our students in academic year 2005–2006 with the aid of a funding grant from the Centre for Excellence in Learning and Teaching at NUI Galway. While colleagues were generally receptive to the possibility, it took some time to clear administrative hurdles and to develop potential placement opportunities for our students. Fortunately, the administrative hurdles were easily surmounted and the "system" was able to accept the new module, despite the fact that there were to be no formal lectures or assessments.

The next task was to find suitable placement opportunities. Based on lengthy consultation with people involved in clinical legal education in the United States and with academics from other disciplines, it was decided that the best way to facilitate placement opportunities for students was to use the wide ranging contacts of my law colleagues. A personal approach, as opposed to "cold calling," while not as far-reaching, seemed far more likely to elicit a response. And fortunately, our experience to date has proven that we were right. Moreover, we were determined that our clinical legal education programme would be consistent with the lofty aims and greatest successes of

14 Volumes 1, 2 and 3 are available at http://www.nuigalway.ie/law/GSLR/. Volume 4 is in production at the time of writing.

15 See, e.g., James Jeffers, *The Representative and Impartial Jury in the Criminal Trial: An Achievable Reality in Ireland Today?*, (2008) 18(2) Irish Criminal Law Journal 34; Emma Storan, *Section 117 of the Succession Act 1965: Another Means for the Courts to Rewrite a Will?*, (2006) 11(4) Conveyancing & Property Law Journal 82; Emma Storan, *et al*., *The Regulation of Genetic Testing in Insurance and Employment – Avoiding the Legal Minefield*, (2006) 13(1) Commercial Law Practitioner 12; Mary Drennan, *Duty of Care to the Intoxicated: The Irish Approach?*, 4 San Diego International Law Journal 423 (2004).

clinical programmes elsewhere, on the one hand, and, on the other, with the strong public interest orientation of legal education at NUI Galway.[16] Simply stated, we wanted our students to utilise their knowledge and skills, wherever possible, for the benefit of marginalised in society and to see how law can be an effective instrument for social change.[17]

The optional module, *Clinical Placement*, has been available to final year students on our B.C.L. degree programme for the past two years. Its description is as follows:

> *This optional one-semester module requires that students utilise their legal training in suitable work placements for ten weeks. Students should generally expect to work for 8–10 hours each week (i.e., the equivalent of two ½ days or one full day). It is preferable that students be engaged to the extent possible in substantive work (i.e., legal research, working with case files, observing court proceedings, etc.) as opposed to more mundane tasks. The module will open with an introductory seminar, in which students will be informed generically as to the nature and scope of their responsibilities, and close with an interactive seminar, in which students will share their individual experiences. Assessments will be predicated on a final reflection paper. Also, satisfactory written evaluations from supervisors are a prerequisite to successfully completing the module. In the event that the number of students desiring to take the module exceeds the limited number of available placements, a selection process incorporating a number of relevant factors, such as results in other modules, interest level and related experience, will determine entry.*

Students have been placed with the quasi-governmental bodies like the Equality Authority, the National Federation of Voluntary Bodies, and the Rape Crisis Network Ireland. They have worked with non-governmental organisations, with academics on public policy research projects and with practitioners throughout Ireland. Their experiences typically involve research and writing and, accordingly, their work can be done remotely. This has enabled students to take on placements in Dublin and elsewhere without being disadvantaged by our somewhat isolated position in the west of Ireland. Students placed with practitioners have been more heavily engaged with clients and court procedure and typically are "on site" more often than students placed with quasi- or non-governmental bodies. Generally, students are placed according to their own interests and tentative career objectives. Some of their revealing feedback follows.

The students placed with practitioners have experienced first hand how theory operates, or does not operate, in practice. One student observed:

> *"The solicitors seemed to welcome the possibility of an e-conveyancing system and regarded its introduction as inevitable. There was some concern, however, that older members of the profession would find the change difficult. My experience with computers and skills I learned in the Legal Methods & Research course were of great assistance in this area. Given continuing modernisation in legal practice, I believe that a bigger emphasis on this type of training would be beneficial in preparing students for dealing with the realities of practice."*[18]

16 See generally Robert Greenwald, *The Role of Community-Based Clinical Legal Education in Supporting Public Interest Lawyering*, 42 Harvard Civil Rights-Civil Liberties Law Review 569 (2007).

17 See Peter Joy, *Political Interference in Clinical Programs: Lessons from the U.S. Experience*, (2005) 8 International Journal of Clinical Legal Education 83 at 87 (noting that foremost among the objectives of students, educators and students who pioneered clinical legal education was "to expand access to justice by representing poor and unpopular clients and causes…").

18 Student Reflective Essay (on file with author).

Another student's frank assessment of his experience on placement demonstrates that the emphasis in university legal training is quite theoretical in nature. This student is not alone in regarding this as a shortcoming in his education.

> *"Leave theory to the academics and legislators. The primary duty of the solicitor is to serve his client, not the law. As an aspiring solicitor, I'm glad I came to recognise this reality sooner rather than later and offer more by way of my skills rather than my opinions. Journal articles are the appropriate forum to propose law reform, not the law office. The firm was client-centred, and naturally so, as the solicitors in the office wished to retain the custom of the numerous clients. I think that this aspect of the law is too often forgotten in university courses and the clinical placement gave me valuable experience in this regard."*[19]

And it is in filling this gap that clinical legal education, as it has in many other jurisdictions across the globe, can potentially play such a vital role in Ireland.

Feedback from students placed with quasi- or non-governmental organisations has tended to be more philosophical in nature.

> *"The placement demonstrated to me the limits of the law and how, within its confines, there is very little place for the vulnerable and the victimised. The person is sometimes invisible. The law can only extend so far and what is needed is much greater correlation between the different spheres: social work, policy makers and the law."*[20]

Other students in similar placements have "gained many valuable skills and insights and learnt so much about how the law can meaningfully impact on society" and found that the placement "made me question my own personal attitudes and values as I was placed on an immense learning curve."[21] Again, the value of the placement experience is manifest.

Fortunately, placement supervisors have been equally enthused and impressed with the quality of students they've worked with. One practitioner observed that:

> *"I usually find that having students in the office can be a hindrance, but she has changed my opinion on that. I found myself looking forward to her placement days and setting aside tasks for her alone to deal with on the placement."*[22]

A supervisor at a quasi-governmental organisation who had two students working on a rather complicated and time-consuming project voiced a similarly high opinion of their work product.

> *"The task set for these students was challenging and demanding, involving a legal analysis of a complex EU Directive. They approached their task with enthusiasm and tenacity, and produced concrete conclusions, which are very helpful in addressing significant information deficits which exist in relation to this topic. I am very happy to commend both women for the high quality product which they produced."*[23]

These comments are only a representative sampling. Many students and supervisors have been equally enthusiastic and a number of students have found that the placement gave them an advantage in pursing employment after graduation or, equally importantly, helped to redefine a

19 *Ibid.*

20 *Ibid.*

21 *Ibid.*

22 Placement Supervisor Evaluation (on file with author).

23 *Ibid.*

career path. So to date, the experiences of all parties involved have been very positive on the whole. That is not to say, however, that there have not been failings – some of which can be ameliorated, others which remain likely to persist.

Some practical problems with the programme have surfaced over the past two years. The experiences of students, placement supervisors and the clinical director – both across placements and from year to year – have been inconsistent. Because we are dealing with the outside world, there are inevitably issues beyond our control. Some placements, for a myriad of different reasons, just cannot provide as good or enriching a learning experience as others. When I place students, at times, I know this, but can only hope that they "make the best of it." One year, a practitioner might have a slew of interesting cases and can give the student a great deal of work, but she might have little work the next. A quasi-governmental organisation might be at the forefront of a volatile legal or political issue one year, but relatively dormant the next. Illnesses occur. These very mundane, yet no less troublesome, problems can and are being addressed on an ongoing basis by imposing stricter quality controls and by requiring full, frank disclosures from all parties to the placement at the start of each academic year.

But there are even larger obstacles in the way of clinical legal education's further development in Ireland. First and foremost, money is scarce. The breadth of resources and the innovative uses those resources have been put to by clinicians from around the globe confounded this attendee at the Sixth *International Journal of Clinical Legal Education* Conference. Given that our students do not pay fees, that our alumni networks have not been tapped for donations the way they have elsewhere in the world and that the Irish government now finds itself facing a significant budgetary shortfall reminiscent of the 1980s malaise, it is hard to see when we will get similar funds. Expanding clinical programmes is impossible without adequate monetary resources. Second, the establishment of legal clinics, similar to those in the United States, the United Kingdom *et al*., is likely to meet with significant opposition from the professions, who fear any diminutions in their slices of the pie. Notably, I suspect that free legal aid centres, fearful of what the government might do to their budgets in the event that universities opened law clinics serving indigent clients, might prove among the most vociferous opponents. And lastly, from the perspective of one within the university, the undeniable emphasis in hiring and in promotion on more esoteric academic scholarship and the inevitable devaluing of practical experience or innovative approaches to teaching is a great disincentive to devoting a career exclusively to clinical legal education. As the great successes of clinical legal education around the globe demonstrate, that full-time commitment is what is required.

IV. Conclusion

So, whither Irish clinical legal education? Despite the despondency of the forgoing sentiments, it is not likely to wither anytime soon. The programme here at NUI Galway, due in large part to the enthusiasm of students, placement supervisors and academic staff, is thriving and attracting notice from a broad audience. University College Cork has its own clinical programme and moves are afoot at the University of Limerick. Perhaps most promisingly on the horizon, a newcomer to the field, University College Dublin, has plans for a Clinical Legal Education Centre in its new, purpose-built law school building, scheduled for completion in 2011.[24]

24 Sarah Neville, *Young Legal Eagles Will Get To Spread Their Wings in Mock Court as part of New University Project*, The Evening Herald, 2 August 2008.

In the end, those of us involved in the development of clinical legal education here in Ireland must remember that we are, to an extent unprecedented in the history of Irish university legal education, equipping some of our students with practical know-how and a cognisance that law can be used to achieve the greater good. We must keep plotting away at our work, mindful of the obstacles that still confront us, but always aware of the opportunities for continued, steady expansion by increments and ever hopeful that something great might be around the next corner.

"10 lessons for new clinicians"

Angela Macfarlane and Paul McKeown[1]

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

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

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

1. Do not pre-judge the students

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

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

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

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

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

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

2. Patience!

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

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

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

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

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

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

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

6 *Ibid*., p.62.

7 *Ibid*., p.62.

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

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

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

4. Whose file is it anyway?

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

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

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

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

8 *Ibid.*, p.65.

9 *Ibid.*, p.65.

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

5. Answer a question with a question

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

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

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

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

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

6. Start at the end and work backwards

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

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

7. Encourage expression of views

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

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

8. Do not expect the students to understand reflection!

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

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

14 Biggs J, Op.cit p.7.

9. Do not be afraid of assessment

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

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

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

10. ENJOY

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