

# **'EDUCATION, EDUCATION, EDUCATION': LEGAL, MORAL AND CLINICAL**

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*On the assumption that law schools should seek to foster a legal profession which takes ethics seriously, this article explores how it may promote the moral development of its students. Having examined how legal education currently fails in this regards, it explores competing psychological theories of moral development and argues that law schools should seek to start students on a 'moral apprenticeship' leading to the development of the necessary moral character to equip them for the ethical challenges of practice. The article then looks at the extent to which ideal methods for promoting moral development can be executed given the current climate in legal education. In particular, it argues that an excellent and viable means of assisting in the process of moral character development is through student involvement in extra-curricular law clinics.*

## **Introduction**

Thanks to the relative explosion of academic interest in lawyers' ethics over the last two decades in the UK most of the main normative issue of professional legal ethics have been debated, and work has also begun on how lawyers actually behave and how best to regulate the profession.<sup>1</sup> However, probably because it is the one issue over which academics have substantial influence, it is the teaching of legal ethics that has received most attention. Indeed, given that answers to the central dilemmas of professional ethics remain essentially contested, one does not have to accept the postmodernist position that there are never correct (as opposed to better) answers to moral questions, to recognise that academics have an important role to play in ensuring that prospective lawyers at least are aware of issues of professional ethics and their possible solutions and better still to care about 'doing the right thing'.

Obviously, this assumes that professional ethics matters. Here, it can be argued that, as gatekeepers to and guardians of the law, lawyers influence access to law and the quality of legal representation. Moreover, in applying, interpreting and even making law they can do great harm to opponents, third parties, the environment, the administration of justice or law itself. How they perform these roles is, or ought to be, the subject of professional ethics. Consequently, whether concerned about access to justice, law's justice or simply with understanding how law operates, attention to lawyers' ethics seems essential to a liberal legal education.<sup>2</sup> Such attention is even more obvious to those who reject as artificial and invidious the division between an academic and vocational legal education in favour of an earlier conception of a liberal legal education as including the preparation of lawyers for practice.<sup>3</sup> Law schools can thus be said to fail students if they do not prepare them for the ethical dilemmas, and

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<sup>1</sup> See the references in D. Nicolson 'Making Lawyers Moral: Ethical Codes and Moral Character' (2005) 26 *Legal Studies* 601, 603.

<sup>2</sup> D.R.F. O'Dair, 'Ethics by the Pervasive Method - The Case of Contract' (1997) 17 *Legal Studies* 305, 306, 309-10.

<sup>3</sup> See eg B. Hepple 'The Liberal Law Degree' [1996] *CLJ* 474, esp. 484.

the pressures and temptations to act unethically, that they will face in practice.<sup>4</sup> Forewarned, graduates can seek careers which are more compatible with their moral values. This, it is argued, increases the chances of career satisfaction and decreases those of the psychological alienation and emotional stress associated with current conceptions of lawyers as amoral technicians.<sup>5</sup> In any event, exposing students to a wide variety of ethical considerations and the obstacles to ethical behaviour thrown up by modern legal practice may equip them to cope more effectively with those dilemmas and obstacles they meet once in practice. Finally, raising ethical standards will enable lawyers to re-assert their professional status in the face of increasing commercialisation and bureaucratisation in legal practice. Thus, ethics education might encourage lawyers to go beyond more technical conceptions of professionalism to display what might be called *ethical professionalism*, which involves an altruistic commitment to helping those in need and treating clients in a sensitive, engaged and empathetic manner.<sup>6</sup>

This article explores how these goals might be best achieved in the light, first, of recent research into moral psychology and, secondly, what is possible in the current legal educational context. It argues that to have a lasting effect on moral behaviour, legal education needs to concentrate on adapting students' moral character to enable them to face the ethical challenges of contemporary legal practice, and that the most effective way of achieving this task is through live-client law clinics. While the connection between law clinics and moral development is already well-recognised, I will propose a clinical model which addresses the reality of limited education budgets and maximises the clinical experience both in terms of student numbers and length of involvement. To being with, however, we need an idea of existing ethical teaching.

### **The Current Position<sup>7</sup>**

Notwithstanding sporadic calls for professional ethics to be taught at the academic stage of legal education,<sup>8</sup> only roughly a quarter of UK law schools do so on a

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<sup>4</sup> E.W. Myers, "'Simple Truths' About Moral Education' (1996) 45 *American University Law Review* 823

<sup>5</sup> See W. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge, Ma., Harvard University Press, 1998). See also G. J. Postema, 'Self-Image, Integrity and Professional Responsibility' in D. Luban (ed) *The Good Lawyer: Lawyer's Roles and Lawyer's Ethics* (Totowa NJ, Rowman & Allanheld, 1983), 'Moral Responsibility in Professional Ethics' (1988) 55 *New York University Law Review* 63.

<sup>6</sup> For a similar vision, see C. Menkel-Meadows, 'Narrowing the Gap by Narrowing the Field: What's Missing From the MacCrate Report – Of Skills, Legal Science and Being a Human Being' (1994) 69 *Washington Law Review* 593, and on professionalism more generally, A. Boon and J. Levin, *The Ethics and Conduct of Lawyers in England and Wales* (Oxford, Hart Publishing, 1999), ch. 2; D. Nicolson and J. Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford, Hart Publishing, 1999), ch. 3.

<sup>7</sup> This critique draws upon Boon and Levin, *ibid*, ch. 6; Nicolson and Webb, *ibid*, 66-70; J. Webb, 'Inventing the Good: A Prospectus for Clinical Education and the Teaching of Legal Ethics in England' (1996) 30 *The Law Teacher* 270, 'Ethics of Lawyers or Ethics for Citizens? New Directions for Legal Education' (1998) 25 *JLS* 134 (hereafter Webb (1998a)); 'Conduct, Ethics and Experience in Vocational Legal Education: Opportunities Missed' in K. Economides (ed), *Ethical Challenges to Legal Education and Conduct* (Oxford: Hart Publishing, 1998) (hereafter Webb (1998b)); K. Economides, 'Learning The Law Of Lawyering' (1999) 52 *Current Legal Problems* 392; D.R.F. O'Dair, *Legal Ethics: Text and Materials* (London, Butterworth, 2001), ch. 4; A. Boon, *Ethics in Legal Education and Training: Four Reports, Three Jurisdictions and a Prospectus* (2002) 5 *Legal Ethics* 34; J. Chapman, 'Why Teach Legal Ethics to Undergraduates?' (2002) 5 *Legal Ethics* 68; N. Duncan, 'Responsibility and Ethics in Professional Legal Education', in R. Burridge and K. Hinett, (eds) *Effective Learning and Teaching in Law* (Kogan Page; London, 2002).

compulsory basis.<sup>9</sup> Admittedly, as interest in ethics, clinical legal education and skills teaching grows, legal ethics is increasingly been taught in optional, or as part of compulsory, courses. However, most students first encounter professional ethics in the vocational stage. Not only is this experience divorced from the aims of a liberal legal education, but it is both too little and too late, especially as only barristers must include professional ethics as part of continuing professional development.<sup>10</sup>

### *The Academic Stage: Ethics in the Hidden Curriculum*

Ethics teaching in the vocational stage is too late because, while most undergraduates are not explicitly taught ethics, they all learn about ethics, legal practice and professional roles from what is variously called the hidden,<sup>11</sup> latent,<sup>12</sup> implicit<sup>13</sup> or informal<sup>14</sup> curriculum, which supplements and may be as powerful as the formal curriculum. Thus, notwithstanding the shrinking dominance of black-letter scholarship and the growth of ‘law and...’ courses, it is probably true to say that undergraduate legal education remains focused on teaching ‘the law’ and ‘how to think like a lawyer’. Yet, whether consciously or not, academics constantly convey messages about justice and ethics.<sup>15</sup> Unfortunately, the lesson tends to be that such issues are unimportant. This is imparted by their low visibility in the formal curriculum, especially whenever questions about lawyers’ ethics, justice and the impact of law on people’s lives cry out for discussion, but are ignored, or when students are told to not to confuse their emotional or moral responses to law with the central question of what it is. This combination of the separation of law and justice, and the relegation of the latter to ‘soft’, and often optional, subjects like jurisprudence is likely to lead to an uncritical acceptance of law’s underlying values as neutral and objective, and that law *is* justice and moral behaviour merely that which is legal. As an alternative to this legalistic morality, an educational focus on developing technical and argumentative skills in relation to malleable law and facts might lead students to abandon ideas of right and wrong in favour of an instrumental morality in which their only goal is success and the only constraints pragmatic. Either way, there is little to challenge the standard conception of lawyers as legal technicians, ‘hired guns’ or, less pejoratively, neutral partisans, whose function is confined to manipulating law and facts in the interests of paying clients.<sup>16</sup> Equally, the concentration on legal reasoning

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<sup>8</sup> See Boon, *ibid.*

<sup>9</sup> P. Harris and S. Beinart, ‘A Survey of Law Schools in the United Kingdom, 2004’ (2005) 39 *The Law Teacher* 299.

<sup>10</sup> And then for only three out of 45 hours.

<sup>11</sup> R.C. Cramton, ‘The Ordinary Religion of the Law School Classroom’ (1977-1978) 29 *Journal of Legal Education* 247.

<sup>12</sup> R.M. Pipkin, ‘Law School Instruction in Professional Responsibility: A Curricular Paradox’ (1979) *American Bar Foundation Research Journal* 247.

<sup>13</sup> H. Lesnick, ‘The Integration of Responsibility and Values: Legal Education in an Alternative Consciousness of Lawyering and Law’ (1986) 10 *Nova Law Journal* 633, 634.

<sup>14</sup> K. Economides ‘Legal Ethics – Three Challenges for the Next Millennium’ in Economides, *op. cit.*, n. 7, xvii.

<sup>15</sup> See eg C.J. Menkel-Meadow, ‘Can a Law Teacher Avoid Teaching Legal Ethics?’ (1991) 41 *Journal of Legal Education* 3; J.H. Aiken, ‘Striving To Teach “Justice, Fairness, and Morality”’ (1997) 4 *Clinical Law Review* 1, 3; S.P. Koniak and G.C. Hazard, ‘“Mainstreaming” Ethics: The Pervasive Method of Teaching Ethics’ (1997) 58 *Law and Contemporary Problems* 117, 118-9; A.C. Hutchinson, ‘Beyond Black-Letterism: Ethics in Law and Legal Education’ (1999) 33 *The Law Teacher* 302, 309.

<sup>16</sup> See eg Nicolson and Webb, *op. cit.*, n. 6, ch. 6; ‘Special Issue: Lawyers’ Duties, Adversarialism and Partisanship in UK Legal Ethics’ (2004) 3 *Legal Ethics*.

as an exercise in dispassionate and abstract logic distracts attention away from law's human and emotional side, while the emphasis on case law portrays law as primarily a means of dispute resolution through adversarial combat.

The dominant message about law, justice and ethics conveyed by the content of teaching is reinforced by its didactic style. Being treated as passive learners, students are encouraged to defer to authority rather than develop critical faculties. The increasingly competitive nature of legal education in terms of admissions, results and obtaining employment echoes the competitive individualism celebrated by law, while the increasing expense of a university education encourages students to see it as a short-term investment for long-term financial gain. The channelling of students into lucrative law careers rather than those devoted to helping the vulnerable is reinforced by the preponderance of law subjects involving the interests of the rich and powerful, by large law firms' dominance of the recruitment process, and by informal messages about legal careers provided by staff and fellow students. However, while many academics may portray a career in large law firms or at the Bar as the height of ambition, others may engender student cynicism by openly disparaging lawyers as mindless form-fillers and grubby money seekers. This leaves little space for the conception of lawyer as heroes, bent on seeking justice and helping those in need.<sup>17</sup>

Absent empirical research, it is difficult to gauge the precise effect of this hidden curriculum on UK law students.<sup>18</sup> However, extensive research in the US<sup>19</sup> shows that legal education there tends to undermine student idealism about using law to promote justice and to engender moral and political cynicism, and a propensity towards ethically dubious behaviour.<sup>20</sup> If UK law schools have a similar effect, and there is no reason to think otherwise, there seems to be little one ethics course at the vocational stage can do to counter the hidden curriculum conveyed for up to four years of an undergraduate degree.

### *The Vocational Stage: Too Little And Too Late*

In any event, vocational ethics teaching does little more than introduce students to the formal conduct rules found in the professional codes, common law and legislation. Thus, instruction manuals almost entirely ignore academic criticism of dominant notions of professionalism and professional role morality.<sup>21</sup> Recruited largely from practice, tutors are also likely to be ignorant of this literature, while their years in practice and own legal education will have done little to encourage them to take ethics, rather than just professional norms, seriously. However, even if tutors are willing<sup>22</sup> and able to go beyond the rules, they have little time to do so. Whereas in Scotland and on some Bar Vocational Courses, professional ethics is given equal

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<sup>17</sup> Cf A. Goldsmith, 'Heroes or Technicians? The Moral Capacities of Tomorrow's Lawyers' (14) *Journal of Professional Legal Education* 1; A. Sherr, 'Of Super Heroes and Slaves: Images and Work of the Legal Profession' 48 *Current Legal Problems* 327.

<sup>18</sup> But see A. Sherr and J. Webb, 'Law Students, the Market and Socialisation: Do We Make Them Turn to the City?' (1989) 16 *JLS* 225, who found that law school left untouched the overwhelming conservative political orientation of incoming law students.

<sup>19</sup> Usefully summarised in Chapman, *op. cit.*, n. 7, 73-9.

<sup>20</sup> But see some of the earlier research in E.G. Gee and W.J. Jackson, 'Current Studies of Legal Education: Findings and Recommendations' (1982) 32 *Journal of Legal Education* 471.

<sup>21</sup> But cf the Inns of Court School of Law, *Professional Conduct* (London, Blackstone, 2006), which partly reproduces R. Cranston, 'Legal Ethics and Professional Responsibility' in R. Cranston (ed.) *Legal Ethics and Professional Responsibility* (Oxford, Clarendon Press, 1995).

<sup>22</sup> Cf Webb (1998b), *op. cit.*, n. 7, 280-1.

status with other subjects and students are required to apply the rules to hypothetical factual scenarios and sometimes even in simulated practice settings, more frequently it receives a few introductory lectures, after which it is taught pervasively. This tends to result in ethics being squeezed out by skills development and other pervasive topics. Not only does this symbolically devalue ethics, but, taking their cue from the manuals on substantive subjects, which either ignore ethical issues or simply reproduce code provisions, tutors are likely to concentrate solely on ensuring that students know the rules.<sup>23</sup>

Leaving aside the philosophical argument that reducing ethics to ‘mindless conformity’ to externally set rules is an inferior form, if not a total denial of, morality,<sup>24</sup> moral psychology shows how far legal education falls short in preparing students for ethical practice. Following Rest, it has become accepted that moral behaviour (whatever its content) requires the engagement, though not necessarily consciously or chronologically, of four psychological components.<sup>25</sup> *Moral sensitivity* enables individuals to recognise moral problems when they arise. Having identified a moral issue, *moral judgment* enables individuals to identify its salient features, and to select and justify appropriate responses. However, empirical research repeatedly confirms that knowing what is morally right by no means guarantees moral behaviour.<sup>26</sup> *Moral motivation* is required to ensure that individuals want to put into effect the moral solution selected and elevate it over competing considerations like self-interest or organisational and institutional values. Finally, even if individuals care about converting ethical judgment into action, they require the *moral courage* to be able to resist temptations to compromise moral standards. Crucial here are moral fibre, steadfastness, perseverance, backbone, or what psychologists call ego-strength, as well as the ability to set goals and focus one’s attention.<sup>27</sup>

This suggests that current legal education only partially equips students for ethical practice.<sup>28</sup> Prima facie, knowledge and understanding of the rules should assist them to identify and resolve ethical problems. However, the codes of both Scottish professional branches and that of English and Welsh barristers eschew detailed regulation in favour of vague aspirational admonitions and general principles.<sup>29</sup> Admittedly, lawyers can seek guidance from professional bodies, but without prior exposure to the specific problems this might only occur once they are already inextricably entangled. The more detailed rules governing English and Welsh

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<sup>23</sup> The Lord Chancellor’s Advisory Committee on Legal Education and Training, *First Report on Legal Education and Training* (London, ACLEC, 1996), para 5.13.

<sup>24</sup> See eg Nicolson, op. cit., n. 1, 608.

<sup>25</sup> J. Rest, ‘The Major Components of Morality’ in W. Kurtines and J. Gewirtz (eds), *Morality, Moral Behaviour and Moral Development*, (New York, Wiley, 1984); J. Rest and D. Narvaez (eds), *Moral Development in the Professions: Psychology and Applied Ethics* (Hillsdale, NJ, Lawrence Erlbaum Associates, 1994), esp. ch. 1; D. Narvaez and J. Rest ‘The Four Components of Acting Morally’ in W.M. Kurtines and J.L. Gewirtz (eds), *Moral Development: An Introduction* (Boston, Allyn and Bacon, 1995); J. Rest et al, *Post Conventional Moral Thinking: A Neo-Kohlbergian Approach* (Mahwah, NJ, Lawrence Erlbaum Associates, 1999). Nb: I have not used his description of the fourth component because I define ‘moral character’ as incorporating all four components.

<sup>26</sup> See eg Rest, *ibid*, 21-22, ‘Can Ethics be Taught in Professional Schools? The Psychological Research’ (1988) 1 *Ethics Easier Said Than Done* 22.

<sup>27</sup> See A. Blasi, ‘Moral Character: A Psychological Approach’ in D.K. Lapsley and F. Clark Power (eds), *Character Psychology and Character Education* (University of Notre Dame Press, 2005), 74

<sup>28</sup> Cf R. Granfield and T Koenig, ‘“It’s Hard to be a Human Being and a Lawyer”: Young Attorneys and the Confrontation with Ethical Ambiguity’ (2002-3) 105 *University of West Virginia Law Review* 495, who provide some empirical support for this in the similar US context.

<sup>29</sup> The following critique of the codes draws upon Nicolson, op. cit., n. 1.

solicitors are better in this regard,<sup>30</sup> but still suffer from the inevitably limited imagination of their framers, the rapidly changing nature of legal practice and society, conflicting rules, and the inherent ambiguity and vagueness of the language in which they are drafted. Moreover, even comprehensive and clear rules can never be sufficiently sophisticated to cope with the contextual nuances and particularities of every unique fact situation. Consequently, whether codes are detailed or not, moral judgment is always required to supplement and apply their norms. Here, current ethical education fails in two respects.

First, it does little to assist students develop their own sense of ethical professionalism. Without exposure to the extensive legal ethics literature, they are unlikely to grapple with issues such as the meaning of professionalism, the justification for neutral partisanship, and the limits to lawyer zeal, confidentiality and lawyer paternalism. Without exposure to ethical theories which underlie and inform professional legal ethics, students lack the intellectual tools to help resolve ethical dilemmas which are not covered by the rules or professional conventions.

Secondly, current education does little to engage student's affective capacities. Judgment is not confined to rationally working out which duty best fits a moral dilemma and how it should be applied. It also involves a 'perceptual capacity'<sup>31</sup> which enables individuals to respond to the unique circumstances of each situation by drawing upon empathy, compassion and imagination, as well as their past experiences and entire world-view.<sup>32</sup> Affective faculties also sensitise lawyers to moral issues, and motivate them to act morally<sup>33</sup> and to implement moral decisions with 'warmth, empathy, compassion, and connectedness', rather than in a 'cool, distant or autocratic manner'.<sup>34</sup>

Current ethical teaching fails most dramatically in relation to moral motivation. Indeed, the focus on the formal rules further reinforces the hidden curriculum's message about lawyer (a)morality. Most obviously, in being premised on neutral partisanship, and lacking substantial concern for the impact of lawyer behaviour on opponents, third parties or the general public, the codes confirm that, aside from protecting clients' material interests and upholding the proper and efficient administration of justice, issues of morality, justice and unmet legal need are not central to the professional role, and require no more than adherence to formal state and professional norms.<sup>35</sup> Similarly, those norms that favour lawyers' own interests over those of clients and the general public are likely to reinforce the perception that legal practice involves making a good living rather than helping others, whereas norms which are too vague to impose real behavioural limits suggest that lawyers are free to pursue whatever course of action best suits their own interests. But even detailed codes are likely to be seen by those with an instrumental morality as simply another set of rules to be manipulated. Accordingly, professional ethics may come to be seen as a matter of risk analysis 'as to the level of malpractice at which they should operate in any given situation'.<sup>36</sup> This attitude is likely to be reinforced by the

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<sup>30</sup> Though they may undermine the development of moral conscience and character: Nicolson, *ibid.*

<sup>31</sup> J. McDowell, 'Virtue and Reason' (1979) 62 *The Monist* 331, 333.

<sup>32</sup> See D. Luban and M. Millemann, 'Good Judgment: Teaching Ethics in Dark Times' (1995) 9 *Georgetown Journal of Legal Ethics* 31.

<sup>33</sup> H.L. Feldman, 'Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?' (1996) 69 *Southern California Law Review* 885, esp. 904-908.

<sup>34</sup> L.J. Duckett and M.B. Ryden, 'Education for Ethical Nursing Practice' in Rest and Narvaez, op. cit., 61.

<sup>35</sup> See Nicolson and Webb, op. cit., n. 6, ch. 4 regarding the English and Welsh codes.

<sup>36</sup> Practitioner quoted in Hazard, *Ethics in the Practice of Law* (New Haven, Yale UP, 1978), 153.

knowledge that sanctions for code breaches are rare because professional regulators do not seem overly concerned to pursue and punish wrongdoers,<sup>37</sup> and in any event are hampered by the hidden nature of much lawyer misconduct and the likely unwillingness of lawyers to risk ostracisation or career impairment by reporting their colleagues or superiors.<sup>38</sup>

Of course, not all students will see professional ethics as a question of being ‘moral when [they] must and immoral when [they] can’.<sup>39</sup> Those who adopt a legalistic morality are likely to see ethics as a matter of blind obedience to formal rules. While the rules may frequently fail to help them identify and resolve ethical problems, lawyers may conclude that they have acted morally when they have not broken any rule, especially as this avoids the anxiety that normally accompanies moral dilemmas.<sup>40</sup> Moreover, mere knowledge of the rules does little to help students develop the necessary moral courage to resist the many temptations to flout the rules that arise in practice. Thus, the increasing commercialisation of practice places a premium on prioritising moral over financial considerations, competition for promotion and organisational hierarchies make it difficult to challenge the moral judgment of superiors, while the increasing specialisation and bureaucratisation of law firms encourages lawyers to see moral responsibility as that of everyone but themselves.<sup>41</sup> These problems may be exacerbated by the deference that legal neophytes are likely to show towards experienced colleagues, especially training partners and pupil/devil-masters, and by the intense socialisation processes in practices which regularly flout the rules.<sup>42</sup>

Legal education thus has a mountain to climb if it is going to positively influence the morality of aspirant lawyers, particularly as regards moral motivation and courage. However, a final reason why it currently does not even reach the foothills is that it lacks a plausible psychological model. Unless it is naively assumed that lawyers will obey the rules simply because they are the rules, it would seem that ethical behaviour is thought to flow from the threat of sanctions for breach. This approach is associated with various, now discredited, psychological approaches such as behaviourism and social learning theory which see morality developing from direct teaching, modelling by authority figures, and reinforcement by rewards and punishments.<sup>43</sup> At best, this may inculcate conformity to externally imposed standards

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<sup>37</sup> R.L. Abel, *English Lawyers Between Market and State: The Politics of Professionalism* (Oxford, Oxford University Press, 2003), ch. 9.

<sup>38</sup> O’Dair, *op. cit.*, n. 7, 5; Granfield and Koenig, *op. cit.*, n. 28, 515-57.

<sup>39</sup> Webb (1996), *op. cit.*, n. 7, 277.

<sup>40</sup> Cf A.S. Watson, ‘Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education’ (1974-1975) *University of Michigan Journal of Law Reform* 248, 251.

<sup>41</sup> See eg Boon and Levin, *op. cit.*, ch. 3, esp. 89-94; Nicolson and Webb, *loc cit* n. 6, esp. 60-1; A. Francis, ‘The Business Context: Legal Ethics, the Marketplace and the Fragmentation of Legal Professionalism’ (2005) 12 *International Journal of the Legal Profession* 173; and for the impact of these factors on US lawyers, Granfield and Koenig, *op. cit.*.

<sup>42</sup> For evidence of unethical behaviour, see J. Baldwin and M. McConville, *Negotiated Justice: Pressures to Plead Guilty* (London, Martin Robertson, 1977); G. Davis, *Partisans and Mediators* (Oxford, Clarendon Press, 1994); M. McConville, J. Hodgson, L. Bridges and A. Pavlovic, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Oxford, Clarendon Press, 1994); A. Boon, ‘Ethics and Strategy in Personal Injury Litigation’ (1995) 22 353; H. Genn, *Hard Bargaining* (Oxford, Clarendon Press, 1997); B. Neale and C. Smart, ‘“Good” and “Bad” Lawyers? Struggling in the Shadow of the New Law’ (1997) 19 *Journal of Social Welfare & Family Law* 377; M. McConville, ‘Plea Bargaining: Ethics and Politics’ (1998) 25 *JLS* 562; J. Griffiths-Baker, *Serving Two Masters* (Oxford, Hart Publishing, 2002).

<sup>43</sup> See eg Lapsley and Power, *op. cit.*, n. 27, *passim*, but esp. ch. 10; D. Carr, *Educating the Virtues: An Essay on the Philosophical Psychology of Moral Development and Education* (London, Routledge,

out of habit. However, such inculcation works best with children, not young adults, and with rewards, rather than sanctions - still less with merely a threat of only irregularly imposed sanctions. Moreover, research clearly establishes that attempts to establish such extrinsic motivation are less effective than, and may actually erode, intrinsic motivation. Many resist being told what to do and even rewarding conformity suggests that morality is a means to an end rather than an end itself – a message which is reinforced in social contexts like legal practice which reward outward success rather than virtue. Attempting to develop moral motivation from ‘outside in’ is far more likely to be successful when little is at stake, social conditions are stable, and there is strong moral consensus. However, lawyers face constantly changing social conditions, myriad pressures to act unethically and a community consensus fractured by the fragmented nature of the legal profession.<sup>44</sup>

## Ethical Education and Moral Psychology

### *The Cognitive Approach*

It is widely recognised that effective ethical education helps morality to develop from ‘inside out’ rather than ‘outside in’.<sup>45</sup> Here, two main theories compete over how this is best achieved.<sup>46</sup> The first is Kohlberg’s cognitive approach.<sup>47</sup>

Influenced by Piaget,<sup>48</sup> and based on numerous experiments, Kohlberg argued that individual morality develops in three levels, each with two sub-stages.<sup>49</sup> At the pre-conventional level, individuals are ruled by self-interest, motivated first by threats of punishment and later the benefits gained from mutually beneficial exchanges. At the conventional level, they become genuinely concerned with others’ needs, first because they desire approval, and loyal and trusting relations, but later out of loyalty to social institutions, and respect for their rules and obligations. The post-conventional level

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1991), 150-155; A Kohn, ‘How Not to Teach Values – A Critical Look at Character Education’ (1997) 78 *Phi Delta Kappa* 428.

<sup>44</sup> See references in n. 41, op. cit..

<sup>45</sup> See eg A. Blasi, ‘Moral Understanding and the Moral Personality: The Process of Moral Integration’ in Kurtines and Gewirtz (1996), op. cit., n. 25; Boon, 57; Webb (1998b), op. cit., n. 7, 284; R.S. Peters, ‘Moral Development and Moral Learning’ (1974) 54 *The Monist* 541, 560-61.

<sup>46</sup> But cf also ego psychology and Freudian psychoanalysis, discussed by Carr, op. cit., n. 43, ch. 5; P.E Langford, *Approaches to the Development of Moral Reasoning* (Hove, Lawrence Erlbaum, 1995) chs 2-3.

<sup>47</sup> Supporters amongst legal educationalists include D.A.J. Richards, ‘Moral Theory, The Developmental Psychology of Ethical Autonomy and Professionalism’ (1981) 31 *Journal of Legal Education* 359; S Hartwell, ‘Moral Development, Ethical Conduct and Clinical Education’ (1990) 35 *New York Law School Law Review* 131, ‘Promoting Moral Development through Experiential Teaching’ (1994-1995) 1 *Clinical Law Review* 505; E.M. Abramson, ‘Legal Education, Punching the Myth of the Moral Intractability of Law Students: The Suggestiveness of the Work of Psychologist Lawrence Kohlberg for Ethical Training’, (1993) 7 *Notre Dame Journal of Law, Ethics & Public Policy* 223.

<sup>48</sup> See eg Langford, op. cit., n. 46, ch. 4; O’Flanagan, *Varieties of Moral Personality: Ethics and Psychological Realism* (Cambridge, Ma., Harvard University Press, 1991), 163ff.

<sup>49</sup> Major works include L. Kohlberg, ‘Moral Stages and Moralization: The Cognitive-Developmental Approach’ in T. Lickone (ed), *Moral Development and Behaviour*, (New York, Holt, Rinehart and Winston, 1976); *Essays on Moral Development, Vol 1: The Philosophy of Moral Development*, (New York: Harper and Row, 1981) L. Kohlberg, C. Levine and A. Hewer, *Moral Stages: A Current Formulation and a Response to Critics* (London, Karger, 1983); *Essays on Moral Development, Vol 2: The Psychology of Moral Development*, (New York, Harper and Row, 1984), For a good introduction, see J. Reiner et al, *Promoting Moral Growth: From Piaget to Kohlberg* (New York, Longman, 2<sup>nd</sup> edn, 1983).

involves a principled approach to morality, with stage five largely correlating with utilitarianism, and stage six with a Kantian preference for universal, impartial and rationally derivable principles of justice involving respect for others' rights.

Following a long philosophical tradition stretching back to Plato and Kant,<sup>50</sup> Kohlberg saw the key to moral development lying in cognition and the ability to reason about morality. He concluded from experiments that this ability can be enhanced by exposing individuals to reasoning at a higher stage than that currently displayed and by creating cognitive conflict through role plays and Socratic dialogues over dilemmas such as whether a dying woman's husband should steal drugs to save her life. However, he found very few moral agents who reasoned at his sixth stage.

This, and the fact that not everyone's morality develops in stages, has led to questions about the accuracy of Kohlberg's theory and the argument that he was over-eager to defeat ethical relativism.<sup>51</sup> He also has been criticised for 'taking sides' against competing ethical theories and for relegating to the conventional level the allegedly more female ethic of care, which values connectedness, subjective feeling and reducing the pain of those in need. Others join with feminists in criticising Kohlberg's focus on the form rather than content of moral reasoning, on questions of justice and rights, and life and death moral dilemmas, instead of the moral issues which arise in everyday life and particularly in interpersonal relations, and on abstract, intellectual responses to dilemmas involving imaginary characters, instead of contextually rich real-life situations where individuals are faced with myriad external and internal pressures to compromise their moral values. As already noted,<sup>52</sup> moral agents might know what morality requires but lack the motivation or courage to convert such knowledge into behaviour. More specifically, as also noted,<sup>53</sup> moral behaviour results as much from moral sentiments and emotions as rational judgment.

In later years, Kohlberg and his associates have addressed some of these criticisms. Thus the idea that morality develops according to a strict hierarchy ending with abstract conceptions of justice has been loosened.<sup>54</sup> Kohlberg also conceded that cognitive competence does not necessarily translate into moral behaviour but nevertheless argued that it is necessary for and a facilitator of moral action. Latterly he became more interested in moral behaviour, ethical socialisation and Aristotle's approach to moral education. This led to experiments with 'just community' schools, where giving pupils a democratic role in rule-setting and application engendered a sense of 'ownership' and hence greater commitment to these rules.<sup>55</sup> Finally, Kohlberg

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<sup>50</sup> However, unlike Kant who thought that the motivation to do what is right flows simply from knowing what is right, Plato seems to require volitional motivations to become implicated in agents' sense of self: J.J. Kupperman, 'How Not To Educate Character' in Lapsley and Power, op. cit., n. 27, 206-207.

<sup>51</sup> For these and other criticisms, see eg Flanagan, op. cit., n. 48, chs 8-11; Lapsley and Power, op. cit., n. 27, passim; Peters, op. cit., n. 45; Rest et al, op. cit., n. 25; Webb (1996), op. cit., n. 7; L. Thomas, 'Morality and Psychological Development' in P. Singer (ed), *A Companion to Ethics* (London, Blackwell, 1991); C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development*, (Cambridge, Ma, Harvard University Press, revised edn, 1993); J. C. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (London, Routledge, 1993); F.K. Oser, 'Professional Morality: A Discourse Approach (The Case of the Teaching Profession)' in W.M. Kurtines and J.L. Gewirtz, *Handbook of Moral Behaviour and Development* (Hillsdale NJ, L Erlbaum, 1991), op. cit.. See also Langford, op. cit., who criticises his methodology.

<sup>52</sup> n. 26 and accompanying text.

<sup>53</sup> Nn 31-33 and accompanying text.

<sup>54</sup> Rest et al, op. cit., n. 25.

<sup>55</sup> See Reiner et al, op. cit., n. 49, ch. 7; T.M. Newcomb, et al, *Bennington College, and its Students After Twenty-Five Years* (New York, John Wiley & Sons, 1967); C. Power, 'The Just Community

acknowledged that emotion influences moral behaviour, though he maintained that affective development parallels, and hence can be read off from, cognitive development.<sup>56</sup>

But even if true, Kohlberg failed to explain why this should be so and more importantly how cognition relates to other psychological processes, such as memory, information processing, and motivation, and how moral behaviour is affected by personal and situational variables.<sup>57</sup> Moreover, his 'phenomenalistic' assumption that moral behaviour requires the explicit exercise of conscious judgment conflicts with evidence that much of our socio-cognitive activity is tacit, implicit, and automatic,<sup>58</sup> and that individuals are often unable to explain what moral judgments motivated their actions.<sup>59</sup> Indeed, automatic or subconscious responses to moral issues are said to be essential to coping effectively with everyday life; otherwise there would be insufficient time left to deal with that which is novel and unusual.<sup>60</sup>

### *The Virtues of Character*

As a result Kohlberg's cognitive approach has fallen out of favour and psychologists are joining moral philosophers in revisiting the Aristotelian tradition of virtue (or aretaic) ethics.<sup>61</sup> Unlike the deontic tradition, exemplified by Kantian deontology but also by various forms of consequentialism, which sees ethics in terms of universally applicable principles or rules imposing behavioural duties, virtue ethics sees morality as largely a question of a person's overall moral worth and in particular their possession of relatively stable character traits, dispositions, or habits of perception, feeling and behaviour which are regarded as virtuous. Virtue ethics recognises that individuals are not born with developed virtues, nor with the 'practical wisdom' which enables them to see how to act in practical situations. Instead, virtue, practical wisdom and a person's overall moral character are gradually developed through actual engagement with moral issues.

However, Aristotle did not dismiss moral rules as unimportant. He acknowledged that they may ground important decisions and that character development starts with an application of rules before reaching the point where it involves instinctive and spontaneous moral responses.<sup>62</sup> Interestingly, Aristotle's view

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Approach to Moral Education' (1988) 17 *Journal Of Moral Education* 196; F.C. Power et al, *Lawrence Kohlberg's Approach to Moral Education* (New York, Columbia, 1989); A. Higgins, 'Educating for Justice and Community: Lawrence Kohlberg's Vision of Moral Education' in Kurtines and Gewirtz, (1996), op. cit., n. 25.

<sup>56</sup> Higgins, *ibid*, 53; G. Lind, 'The Theory of Moral-Cognitive Development: A Socio-Psychological Assessment' in G. Lind et al, *Moral Development and the Social Environment: Studies in the Philosophy and Psychology of Moral Judgment and Education* (Chicago, Precedent Publishing, 1985); and see also the discussion of Piaget in Reiner et al, op. cit., n. 49.

<sup>57</sup> D.K Lapsley and D Narvaez, 'Moral Psychology at the Crossroads' in Lapsley and Power, op. cit., n. 27, 20.

<sup>58</sup> *Ibid*, 26

<sup>59</sup> *Id*, and see also D. Narvaez and D.K. Lapsley, 'The Psychological Foundations of Everyday Morality and Moral Expertise' in Lapsley and Power, op. cit., n. 27.

<sup>60</sup> R.S. Peters, *Moral Development and Moral Education* (London, George & Unwin, 1981), 56.

<sup>61</sup> See eg 'Virtue Theory' in Singer, op. cit.; W.K. Frankena, *Ethics* (Englewood, Cliffs, NJ, Prentice-Hall, 1963), ch. 4; T.L. Beauchamp, *Philosophical Ethics: An Introduction to Moral Philosophy* (New York, McGraw-Hill, 1982) ch. 5; G. Pence, 'Recent Work on Virtues' (1984) 21 *American Philosophical Quarterly* 281.

<sup>62</sup> Aristotle, *The Nicomachean Ethics* (Amherst, NY, Prometheus Books, 1987), esp. book X, ch. 10. See also Peters, op. cit., n. 60, ch. 2; Kupperman, op. cit., n. 50, 203; H.I. Dreyfus and S.E. Dreyfus,

that children first obey rules out of fear and later shame and the desire for conformity is similar to Piaget, Kohlberg and other stage theorists. However, his view of moral education and moral maturity is very different.<sup>63</sup> Thus, by emulating others, by trial and error, by instruction from authoritative others, by experiencing and reflecting on the appropriate pride or regret at the outcome of one's actions, moral habits or dispositions are said to gradually develop to the point that appropriate moral behaviour and feelings become embedded in the individual's character.<sup>64</sup> In other words, character formation results not so much from direct teaching but from experience in moral behaviour, or what might be called a 'moral apprenticeship'.<sup>65</sup> As William James, puts it: 'Every smallest stroke of virtue or vice leaves its never so little scar'.<sup>66</sup> Moreover, strong moral character are more likely to develop where individuals are subjected to difficult and sustained challenges.<sup>67</sup>

Recently, character development has been analogised to the way in which expertise is developed in other walks of life.<sup>68</sup> Like other experts, those with developed moral characters tend to respond to moral issues more or less spontaneously and instinctively. However, this does not mean that they do so without intention or other forms of cognitive control.<sup>69</sup> Indeed, Aristotle's notion of practical wisdom clearly contemplates that virtue requires mature reasoning and that habits can 'involve complex activities in which deliberation and adaptability are required'.<sup>70</sup> Moreover, virtuous people know what they are doing and choose virtuous conduct for its own sake.<sup>71</sup>

If properly developed, moral character can be said to equip individuals with all four psychological components involved in moral behaviour rather than just the judgment and perhaps also sensitivity emphasised by moral cognitivists. Where moral motivation and courage are also developed to the extent that virtue becomes a way of life, moral behaviour is far more likely to ensue. Thus, moral 'saints', such as Gandhi, Mother Teresa, and Oskar Schindler, seem to act out of deep-seated and spontaneous feelings of compassion, empathy, etc – by 'habits of the heart' – rather than conscious deliberation. This is confirmed by studies of moral exemplars who acted more or less automatically.<sup>72</sup> According to contemporary psychologists, this automaticity derives from the fact that frequent activation renders moral considerations and categories part of the easily (or 'chronically') accessible set of cognitive-affective constructs which 'encompass the person's encoding or construal of the self and of situations, enduring goals, expectations and feeling states, as well as specific memories of the people and

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'What is Morality? A Phenomenological Account of the Development of Ethical Expertise' in D. Rasmussen (ed), *Universalism and Communitarianism* (Cambridge, Mass, MIT Press, 1990).

<sup>63</sup> See also the approach of John Dewey: eg *Human Nature and Conduct* in J.A., Boydston (ed), *John Dewey: The Middle Works, Vol. 14* (Carbondale, Southern Illinois University Press, 1922).

<sup>64</sup> Aristotle, *ibid*, esp. bk II, ch. I and bk VI, ch. XIII; Carr, *op. cit.*, n. 43; D. Luban, 'Epistemology and Moral Education' (1983) 33 *Journal of Legal Education* 636.

<sup>65</sup> Carr, *op. cit.*, n. 43, 242; Peters, *op. cit.*, n. 60, 37.

<sup>66</sup> Quoted by Peters, *ibid*, 54.

<sup>67</sup> Kupperman, *op. cit.*, n. 50, 214.

<sup>68</sup> Dreyfus and Dreyfus, *op. cit.*, n. 62; Narvaez and Lapsley, *op. cit.*, n. 59.

<sup>69</sup> Peters, *op. cit.*, n. 60, esp 103

<sup>70</sup> Higgins et al, 'Character, Responsibility, and the Moral Self', in Lapsley and Power, *op. cit.*, n. 27, 103. See also Peters *ibid*, 52; C. Power et al, 'The Habit of the Common Life: Building Character Through Democratic Community Schools' in L.P. Nucci (ed), *Moral Development and Character Development: A Dialogue* (Berkeley, McCutchan Publishing Corporation, 1989).

<sup>71</sup> Carr, *op. cit.*, n. 43, 51.

<sup>72</sup> S.P. Oliner and P.M. Oliner, *The Altruistic Personality: Rescuers of Jews in Nazi Europe* (New York, Free Press, 1988); A. Colby and W. Damon, *Some Do Care: Contemporary Lives of Moral Commitment* (New York, Free Press, 1992).

events that have been experienced'.<sup>73</sup> For such individuals moral categories are 'salient, chronically accessible, easily primed and readily utilized.'<sup>74</sup> And on the basis of the insight that 'what we *see* depends on who we *are*,'<sup>75</sup> and on empirical studies, it is argued that moral behaviour is more likely for those for whom moral considerations are central to their personal identity and sense of self.<sup>76</sup> For such individuals, immoral behaviour will diminish and moral behaviour enhance their sense of self and self-esteem. Indeed, following Aristotle, Blasi argues that where moral motivations are central to the individual's self-identity 'moral action flows from a kind of spontaneous necessity' without the need for willpower or moral courage to overcome temptations or pressures to act unethically.<sup>77</sup>

### *Can Law Schools Influence Character?*<sup>78</sup>

Virtue ethics<sup>79</sup> and moral psychology thus suggest that if law schools are to help make lawyers moral they should aim to ensure that ethical constructs and motivations become central to students' self-identity and, through repeated use, their character.<sup>80</sup> Some,<sup>81</sup> however, question whether law schools can influence character development particularly at this stage of students' lives.<sup>82</sup> Unfortunately, partly because

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<sup>73</sup> Y. Shoda, S.L. Tiernan, and W. Mischel, 'Personality as a Dynamical System: Emergence of Stability and Distinctiveness from Intra- and Interpersonal Interactions' (2002) 7 *Personality and Social Psychology Review*, 316, 317. See in general Lapsley and Narvaez, op. cit., n. 57, 29-31; Narvaez and Lapsley, op. cit., n. 59, 146ff

<sup>74</sup> Lapsley and Narvaez, *ibid*, 31

<sup>75</sup> G. Meilaender, *The Theory and Practice of Virtue* (Notre Dame In, Notre Dame University Press, 1984), cited by Lapsley and Narvaez, op. cit., n. 57, 31.

<sup>76</sup> See Blasi, op. cit., n. 45, Lapsley and Powers, op. cit., n. 27, *passim*, but esp. chs 1, 2-4, 9 and 13; F.C. Power 'Understanding the Character in Character Education', Paper presented to meeting of the American Educational Research Association, Chicago, March 1997, <http://tigger.uic.edu/~lnucci/MoralEd/articles/powerunder.html>.

<sup>77</sup> n. 27 op. cit., 84-5.

<sup>78</sup> I have already dealt with the argument that they cannot because character dispositions do not in fact exist, or at best only provide reliable behavioural dispositions in highly specific situations: Nicolson, op. cit., n. 1, 624-5.

<sup>79</sup> As I argue, *ibid*, 615, this does not mean that the process of character development that moral principles can be totally abandoned or needs to be tied to all aspects of virtue ethics: cf Kupperman's character-centered ethics: J Kupperman, *Character* (New York, Oxford UP, 1991).

<sup>80</sup> Supporters of this approach include R. Condlin 'The Moral Failure of Clinical Legal Education' in Luban, op. cit., n. 5; Luban and Millemann, op. cit., n. 32; Webb (1998), op. cit., n. 7; T. D. Eisele, 'Must Virtue Be Taught?' (1987) 37 *Journal of Legal Education* 495; T.L. Shaffer, 'Lawyer Professionalism as a Moral Argument' (1990-1) 26 *Gonzaga Law Review* 393.

<sup>81</sup> Eg Pipkin, op. cit., n. 12, 265ff; J. Carlin, 'What Law Schools Can Do About Professional Responsibility' (1971) 4 *Connecticut Law Review* 459; M. Robertson, 'Challenges in the Design of Legal Ethics Learning Systems: An Educational Perspective' (2005) 8 *Legal Ethics* 222, 234. Some are even pessimistic about changing attitudes and preventing professional misconduct: D. Webb, 'Ethics as a Compulsory Element of Qualifying Degrees: Some Modest Expectations' (2001) 4 *Legal Ethics* 109; E. Schnapper, 'The Myth of Legal Ethics' [1978] *American Bar Association Journal* 202, 205; A. Evans in H. Brayne, N. Duncan & R. Grimes (eds), *Clinical Legal Education: Active Learning in Your Law School* (Blackstone Press Ltd, London, 1998), 268. For an overview of the debate, see J.E. Moliterno, 'An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere' (1991-2) 60 *University of Cincinnati Law Review* 83, 94ff.

<sup>82</sup> But see Watson, op. cit., n. 40, 249; A. Stone, 'Legal Education on the Couch' (1971) 85 *Harvard Law Review* 392, 422; W.E. Burger, 'The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility' (1980) 29 *Cleveland State Law Review* 377, 388; R. Wasserstrom, 'Legal Education and the Good Lawyer' (1984) 34 *Journal of Legal Education* 155, 160.

psychological concepts do not map neatly onto the philosophical language of character, psychological research has not directly sought to establish whether character becomes set by a particular age.<sup>83</sup> On the other hand, some empirical research does indirectly suggest that character development is possible in adulthood and may indeed be affected by university education. Certainly, as we have seen,<sup>84</sup> law schools may negatively affect student attitudes. More positively, studies by Kohlberg and his associates show that moral judgment continues to develop well into adulthood and that university education, particularly if accompanied by ethical instruction and involvement in community projects, can have a lasting effect.<sup>85</sup> Admittedly, as already noted,<sup>86</sup> moral reasoning does not necessarily translate into behaviour. However, there is some, albeit weak, connection between the two.<sup>87</sup> And, if moral reasoning continues to develop at university why not other psychological components? In fact, research indicates a ‘college effect’ on moral sensitivity and the related capacity for moral imagination.<sup>88</sup> Similarly, university provides ideal opportunities for the development of self-identity, which is so crucial to moral character, particularly as tertiary education tends to postpone important character forming events like marriage and career choice.<sup>89</sup>

The potential for law schools to influence character development is further enhanced by the fact that, even if the self-identity and moral character of incoming law students are fairly well-formed, they will only have developed in relation to the sort of moral issues that arise in the family, friendships, school, sport, etc. Without exposure to the realities of legal practice, the type of ethical issues it raises and the moral considerations relevant to their resolution, students will have not begun to develop the professional identity, moral judgment and instinctive, spontaneous and habitual responses to professional moral problems that make lawyer morality much more likely. In other words, while they might have a developed *personal* moral character, they have yet to develop a *professional* moral character. And, as law teachers generally are the first to introduce them to the legal world, they have a unique opportunity to influence this process.<sup>90</sup>

In terms of the above empirical research and commonsense ‘armchair psychology’,<sup>91</sup> Kupperman’s view of character development seems plausible. He hypothesises that the outlines of character are formed in childhood, with late

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<sup>83</sup> Higgins et al, op. cit., n. 70, 110; C.A. Cunningham, ‘A Certain and Reasoned Art, The Rise and Fall of Character Education in America’ in Lapsley and Power, op. cit., n. 27, 188.

<sup>84</sup> Op. cit., at n. 19.

<sup>85</sup> Eg Abramson, op. cit., n. 47; Rest and Narvaez, op. cit., n. 25, *passim*; A.G. Lind, ‘Educational Environments which Promote Self-Sustaining Moral Development’, Paper presented at E Division, American Educational Research Association April 1996, [http://www.uni-konstanz.de/ag-moral/pdf/Lind-1996\\_Selfsustaining-moral-development.pdf](http://www.uni-konstanz.de/ag-moral/pdf/Lind-1996_Selfsustaining-moral-development.pdf).

<sup>86</sup> Op. cit., at n. 26.

<sup>87</sup> Rest et al, op. cit., n. 25, 80ff; ; S. Thoma, Moral Judgments And Moral Action, ‘Establishing the Link between Judgement and Action’ in Rest and Narvaez, op. cit., n. 25; A. Blasi, ‘Bridging Moral Cognition and Moral Action: A Critical Review of the Literature’ (1980) 88 *Psychological Bulletin* 1.

<sup>88</sup> See J.W. Brandenberger, ‘College, Character and Social Responsibility, Moral Learning Through Experience’ in Lapsley and Power, op. cit., n. 27 ; M.J. Bebeau, ‘Influencing the Moral Dimensions of Dental Practice’ in Narvaez and Rest, op. cit.. See also regarding general moral development, M.L. Davidson, ‘Harness the Sun, Channel the Wind, The Art and Science of Effective Character Education’ in *ibid*, 223

<sup>89</sup> Stone, op. cit., n. 82, 398-400; Watson, op. cit., n. 40, 250.

<sup>90</sup> N. Redlich, ‘Professional Responsibility of Law Teachers’ (1980) 29 *Cleveland State Law Review* 623, 624.

<sup>91</sup> Cf D. Luban *Lawyers and Justice: An Ethical Study* (Princeton, NJ, Princeton University Press, 1988), 69.

adolescence and early adulthood involving fine-tuning and the filling in of detail, and further fine-tuning along perhaps with attempts at revision occurring in later adulthood. If accurate, this suggests that law schools may help students begin to develop the professional moral character which fills in the details relevant to legal practice left untouched by personal moral character.

At the same time, without the sort of life-changing events experienced by those like St Francis and John Profumo, radical character transformation at university is unlikely. Students predisposed to immoral behaviour will not suddenly develop a moral conscience. And, unfortunately, research indicate that incoming law students are not predominantly altruistic, justice-oriented individuals.<sup>92</sup> On the other hand, research also suggest that law schools do influence students' social conscience, albeit currently in a negative direction,<sup>93</sup> whereas many law teachers report that there are students who can be encouraged and guided to adapt what is virtuous in everyday life to professional life.<sup>94</sup> Given that students differ as to the content and obduracy of their moral outlook, we might usefully distinguish between:

- *The Sinners*: a very small group, who are irredeemably immoral – they are already inclined to lie, cheat, bully and oppress others in the service of their clients and themselves;
- *The Saints*: a relatively small group of students with already developed virtuous characters – they want to act morally and use their skills to help others, and require only to be guided as to what virtue entails in legal practice.
- *Thatcher's Children*: possibly the largest group – they are not incorrigibly bad but tend towards amorality and the pursuit of self-interest, and will require considerable encouragement to take morality seriously.
- *The Moral Innocents*: probably the second biggest group - with the right support they may develop a sense of ethical professionalism, but otherwise are likely to adopt the current norms of amoral professionalism.

Using this typology, one might predict that, depending on the extent to which each student's character is fixed on entering university, and the extent and nature of ethical education, there is a good chance of law schools providing the foundation for the development of commendable moral character amongst the Saints, some chance with the Moral Innocents, but no chance with the Sinners and little with Thatcher's Children. Moreover, it is possible that starting even a small group on the road to ethical professionalism will have a knock-on effect. Students who have already started the journey might encourage newer colleagues to join them, whereas those in practice may provide both encouragement and role models for similarly disposed neophytes. This, in turn, may water down the generally amoral environment of legal practice and perhaps also lead to areas of practice or isolated environments within practice, such as ethical discussion groups,<sup>95</sup> which provide sustenance and support for ethical professionalism. As research shows, those who display moral character tend to be involved in ongoing relationships with others who challenge, and thus sustain and expand, their sense of morality.<sup>96</sup>

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<sup>92</sup> n. 18, op. cit..

<sup>93</sup> n. 19, op. cit..

<sup>94</sup> See at nn 119 and 133, below.

<sup>95</sup> See C. Sampford and C. Parker, 'Legal Regulation, Ethical Standard-Setting, and Institutional Design' in S. Parker and C. Sampford (eds), *Legal Ethics and Legal Practice* (Oxford, Clarendon Press, 1995), 17 and, for an example, J. Jenkyns, 'The American Inns of Court: Preparing Our Students for Ethical Practice' (1993) 27 *Akron Law Review* 175.

<sup>96</sup> See Brandenberger, op. cit., n. 88, 316.

## Reforming Legal Education

### *The Ideal*

Combining the lessons of moral psychology with the critique of legal education suggests that ethical education should have four aims: *inspiring* an interest in ethics; *illuminating* the general and professional ethical tools available to resolve issues of professional ethics; *illustrating* these tools and issues through exposure to situations involving moral dilemmas; and *inculcating* the habit of identifying, evaluating and caring about ethical issues so that this becomes a more or less spontaneous response in practice.

As regards illuminating professional ethics, while it is not inappropriate to continue teaching the formal rules in the vocational stage, students should be exposed to legal ethics literature in the academic stage so that they first develop the ability to critically evaluate these rules and their underlying professional role morality, apply them in ways which are sensitive to the contexts of legal practice and fill in the gaps where they are silent, vague or conflicting. This literature is best understood if supported by an introduction to its philosophical underpinnings and the institutional setting in which lawyers operate.<sup>97</sup> Students will be better equipped to evaluate current professional rules and roles if they appreciate the limitations of their underlying ethical theories. Furthermore, engaging with ethical theory may encourage clarity of thought and expression, force students to examine their instinctive responses to ethical dilemmas, inspire some to take ethics seriously and guide the decision-making of those already converted.<sup>98</sup> Exposure to the institutional context enables students to better appreciate legal ethics debates and helps prepare them for the realities of practice. Thus existing coverage of the adversarial system, the legal profession and access to justice needs to be augmented by exposure to the ways in which the increasing specialisation, fragmentation, bureaucratisation, commercialisation and globalisation of legal practice affect lawyers' ability to act ethically<sup>99</sup> and how professional regulation might be reformed to enhance ethical behaviour.<sup>100</sup>

While the professional norms and their philosophical and institutional contexts can be taught in traditional lecture format, interactive teaching methods are more likely to inspire and help students develop their own moral stance. Here, Socratic dialogue, preferably in small classes, may not only produce deeper understanding of issues through exposure to a plurality of views,<sup>101</sup> but also encourage students to see

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<sup>97</sup> Boon, op. cit., n. 7, 58; Boon and Levin, op. cit., n. 6, 176; Goldsmith, op. cit., n. 17, 10; Myers, op. cit., n. 4; Nicolson and Webb, *ibid*; Webb (1996) op. cit., n. 7, 277-8; D.T. Link 'The Pervasive Method of Teaching Ethics' (1989) 39 *Journal of Legal Education* 485, 487; I. Johnstone and M.P. Treuhart, 'Doing the Right Thing: An Overview of Teaching Professional Responsibility' (1991) 41 *Journal of Legal Education* 75, 83-6; D. Nicolson, 'The Theoretical Turn in Professional Legal Ethics' (2004) 7 *Legal Ethics* 17.

<sup>98</sup> See eg D.M. Rosenthal and F. Shehardi (eds), *Applied Ethics and Ethical Theory: Ethics in a Changing World* (1988); D. Luban, 'Calming the Hearsed Horse: A Philosophical Research Program for Legal Ethics' (1981) 40 *Maryland Law Review* 451, 475

<sup>99</sup> See n. 41, op. cit..

<sup>100</sup> Nicolson and Webb, op. cit., n. 6, ch. 4; Boon and Levin, op. cit., n. 6, chs 4-5; J. Webb and D. Nicolson 'Institutionalising Trust: Ethics and the Responsive Regulation of the Legal Profession' (1999) 2 *Legal Ethics* 148; M. Davies, 'The Regulatory Crisis in the Solicitors' Profession' (2003) 6 *Legal Ethics* 185.

<sup>101</sup> Webb (1998), op. cit., n. 7, 148.

ethical dialogue and reflection as a normal part of legal work.<sup>102</sup> In addition, academic debates can be brought to life by exposure to legal biographies, fictional accounts of legal practice in literature, films and television<sup>103</sup> or even vignettes scripted and filmed by academics,<sup>104</sup> and the personal accounts of local lawyers, clients and those affected by lawyer behaviour.<sup>105</sup> Not only does narrative readily engage the imagination, but real or fictional legal heroes may inspire students,<sup>106</sup> while villains may bring home the unattractiveness of immoral behaviour.

When it comes to developing students' ability to identify and resolve legal ethics issues, hypothetical ethical dilemmas may be useful. However, role plays and simulations are more likely to be effective in engaging their interest and emotions, introducing them to law's human dimension and requiring greater attention to context.<sup>107</sup> Active or experiential learning, in which students engage in roles, is said to have numerous educational advantages. Thus, where student experiences are more personal, immediate and realistic, and relate to the fulfilment of their future social roles, learning is more profound and likely to lead to greater self-knowledge.<sup>108</sup> In addition, critical evaluation of performance by self and others in class and self-reflective journals may enhance understanding and develop the life-long learning skills of the reflective practitioner.<sup>109</sup> The 'disorienting moments'<sup>110</sup> or 'moral crises' which occur when prior assumptions and settled values jar with experienced reality in role plays and simulations may stimulate an 'engaged moral faculty',<sup>111</sup> whereas reciprocal role-playing encourages participants to see issues from the 'other side', thus hopefully developing empathy. Finally, the collaboration required in role plays and simulations may combat the individualism and competitiveness so pervasive in law school.

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<sup>102</sup> Nicolson and Webb, op. cit., n. 6, 288.

<sup>103</sup> See See Johnstone and Treuthart, op. cit., n. 97, 100-1; C. Menkel-Meadow 'The Sense and Sensibilities Of Lawyers: Lawyering in Literature, Narratives, Film and Television, and Ethical Choices Regarding Career and Craft' (1999) 31 *McGeorge Law Review* 1, 61, 64-6, Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics (2000) 69 *Fordham Law Review* 787.

<sup>104</sup> S. Gillers, 'Getting Personal' (1995) 58 *Law and Contemporary Problems* 61; E.B. Spaeth, Jr, J.G. Perry and P.B. Wachs, 'Teaching Legal Ethics: Exploring the Continuum' (1996) 58 *Law and Contemporary Problems* 153, 159-60. But cf M.E Wolfson, 'Professional Responsibility as a Lawyering Skill' (1995) 58 *Law and Contemporary Problems* 297, 301, who argues that the need to entertain limits the pedagogical value of film and television.

<sup>105</sup> W.H. Bennett, 'The University of North Carolina Intergenerational Legal Ethics Project: Expanding the Contexts For Teaching Professional Ethics and Values' (1995) 58 *Law and Contemporary Problems* 173.

<sup>106</sup> Link, op. cit., n. 97, 487-8; J. Mixon and R.P. Schuwerk, 'The Personal Dimensions of Professional Responsibility' (1995) 58 *Law and Contemporary Problems* 87.

<sup>107</sup> See Lind, op. cit., n. 85; N.A. Sprinthall, 'Counselling and Role Taking: Promoting Moral and Ego Development' in Rest and Narvaez, op. cit., n. 25; Richards, op. cit., n. 47. But cf W.Y. Penn, 'Teaching Ethics – A Direct Approach' (1990) 19 *Journal of Moral Education* 124, who argues that direct teaching is more effective.

<sup>108</sup> See F. Block, 'The Andragogical Basis of Clinical Legal Education' (1982) 35 *Vanderbilt Law Review* 321 on the characteristics of adult learning.

<sup>109</sup> See Aiken, op. cit., n. 15; Webb (1998b), op. cit., n. 7, 289-90; P.J. Spiegelman, 'Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web' (1988) 38 *Journal of Legal Education* 243; H. Lesnick, 'Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum' (1990) 37 *UCLA Law Review* 1157, 1184-5.

<sup>110</sup> F. Quigley, 'Seizing the Disorienting Moment: Adult Learning and the Teaching of Social Justice in Law School Clinics' (1995) 2 *Clinical Law Review* 37.

<sup>111</sup> Webb, (1998b), op. cit., n. 7, 290.

Whereas ‘fishbowl’ role plays<sup>112</sup> involving a few students can be conducted in front of large classes, which then discuss the performance, they are obviously better conducted in small groups so that, as in simulations, all students can participate. Moreover, simulations are preferable to role plays because students are more likely to emotionally invest in their role when the results ‘count’. Where simulations are ongoing and particularly where linked to skills training, they may more accurately reflect practice, in which ethical questions of how to treat clients, other lawyers, court officials and third parties in a decent, honest and preferably also empathetic and caring way arise on a daily basis, rather than as the sort of isolated, dramatic and often irresolvable ethical dilemmas presented in hypotheticals and role plays.<sup>113</sup>

However, it is generally accepted<sup>114</sup> that the benefits of active, experiential learning are best obtained in live-client clinics.<sup>115</sup> By engaging with actual clients, students are far more likely to develop empathy and emotional maturity. Learning is likely to be more profound when students bear responsibility for decisions which have consequences in the ‘real’ world. Whereas students might undervalue courses which abjure the ‘hard’ intellectual skills of legal analysis in favour of playing at being lawyers, not to mention reading, watching or listening to stories about lawyers,<sup>116</sup> the presence of flesh and blood clients with actual problems is likely to make learning seem more useful than traditional legal education. Crucially, as we have seen,<sup>117</sup> any feelings of satisfaction or regret at their actions in representing actual clients and real dilemmas may affect character development, whereas, involvement in community work contributes to moral development.

Law clinics have other advantages. Dilemmas arise in a realistic manner and must be resolved without the luxury of ‘quiet and careful deliberation’.<sup>118</sup> Because of their perceived practical knowledge and skills, clinic supervisors may function as influential moral exemplars, modelling good client relations, concern for how their actions affect others, and an altruistic commitment to the community. In addition, perhaps most importantly, clinics reveal the extent of unmet legal need, and social and legal injustice, that legal practice can involve helping others, and that this can be rewarding as well as intellectually challenging. My own and others’ experience suggests that this may inspire, or at least reinforce, altruistic aspirations in students.<sup>119</sup>

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<sup>112</sup> Cf Spiegelman, *op. cit.*, n. 109, 259.

<sup>113</sup> Moliterno, *op. cit.*, n. 81, 107-8, 117-8; S.J. Burnham, ‘Teaching Legal Ethics in Contracts’ (1991) 41 *Journal of Legal Education* 105, 105, 108; M.A. Noone and J. Dickson, *Teaching Towards a New Professionalism: Challenging Law Students to become Ethical Lawyers*, (2001) 4 *Legal Ethics* 131, 135.

<sup>114</sup> But see at n. 142, below.

<sup>115</sup> See eg Aiken, *op. cit.*, n. 15, 47; Boon, *op. cit.*, n. 7, 60; Rhode, *op. cit.*; Webb, (1998b), *op. cit.*, n. 7, 296. See, more generally, Condlin, *op. cit.*, n. 80, 320-24; Duncan, *op. cit.*; Jewell, *op. cit.*, 507-10; Luban, *op. cit.*; Luban and Millemann, *op. cit.*, n. 32; T. Glennon, ‘Building an Ethic of Responsibility’ (1991-2) 43 *Hastings Law Journal* 1175.

<sup>116</sup> See Koniak and Hazard, *op. cit.*, n. 15, 120.

<sup>117</sup> See, respectively, text accompanying nn 64 and 85, *op. cit.*,...

<sup>118</sup> Robertson, *op. cit.*, n. 81, 232.

<sup>119</sup> Q. Johnstone, ‘Law School Legal Aid Clinics’ (1951) 3 *Journal of Legal Education* 535, 537; M. Rees, ‘Clinical Legal Education: An Analysis of the University of Kent Model’ (1975) 12 *The Law Teacher* 125 136; M. Guggenheim, ‘Fee-Generating Clinics: Can We Bear the Costs?’ (1995) 1 *Clinical Law Review* 677, 683; M.J. Kotkin, ‘The Law School Clinic: A Training Ground for Public Interest Lawyers’ and S. Maresh, (1997) ‘The Impact of Clinical Legal Education on Decisions of Law Students to Practice Public Interest Law’ in J. Cooper and L.G. Trubek (eds) *Educating for Justice: Social Values and Legal Education* (Aldershot, Ashgate, 1997); I. Styles, and A. Zariska ‘Law Clinics and the Promotion of Public Interest Lawyering’ (2001) 19 *Law in Context* 65; K. Tranter ‘Pro-Bono Ethos: Teaching Legal Ethics’ (2002) 29 *Brief* 12, 13.

However, even those who recommend clinics as the most effective vehicle for ethical development believe that other forms of ethics teaching should come first.<sup>120</sup> And here the consensus is that, while certain issues of ‘macro ethics’, such as the impact and appropriateness of the adversary system and problems with access to justice can be discussed in existing courses, and ethical theory covered in jurisprudence courses, law schools ought to teach ethics both pervasively *and* in compulsory dedicated courses.<sup>121</sup>

Addressing ethical issues as and when they arise throughout the curriculum redresses their current marginalisation, and demonstrates that they are integral to legal practice and vary according to contextual factors, such as the practice setting, the type of case and the client’s status.<sup>122</sup> On the other hand, as Bundy argues ‘by giving the pieces of legal ethics a home everywhere, it effectively deprives its core concepts of a home anywhere...’.<sup>123</sup> There is therefore a need for overarching theoretical and institutional issues, and multi-dimensional and interdependent substantive issues like confidentiality and conflicts of interest to be subjected to in-depth analysis in a dedicated course. Another problem with teaching professional ethics pervasively is that non-specialists may teach it in the same legalistic manner as traditional law teaching. Moreover, even well-intentioned academics might cut corners to ensure adequate coverage of their specialist topics, whereas hostile teachers may simply ignore ethical issues or make clear their disdain for having to waste precious time.<sup>124</sup> Against the background of the hidden curriculum, this is likely to encourage students respond to ethical interludes with dropped pen and raised eyebrow.<sup>125</sup>

### *The Possible*

However, while in an ideal world law schools would teach ethics pervasively, as well as in dedicated course, support expository teaching with critical discussion, role plays, simulations and clinical experience, this seems a distant dream in the current university climate.<sup>126</sup> Academics, quite justifiably, zealously guard their autonomy from outside interference.<sup>127</sup> And, given the space taken up by the profession’s

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<sup>120</sup> Duncan, op. cit., n. 7, 229; Luban and Millemann, op. cit., n. 32, 14-15; O’Dair, op. cit., n. 7, 128; Webb (1996), op. cit., n. 7, 294, (1998b), op. cit., n. 7, 296. See also D. Rhode, Ethics by the Pervasive Method, ‘Into the Valley of Ethics: Professional Responsibility and Educational Reform’ (1995) 58 *Law and Contemporary Problems* 139, 141.

<sup>121</sup> See Nicolson and Webb, op. cit., n. 6, 287-8; Webb (1996), op. cit., n. 7, 292-4, ‘Developing Ethical Lawyers: Can Legal Education Enhance Access to Justice?’ (1999) 33 *The Law Teacher* 284, 293-4; A Paterson, ‘Legal Ethics: Its Nature and Place in the Curriculum’ in Cranston, op. cit., n. 21; O’Dair, op. cit., n. 2. On the relative merits and drawbacks of pervasive versus dedicated ethics teaching, see further Boon and Levin, op. cit., 164-5; Chapman, op. cit., 81-2; Moliterno, op. cit., n. 81, 119-21; Webb (1998b), op. cit., n. 7, 290-1; M. Daly, B.A. Green and R.G. Pearce, ‘Contextualizing Professional Responsibility: A New Curriculum For a New Century’ (2004) 58 *Law and Contemporary Problems* 193, 197-8.

<sup>122</sup> Cf Nicolson and Webb, op. cit., n. 6, esp. chs 8-10.

<sup>123</sup> Bundy, op. cit., 33.

<sup>124</sup> Cf Luban and Millemann, op. cit., n. 32, 39.

<sup>125</sup> Cf Koniak and Hazard, op. cit., n. 15, 120; R.W. Gordon, ‘Lawyers, Scholars and the “Middle Ground”’ (1993) 91 *Michigan Law Review* 2075, 2108 n.81.

<sup>126</sup> Cf Boon, op. cit., n. 7, 63-4; O’Dair, op. cit., n. 2, 314, op. cit., n. 7, 130.

<sup>127</sup> Other objections are less justified. Eg, worries about indoctrination are undermined by the fact that black-letter law teaching is itself a sustained promotion of the status quo, and by sensitivity to indoctrination of campaigners for ethics teaching, not least because it is likely to be counter-productive (eg Johnstone and Treuthart, op. cit., n. 97, 75-7; Spaeth, op. cit., n. 104, 161-2; Webb, op. cit., n. 81, passim).

dictation of the ‘core’, the argument for another compulsory course and/or for all courses to have a compulsory ethical element is likely to fall on deaf ears. There are already other more popular candidates for new compulsory subjects (such as evidence, unjust enrichment, the law of persons) or pervasive teaching (such as human rights, gender and race). Moreover, given the current ‘publish or perish’ pressure and the increasingly managerialist nature of universities, it is unreasonable to expect all law teachers to gain the necessary background knowledge and to rethink their courses in order to teach ethics pervasively,<sup>128</sup> while preventing omissions and overlaps requires considerable co-ordination efforts.<sup>129</sup> Yet, as the US experience shows, even compulsory ethics courses will be of little value if taught by ‘a reluctant cadre of junior faculty and outside lecturers’ and come to be seen as the ‘dog of the law – hard to teach, disappointing to take, and often presented to vacant seats or vacant minds’.<sup>130</sup>

Accordingly, perhaps the most that can be achieved is for more and more individual academics to establish optional ethics courses or incorporate ethics into existing courses, whether they be on the legal process, legal theory, substantive law,<sup>131</sup> legal skills<sup>132</sup> or involve clinical legal education. Anecdotal evidence suggests that committed and enthusiastic teachers can inspire student interest in ethics.<sup>133</sup> Arguably, a few such teachers are more likely to have a positive effect than many teachers on compulsory courses raising ethical issues reluctantly, or with ill-disguised or open disdain. Moreover, students who become interested may raise ethical issues in other courses, thus encouraging ethics to spread throughout the curriculum.

If the aim of incorporating ethics into legal education has to rely on a gradual ripple effect, the sustained immersion in ethics, and the mentoring and supervised reflection required for character development seem to be an even more remote possibility. This is because relevant opportunities are only available in sophisticated and extended practice simulations or in live-client law clinics and both are highly resource-intensive as regards staff time and money. Consequently, student involvement is usually confined to a semester or at best a year, which is inadequate for sort of the moral apprenticeship that character development requires.<sup>134</sup> Another problem is that engagement with ethical issues is likely to be de-prioritised in favour of other educational aims such as learning about how law actually operates and developing legal skills. In fact, clinics which prioritise educational goals over the

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<sup>128</sup> Webb, op. cit., n. 8, 118; J. Giddings, ‘Teaching the Ethics of Criminal Law and Practice’ (2001) 35 *The Law Teacher* 161, 172. But cf contra O’Dair op. cit., n. 7, 118.

<sup>129</sup> Daly et al, op. cit., n. 21, 198; Giddings, *ibid*, 173. But cf n. Tarr in Brayne et al, op. cit., n. 81, 312-13 who regards any repetition as valuable in deepening understanding through multiple perspectives.

<sup>130</sup> D.C. Moss, ‘Out of Balance: Why Can’t Look Schools Teach Ethics?’ *Student Law*, Oct. 1991, 19, quoted in D.L. Rhode, ‘Missing Questions: Feminist Perspectives on Legal Education’ (1993) 45 *Stanford Law Review* 1547, 1561.

<sup>131</sup> See eg Daly, et al, op. cit., n. 21; Giddings, op. cit., n. 128; C. Menkel-Meadow, and R.H. Sander, ‘The “Infusion” Method at UCLA: Teaching Ethics Pervasively’ (1995) 58 *Law and Contemporary Problems* 129.

<sup>132</sup> See eg Wolfson, op. cit., n. 104; P. Brest and L. Krieger ‘On Teaching Professional Judgment’ (1994) 69 *Washington Law Review* 527; J.E. Moliterno, ‘Professional Preparedness: A Comparative Study of Law Graduates’ Perceived Readiness for Professional Ethics Issues’ (1995) 58 *Law and Contemporary Problems* 259.

<sup>133</sup> Daly, et al, op. cit., n. 21, 194; Giddings, op. cit., n. 128, 177; Menkel-Meadow and Sander, op. cit., n. 131, 136; Tranter, op. cit., n. 119, 13; P.J. Schiltz, ‘Legal Ethics in Decline: ‘The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney’ (1997-8) 82 *Minnesota Law Review* 705, 780. See also Webb (1998b), op. cit., n. 7, 281; Rhode, op. cit., 150.

<sup>134</sup> Robertson, op. cit., n. 81, 233.

provision of legal services may even have a deleterious educative effect, teaching students that their own interests are predominant, and that clients are means to their (now educational but later commercial) ends rather than possibly vulnerable human beings with pressing material and emotional needs.<sup>135</sup> This not only reduces the potential to positively influence the character of clinic students but is likely to confirm the attitude of those already disinclined towards ethical altruism.

Nevertheless, given that the development of extended simulations involving sophisticated ethical issues has yet to get off the ground in the UK,<sup>136</sup> live-client clinics remain the best hope for a moral apprenticeship. However, to maximise their potential as I have argued elsewhere<sup>137</sup> they ought to adopt a social justice, as opposed to an educational, orientation. By concentrating on ensuring access to justice rather than students' educational needs, such clinics may also avoid the danger that supervisors, especially if recruited from practice, model the sort of harmful models of adversarial lawyering, competitiveness, insensitivity and client manipulation which has allegedly tainted US clinical legal education.<sup>138</sup> Indeed, by prioritising social justice, clinics may achieve a secondary aim of encouraging students to see their professional obligations as including service to the community, particularly if they obtain great satisfaction from helping those in need and are impressed by the example of academics and practitioners who devote some of their spare time to clinic work.

And in order to meet the two main concerns about clinics as sites of ethical education, social justice clinics are better operate better if they are extra-curricular rather than credit-bearing. The first of these relates to the cost entailed by the very low staff-student ratios thought to be necessary in traditional clinics.<sup>139</sup> Costs can be further reduced by using students to help run clinics and even train incoming members. As a result, clinics like that at the University of Strathclyde<sup>140</sup> can operate with the staff input of one part-time director and occasional legal advice from academics and local lawyers, and on a budget of around £5,000 raised from sources like local law firms or alumni associations. For this expenditure of money and time, over 130 students are involved, many for up to five years and therefore highly likely to encounter ethical dilemmas. This, and the fact that, as already argued,<sup>141</sup> every instance of client representation requires an ethical stance, meets the other objection to clinics as vehicles of ethical education which points to the uncertain supply of

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<sup>135</sup> See Boon, *op. cit.*, n. 7, 62; Evans, *op. cit.*, n. 81, 269; D. Nicolson, 'Legal Education or Community Service? The Extra-Curricular Student Law Clinic' (2006) *Web Journal of Current Legal Issues*, <http://webjcli.ncl.ac.uk/2006/issue3/nicolson3.html>.

<sup>136</sup> But see P. Maharg, *Transforming Legal Education: Learning and Teaching the Law in the Early Twenty-first Century* (London, Ashgate Publishing, forthcoming 2007), chs 7 and 8.

<sup>137</sup> Nicolson, *ibid.*

<sup>138</sup> Condlin, *op. cit.*, n. 80, 'Clinical Education in the 70s: An Appraisal of the Decade', (1983) 33 *Journal of Legal Education* 604; "'Tastes Great, Less Filling": the Law School Clinic and Political Critique', (1986) 35, *Journal of Legal Education* 45; but cf N. Redlich, 'The Moral Value of Clinical Legal Education' (1983) 33 *Journal of Legal Education* 613 and the more sensitive style of teaching advocated in Brayne *et al*, *op. cit.*, n. 81.

<sup>139</sup> Anything from 1:12 according to Clinical Legal Education Organisation Guidelines: <http://www.ukcle.ac.uk/ukcleadm/resources/clinic/standards.html> to 1:6 in 16% of US clinics: M.A. McDiarmid, 'What's Going on Down There in the Basement: In-House Clinics Expand their Beachhead' (1990) 35 *New York Law School Law Review* 239, 254-5.

<sup>140</sup> <http://www.lawclinic.org.uk/>. For two other extra-curricular clinics, see J. Griffiths-Baker, 'Ethical Education through the Student Law Clinic', (2002) 5 *Legal Ethics* 24; C. Rochester, 'Legal advice as Student Community Action: The Case of the University of Bristol Law Clinic' (2002) 2 *The Journal of the Institute for Volunteering Research* 71; [www.swansealawclinic.org.uk](http://www.swansealawclinic.org.uk).

<sup>141</sup> Text accompanying n. 113, *op. cit.*.

ethical dilemmas.<sup>142</sup> Indeed, student engagement with ethics is extended at Strathclyde by requiring all ethical dilemmas to be resolved by a committee, constituted by around 20 per cent of clinic membership, who function as a Kohlbergian just community and publicise their decisions externally to the rest of the clinic. Moreover, in order to remedy the fact that students have no curricular exposure to professional legal ethics, a course has been introduced for clinic members who have at least a year's experience to allow for guided reflection on ethical issues which arise in cases and on the interrelationship between their personal and professional moral identities. While this reverses received wisdom that clinical experience should follow ethical teaching,<sup>143</sup> it accords with adult learning theory, which holds that adults learn best by using theory to reflect on past and existing experiences in ways which prepare them for future social roles.<sup>144</sup>

## Conclusion

In this article I have argued that student participation in extra-curricular law clinics combined with ethical discussion in clinical or other courses is the most likely means of ensuring that at least some begin a process of professional character development which incorporates ethical professionalism. Admittedly, not everyone is convinced that clinics will have this effect. Evans has argued that they can only confirm students' pre-existing ethical orientations.<sup>145</sup> However, his more recent research tentatively suggests otherwise,<sup>146</sup> and significantly he and others who have reported a neutral<sup>147</sup> or a negative<sup>148</sup> impact have not looked at student's long-term involvement in *extra-curricular* clinics. Moreover, as already noted,<sup>149</sup> anecdotal evidence suggests that those students who join clinics merely to gain skills or pad their CVs may become committed to serving those in need once they begin to appreciate the sort of problems many face and gain satisfaction from making a difference to the lives of others. This might, of course be exceptional and such students may quickly revert to their initial more self-centred orientation once in practice. On the other hand, the sense of satisfaction at helping solve the problems of those in need and making correct moral decisions or the feeling of regret at making wrong decisions might start a process of professional moral character development which equips young lawyers to

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<sup>142</sup> Moliterno, op. cit., n. 81, who argues that accordingly ethics are best taught through simulation, and that students only need one or two exposures to actual clients. This not only ignores the fact that all client contact raises issues of ethics (ibid), but also that clinics teach lessons about unmet legal need and legal justice, and hopefully inspire student altruism.

<sup>143</sup> See at n. 120, op. cit..

<sup>144</sup> Block, op. cit., n. 108.

<sup>145</sup> Loc cit n. 81.

<sup>146</sup> A. Evans and J. Palermo, 'Does Clinical Experience Make any Observable Difference to Ethical Legal Practice?' paper delivered at *Flowers in the Desert: Clinical Legal Education, Ethical Awareness and Community Service*, Monash University, July 2005. Cf also A. Evans, 'Lawyers' Perceptions of their Values: an Empirical Assessment of Monash University Graduates in Law, 1980-1998' (2001) 12 *Legal Education Review* 209.

<sup>147</sup> R.J. Simon, 'An Evaluation of the Effectiveness of Some Curriculum Innovations in Law Schools' (1966) 2 *International Journal of Applied Behavioural Science* 219; H. Sacks, 'Student Fieldwork as a Technique in Educating Students in Professional Responsibility' (1968) 20 *Journal of Legal Education* 291.

<sup>148</sup> J. MacFarlane, 'Look Before You Leap: Knowledge and Learning in Legal Skills Education' (1992) 19 *JLS* 293, 306.

<sup>149</sup> See op. cit., n. 133.

resist the counter-pressures of modern practice or encourages them to practice in areas more amenable to ethical professionalism.

Equally, while arguing that the most likely means to begin this process of character development is through live-client clinics, I am not suggesting that all other means of equipping students for the moral challenges of legal practice should be abandoned. Not only will ethical teaching reinforce and help make sense of clinic experience, but legal education is currently so far from taking ethics seriously that any means of illuminating and illustrating professional legal ethics and inspiring student interest is worth pursuing even if it does not necessarily inculcate the sort of habits of moral conscience argued for in this article.