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Foreword

Welcome to the Winter edition of the Journal for 2005.

This edition of the Journal

This edition brings together three of the papers originally delivered at the Summer 2005 joint conference between this Journal and the Australian Clinical Legal Education Association, held in Melbourne in July.

The first paper, from Peter Joy from Washington University School of Law in St. Louis looks at issues of external interference with clinical programmes, picking up on a series of attacks on the work undertaken by law clinics in the United States by those interested in restricting the scope of the work that such clinics can undertake. It is an article of relevance to us all, reminding us not only of the value of what we can do in our clinics, but also our vulnerability in different ways, to different forms of institutional pressure which may be brought to bear. I challenge any reader to put himself or herself into the position of any one of the clinicians threatened by organisations, professional bodies and political groupings, and not to feel a sense of deep concern. In such an environment, is there a danger that there will be an insidious "chilling effect" from such challenges, reining back the scope of clinical teaching.

What is also implicit in Peter's article is the way in which clinics can engage the commitment and enthusiasm of clinical students by recognising their particular passion for justice – and often an enthusiasm for justice in causes that may be less than popular with existing political and business interests – such as environmental challenges. Here there is common ground between Peter's article, and the article from Liz Curran, Judith Dickson and Mary Anne Noone from La Trobe University in Australia. In their article they too look at the issues that arise from the particular societal responsibilities inherent in being a legal professional, and ask how we can most usefully structure our clinical programmes to maximise the benefits from the ethical and moral issues (in their broadest sense) that arise from almost every case that the students will encounter. Valuably, they identify the particular responsibility of the clinical teacher in both managing the learning experience but also in acting as a role model.

The final article broadens this theme yet further, by identifying a far wider issue for us as clinicians and for our students – what is it that we are teaching? Is it purely effective lawyering skills – or even ethical and socially conscious lawyering skills – to future professionals? Do we have a much greater opportunity to recognise the importance of personal fulfilment as a necessary component in any career? The pursuit of happiness is not something that is normally associated with legal careers, and Colin James, from the University of Newcastle, Australia, puts forward an enormously interesting article, challenging us to recognise that through our clinical learning and teaching we may be able to open up for our students (and indeed ourselves) a much more positive approach to self-development and self-fulfilment than we find through our more narrow professional concerns.

The Summer 2006 conference

The Summer 2006 IJCLE conference returns to London – and even at this early stage it promises

to build on the success of the earlier years, with papers from almost every major jurisdiction, focusing on the broad theme of Emancipation through learning. Full details of the conference can be found at: http://law.unn.ac.uk/IJCLE. In view of the level of interest from delegates, the conference has been expanded to run over two full days (12th and 13th July 2006), but we have managed to keep the cost of attending unchanged from previous years.

The Journal conference will immediately be followed by the one day conference of CLEO, the UK clinical legal education organisation. This will be a very practically focussed conference, looking at the particular practical issues inherent in setting up and sustaining clinical programmes, and I am delighted that we have been able to organise matters so that the delegates attending the IJCLE will have free registration so as to enable them to attend the CLEO conference on the following day to contribute their own experiences from their own programmes.

As ever, I hope that many readers of the Journal will be able to attend the conference – and I look forward to seeing you there.

Student contributions and the Journal

Can I take this opportunity to remind readers that the Journal has three sections.

The first section of the Journal is fully refereed, with two independent specialist referees reviewing every submission. It has been designed to fit with the highest standards of academic peer review. I am always happy to receive unsolicited articles, but please make clear that you intend your article for publication in this section.

The second section of the Journal is the Clinical Practice section. This is intended to be a less formal section and to provide a forum for more descriptive pieces, which are often of huge value in setting out the details of particular clinical initiatives or projects. I am always eager for material for this section since I know from feedback that readers often find it very valuable to learn more about particular ideas from other clinical programmes.

The third section of the Journal is dedicated to student submissions – preferably relatively short pieces, but focusing on any aspect of their clinical experience – whether a particular case, or a particular learning experience, or indeed a wider consideration of issues such as clinical organisation or assessment. This is probably the most underutilised section of the Journal and I think this is a shame since it has the scope to give a voice to the people for whom we run our clinics, and whose commitment and enthusiasm is an essential pre-requisite for any successful clinical programme: again, I would welcome submissions for this section.

Philip Plowden

Editor

Political Interference in Clinical Programs: Lessons From The U.S. Experience

*Peter A. Joy**

INTRODUCTION

Around the world, law school clinics are playing an increasingly important role in training future lawyers and providing access to the courts for traditionally underrepresented individuals and groups. Today, there are law school clinical programs on the continents of Africa, Asia, Australia, Europe, North America and South America, and each year brings clinical education to more countries – most recently Japan.[1] In the United States, which has had clinical programs for several decades, student practice rules in every jurisdiction permit law students to represent clients in and

* *Professor of Law & Director, Criminal Justice Clinic, Washington University School of Law in St. Louis.*

1 *Japan may be the most recent country to initiate clinical legal education programs, following the adoption of a new system of graduate professional legal education as part of reforms "for the purposes of 'clarifying the role to be played by justice in Japanese society in the 21st century and examining and deliberating fundamental measures necessary for the realization of a justice system that is easy for the people to utilize, participation by the people in the justice system, achievement of a legal profession as it should be and strengthening the functions thereof, and other reforms of the justice system, as well as improvements in the infrastructure of that system.'" Recommendations of the Justice System Reform Council – For a Justice System to Support Japan in the 21st Century – at http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html (last visited June 3, 2005) (quoting article 2, Paragraph 1 of the Law concerning Establishment of the Justice System Reform Council) [hereinafter Justice System Reform Recommendations]. The new law schools are a cornerstone of the reforms designed to "bridge between theoretical education and practical education," and to provide law students with the opportunity to acquire the specialized legal knowledge, lawyering skills, and professional values "necessary for solving actual legal problems." Id. at ch. III, pt. 2. Some of the new law schools have already instituted clinical courses in which law school faculty and students provide legal assistance to clients. See, e.g., Takao Suami, Clinical Legal Education and the Foundation of Japanese Law Schools in the Context of Judicial System Reform (April 15, 2005) (unpublished manuscript, on file with author) (describing the judicial reforms in Japan the importance of clinical legal education for Japanese law schools).*

out of court,[2] effectively making them "student-lawyers."[3] Through their representation of clients, law students in clinical programs experience the practice of law and learn the important lawyering skills and professional values needed to be competent, effective lawyers.[4] The student-lawyers in clinical programs, and their supervising clinical faculty, also experience issues that other lawyers representing poor and sometimes unpopular clients face – interference with the selection and representation of clients designed to deny legal services in some matters to those unable to afford to hire other lawyers.[5]

For more than thirty-five years, clinical programs in the United States have faced political interference and attacks by elected officials, business groups, and others for providing poor people access to the courts on matters including redress of racial discrimination, prisoner rights litigation, death penalty cases, and environmental issues. In each instance, the political interference has sought to subvert the legal process by preventing clinical programs from representing their clients rather than having the courts rule on the legal merits of their clients' claims. The political interference with law school clinic client representation also appears to be part of the broader

2 *In 1969, the American Bar Association (ABA) promulgated a Model Student Practice Rule to facilitate the growth of clinical courses in United States law schools. See Proposed Model Rule Relative to Legal Assistance by Law Students, A.B.A. Rep. 290, 290 (1969) [hereinafter Proposed Model Rule]. The dual jurisdictional system of separate state courts and federal courts in the United States results in each separate jurisdiction having the power to regulate the student practice of law before the courts within the jurisdiction. The high court in each state, usually called the state supreme court, regulates the practice of law before all the trial and appellate courts within the state. In contrast, in the federal system each individual federal court has the authority to adopt its own student practice rule that applies only to those clinical students who appear before it. See George K. Walker, A Model Rule for Student Practice in the United States Courts, 37 WASH. & LEE L. REV. 1101, 1106-13 (1980). All fifty states, plus the District of Columbia and Puerto Rico, have adopted student practice rules. See Joan W. Kuruc & Rachel A. Brown, Student Practice Rules in the United States, 63 B. EXAMINER, No. 3, at 40, 40–41 (1994). In addition, almost every federal court has adopted some form of a student practice rule or permits law students to appear upon motion with the court. See Jorge deNeve, Peter A. Joy & Charles D. Weisselberg, Submission of the Association of American Law Schools to the Supreme Court of the State of Louisiana Concerning the Review of the Supreme Court's Student Practice Rule, 4 CLINICAL L. REV. 539, 549–50 (1998).*

3 *In the United States, law students must be admitted to practice under a state jurisdiction's or federal court's student practice rule or order before they are legally and ethically able to provide legal representation to clients or claim to be "student-lawyers." Clinical programs often enroll other students who are not admitted to the limited practice of law under a student practice rule, but these clinical students must function as lawyer assistants or law clerks and not as student-lawyers authorized to provide legal advice and other legal representation to clients. See Peter A. Joy & Robert R. Kuehn, Conflict of Interest and Competency Issues in Law Clinic Practice, 9 CLINICAL L. REV. 493, 497 (2002).*

4 *A study by the ABA identified ten fundamental lawyering skills and four fundamental professional values essential for the competent, professional representation of clients. See SECTION ON LEGAL EDUC. AND ADMISSIONS TO THE BAR, AMERICAN BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – A CONTINUUM 138–41(1992) [hereinafter MacCrate Report]. The ten fundamental lawyering skills are: problem solving; legal analysis and reasoning; legal research; factual investigation; communication; counseling; negotiation; dispute resolution; organization and management of legal work; and resolving ethical dilemmas. See id. at 138–40. The four fundamental values of the legal profession are: providing competent representation; promoting justice, fairness, and morality; improving the profession; and fostering professional self-development. See id. at 140–41.*

5 *Robert R. Kuehn & Peter A. Joy, An Ethics Critique of Interference in Law School Clinics, 71 FORDHAM L. REV. 1971, 1974 (2003). The interference is typically designed to prevent the bringing of certain types of cases, such as environmental or civil rights legal claims, or bringing or defending lawsuits against certain defendants, such as businesses or governmental entities, more that focusing on denying legal representation of certain clients. See infra Part IB. The net effect of this interference, however, is such that it would deny those clients unable to afford to pay for legal assistance access to the courts.*

attacks on public interest lawyers and other lawyers representing clients in disputes with governmental entities, business interest, or other more powerful adversaries.

The extent to which clinical programs in other countries currently face or will face political interference in the representation of their clients is unclear. Even if political interference in clinical programs is not yet a pressing issue in some countries, an analysis of political interference may be helpful to law faculty currently teaching in or working to implement clinical programs for at least three reasons. First, from a comparative law perspective, understanding the nature of political interference in clinical programs outside of one's own country may afford useful insights to foster critical thinking about the relationship between the role of lawyers in providing access to the courts and the role of clinical legal education in acculturating law students to the legal profession. Second, the increasing internationalisation of law makes understanding the experiences in other countries vital to being a legal educator in the 21st century, and understanding clinical legal education issues in other countries makes clinical educators more effective teachers. Finally, understanding the types of political interference and the responses to political interference in the United States may prove useful to clinical faculty in other countries experiencing similar attacks on their work in clinical courses.

This article reviews the history of political interference in clinical programs in the United States, considers the attacks on clinical programs in the context of attacks on other lawyers representing the poor or other marginalized clients, and draws lessons from the experience in the United States that may be helpful to clinical programs in other countries.[6] With the spread of clinical teaching throughout the world, it is likely that law faculty teaching clinical courses in other countries may encounter the types of political interference with client and case selection experienced by their colleagues in the United States.

Part I of this article examines the access to justice mission of clinical legal education in the United States and briefly traces the history and types of political interference in law school clinical programs. It also discusses the ethical obligations of lawyers to represent unpopular or controversial clients or causes, and considers how the attacks on clinical programs interfere with a lawyer's ethical obligation to act independently of third-party interests.

Part II examines the relationship between access to justice and the attacks on the major sources of public interest lawyers in the United States. Part II contends that access to the courts is a cornerstone principle for the rule of law, and access to the courts depends on having the assistance of a lawyer. Part II draws a connection between the political interference in clinical programs and other attacks on public interest lawyers.

Part III analyzes the legacy of political interference on clinical programs. It discusses the effects of both the highly publicized attacks on clinical programs and the more frequent questions concerning clinical programs' choices of clients and cases. It argues that the breadth of political interference in clinical programs in the United States indicates that any clinical program may be

6 *This article builds upon some ideas I have explored in previously published articles. See generally Peter A. Joy & Charles D. Weisselberg, Access to Justice, Academic Freedom, and Political Interference: A Clinical Program Under Siege, 4 CLINICAL L. REV. 531 (1998) (discussing the nexus between academic freedom, access to the courts, and political interference with clinical programs); Peter A. Joy, Political Interference with Clinical Legal Education: Denying Access to Justice, 74 TULANE L. REV. 235 (1999) (examining the role of law school clinics in providing access to justice and attacks on law school clinics); Kuehn & Joy, supra note 5 (examining the history and ethics of political interference in law school clinics).*

targeted even if the clinical faculty believe that they are taking non-controversial cases. Part III also questions whether political interference in clinical programs will be as great an issue in those countries that make legal assistance in civil cases more available to persons who are unable to afford to hire a lawyer than does the Unites States.

The article concludes that law school clinical programs can model the highest ideals of the legal profession by evaluating potential cases on the legal merits and pedagogical value and not with a concern for whether or not the case or client may be controversial.

I. INTERFERENCE IN LAW SCHOOL CLINIC CASE AND CLIENT SELECTION

A. Access to Justice Mission of Clinical Legal Education in the United States

Clinical legal education in the United States has existed for more than one hundred years in some form, and it has its roots in law students setting up volunteer legal aid bureaus or dispensaries to assist persons unable to afford to hire attorneys.[7] By the early 1950s, clinical pedagogy was becoming accepted both as a valuable means for exposing "the law student to actual problems . . . [of] actual people who are in actual trouble"[8] and as a way of advancing "equality of justice" by helping to develop throughout the country "an adequate system of legal aid offices."[9] From its earliest development, clinical legal education in the United States has included an access to justice mission.

Clinical legal education developed at a much more rapid pace starting in the 1960s, and the social justice mission of providing access to the courts remained a primary goal. Starting in 1959 and continuing through 1978, the Ford Foundation provided approximately $13 million in grants and other assistance to over 100 law schools through a program which was eventually known as the Council on Legal Education for Professional Responsibility (CLEPR).[10] William Pincus, who directed CLEPR, stressed that access to the courts or "a concern with justice for all" was a

7 *The first clinical programs in the United States were started in the late 1890s and early 1900s as non-credit, volunteer legal aid bureaus or legal dispensaries run by law students at a small number of law schools. See John S. Bradway, The Nature of a Legal Aid Clinic, 3 S. CAL. L. REV. 173, 174 (1930); William V. Rowe, Legal Clinics and Better Trained Lawyers – A Necessity, 11 ILL. L. REV. 591, 591 (1917).*

8 *Robert G. Storey, Law School Legal Aid Clinics: Foreward, 3 J. LEGAL EDUC. 533, 533 (1951).*

9 *Id. at 534. A 1951 study of clinical legal education programs identified twenty-eight clinics run by law schools, independent legal aid societies, or public defender offices. See Quintin Johnstone, Law School Clinics, 3 J. LEGAL EDUC. 535, 535 (1951). Most of the law schools offered clinics as elective courses or extracurricular activities. See id. at 541–42.*

10 *From 1959 to 1965, the Ford Foundation made a total $500,000 in grants to nineteen law schools through a program entitled the National Council on Legal Clinics (NCLC). See Orison S. Marden, CLEPR: Origins and Programs, in COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING 3, 3 (1973) [hereinafter CLINICAL EDUCATION FOR THE LAW STUDENT]. In 1965, the Ford Foundation provided an additional $950,000 to NCLC and renamed NCLC the Council on Education in Professional Responsibility, which was renamed the Council on Legal Education for Professional Responsibility (CLEPR) in 1968. See id. at 3, 6–7. The Ford Foundation granted an additional $11 million to CLEPR, which awarded 209 grants equaling approximately $7 million to 107 ABA-approved law schools from 1968 through 1978. See Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, Clinical Education for This Millennium: The Third Wave, 7 CLINICAL L. REV. 1, 19 (2000). Other CLEPR support for clinical programs in law schools consisted of teaching materials, publications, and conferences. Id. at 19 n.74.*

challenge for the legal profession,[11] and CLEPR funded clinical programs "to make unique and valuable contributions to the improvement of justice . . . generally to those most in need and least able to afford them."[12] Orison Marden, Chair of CLEPR, explained that clinical legal education was important to expose law students to "public responsibilities" of the legal profession "to serve the poor as well as the rich, to work for reforms in the administration of justice, to be leaders in their communities."[13] Marden also noted that law students needed to learn that lawyers "should be willing to undertake the unpopular cause and to withstand with courage the disapproval of unthinking people when they do so."[14]

While CLEPR funded the growth of clinical programs with a purpose of providing legal assistance to those in need of lawyers, members of the bench and bar also supported the development of clinical legal education for access to justice reasons.[15] To facilitate the spread of clinical legal education courses and to enable law students to provide legal representation to clients, the American Bar Association (ABA) promulgated the ABA Model Student Practice Rule in 1969.[16] In creating the Model Student Practice Rule, the ABA stated that it had dual purposes to assist the bench and bar "in providing competent legal services for . . . clients unable to pay for such services and to encourage law schools to provide clinical instruction."[17]

In addition to CLEPR and the legal profession supporting an access to justice mission of clinical legal education in the 1960s, one commentator noted that the growth of clinical programs was also motivated by "a desire on the part of a significant number of law students to help make the law serve the needs of the poor."[18] Other commentators echo the role of law student activism by attributing the growth of clinical legal education to the "social ferment of the 1960s,"[19] and to the growing appreciation for the role of law in addressing "the fundamental problems of contemporary society."[20]

Although CLEPR, the ABA, and law students all encouraged clinical programs to expand access to justice by representing poor and unpopular clients and causes, as clinical programs fulfilled this mission clinical faculty and their students found that some politicians, business interests, and university officials would sometimes attack law school clinics for their choices of clients and cases.

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11 *WILLIAM PINCUS, The Lawyer's Professional Responsibility, in CLINICAL LEGAL EDUCATION FOR LAW STUDENTS: ESSAYS 37, 38 (1980).*

12 *WILLIAM PINCUS, A Statement on CLEPR's Program, in CLINICAL LEGAL EDUCATION FOR LAW STUDENTS: ESSAYS, supra note 11, at 69, 70.*

13 *Marden, supra note 10, at 4.*

14 *Id.*

15 *For example, a former chief justice for the United States Supreme Court called on law schools to expand lawyering skills programs, and "provide society with people oriented and problem oriented counselors and advocates to meet the broad social needs of our changing world." See Warren E. Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 FORDHAM L. REV. 227, 233–34 (1973). In addition, the United States Court of Appeals for the District of Columbia Circuit observed that law student practice "has been praised by members of the judiciary and encouraged by the Judicial Conference of the United States, and we have ample reason to extend our commendation." Jordan v. United States, 691 F.2d 514, 523 (D.C. Cir. 1982).*

16 *Proposed Model Rule, supra note 2, at 290. Colorado adopted a student practice rule in 1909, but only fourteen other states had student practice rules prior to 1969. See Michael D. Ridberg, Student Practice Rules, in CLINICAL LEGAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 223. 231–64 (Edmund W. Kitch ed., 1970).*

17 *Id.*

18 *Charles E. Ares, Legal Education and the Problem of the Poor, 17 J. LEGAL EDUC. 307, 310 (1965).*

19 *PHILIP G. SHRAG & MICHAEL MELTSNER, REFLECTIONS ON CLINICAL LEGAL EDUCATION 1 (1998).*

20 *Arthur Kinoy, The Present Crisis in Legal Education, 24 RUTGERS L. REV. 1, 7 (1969).*

The following section briefly reviews the history and types of political interference with clinic case and client selection.

B. History of Political Interference with Clinical Programs

It is not unusual for clinical programs in the United States to be questioned by people outside of their law schools about the clients and cases the clinics represent. Law school alumni, legislators, university trustees, and opposing counsel or parties occasionally ask "why" a law school clinic is providing representation to certain clients asserting legal claims.[21] These inquiries often incorrectly equate the clinic's client representation with law school approval of support for a client's views or activities, and misunderstand the basic principle that a lawyer's representation of a client is not an endorsement of the client's views.[22] Usually, these inquires end once those raising the questions learn more about the clinic's teaching and service missions, and how the clinic faculty and students are fulfilling their ethical obligation to make legal services available to clients unable to afford lawyers or whose cause is controversial.[23] When those questioning a clinic's representation have interests opposed to the interests of a clinic's client, however, the inquiries may turn into attacks on the clinic designed to interfere with or stop the clinic's representation of its clients or participation in specific types of cases.

It is unclear when the first attack and political inference in a clinical program took place, but the first documented instance of political interference appears to be attacks on the clinical program and faculty at the University of Mississippi in 1968. State legislators and some members of the legal community complained to university officials and the law school dean because of the clinical program's involvement in a school desegregation case brought by a local legal services office.[24] In response to this pressure, the university dismissed the two law faculty involved in the civil rights litigation for refusing to cease their work with the legal services office.[25] The faculty brought a lawsuit against the university, alleging that the university permitted other law faculty to engage in part-time law practice without any restrictions on the clients they could represent. The court agreed that the university impermissibly treated the two faculty members differently and unequally

21 *See Joy & Weisselberg, supra note 6, at 531.*

22 *Ethics codes in the United States make it clear that a lawyer's representation of a client is not an endorsement of a client's views or actions. The high court in each state adopts the lawyer ethics rules, which are usually based on the ABA Model Rules of Professional Conduct. The ABA Model Rules provide: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of a client's political, economic, social or moral views or activities." MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2005) [hereinafter MODEL RULES]. The ABA Model Rules, adopted in 1983 and amended frequently, replaced the ABA Model Code of Professional Responsibility, which the ABA adopted in 1969 and amended in 1980. MODEL CODE OF PROF'L RESPONSIBILITY (1980) [hereinafter MODEL CODE]. More than forty states and the District of Columbia have adopted some version of the Model Rules. See STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 3 (2005). Most of the states that have not adopted some form of the Model Rules retain some version of the Model Code. Id. The Model Code provides: "The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a person viewpoint favorable to the interest or desires of his client." MODEL CODE, supra, at EC-17.*

23 *"Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval." MODEL RULES, supra note 22, at R. 1.2 cmt. 5.*

24 *Francis B. Stevens & John L. Maxey, II, Representing the Unrepresented: A Decennial Report on Public-Interest Litigation in Mississippi, 44 MISS. L.J. 333, 345 (1973); Elizabeth M. Schneider & James H. Stark, Political Interference in Law School Clinical Programs: Report of the AALS Section on Clinical Legal Education, Committee on Political Interference 1 n.1 (1982) (unpublished report on file with author).*

25 *Trister v. Univ. of Miss., 420 F.2d 499, 500–02 (5th Cir. 1969).*

than other professors because they represented unpopular clients, and the court ordered the university to reinstate the faculty to their teaching positions.[26] In reaching its decision, the court held that the state university could not "arbitrarily discriminate against professors in respect to the category of clients they may represent."[27]

Soon after the political interference with the work of the clinical faculty at the University of Mississippi School of Law, the governor of Connecticut and members of the local legal community objected to the University of Connecticut law school clinic's representation of Viet Nam War protestors and other unpopular clients in the early 1970s.[28] The attacks included the threat to end state funding for the law school, and the interference led to a proposal for a law school faculty committee to select cases for the clinic.[29] A clinic professor requested and received an advisory ethics opinion from the ABA discussing the ethical propriety of the new client screening process.[30] The ABA ethics opinion stated that case-by-case prior approval by a dean or faculty committee would interfere with the independent professional judgment of the clinical faculty and violate the ethical obligations of the dean and faculty members by placing the clinical faculty in a position to violate their ethical duties to clients.[31] The ABA ethics opinion stated: "Acceptance of such controversial clients and cases by legal aid clinics is in line with the highest aspirations of the bar to make legal services available to all."[32] The law school discontinued the screening committee after the ABA issued its opinion.[33]

In the 1980s, there were several more attacks on clinical programs at the state-supported law schools in Colorado, Idaho, Iowa, and Tennessee seeking to prevent their clinical programs from filing lawsuits against the state or political subdivisions. In 1981, the governor of Colorado vetoed legislation that would have prohibited "law professors at the University of Colorado from assisting in litigation against a governmental unit or political subdivision."[34] The legislation was drafted after a law professor, working with students in a constitutional litigation seminar, filed a lawsuit challenging a nativity scene at the Denver City and County Building claiming that the nativity scene on government property was the government's endorsement of religion in violation of the United States Constitution.[35]

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26 *The court found a violation of the Equal Protection Clause of the United States Constitution because the law school had imposed on the clinical faculty "restrictions that are different and more onerous than those imposed upon other professors in the same category." Id. at 502.*

27 *Id. at 504.*

28 *See Kuehn & Joy, supra note 5, at 1977 n.18 (citing e-mails from one of the clinical professors who was at the University of Connecticut at the time of the attacks on the clinic). The governor stated that the law school clinic was "nothing more than an agency designed to destroy our government and its institutions." Elizabeth M. Schneider, Political Interference in Law School Clinical Programs: Reflections on Outside Interference and Academic Freedom, 11 J.C. & U.L. 179, 184 (1984).*

29 *See Kuehn & Joy, supra note 5, at 1977 & n. 19.*

30 *ABA Comm. On Ethics & Prof'l Responsibility, Informal Op. 1208 (1972).*

31 *Id.*

32 *Id.*

33 *See Kuehn & Joy, supra note 5, at 1977 & n. 21. Several years later, in the early 1980s, a high-ranking state official threatened to introduce legislation to limit the activities of the University of Connecticut Criminal Clinic after the clinic successfully challenged a provision of the Connecticut death penalty statute. Schneider & Stark, supra note 24, at 2 n.4.*

34 *Schneider, supra note 28, at 185–86; Schneider & Stark, supra note 24, at 2.*

35 *Schneider, supra note 28, at 185; Schneider & Stark, supra note 24, at 2 n.3. The litigation resulted in a court order for the removal of a nativity scene at the Denver City and County Building, enjoining the inclusion of the nativity scene at the local government holiday display, and the awarding of costs and attorney fees to the plaintiff, who was represented by the University of Colorado law professor. Citizens Concerned for Separation of Church and State v. City and County of Denver, 481 F. Supp. 522, 532 (D. Colo. 1979), appeal dismissed, 628 F.2d 1289 (10th Cir. 1980), cert. denied, 452 U.S. 963 (1981).*

That same year, legislation was proposed in Idaho that would have prohibited the use of state funds for the representation of clients in litigation against the state or any political subdivision.[36] This legislation, which was not adopted, was proposed after the University of Iowa College of Law's clinic successfully represented prisoners in litigation against the state.[37] A year later, in 1982, the Idaho House of Representatives passed legislation that would have prohibited law faculty and students from participating in lawsuits against the state and would have banned "courses, clinics or classes in which a student assists or participates in any suit or litigation against the State, its agencies or its political subdivisions."[38] The legislation, which was defeated in the state senate, was introduced after the University of Idaho College of Law clinic challenged the proposed expansion of a highway.[39]

Although these early attacks on clinical programs were largely unsuccessful in limiting clinical programs' choice of clients and types of cases, in 1981 university officials in Tennessee imposed restrictions on the University of Tennessee College of Law suing the state after the clinic successfully brought a prisoner lawsuit against a state agency.[40] The state attorney general filed a motion to deny the law clinic attorney fees arguing that it was illegal to transfer funds from one state agency to another without going through the legislative appropriations process.[41] The fee dispute was resolved by directing the attorney fees to the legal services office that housed the clinic,[42] but the university board of trustees required the clinic to separate from the legal services office and ordered that "no suits of significance shall be brought by the UT Legal Clinic on behalf of any litigant against the State."[43]

Other early instances of political interference with law school clinic case and client selection include litigation in which government officials argued that it would be a conflict of interest for the state-supported Rutgers School of Law-Newark to continue to represent clients in any matter against the state and its political subdivisions,[44] and legislation to cut-off state funding for the clinical program at the Arizona State University College of Law because of the clinic's representation of clients in lawsuits challenging ownership rights to riverbeds and the state prison system's failure to provide adequate law library materials to state inmates.[45] The conflict of interest litigation failed against the clinical program at Rutgers School of Law-Newark in 1989,[46] but in the mid-1990s the Arizona legislature successfully inserted language in the state budget that prohibited

36 *Schneider, supra note 28, at 185 & n.30; Schneider & Stark, supra note 24, at 1.*

37 *See Schneider, supra note 28, at 185 n.30. See also Kuehn & Joy, supra note 5, at 1977 n.18 (citing an e-mail from one of the clinical professors at the University of Iowa College of Law).*

38 *Schneider, supra note 28, at 186 & n.33.*

39 *Id.*

40 *Memorandum from the Clinic Advisory Committee to the Faculty of the University of Tennessee College of Law 11–12 (May 22, 1981) (on file with author). In 1977, government officials successfully pressured the University of Tennessee's law clinic to withdraw from a lawsuit filed against the Tennessee Valley Authority (TVA) for air pollution violations, and the clinical faculty continued representation in his private capacity. See Kuehn & Joy, supra note 5 at 1979 n.32 (citing Telephone Interview with Dean Rivkin, Professor, University of Tennessee College of Law (Apr. 5, 2001)).*

41 *Memorandum from the Clinic Advisory Committee to the Faculty of the University of Tennessee College of Law, supra note 40, at 11–12.*

42 *Id.*

43 *Minutes of Meeting of Board of Trustees, University of Tennessee 6–7 (Sept. 25, 1981) (on file with author). See also Douglas A. Blaze, Déjà vu All Over Again: Reflections on Fifty Years of Clinical Education, 64 TENN. L. REV. 939, 960 & n.180 (1997); Julia P. Hardin, Polishing the Lamp of Justice: A History of Legal Education at the University of Tennessee, 1890–1990, 57 TENN. L. REV. 145, 193 (1990).*

44 *In re Executive Commission on Ethical Standards, 561 A.2d 542, 543–46 (N.J. 1989).*

45 *See Kuehn & Joy, supra note 5, at 1980 & nn.39–40.*

46 *In re Executive Commission on Ethical Standards, supra note 44, at 549.*

the Arizona State College of Law clinic from representing prisoners in any litigation against the state – a restriction the clinic has followed ever since.[47]

Conditions on government funding have been a frequent, preemptive form of interference with clinical programs. For example, the governor of Maryland imposed a requirement on the clinical program at the University of Maryland Law School and all other legal organizations receiving state funds that prior to filing any lawsuits against the state the entity receiving state funds must notify the state and attempt to resolve the matter without initiating litigation in court.[48] This requirement trumps the desires of clinic clients or the litigation strategies of their lawyers. The Bureau of Prisons has taken a similar and more absolute approach by conditioning law school clinics' receipt of federal funds for prison legal assistance programs with a condition that the law school clinics shall not sue the United States or any employee of the United States.[49] The Bureau of Prisons' approach effectively bans laws schools accepting funds to provide legal assistance to prisoner-clients seeking to use litigation against the federal government or its employees no matter how blatant the alleged violation of prisoners' legal rights. These types of funding restrictions obviously apply to all legal service providers and are broader than restrictions targeted solely to clinical programs.

Some of the most prolonged attacks on clinical programs came in response to work of environmental law clinics. The longest series of attacks were those attacks aimed at the University of Oregon Law School's Environmental Law Clinic starting in 1981 and continuing through the early 1990s. The timber industry and government officials exerted pressure on university officials to close the Environmental Law Clinic because of the clinic's involvement in forest conservation and endangered species cases.[50] In response to the pressures, the President of the University of Oregon appointed a committee to study the clinic and its use of public funds, and in 1988 the committee issued a report finding that the clinic "fulfills its educational function extremely well, through its advocacy serving a proper social role."[51] Similarly, the Oregon Attorney General, responding to the request of a state legislator requesting an investigation into the propriety of state funds supporting the clinic's representation of clients in matters against governmental entities, found that the "University is acting for an educational purpose it is authorized to undertake even though there are benefits inuring to private parties."[52] Faced with continued attacks and proposed legislative action to cut-off state funding of the law school, the Environmental Law Clinic eventually moved all litigation activities outside of the law school to a not-for-profit environmental law center.[53]

In more recent years, there were highly publicized attacks on the Environmental Law Clinic at Tulane University Law School starting in 1993 and continuing until 1998. In 1993, the governor of Louisiana demanded that the president of Tulane University either "shut up [the director] or get rid of" the director of the Environmental Law Clinic after the director made public comments

47 *See Kuehn & Joy, supra note 5, at 1980 & n. 41.*

48 *Robert Barnes, Gov. Schaefer Patches Spat With Lawyers, WASH. POST, July 23, 1987, at B5; Kuehn & Joy, supra note 5, at 1981 & n.44.*

49 *See, e.g., Kuehn & Joy, supra note 5, at 1981 n.45 (citing letters and interviews with faculty at the University of Southern California Law Center and Washington and Lee University School of Law).*

50 *See Joy & Weisselberg, supra note 6, at 534; Kuehn & Joy, supra note 5, at 1981–82.*

51 *University of Oregon School of Law, Report of the Ad Hoc Study Committee for the Environmental Law Clinic 15 (Nov. 30, 1985) (on file with author).*

52 *Oregon Attorney General OP-5498 (July 11, 1983).*

53 *See Joy & Weisselberg, supra note 6, at 534; Kuehn & Joy, supra note 5, at 1982.*

critical of the governor's plan to reduce state taxes on businesses generating hazardous waste.[54] The governor threatened to pull state support for a university building project, deny state educational assistance to residents attending Tulane, and prohibit Tulane medical schools students from working in state hospitals.[55] When the president of Tulane did not interfere with the clinic director's actions, the head of the Louisiana Department of Environmental Quality asked the Louisiana Supreme Court to review whether the clinic was complying with the state's student practice rule.[56] That effort also failed, and the Louisiana Supreme Court found no reason to exercise oversight over the clinic.[57]

Several years later in 1997, when the Tulane Environmental Law Clinic undertook to represent a primarily low-income, minority community's opposition to a chemical plant, another governor, other state officials, and business interests sought to derail the clinic's representation in the matter.[58] At first, the attacks involved public criticism, threats to revoke the tax-exempt status of the private non-profit law school, proposals to deny the university state educational trust fund money, and an orchestrated effort to stop charitable donations to the university.[59] Some Louisiana employers even refused to interview or employ Tulane students as a way of increasing pressure on the university and law school.[60] When none of these pressure tactics proved successful at stopping the clinic's representation of its clients, the government officials and business groups succeeded in persuading a majority of the elected justices to the Louisiana Supreme court to impose severe restrictions on the student practice rule aimed at preventing future representation of community groups.[61] The amended rule imposes very restrictive income guidelines for clinic client eligibility, requires that at least 51% of an organization's members must meet the guidelines, prohibits contact with potential clients through community education or other outreach efforts, and

54 *Michael Dehncke, Life in Louisiana, TULANE LAW SCHOOL DICTA (New Orleans, La.), Oct. 25, 1993, at 1 (quoting Governor Edwin Edwards of Louisiana) (on file with author).*

55 *Id.*

56 *Letter from Kai David Midboe, Secretary, Louisiana Department of Environmental Quality, to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (Oct. 15, 1993) (on file with author). See also Bob Anderson, "Politics" Prompted Protest of TU Law Clinic, Official Says, ADVOCATE (Baton Rouge, La.), Oct. 19, 1993, at 1B.*

57 *Letter from Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court, to Kai David Midboe, Secretary, Louisiana Department of Environmental Quality (Nov. 18, 1993) (on file with author). See also, Bob Anderson, High Court Rejects Midboe Request on Law Clinic Restraints, ADVOCATE (Baton Rouge, La.), Feb. 4, 1994, at 12C.*

58 *See Joy, supra note 6, at 243–47.*

59 *See id.*

60 *See Kuehn & Joy, supra note 5, at 1893 n.58 and accompanying text. There have been reports that the prosecutor in Houston has discriminated against University of Houston law students who have participated in the law school's Innocence Network, a clinic that represents wrongfully convicted inmates. See Rebecca Luczycki, DA Hiring Policies Questioned, NAT'L JURIST, Oct. 2002, at 27; John Suval, Innocence Lost, HOUSTON PRESS, July 4, 2002, at 13. The prosecutor's office denies that it discriminates against law students who have participated in the clinic. See id.*

61 *Various business groups sent letters to the Louisiana Supreme Court demanding that the Court investigate the Tulane Environmental Clinic and change the student practice rule. See Letter from Daniel L. Juneau, President, Louisiana Association of Business and Industry, to Pascal F. Calogero, Jr., Chief Justice, Supreme Court of Louisiana (Sept. 9, 1997) (on file with author); Letter from Erik F. Johnsen, Chairman, Business Council of New Orleans and the River Region, to Pascal F. Calogero, Jr., Chief Justice, Supreme Court of Louisiana (Sept. 9, 1997) (on file with author); Letter from Robert H. Gayle, Jr., President and Chief Executive Officer, The Chamber/New Orleans and the River Region, to Pascal F. Calogero, Jr., Chief Justice, Supreme Court of Louisiana (Sept. 9, 1997) (on file with author). The letter writing campaign seeking changes to the student practice rule was an idea generated at a meeting with Governor Mike Foster of Louisiana where business leaders were urged "to send a series of letters to the Louisiana Supreme Court." Shintech's Secret Backer, COUNTERPUNCH, Nov. 16–30, 1997, at 2, 2–3.*

prohibits clinic students from appearing in a representative capacity before a legislature.[62] The restrictions make Louisiana's student practice rule the "most restrictive student practice rule in the nation."[63] A challenge to the restrictions on constitutional grounds was rejected by the federal courts.[64]

After the attacks on the Tulane clinical program, there were highly publicized attacks on the University of Pittsburgh Environmental Law Clinic, for the representation of community groups that were seeking to block the sale of timber in a national forest in 2001,[65] and for representation of a community organization raising environmental concerns over the plans for a new highway in 2002.[66] The attacks on the clinic at the University of Pittsburgh involved state legislators and business groups, and the first set of attacks succeeded in convincing the state legislature to pass a budget measure, which the governor signed, prohibiting taxpayer funds to be used to support the Environmental Law Clinic.[67] Relying on private funds, the clinic continued and experienced further attacks in which opponents, using the threat of cutting off all state aid for the public university, sought to have university officials fire the director and close the clinic.[68] Although university officials originally took actions to force the clinic out of the law school, they abandoned giving into the political interference after the university's academic freedom and tenure committee found that the proposal to force the clinic to leave the law school infringed on academic freedom.[69]

Another recent attack on a clinical program has come from a state legislator, the local media, and others against the Civil Rights Project at the University of North Dakota for representing clients challenging a display of a monument of the ten commandments on city property.[70] Among the

62 *See La. Sup. Ct. R XX (1999).*

63 *Letter from Carl C. Monk, Executive Director, Association of American Law Schools, to Murphy J. Foster, Governor, State of Louisiana 1 (Aug. 21, 1998) (on file with author).*

64 *S. Christian Leadership Conference v. Supreme Court of La., 61 F.Supp. 2d 499 (E.D. La. 1999), aff'd, 252 F.3d. 781 (5th Cir.), cert. denied, 534 U.S. 995 (2001).*

65 *Senator Wants to Punish Pitt for Logging Suit, PA. L. WKLY., May 28, 2001, at 9; Jim Eckstrom, Scarnati Prepared to Hit U. Pittsburgh Where it Counts – Budget, BRADFORD ERA (Bradford, Pa.), May 23, 2001. See also Kuehn & Joy, supra note 5, at 1985–86.*

66 *Don Hopey, Law Clinic at Pitt Feeling Pressure, PITTSBURGH POST-GAZETTE, Oct. 17, 2001, at B-1; Johnna A. Pro, Road Group Targets Law Clinic at Pitt, PITTSBURGH POST-GAZETTE, Aug. 24, 2001, at B-4. See also Kuehn & Joy, supra note 5, at 1986–88.*

67 *State Senator Gets Symbolic Rebuke of Pitt Professor, Associated Press Newswires, June 23, 2001, WESTLAW, PANEWS library.*

68 *Frank Irey Jr., Pitt Should Drop Client that Opposes Expressway, PITTSBURGH POST-GAZETTE, Sept. 19, 2001, at E-2 (letter to editor from the President, Mon Valley Progress Council). See also Kuehn & Joy, supra note 5, at 1986–87.*

69 *University of Pittsburgh Senate, Report of the Tenure and Academic Freedom Committee on the Environmental Law Clinic (Jan. 28, 2002) (on file with author); Don Hopey & Bill Schackner, Faculty Rips Pitt, Defends Law Clinic, PITTSBURGH POST-GAZETTE, Jan. 29, 2003, at B-1; Don Hopey & Bill Schackner, In Reversal, Pitt Decides to Keep Law Clinic Going, PITTSBURGH POST-GAZETTE, Mar. 15, 2002, at A-1.*

70 *See Chuck Haga, City is Sued to Remove Religious Monument: Fargo's Ten Commandments Plaque is at Issue, STAR TRIBUNE (Minneapolis, Minn.), Oct. 30, 2003, at 1A. The clinic represented citizens objecting to a ten commandment monument on city property as constituting the government's endorsement of religion in violation of the First Amendment of the United States Constitution, which states: "Congress shall make no law respecting an establishment of religion . . . . U.S. Const. amend. I. The clinic's representation of the clients in the controversial case prompted a state legislator to seek an investigation charging that the clinic's representation against the municipality was "a totally inappropriate use of public funds." Tony Lucia, U. North Dakota Law School Criticized for Taking Ten Commandments Case, UNIVERSITY WIRE, Sept. 15, 2003. A local newspaper supported the representative's efforts and called for the "university to rein in its law school." UND Should Rein In Its Law School, BISMARK TRIBUNE, Sept. 4, 2003, A4. Responding to criticisms, the interim dean of the law school stated*

tactics employed to stop the clinic from representing its clients was a request from the state lawmaker for the North Dakota Attorney General to investigate whether the state supported law school's clinic could represent individuals with claims against the state or its political subdivisions.[71] The Attorney General issued an opinion finding that the clinic was acting legally and that "the legal clinic's representation of the client does not constitute the state or University's position on the underlying subject matter."[72] The Attorney General also found that "the North Dakota Rules of Professional Conduct support the principle that controversial or unpopular clients should not be denied legal representation."[73]

After the Attorney General issued his opinion, someone who had made "several harassing statements" toward the clinic director and the clinical program because of the ten commandment case sued the director and the clinic alleging viewpoint discrimination when the clinic declined to provide legal assistance to him.[74] The clinic declined to represent him due to lack of time and resources, and also because of curricular and ethical reasons. The clinic director "determined that the clinic would not be able to establish an effective client-attorney relations with him based on . . . [his] antagonistic position against her personally and the clinical program."[75] Although his case was dismissed at the federal district court level at the beginning of the litigation, the court of appeals has ruled that the district dismissed the case prematurely.[76] Reconsideration of this ruling has been sought, and the matter will be remanded to the district court for additional proceedings if the court of appeals does not reconsider the matter.

This brief history into the nature and types of attacks on clinical programs is part of what one commentator, writing in 1984, characterized as "a broader war on legal services and public interest legal groups" in the United States.[77] That connection between the attacks on public interest lawyers and clinical programs has been repeatedly made since that time by others, and the next section examines some of the larger issues of access to justice and attacks on lawyers serving those otherwise unable to afford legal assistance in order to place the attacks on clinical programs in context.

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that the law school did not seek out controversial cases, "[b]ut as attorneys, we're not supposed to refuse to take cases just because they're controversial. When you think about it, that would have a devastating effect on a person's ability to attain an attorney." Brenden Timpe, N.D. Attorney General Sides with U. North Dakota Law School's Representation, UNIVERSITY WIRE, Sept. 30, 2003.

71 *N.D. Attorney General Op. 2003-L-42 (Sept. 26, 2003).*

72 *Id.*

73 *Id.*

74 *See Washington University School of Law, CLEA Newsletter, Feb. 2005, at 43 (on file with author).*

75 *Id.*

76 *Wishnatsky v. Rovner, 433 F.3d 608, 612–13 (2006)*

77 *Schneider, supra note 28, at 180. Professor Elizabeth Schneider may have been the first commentator to observe that interference in clinical programs bringing public interest litigation has been part of the attacks on public interest lawyers throughout the United States.*

II. ACCESS TO JUSTICE AND ATTACKS ON PUBLIC INTEREST LAWYERS

Access to the courts is generally accepted to be a precondition for justice, and equal access to justice and equality of justice are among the most fundamental principles of a democratic society.[78] Individuals and groups customarily must have lawyers representing them to assert rights before courts and administrative agencies and without lawyers to advocate for them their rights are usually lost.[79] Indeed, fairness in a legal proceeding assumes a meaningful opportunity to be heard, and the right to be heard is often an empty promise if legal representation is not available.[80]

Despite the promises of equal justice and access in the United States, the poor are not entitled to the assistance of a lawyer if they cannot afford to hire one except in criminal cases.[81] Those individuals and families with incomes at or below 125% of the poverty level as defined by the federal government are eligible for federally funded legal services through the Legal Services

78 *These principles are repeated often in the United States, and underlie the motto "Equal Justice Under Law," which is inscribed above the entrance to the United States Supreme Court Building. Former United States Supreme Court Justice Lewis Powell explained, "Equal justice under law is not just a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our society . . . It is fundamental that justice should be the same, in substance and availability, without regard to economic status." Scott S. Brinkmeyer, Are the Doors to the Courthouse Really Open?, 83 MICH. B.J. 12, 13 (2004) (quoting Lewis Powell, Address to the ABA Legal Services Program, ABA Annual Meeting (1976)). "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice." In re Smiley, 330 N.E. 2d 53, 63 N.Y. 1975) (internal quotations omitted) (quoting Learned Hand, Address Before the Legal Aid Society of New York (1951)). [footnote to be completed with citation to international sources]*

79 *Professor Edgar S. Cahn & Jean C. Cahn have explained: The lawyer's function is essentially that of presenting a grievance so that those aspects of the complaint which entitle a person to a remedy can be communicated effectively and properly to a person with power to provide a remedy. . . . [I]t is altogether possible that for many a remedy is available if the grievance is properly presented. . . . Edgar S. Cahn & Jean C. Cahn, The War on Poverty: A Civilian Perspective, 73 YALE L.J. 1317, 1336 (1964).*

80 *"At the very heart of our recognition of the right to counsel elsewhere has been our articulated conviction that the right to be heard would be of little avail of it did not comprehend the right to be heard by counsel." Smiley, 330 N.E. 2d at 59 (Jones, J., dissenting) (internal quotations omitted) (quoting People ex rel. Menechino v. Warden, 267 N.E. 2d 238, 241 (N.Y. 1971)).*

81 *The Sixth Amendment to the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to ... be informed of the nature and cause of the accusation; to be confronted with the witnesses against him ... and to have the Assistance of Counsel for his defense." U.S. Const. amend. VI, 1. The landmark case of Gideon v. Wainwright interpreted this language to mean that defendants have a right to counsel at all criminal trials where incarceration was possible. Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("Any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."). Subsequent to the Gideon decision, the Supreme Court refused to extend the constitutional right to counsel in civil matters holding that the due process clause of the Fourteenth Amendment requires the appointment of counsel only where denial would prove "fundamentally unfair." Lassiter v. Dept. of Social Services, 452 U.S. 18, 33 (1981). The fundamental fairness test in Lassiter requires an inquiry into "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." Id. at 27. Few judges have been reversed for finding that counsel is not required under this test. Deborah L. Rhode, The Constitution of Equal Citizenship for a Good Society: Access to Justice, 69 FORDHAM L. REV. 1785, 1798 (2001).*

In many states, however, case law, legislation, or constitutional provisions guarantee the assistance of counsel in some criminal matters where incarceration is not possible, some quasi-criminal matters, or some civil proceedings. See, e.g., In re Miller, 585 N.E. 2d 396, 400 (1992) (holding that involuntary commitment is a sufficient deprivation of liberty requiring at lawyer for due process protection); In re Adoption of R.I., 312 A.2d 601, 603 (Pa. 1973), cert. denied, 429 U.S. 1032 (1977) (holding that an individual is entitled to representation by counsel when contesting proceeding to terminate parental rights). See Robert L. Spangenberg & Marea L. Beeman, Toward a More Effective Right to Assistance of Counsel: Indigent Defense Systems in the United States, 58 LAW & CONTEMP. PROBS. 31, 31 (1995); Randolph N. Stone, The Role of State Funded Programs in Legal Representation of Indigent Defendants in Criminal Cases, 17 AM. J. TRIAL ADVOC. 205, 207 (1993).

Corporation (LSC),[82] but the LSC estimates that it handles only some of the legal problems for approximately 20% of those eligible.[83] Professor David Luban estimates that there are only 4000 legal-aid lawyers plus an estimated 1000 to 2000 additional lawyers representing the poor in the United States.[84] As a result, "[a]n estimated four-fifths of the legal needs of the poor, and the needs of two-to three-fifths of middle-income individuals, remain unmet."[85]

In the context of the very limited legal services for the poor in the United States, efforts to limit or prohibit the legal services provided by clinical programs are particularly troubling, and they are part of the same attacks and restrictions experienced by others providing legal assistance to the poor.[86] Similar attacks and often more serious restrictions have been directed to LSC and aid to public interest lawyers through Interest on Lawyers Trust Accounts (IOLTA) programs. A brief review of the attacks on LSC and IOLTA demonstrates the similarity with the attacks on clinical programs.

A. Restrictions on LSC Recipients

Federal funding restrictions on the LSC have long prohibited the LSC from providing representation to clients on controversial issues such as abortion, but in 1996 the United States Congress enacted even greater restrictions. Today, LSC-funded lawyers may not participate in any class action litigation, may not collect court-awarded attorney's fees, litigate on behalf of anyone incarcerated, or represent various classes of non-citizens, many of who have legal immigration status.[87] In addition, LSC-funded lawyers may not be involved in election redistricting cases, evictions from public housing of persons allegedly involved with drugs, or attempts to influence

82 *See Legal Services Corp., Serving the Civil Legal Needs of Low-Income Americans 1 (2000), at http://www.lsc.gov/pressr/EXSUM.pdf [hereinafter Serving Civil Legal Needs] (last visited June 17, 2005). The Legal Services Corporation (LSC) was created by the federal government in 1974 and "charged by Congress 'to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances' and 'to provide high quality legal assistance to those who would otherwise be unable to afford adequate legal counsel.'" Id. In 2000, approximately 34.5 million Americans lived in households with incomes below the poverty level, and an additional 10 million more had incomes between 100% and 125% of the poverty level, thereby making them eligible for LSC legal assistance. Id. at 12.*

83 *Nationwide Survey of the Civil Legal Needs of the Poor 4, in TWO NATIONWIDE SURVEYS: 1989 PILOT ASSESSMENTS OF THE UNMET LEGAL NEEDS OF THE POOR AND OF THE PUBLIC GENERALLY (American Bar Ass'n 1989).*

84 *David Luban, Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers, 91 CALIF. L. REV. 209, 211 (2003).*

85 *Deborah L. Rhode, Equal Justice Under Law: Connecting Principle to Practice, 12 WASH. U. J.L. & POL'Y 47, 47 (2003). See also Roger C. Cramton, Mandatory Pro Bono, 19 HOFSTRA L. REV. 1113, 1121 (1991) ("But informed observers agree that there remains a tremendous unmet need, estimated at 75% to as much as 95% of the total legal needs of the poor.") In the United States, "approximately 35.8 million people lived below the poverty line in 2003, or about 12.5 percent of the population." Tyche Hendricks, Number Living in Poverty Grows as Middle-class Incomes Stay Flat, SAN FRANCISCO CHRON., Aug. 27, 2004, at A20. Various studies support the view that most of the legal needs of those living at or near the poverty level are not being met by the legal system in the United States. See, e.g., ALBERT H. CANTRIL, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE 1–2 (American Bar Ass'n 1996) (presenting survey results of the nearly 20% of the households eligible for federally funded legal services); Legal Needs and Civil Justice: A Survey of Americans 23 (American Bar Ass'n 1994) (finding that the legal system does not address approximately 71% of the legal problems of low-income households).*

86 *See note 77 and accompanying text.*

87 *Serving Civil Legal Needs, supra note 82, at 2. Congress originally imposed a prohibition on litigation to challenge existing welfare laws, but the Supreme Court ruled that provision as viewpoint discrimination in violation of the First Amendment. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 547–48 (2001). Challenges of other restrictions on equal protection and due process bases failed. See Legal Aid Soc. of Haw. v. Legal Serv. Corp., 145 F.3d 1017 (9th Cir. 1998); Velazquez v. Legal Servs. Corp., 164 F3d 757 (2d Cir. 1999).*

government rulemaking or the enactment of laws.[88] Those receiving LSC funds are also prohibited from using any nonfederal funds to fund any prohibited legal representation.[89]

Some of these restrictions also have the effect of making it more costly and time consuming for LSC lawyers to pursue certain claims. For example, the restrictions require LSC lawyers to litigate individual cases when a class action case would be more efficient, thus presenting LSC lawyers with the choice of engaging in redundant litigation or turning away the individual cases that would be most amenable to class action representation.[90] The ban on receiving attorney fees also deprives LSC offices of supplemental funds that could be used to represent more clients. When LSC lawyers do litigate in matters where attorney fees are possible, the Congressional ban on seeking attorney fees also removes some of the incentives for defendants to resolve cases quickly or to enter into settlement discussions because defendants will not have to pay reasonable attorney fees for the work done by the LSC lawyers representing successful clients.

As a result of the LSC restrictions, whole groups of otherwise income eligible persons with cognizable legal claims are denied legal representation and an opportunity to have their claims presented. Even those individuals who are not barred from receiving legal representation find that they cannot have a lawyer for certain types of legal problems, nor have a lawyer assist them in asking legislators or other government officials from creating systematic solutions and preventative measures to reoccurring problems through changes in the laws and rules.

Because of the restrictions on the LSC and the LSC's ability to assist only a small fraction of those who are income eligible because of inadequate funding, other forms of legal assistance for the poor become even more importation. But, the attacks on public interest lawyers have extended to the other means of providing lawyers for the poor.

B. Legal Challenges to IOLTA Programs Funding Civil Legal Services

IOLTA programs are an important source of funding for public interest lawyers providing civil legal services to the poor in the United States. Clients funds that are too small to be placed in individual trust accounts, or held for too short of a period of time to earn interest for individual clients after paying bank fees, are placed in pooled IOLTA accounts where the funds generate interest that is used to support non-governmental organizations providing public interest lawyers.[91]

88 *Serving Civil Legal Needs, supra note 82, at 2.*

89 *Id.*

90 *Professor David Luban has described this dilemma and suggests that it is more likely that rather than litigate numerous individual cases, LSC lawyers will turn those cases down that creating a "perverse result: the more poor people a legal problem affects, the less likely they are going to find a lawyer to represent them." Luban, supra note 84, at 223.*

91 *The fiduciary obligations of a lawyer require that the lawyer hold client funds separate from the lawyer's funds. See, e.g., MODEL RULES, supra note 22, at R.1.15(a) ("A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property."); Model Code, supra note 22, at DR 9-102 ("All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein . . . ."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 44(1) (stating that a lawyer must hold property in which a client has or claims an interest "separate from the lawyer's property"); National Legal Aid & Defender Association, Fact Sheet on Interest on Lawyers' Trust Accounts (IOLTA), at http://www.nlada.org/DMS/Documents/1011300749.75/-Fact%20Sheet%20on%20IOLTA.PDF (last visited June 17, 2005) (describing IOLTA accounts).*

IOLTA programs were made possible by changes in banking laws and regulations that permitted the pooling of funds into a single interest bearing account

There are IOLTA programs in all fifty states and the District of Columbia, and together they rank second only to the LSC in funding legal services for the poor.[92] Yet, there have been a number of legal challenges to IOLTA programs funding civil legal services.

Although there have been attacks on IOLTA programs since the 1980s,[93] the Washington Legal Foundation (WLF), known for litigating free-enterprise and property rights issues, has been the principal opponent to IOLTA in recent years.[94] In a succession of cases litigated in several states,[95] WLF challenged IOLTA programs as an impermissible "taking" of private property under the United States Constitution.[96] As a result of the litigation to date, the United States Supreme Court ruled in one case "that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal."[97] In a second and more recent case, the Court held that even if the IOLTA program was a per se taking, the taking was for a legitimate public use and "compensation is measured by the owner's pecuniary loss – which is zero."[98] The Court reached the conclusion that the WLF clients had no cognizable pecuniary loss based on the lower court's finding that if the individual client funds were substantial enough "to make any net return, they would not be subject to the IOLTA program."[99]

The Court's decisions in the WLF cases still leave open the question of whether or not IOLTA programs violate the First Amendment rights of those challenging the programs because their property generates the funds supporting litigation with which they may disagree.[100] In a dissenting opinion, one Supreme Court Justice noted that the First Amendment issue had not yet been addressed by the Court and he predicted: "One constitutional violation (the taking of property) likely will lead to another (compelled speech). These matters may have to come before the Court in due course."[101] In a statement issued after the last Supreme Court decision, the WLF stated that

that were adopted in the early 1980s. Prior to this time, small or short-term client funds were kept in non-interest bearing accounts and the banks benefited from the use of the funds held interest free. See Fact Sheet on Interest on Lawyers' Trust Accounts (IOLTA), supra. When a client's funds are substantial enough to net interest after the payment of banking fees, lawyers should place those funds in a separate trust account for the benefit of the client.

92 *IOLTA programs generated over $139 million in 1999. Fact Sheet on Interest on Lawyers' Trust Accounts (IOLTA), supra note 91. The budget for LSC was $335 million in 2004. National Legal Aid & Defender Association, President's FY 2005 Budget Request Remains the Same, at http://www.nlada.org/-Civil/NLADA_News/20040301303947 25 (last visited June 20, 2005).*

93 *See, e.g., Luban, supra note 84, at 227 & n.70 (describing and citing early litigation against IOLTA programs).*

94 *The Washington Legal Foundation (WLF) also sided with the business interests attacking the Tulane Environmental Clinic. See infra note 104 and accompanying text.*

95 *See Luban, supra note 84, at 228–34 (describing Washington Legal Foundation litigation against IOLTA in Massachusetts, Texas, and Washington). Washington Legal Foundation (WLF) literature states that WLF "has been battling IOLTA programs on behalf of property owners since 1991." Washington Legal Foundation, Litigation Update: Supreme Court Rejects Challenge to Confiscatory IOLTA Programs (Apr. 4, 2003), at http://www.wlf.org/upload/4-4-03IOLTA.pdf (last visited June 20, 2005).*

96 *The Takings Clause of the Fifth Amendment states "nor shall private property be taken for public use, without just compensation." U.S. Const. amend V.*

97 *Phillips v. Washington Legal Found., 524 U.S. 156, 172 (1998).*

98 *Brown v. Legal Found. of Wash., 538 U.S. 216, 240 (2003). See also Marcia Coyle, Battle over IOLTA Could be Renewed: Using Funds for Indigent Clients Might be Seen as "Compelled Speech", NAT'L. L.J., Mar. 31, 2003, at A5.*

99 *Brown v. Legal Found. of Wash., 538 U.S. at 240 (citing Washington Legal Foundation v. Legal Foundation of Washington, No. C97-0146C (WD Wash., Jan. 30, 1998), App. to Pet. for Cert. 94a).*

100 *Id. at 228 (stating that one of the claims raised by the WLF was a First Amendment issue).*

101 *Id. at 253 (Kennedy, J., dissenting).*

"WLF is consulting with its clients to determine whether they wish to continue to pursue their First Amendment claims."[102]

Whether WLF challenges to IOLTA on First Amendment grounds will materialize remains to be seen. Even some supporters of the WLF's Takings Clause challenges acknowledge that a successful First Amendment challenge would be very difficult.[103] Still, WLF and others have been challenging IOLTA programs almost from their inception, and there is no clear sign that litigation against IOLTA funding civil legal services will cease. Indeed, the WLF's attack on public interest lawyers appears to be broader than just attacks on IOLTA programs. For example, the WLF sided with the business groups seeking changes in the Louisiana student practice rule to stop the Tulane Environmental Clinic from representing community groups by filing an amicus brief in federal court arguing that the restrictions on clinic students' ability to represent indigent clients are appropriate.[104]

III. THE LEGACY OF POLITICAL INTERFERENCE ON CLINICAL PROGRAMS

The history and description of political interference in clinical programs demonstrate that in some instances restrictions have been imposed that foreclose particular clinical programs from representing certain clients, advancing some legal claims for clients, or engaging in litigation strategies against some parties.[105] These are the same types of restrictions imposed on the LSC. The restrictions on clinic case and client selection also have the effect of essentially cutting off funding for the legal representation to the poor, one of the goals of challenges to IOLTA programs.

In addition to the formal restrictions that have been imposed on some clinical programs, commentators suggest that perhaps a greater number of clinical programs have imposed their own internal restrictions and "have refused to represent certain controversial cases or clients because of fears that taking such cases could result in threats to their continued operation."[106] For example, commenting on the attacks to the Tulane Environmental Law Clinic, the director of one of the

102 *Litigation Update: Supreme Court Rejects Challenge to Confiscatory IOLTA Programs, supra note 95.*

103 *Responding to the Court's rejection of the Takings Clause claims, James Burling, who filed an amicus brief on behalf of the Pacific Legal Foundation supporting the WLF in Brown v. Legal Foundation of Washington, stated that it "would be tough to raise a First Amendment challenge to" using IOLTA funds for civil litigation "like divorces and landlord-tenant problems." Coyle, supra note 98, at A5. He stated, however: "If you're talking about money used for impact litigation – to make policy decisions – you might be on more fertile ground." Id.*

104 *See Brief for Amicus Curiae Washington Legal Foundation and Economic Freedom Law Clinic, S. Christian Leadership Conference, La. Chapter v. Supreme Court of La., 252 F.3d 781 (5th Cir. 2001). The Washington Legal Foundation (WLF) describes their amicus brief in this case as part of its project Reigning in the Plaintiffs' Bar. See Washington Legal Foundation, Reining in the Plaintiffs' Bar, at http://www.wlf.org/Litigating/casedetail.asp?detail=47 (last visited June 20, 2005). WLF literature states that the as part of its Reining in the Plaintiffs Bar project it "has litigated to ensure that court-awarded fees are kept within reasonable limits, that public funds are not used to support unwarranted litigation, and that appropriate sanctions are imposed on attorneys who file frivolous suits or otherwise abuse the public trust." Id. None of these issues are present in the limits imposed on clinical programs in Louisiana. See supra notes 62–63 and accompanying text. In addition to its amicus brief, the WLF took out an advertisement in the New York Times criticizing clinical programs for the clients clinics represent. See Daniel J. Popeo, A One-Sided Paper Chase, advertisement, N.Y. TIMES, Feb. 20, 2000, at A23.*

105 *See supra Part I.B. for a discussion of restrictions that have been imposed on some clinical programs.*

106 *Kuehn & Joy, supra note 5, at 1989 & n.87.*

largest clinical programs in the United States reportedly stated that her program is "very careful about the cases it accepts" and that it "tries to avoid high-profile cases."[107]

It is important to recognize, however, that most of the work of clinical programs in the United States involves the representation of individual clients in matters that have been described as "one-client-at-a-time, more-or-less routine, direct-client representation."[108] In addition, some of the cases that triggered political attacks, such as prison litigation to gain access to library resources for inmates,[109] may not have seemed like a controversial case when the clinic first undertook the representation. What makes a case controversial often has less to do with the case itself, and more to do with the reaction of a government official, opposing counsel, or an interested party. The breadth of the attacks on clinical programs, in both public and private law schools, for the different types of cases handled "demonstrates that no law clinic program is immune from such assaults."[110]

Still, those clinical programs that intentionally take some challenging cases that may be controversial in order to provide clinic students with the exposure to more complex legal issues run a greater risk of being targeted for political interference. This is particularly troubling because of the long history in the Unites States of published court decisions in which clinical law students and faculty represented individuals with regard to important issues such as access to the courts in *forma pauperis*,[111] challenging discrimination in radio broadcast licensing,[112] sex discrimination in employment,[113] supporting municipal nuisance ordinances,[114] asserting the civil rights of the homeless,[115] representing inmates in civil rights cases against municipalities and police for intentionally violating their *Miranda* rights,[116] and other important cases.[117]

It is undeniable that political interference in clinical programs in the United States has taken its toll not only on those clinics that have been targeted but also on other law school clinics. The public attacks on law school clinical programs represent just a small percentage of the less well publicized

107 *Caille M. Millner, Harvard U. Law School Watches Court Case About Legal Assistance, UNIVERSITY WIRE, Mar. 9, 1999 (paraphrasing Jeanne Charn's statements reacting to the attacks on the Tulane Environmental Law Clinic). Jeanne Charn, Lecturer in Law and Director of the Hale and Dorr Legal Services Center for Harvard Law School, one of the largest law school clinical programs in the United States, is also quoted as stating, "The best way for students to get clinical education is to avoid tackling controversial cases." Id. In the article, Charn does not explain if her clinical program attempts to screen out controversial cases for purely pedagogical reasons, or if the aversion to controversial cases is related to some fear of possible interference with the clinical program. See id.*

108 *Luban, supra note 84, at 236.*

109 *See supra note 45 and accompanying text.*

110 *Kuehn & Joy, supra note 5, at 1992.*

111 *California Men's Colony, Unit II Men's Advisory Council v. Rowland, 939 F.2d 854 (9th Cir. 1991), rev'd, 506 U.S. 194 (1993) (Post-Conviction Project, University of Southern California).*

112 *National Black Media Coalition v. F.C.C., 822 F.2d 277 (2d Cir. 1987) (Media Law Clinic, New York University School of Law).*

113 *Congregation Kol Ami v. Chicago Comm'n on Human Relations, 649 N.E.2d 470 (Ill. App. Ct. 1995) (Edwin F. Mandel Legal Aid Clinic, University of Chicago).*

114 *Inter Urban Bar Assoc. of New Orleans v. City of New Orleans, 652 So.2d 1038 (La. App. Ct. 1995 (Tulane Environmental Law Clinic, Tulane Law School).*

115 *Johnson v. Bd. of Police Comm'rs, 351 F. Supp. 2d 929 (E.D. Mo. 2004) (Civil Justice Clinic, Washington University in St. Louis & St. Louis University Legal Clinic); Streetwatch v. Nat'l R.R. Passenger Corp., 875 F. Supp. 1055 (S.D.N.Y. 1995).*

116 *California Attys. for Crim. Justice v. Butts, 195 F.3d 1039 (9th Cir. 1999) (Center for Clinical Legal Education, Boalt Hall School of Law, University of California, Berkeley).*

117 *The cases listed in footnotes 112–117 represent a small number of reported cases in which clinical programs have represented clients.*

questions clinical programs more frequently face over the clients and cases clinics represent.[118] Each phone call or letter to a clinic director, law school dean, or university official questioning a clinic's involvement in the case raises the possibility that the questions may turn into pressure to force the clinic to end its representation of a client in need, to refuse to represent such clients in the future, or to avoid representing any client against more powerful parties such as governmental entities or large businesses. Both the public, prolonged attacks on clinical programs and the more frequent phone calls and letters questioning clinics' representation of clients send a message to clinical programs that representation of almost any client, and particularly unpopular clients or controversial causes, may come at a cost. When viewed in connection with the attacks on the LSC and IOLTA, the political interference in clinical programs also demonstrate that those who ultimately suffer the most are the potential clients whose rights are being lost due to the lack of legal representation.[119]

In many ways, interference with clinical programs operate like SLAPP suits – Strategic Lawsuit Against Public Participation. In SLAPP suits, citizens in the United States protesting corporate policies, business developments, or even complaining against teachers or police, may face lawsuits for defamation or tortuous interference with business. Although nearly all SLAPP suits are dismissed before trial, the SLAPP suits are designed to intimidate opposition by causing those protesting to incur large legal fees and to fear possible personal liability.[120] Because of fear of SLAPP suites, citizen participation is often stifled. The ultimate aim of those interfering with clinical programs is also one of intimidation – to cause clinical faculty, law school deans, and university administrators to drop cases and to avoid taking cases against certain businesses or governmental entities. To the degree that clinical faculty screen out cases that would otherwise make good clinic cases because faculty fear that the cases may be trigger interference, the faculty succumb to ultimate aim of those seeking to block legal representation for anyone challenging their actions.

Experience in the Unites States has shown that cultivating support for clinical programs among non-clinical faculty and law school deans is key to withstanding political interference. Such support generally flows from explaining what the clinic does, and how cases are selected based on pedagogical values and, when it is a goal of a clinic, the legal needs of the community. It is also good to cultivate contacts with the local media, and to explain to them the important work that the clinic is doing. It is not unusual in the United States for clinical programs to be the focus of human interest stories. It is best to have the support for clinical programs in place prior to an instance of interference, and it is important to resist the interference. Pointing out that the interference is seeking to deny access to the courts for those unable to hire attorneys is often a hook that some in the media use to characterize the conflict.

The full extent of direct and indirect pressure on clinical faculty to restrict their client and case selection is not known, but there are sufficient examples to illustrate that this is a problem, at least in the United States. Whether and to what extent clinical faculty in other countries face or will face

118 *See, e.g., Joy & Weisselberg, supra note 6, at 531 & n.1 (stating that many who teach in clinical programs receive inquires from people outside of the law school questioning "why 'the law school' is involved in a particular case"); Kuehn & Joy, supra note 5, at 1989 n.88 (documenting several instances of complaints to law school deans and pressure on university officials to order clinical programs to withdraw from litigation).*

119 *There are no reported instances of clinical programs or their clients being targeted by countersuits, often referred to as SLAPP suits – strategic*

120 *See Luban, supra note 84, at 219.*

similar issues of political interference in the clients they represent are questions that existing scholarship and news reports do not answer.[121] In contrast to the United States, the Australian states, Canada, New Zealand, European countries, and some other nations have different schemes for providing legal assistance to individuals in civil matters which may make legal counsel more available for lower income persons than it is in the United States.[122] The greater availability of legal counsel to those unable to hire attorneys in other countries may possibly mute or tend to discourage attacks on clinical programs providing representation to those with low incomes. There may also be some different cultural norms against attacking access to the courts in other countries that may prevent some attacks on clinical programs. Nevertheless, clinical faculty in other countries may find that understanding the experience of attacks on clinical programs in the United States will be helpful in addressing this issue should their clinical programs become the targets of similar political attacks.

CONCLUSION

An essential cornerstone of any society based on the rule of law is access to the courts.[123] In a functioning democracy, access to the courts is access to justice, and an individual's right to sue and to defend against actions taken by the state or others becomes "the right that protects all other rights."[124] Thus, in many countries the most pressing issues are the fairness of the judicial system and the allocation and delivery of legal services – conditions necessary for an effective rule of law.

The political interference in clinical programs affects the ability of law school clinics to provide access to the courts to traditionally underrepresented individuals, families, and groups. When efforts to limit the types of clients or causes clinical programs are successful, they effectively close the courthouse doors to those unable to find other legal representation. In this way, political interference in clinical programs is a maneuver designed to subvert the normal processes of the rule of law.

Political interference in clinical programs, like the attacks on other programs providing lawyers for the low income persons and community groups in the United States, has been called a "silencing doctrine" or "extralegal strategy" because these attacks are deliberate attempts to deny those

121 *This author was unable to find scholarly articles, reports, or news items discussing political interference in clinical programs outside of the United States. However, conversations with clinical faculty from Australia, Canada, Great Britain, and Israel have disclosed instances of varying degrees of interference with clinical programs.*

122 *See, e.g., Earl Johnson, Jr., The Right to Counsel in Civil Cases: An International Perspective, 19 LOY. L.A. L. REV. 341, 342 (1985) (citing the laws and constitutional provisions establishing the right to legal counsel in civil cases in countries around the world); Lua Kamal Yuille, No One's Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe, 42 COLUMBIA J. TRANSNAT'L L. 863, 878–85 (2004) (describing civil legal assistance as a "right" in most European countries). Although some countries may describe civil legal assistance as a right, or make legal assistance in civil matters more available to low income persons than it is in the United States, providing adequate legal representation to persons unable to pay for lawyers is a world-wide issue.*

123 *See, e.g., Jégo-Quéré v. Commission, Ct. First Instance, Case No. T-177/01 (2002) (stating that "it should be borne in mind that the Court of Justice itself has confirmed that access to the courts is one of the essential elements of a community based on the rule of law"); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 256–66 (1988) (arguing that access to the courts is necessary to promote the legitimacy of a government).*

124 *Deborah L. Rhode, Professionalism in Law Schools, 27 FLA. ST. U.L. REV. 193, 199 (1999).*

unable to hire attorneys the opportunity to have access to the courts.[125] These efforts seek to transcend the normal legal processes available to all in theory by limiting access to justice in reality only to those who can afford to hire attorneys. When these efforts to limit access to the courts are successful, the rule of law is eroded.

Law school clinical programs play important roles in educating law students and in providing access to the courts for many in need. Because law school clinics are places where law students often receive their first exposure to the practice of law, the clinic law office should be a model ethical law office, and the clinical faculty and other lawyers in those offices should model the highest ethical practice and norms of the legal profession. By evaluating potential cases on the legal merits and their pedagogical values, and by agreeing to represent clients even when a case may become controversial, clinical faculty and their programs can model the highest ideals of legal profession.

125 *Luban describes silencing doctrines as "statutes, rules, and judicial decisions that allow opponents to attack the funding or restrict the activity of their adversaries' advocates." Luban, supra 84, at 220. I have previously discussed the attacks on the Tulane Environmental Clinic, and the successful efforts to persuade the elected judges of the Louisiana Supreme Court to adopt restrictive student practice rules, as extralegal because they prevent "opposing parties from having meaningful access to the courts." Joy, supra note 6, at 272 n.188 and accompanying text. Professor Lynn LoPucki and Walter Weyrauch coined the term "extralegal strategies" to describe "strategic effort is devoted to extralegal means of deterring those entitled to legal remedies from suing or from continuing suits already filed." Lynn M. LoPucki & Walter O. Weyrauch, A Theory of Legal Strategy, 49 DUKE L.J. 1405, 1461 (2000).*

Pushing The Boundaries or Preserving the Status Quo?

Designing Clinical Programs to Teach Law Students a Deep Understanding of Ethical Practice[1]

*Liz Curran, Judith Dickson & Mary Anne Noone**

Introduction

The clinical legal education environment is one that is ripe with professional and ethical situations. Students involved in this educational experience inevitably are exposed to ethical dilemmas and choices. In this paper we examine the role played by clinical legal education programs in the development of ethical awareness among those law students. Within the context of the well documented concerns in the wider legal profession as to the standard of ethics teaching and ethical practice we assert that the clinical environment provides a rich opportunity for a deep learning experience about the nature and extent of a legal practitioner's professional and ethical responsibilities.

We begin by setting out the assumptions that underpin our approach, place our discussion in context and discuss various lawyering paradigms. We then outline key features for designing a clinical program within the context of a practical example. These key features include a whole of program approach, objectives, format and assessment.

We argue that the unique clinical opportunity lies in encouraging students to critically analyse the law of lawyering including the various codes of practice and their rationales within a framework of access to justice issues, a client centred approach and a recognition of the public role of a legal practitioner. This approach is built on the Australian experience of clinical legal education.

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1 *This article is based on a paper given at the Third International Journal Of Clinical Legal Education Conference and Eighth Australian Clinical Legal Education Conference July 2005 Melbourne, Australia. The authors are grateful to the helpful comments from two reviewers.*

We conclude that if clinical legal education is to be more than practical legal training clinical teachers and program designers need to be wary of the easy option of simply perpetuating an uncritical acceptance of the law of lawyering. We submit that unless clinical law teachers make the intellectual and practical effort to articulate their own approach (model) to legal practice and communicate this to their students, they have little chance of engendering a deep understanding of ethical lawyering in their students. In our vision of the role of clinic in ethics education we aim to provide future lawyers with a range of conceptual, analytical, critical and practical skills with which to engage in the ongoing professional project of exploring what is an ethical legal practitioner.

Assumptions underpinning our approach

The approach we describe in the paper flows from a number of assumptions. We recognise that these views are contestable and for that very reason believe it is important to articulate them.

Our first assumption is that the role and responsibilities of a legal practitioner include serving the community. Good lawyers are more than just expert legal technicians serving the interests of their clients. We think that lawyers should strive to do good.

This view stems from an acknowledgement that lawyers hold a privileged position in the community as a result of the community's direct bestowal on them of rights and privileges. Lawyers in Australia and elsewhere in the common law world have a virtual monopoly over the delivery of key legal services for fee including a monopoly over advocacy in the courts. In return for the community granting this privilege, lawyers have traditionally espoused a commitment to public service – the 'service ideal' – as a means perhaps of earning 'social credit'.[2]

> *Membership of a profession entails privileges. Members of the legal profession have a monopoly on the right to represent litigants in court for a fee, and to perform certain other kinds of service.....In return, the community expects that they will acknowledge obligations and responsibilities, which override considerations of financial reward and which are not necessarily enforceable either by legal sanction or by the practical constraints of the marketplace. The conferring of privilege and the acceptance of responsibility are two sides of the one coin.*[3]

We consider that ethical practice involves asking oneself what the impact of one's proposed conduct is on the community as well as on the client. This is because legal practice is a public activity not a private one, with lawyers' monopolies over certain areas of work entrenched in legislation.[4] As Stephen Parker argues:

> *We have fallen into the mindset that lawyers are part of the private sphere....but the profession they practise is a public one. The duties they owe to the system of justice always prevail, in law and in professional ethics, over the duties they owe to their clients or themselves or their partners.*

2 *Larson, MS (1977) The Rise of Professionalism: A Sociological Analysis. Berkeley: University of California Press Ltd.*

3 *Gleeson, M. (1999) `Honest and Liberal Practice' 73 (7) Law Institute Journal 78*

4 *For example in Australia each state has legislation regulating the practice of law. Eg: Legal Profession Act (Vic) 2004; Legal Profession Act (NSW) 2004; Legal Profession Act (Qld) 2004; Legal Practitioners Act (1981) SA; Legal Profession Act (Tas) 1993; Legal Practice Act (WA) 2003. A similar regime exists in other common law countries eg Courts and Legal Services Act 1990 in the UK.*

> *They hold a position or office. They do not merely do a job. We have lost sight of the public nature of a lawyer's position.*[5]

Our second assumption is that the clinical method of legal education, properly implemented, offers unrivalled opportunities for exploring and examining the ethical dimension of legal practice. The key to this assumption is the existence of spontaneity or 'randomness' in the clinic environment. This provides a rich and realistic learning opportunity for both individual student practice and group discussion that shares their experiences and application of ethical decision-making strategies.[6] While we acknowledge that teaching ethics by classroom problem based learning ensures the curriculum is covered, our experience is that every aspect of legal practice (not just student clinical legal practice) and every case, no matter how simple, illustrates the nature of the lawyer-client relationship and the ethical dimension of legal practice. For example, a non-English speaking client with an adult child interpreting raises starkly the question "who is my client?" with attendant issues of obtaining instructions and advice. It also raises significant access to justice issues (for example, language and cost). Our preference for the clinical as against simulated teaching method is founded on the richness of our experience as teachers in that environment where teacher and student are confronted with unanticipated ethical dilemmas which must be analysed and resolved.

Our third assumption is that law teachers, especially clinical law teachers are inevitably role models for their students. This idea of law teachers as role models is not new. Carrie Menkel-Meadow in 1991 argued that law teachers cannot avoid teaching legal ethics simply because they project an approach to lawyering in the way they teach.[7] Clinical law teachers are in the hot spot.[8] For many law students, we are the first legal practitioner they have ever met. Our credibility is high because students see clinical teachers as "real lawyers" in contrast with other members of academic staff. We therefore need to be aware, as Gary Blasi says, "in these areas [of ethics, morals and justice] our example can be absolutely critical."[9]

This by implication requires the clinical law teacher, who is also an advocate and practitioner, to consider the model of lawyering that they adopt.

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5 *Parker, S. (2001). 'Why Lawyers Should Do Pro Bono Work.' 19(1 and 2) Law in Context 5. Parker is reiterating the view of the public nature of the professional role expressed by two influential Reports into legal education in Australia. See, Committee on the Future of Tertiary Education in Australia, Tertiary Education in Australia (Martin Report) Australian Universities Commission Canberra Government Printer 1964 and Committee of Inquiry into Legal Education in NSW, Legal Education in N.S.W. (Bowen Committee) (Sydney, Government Printer, 1979).*

6 *Simon Rice, (1996), A Guide to Implementing Clinical Teaching Method in the Law School Curriculum 9–15.*

7 *Carrie J. Menkel-Meadow, (1991) "Can a Law Teacher Avoid Teaching Legal Ethics?" 41Journal of Legal Education 3. See also American Bar Association (1986) In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism 16; Noone, M. A. and J. Dickson (2001) "Teaching Towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers." Legal Ethics 127. See also discussion in Ross, Y., (2005) Ethics in Law: Lawyers' Responsibility and Accountability in Australia (4th ed) Butterworths, p 25–26.*

8 *Peter Joy from Washington University Law School in the US has recently written very interestingly on this topic drawing on empirical research into the negative effect on law students' ethical awareness of role modelling by lawyers in unsupervised work experience, Joy, PA. "The Ethics of Law School Clinic Students as Student-Lawyers." Southern Texas Law Review 45 (2003–2004): 815–841.*

9 *Gary Blasi, "Teaching/Lawyering as an Intellectual Project" (1996) 14 Journal of Professional Legal Education 65, 73.*

The challenge is for clinical law teachers to develop a program/course that fosters the development of a rich and critical ethical understanding by using a variety of strategies for the exploration of ethical decision making. On a personal professional level, part of that challenge for the clinical teacher/supervisor is to model the application of moral judgement and legal knowledge to ethical decision-making.

Setting the Australian scene

Clinical Legal Education

Until recently the most common clinical legal education model in Australia was a one-on-one client service model.[10] Under this definition of clinical legal education it is a legal-practice based method of legal education in which law students assume the role of a lawyer and are required to take on the responsibility, under supervision, for providing legal services to real clients. The students receive academic credit and attend classes. But increasingly, clinical legal education programs now include externships, where students are placed in outside agencies. In these courses the students may deliver legal services to clients or may focus on policy, research and law reform activities. Clinical legal education in Australia does not usually refer to simulated client environments.[11]

In Australia, clinical courses have traditionally been situated within the community, usually within community legal centres.[12] This university-community connection is pivotal to an understanding of the goals of clinic in Australia which are both educational and service oriented. Legal activism lies at the heart of community legal centres. Early centres challenged the status quo and were viewed with suspicion by the mainstream private legal profession. Clinical programs based in community legal centres share some of this legacy.[13]

Although not overtly about teaching ethical legal practice, clinical legal education in Australia, from its inception in 1975 at Monash University, has been doing this. The educational goals of first, a practice based knowledge and understanding of the operation of the law and legal processes and secondly, the ability to critically analyse the practical connection between the current law and legal processes and practical justice, emphasise the public role of the lawyer in the administration of justice. Added to these goals is the service orientation of Australian clinical programs. Traditionally, the legal services of the clinical program are provided to poor and disadvantaged people in the community and the service element is integral to the achievement of the educational goals.[14]

10 *Giddings, J (2003) ' Clinical Legal Education in Australia: A Historical Perspective' 3 International Journal of Clinical Legal Education 7*

11 *University of New South Wales, Kingsford Legal Centre, Clinical Legal Education Guide 2005.*

12 *Noone, M. (1997). Australian Community Legal Centres – The University Connection. Educating for Justice: Social Values and Legal Education. J. Cooper and L. G. Trubek. Aldershot, Dartmouth Publishing Company Limited: 257–284. Giddings, J (2003) ' Clinical Legal Education in Australia: A Historical Perspective' above n. 10.*

13 *Noone M.A. (2001), `The Activist Origins of Australian Community Legal Centres' (19) Law in Context 128.*

14 *Dickson, J. (2000) 'Clinical Legal Education in the 21st Century: Still Education for Service? 1International Journal of Clinical Legal Education 33.*

With the diversification of clinic in Australia, the connection to community and commitment to service appears to remain in that externships are most commonly situated in not-for-profit, public interest and community agencies.[15]

La Trobe University's clinical legal education program has three courses. Ethical legal practice and conduct are the primary focus of one unit. This clinic is based within a regional office of Victoria Legal Aid, the statutory legal aid body. Another clinic based at the West Heidelberg Community Legal Service is centred on poverty and human rights law. A third externship unit addresses the work of a range of public interest law organisations.[16] The latter two clinics both address ethical issues within the course content. This paper draws on our collective experience in running a clinical program for over 20 years.

External focus on ethics and legal profession

Over the past 25 years in Australia there have been numerous inquiries and resultant reports where the legal profession's role in the justice system has come under scrutiny.[17] Many of these reports encapsulated the concerns of sections of the Australian community that the regulation of the legal profession and the mode of delivery of legal services contributed to the inaccessibility of the legal system.[18]

A recurring theme in the reports is a concern that the teaching of ethics in law schools needs to be undertaken seriously as part of the development of a culture of ethical practice in the legal profession. In its 2000 Report *Managing Justice: a review of the federal civil justice system*, the Australian Law Reform Commission ("ALRC") examined the role of academic legal education in shaping the legal culture.[19] It recommended that:

> *In addition to the study of core areas of substantive law, university legal education in Australia should involve the development of high level professional skills and a deep appreciation of ethical standards and professional responsibility.*[20]

15 *University of New South Wales, Kingsford Legal Centre, Clinical Legal Education Guide 2005; see also Giddings, J (2003) ' Clinical Legal Education in Australia: A Historical Perspective': above n. 10.*

16 *Dickson J., (2004) '25 Years of Clinical Legal Education at La Trobe University' 29(1) Alternative Law Journal 41; Curran, L (2004) 'Innovations in an Australian Clinical Legal Education Program: Students Making a Difference in Generating Positive Change' 5 International Journal of Clinical Legal Education 162.*

17 *New South Wales Law Reform Commission, First Report on the Legal Profession, 1982; Law Reform Commission of Victoria, Access to the Law: Restrictions on Legal Practice, Report No 47, 1992; Senate Standing Committee on Legal And Constitutional Affairs, Cost of Legal Services and Litigation Discussion Papers No 1–7 and Final Reports 1 and 2. 1991–1994; Trade Practices Commission, Study of the Professions – Legal, Final Report 1994; Access to Justice Advisory Committee, Access to Justice – an Action Plan, Canberra 1994; Reforming the Legal Profession – Report of the Attorney General's Working Party on the Legal Profession, Victoria August 1995; Australian Law Reform Commission, Managing Justice: a review of the federal civil justice system AGPS Canberra 2000.*

18 *For a discussion on the impact of this repeated inquiry on the notion of professional responsibility see Dickson, J.A. and Noone, M.A. 'Teaching Towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers' above n.7.*

19 *Australian Law Reform Commission, Managing Justice above n.17, p113.*

20 *Ibid. The ALRC acknowledged that clinical legal education programs offer a rich environment for students to confront and practise ethical decision-making. However, it accepted that in Australia, law schools generally lacked the level of resources required for a widespread adoption of the 'live client' clinical method. See p 118–119.*

In reaching this recommendation the ALRC looked back to the *Martin* and the *Bowen Committee* reports into legal education in Australia[21]. The *Martin Report*'s recommendations in 1964 for university based legal education were based on the assumption that the practice of law was a public function in the administration of justice. The *Bowen Committee* Report in 1979 saw the law school as part of the process of "professionalisation", that is "the development of skills . . .but it also involves the development of a feeling for the professional role – for its responsibilities and limits".[22] In 1982, the New South Wales Law Reform Commission ("NSWLRC") in its influential Report on the complaints system in New South Wales[23] took a similar view of ethical decision-making as a fundamental skill. The NSWLRC took the view that

> *...it is inadequate to teach legal ethics and professional responsibility as if these are matters of etiquette...Rather, these are matters which are bound up in the fundamental nature and essence of lawyering and legal professional practice, which necessitates a process or problem-solving approach to the subject...*[24]

The ALRC in *Managing Justice* also considered approvingly the approach of the 1992 MacCrate Report into legal education in the USA[25] and in many respects the Australian concerns for ethics education mirror those expressed in other jurisdictions.[26]

As well as these formal government initiated inquiries, academic writing and inquiry has blossomed in Australia and elsewhere over the past ten years leading to an increasing literature exploring the nature of ethics in law and ethical legal practice as well as the teaching of ethics in the law school curriculum.[27] Professional bodies in Australia have also come to the realisation that there must be a re-envisioning of the meaning of ethical legal practice.[28] Nonetheless, there is still considerable debate about what constitutes ethical legal practice. Academics and practising lawyers disagree about definitions and the requirements, scope and meaning of ethical legal practice.

21 *Above n. 5.*

22 *Bowen Committee Report, above n. 5, Ch 3.30–1*

23 *New South Wales Law Reform Commission (1982) above n.17.*

24 *Ibid Para 5.24.*

25 *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap Legal Education and Professional Development – An Educational Continuum, (American Bar Association July 1992) (the "MacCrate Report").*

26 *For Example: ACLEC, First Report on Legal Education and Training (London, ACLEC 1996) Para 1.19; Nelson, S. Reflections from the International Conference on Legal Ethics from Exeter (2004) Legal Ethics 7(2) 160–166 discussing the work of the Training Framework Review Group of the Law Society of England and Wales. In Canada see Committee Responding to Recommendation 49 of the Systems of Civil Justice Task Force Report Attitudes-skills-knowledge: proposals for legal education to assist in implementing a multi-option civil justice system in the 21st Century Discussion Paper, Canadian Bar Association Ottawa August 1999 and in the US see American Bar Association (1986) In the Spirit of Public Service: A Blueprint for the Rekindling of Professionalism.*

27 *See eg: a recent Australian journal edition dedicated to the teaching of legal ethics, (2001) 12 (Nos 1 & 2) Legal Education Review, and the collection of articles (both Australian and international) contained in, Le Brun, M.J. et al, Improving the Teaching and Learning of Legal Ethics and Professional Responsibility in Australian Law Schools: Workshop Materials, July 1999 [The materials developed under a National Teaching Fellowship Award]. See also Economides, Kim (ed), Ethical Challenges to Legal Education & Conduct, (Hart Publishing Oxford 1998), Noone, M. A. and J. Dickson (2001)"Teaching Towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers." above n.7; special issue on teaching ethics in (1999) 33(3) Law Teacher. See also (1995) 58 Law and Contemporary Problems for a symposium in the US context and Nelson, R. L., D. M. Trubek, et al., Eds. (1992). Lawyers' Ideals/Lawyers' Practices. Ithaca, Cornell University Press.*

28 *Law Council of Australia, 2010: A Discussion Paper: Challenges to the Legal Profession (2004). The professional journals also regularly address issues of professional conduct using the language of ethics.*

In both the professional and academic literature there are a range of views about the role of lawyers. Essentially, we see that the difference is between an understanding of ethical practice which focuses on the lawyer's role vis a vis client and one which extends this understanding to require and include consideration of the effect of the lawyer's and client's conduct on the community. A key element of each view could be the interpretation of the extent of the duty to the administration of justice. As part of this debate various paradigms of lawyering have been put forward.

Paradigms of lawyering

A simplified dichotomy often presented is the distinction between "*the client advocate role*" and the "*legal system advocate role*".[29] The client advocate pursues the client's interest no matter what the consequences. In this role the lawyer is seen as the mere mouthpiece of the client. This is also sometimes described as the hired gun approach. *The legal system advocate* emphasises the role of the lawyer as an officer of the court. Using this model the lawyer takes into consideration the interests of the administration of justice as well as those of their clients.

This approach has been expanded by academics in both Canada and Australia. Christine Parker recently outlined four paradigms of lawyering – adversarial advocate (the tradition conception of a lawyer); responsible lawyer (officer of the court and trustee of legal system); moral activist (agents for justice through law reform, etc) and ethics of care (relational lawyering).[30] Parker assesses her four approaches to legal ethics by looking at how the lawyer views the social role of lawyers, the relationship of legal ethics to general ethics and the nature of the relationship between the client and the law. She describes these approaches as a "set of conceptual tools that can be used to guide or assess the ethics-in-practice of Australian Lawyers".[31] She does not intend these to be seen as stand alone, discrete models. Rather they "can be used as a set of considerations that lawyers ought to 'respond' to in deciding what to do in any particular situation".[32]

Canadians Buckingham and others describe three approaches to lawyering: the adversarial/ traditional lawyer, the merchant lawyer and the responsible lawyer.[33]

In the adversarial approach, legal practice centres on the existing interests of the client, whatever they may be. It is based on the adversarial nature of law (the criminal courtroom) where winners or losers are defined by the rules of the game. Legal ethics are also seen in this context. If a lawyer acts (plays) within the rules then their conduct is ethical irrespective of other considerations. The moral universe of the lawyer is thus one dictated by the *role* of the lawyer within the adversarial system.[34] This narrow focus requires lawyers to vigorously adopt their client's position as their own. This leads to role differentiation where the lawyer has to separate/ delineate their own personal being from their role of lawyer. They do things for their clients that they would otherwise find immoral. They must constantly justify their actions to themselves and others.[35]

29 *As detailed by Chernov A.(1991) 'The Lawyer and Morality' 18(1) Brief 6; Ramsey, I.,(1992) 'Ethical Perspectives in the Practice of Business Law' 30(5) Law Society Journal 60.*

30 *Parker, C.,(2004) 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' 30 (1) Monash University Law Review 49 at 56 onwards.*

31 *Ibid at 74.*

32 *Ibid.*

33 *Buckingham, D., Bickenback, J., Bronaugh, R. & Wilson, B., (1996) Legal Ethics in Canada Theory and Practice Harcourt Brace Canada.*

34 *Ibid.*

35 *Wasserstrom, R, " Lawyers as Professionals: Some Moral Issues" (1975) 5 Human Rights 1 as quoted in Ross Y, Ethics in Law (2005) above n. 7, p 34.*

The merchant lawyer approach is the one that many would now say is the dominant one, where the lawyer is principally a business person. The prospect of immediate financial gain is more important than professional responsibilities. The suggestion is that at the beginning of the 21st century, commercialism has won the day. This is not a recent criticism.[36] However, the increasingly global nature of large law firms with the associated escalation of profits and inevitable changes to the work environment of individual lawyers suggests that the incentives to adopt this approach are stronger now.[37]

The responsible lawyer approach recognises that lawyers not only play several professional roles in their careers, they also serve a variety of other social roles. It might be called the whole lawyer or whole person approach. It is critical of the adversarial approach. The lawyer has their own moral convictions to deal with but also issues wider than the particular client. For example this lawyer considers the consequences for the opposing party, third parties, the legal system and the lawyers own integrity. This approach requires a full assessment of the client's needs.

> *A more generous understanding of ethical lawyering is achieved when it is viewed as a vocation that enables the integration of social responsibilities and personal convictions.*[38]

It is our view that as clinical teachers, our obligation and challenge goes beyond merely reacting to pressure for ethics teaching to be embedded in the curriculum. Through our teaching, we play an influential role in the development of future lawyers and hence legal culture. This gives us individually, and the law school as an institution, the opportunity to work with and perhaps lead the practising legal profession in a re-envisioning of the meaning and application of ethics in law.[39]

The contest of views about what is ethical legal practice and the different lawyering paradigms provides fertile ground for debate and growth amongst students to which clinical supervisors can contribute with their blend of practice, academic rigour and reflection. In this way students begin to develop a deep understanding of ethical practice.

What is a 'deep understanding of ethical practice?

As clinical teachers we cannot avoid engaging our students in discussion of the meaning and extent of ethical legal practice and in our view, the aims of those discussions are to challenge conventional and narrow interpretations of ethical conduct, the status quo, and to push the boundaries of our own and our students' understanding of the requirements of an ethical lawyer.

In a recent student exercise at the beginning of the clinical course *Legal Practice and Conduct* (focussed on ethics and law of lawyering), there was surprisingly clear and consistent views among the group as to their understandings of the requirements or meaning of ethics in law. In the first class the students were asked to work in groups to write short descriptions of their understanding of 'ethics' as applied in the practice of law. The aim of the task was for the students to explore and

36 *Kirby, M., 'Billable Hours in a Noble Calling?' (1996) 21(6) Alternative Law Journal 257 ; See Galanter M & Palay T, 'The Transformation of the Big Law Firm' in Nelson, R.L.,Trubek, D. M. et al.,Eds.(1992)above n. 27.*

37 *For a recent discussion of the impact of globalism on lawyers' practices and conduct see, Nagan, Winston P., 'Lawyer Roles, Identity, and Professional Responsibility in an Age of Globalism' 13 Fla. J. Int'l L. 131, 2000–2001.*

38 *Buckingham, D., Bickenback, J., Bronaugh, R. & Wilson, B., above n. 33.*

39 *Adrian Evans comments that habitual ethical reflection has benefits for both clients and practitioners – (2003) 77(5) Law Institute Journal 80. ALRC Managing Justice above n 17, Bowen Committee Report above n. 5.*

articulate their personal views and thereby provide a context for an examination during semester of varying interpretations in the academic and professional literature of legal ethics and professional responsibility.[40]

The students noted on transparent overheads the following aspects: "integrity, encompassing moral elements, looking beyond personal bias, responsibility to clients and courts, balancing act, beyond the letter of the law, 'proper' behaviour, awareness of the issue by professional in position of power, response guided by: society's values, social good/public benefit, morality."[41]

These students were beginning their studies in ethical legal practice but their responses illustrated a broad appreciation of the issues. The majority of students in the class apparently believed that ethics and legal ethics embodies moral choices – 'right v wrong' 'proper behaviour'. There was a belief that ethics and ethical conduct requires consideration not only of personal values but also of wider societal values and the 'public benefit'. 'Responsibility' is also a common thread – leading to the question 'to whom'? Do legal ethics require responsibility only to client and court or is there a responsibility to the community? The students' responses illustrated that they considered ethical decisions are based on a number of considerations beyond the mere letter of the conduct rules or the 'law of lawyering'.

Students come to law school for a variety of reasons but a significant number come with notions of 'helping people' and 'doing good'.[42] Students who do our clinics are self selecting in that they have to apply to do the course (they are not compulsory). It is likely that a majority of those who choose to undertake a clinical subject are already concerned about broader issues of justice and are more altruistic. Their resume is also clearly a consideration.

Ethical legal practice requires an adherence to the relevant rules of professional conduct but as most students quickly realise the codes of conduct are often indeterminate and ambiguous. Consequently, ethical legal practice requires more than this. It involves an understanding of the interaction between the rules and morality, between the rules and justice. Ethical decision-making involves moral decisions as well as compliance with rules. This pre-supposes that the lawyer knows the rules, has skills of moral reasoning and a developed set of strategies for recognition of ethical issues and resolution of them.

In adopting Rest and Narvaez' four elements of moral decision making (moral sensitivity; moral judgment; moral motivation; moral character)[43], Julian Webb suggests that 'failure to act ethically may be the result of a "moral failure" at any of these four stages – a failure of recognition, of judgement, motivation or character.'[44]

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40 *It also of course gave the teacher an insight into the opinions of the group.*

41 *Student responses recorded on transparency and held by Judith Dickson.*

42 *See Susan Daicoff, 'Lawyer Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism' (1997) 46 The American University Law Review 1340. See also, Western, J,; Makkai, T. & Natalier, K. 'Professions and the Public Good' in Arup, C & Laster K (eds) For the Public Good: Pro Bono and the Legal Profession in Australia (2000) 19 Law in Context 21.*

43 *Rest, James R. & Narvaez, Darcia (eds) Moral Development in the Professions: Psychology and Applied Ethics (Hillsdale, NJ, L. Erlbaum, 1994) quoted in Julian Webb, 'Conduct, Ethics and Experience in Vocational Legal Education' in Economides (ed) above n 28, 284–285; see also discussion in Ross, Y (2005) Ethics in Law above n.7, p 50.*

44 *Webb, ibid.*

As Sampford and Blencowe point out, 'good legal practice depends upon the making of complex judgements about a variety of matters not strictly related to the law.'[45] Competence and ethics are, in our view, intertwined. A lawyer has both a contractual and an ethical duty of competence and in many situations the nature of the advice given to a client is founded on a judgement (a moral judgement) about what is both legally and ethically correct. Sampford and Blencowe argue that 'at their best [law and ethics] are mutually supportive, with ethical principles providing the principled justification for legal rules and offering valuable interpretive tools for legal rules as well as the basis for a supportive ethical culture.'[46]

Confronted as clinical law teachers with students who hold the ideas shown earlier, as well as by those with more directly self interested motives for studying law how do we proceed? We believe that our task as clinical teachers is to provide our students with a clear framework for ethical decision-making and to model the process of that decision-making.

As educators we need to be constantly thinking about ways in which we can present our students with possibilities for regular opportunities to tackle difficult ethical issues in the broader context of the society around them. In our experience such an approach creates huge interest for the students and they rise to the occasion with vigorous debate and questioning.

In 1997, Brett Walker QC, then president of the Law Council of Australian stated:

> *the Australian legal profession must continue to examine itself and the legal system, in order to push sensible reforms and save the community impracticable experiments with the administration of justice....The Australian justice system is a good justice system, with a sound international reputation but of course, no system is ever perfect, and – like all professional sectors – the legal system can be fine tuned and improved.*[47]

Similarly, Baxt in a discussion of ethics and law reform recognized a role for lawyers in ensuring the maintenance of cherished rules for the protection of citizens and the need "not to want to see the other extreme laws being piled on laws simply because there has been no enforcement in the past."[48]

The Australian Law Reform Commission has recognized that law schools can foster a sense of public responsibility in budding lawyers. It states that "education, training and accountability play a critical role in shaping the legal culture and thus in determining how well the system operates in practice".[49] It goes on to state that it is evident that, "while it is of the utmost importance to get structures right, achieving systemic reform and maintaining high standards of performance rely on the development of a healthy professional culture."[50]

In order to facilitate discussion of these various aspects of ethical legal practice and the various paradigms of lawyering, the design of the clinical program (implementation of the method) is

45 *Sampford C. & Blencowe S., 'Educating Lawyers to be Ethical Advisers' in Economides (ed) above n 27, 319.*

46 *Ibid.*

47 *Press Release: Lawyers Must keep Driving Justice reform, to Ensure Sensible Change, 2 October 1997 see http://www.lawcouncil.asn.au/read/1997/1957000630.*

48 *B. Baxt 'The Role of Regulators' in Coady, C. A. J., & Sampford C. J. G., (eds) Business, Ethics and the Law (1993) The Federation Press, p 80. For some interesting discussions of the important role of legal practitioners in combating systemic injustice see: Hambly, A. D. and Goldring, J. L. Australian Lawyers and Social Change, (1976) Law Book Company Sydney particularly the opening remarks by H C Coombs pages 1.4, and Robertson,C., 'The Demystification of Legal Discourse: Reconceiving the Role of Poverty Lawyer as Agent of the Poor', (1997) 35 (3) Osgoode Hall Law Journal.*

49 *ALRC Managing Justice above n. 17, Chapter 2 page 1.*

50 *Ibid.*

critical. In discussing the issues of program design to enhance a deep understanding of ethical issues, we draw on a recent practical problem from one of clinics.

Designing a clinical program with ethics in mind

Our suggestions for program design are based on our combined experiences, including our specialist ethics clinic, but are intended as generic on the basis that an objective inherent in every clinical program is ethics education.

We consider that the critical design features include:

1 Whole of Program Approach – Supervision expertise

A whole of program approach means that directors have a responsibility both to the students and to their supervisor staff, to ensure first, that supervisors understand basic principles of adult learning, secondly, that supervisors have a developed knowledge and understanding of ethics in law and finally that the individual programs are structured in such a way as to provide opportunity for debate and discussion.

Program design (as against individual course design) needs to acknowledge the importance across the program of these elements. Critically, for a program director, is the further factor of expertise of clinical staff. With the expansion of clinical programs it could be difficult to find competent and experienced practitioners who want to work in the university environment. The temptation might be to focus on legal competence and hope that supervision skills come with time. Most Australian clinical supervisors have learned 'on the job'. However, in clinical programs, the quality and structure of supervision is critical to the students' learning experience. The supervisor is the role model, perhaps the first legal practitioner that the student has ever met. The supervisor and the clinical law teacher, cannot avoid teaching legal ethics.[51] If the formal objectives speak of ethical awareness but supervision practice ignores engagement with these issues or if there is little guidance in reflections, then the ethic being modelled is contrary to that espoused.

A program director can adopt a number of methods of professional development of supervisors. These include formal supervision training, peer supervision and mentoring and ongoing independent evaluation and reflection. All are valuable. We have found the latter method particularly useful. The University's Academic Development Unit conducts a formal workshop with the students in the absence of their supervisors. The aim is to frankly assess the program and identify what works well and what can be improved. This invaluable process encourages us to revisit the stated objectives of our clinical courses, to re-examine the content we teach in the classroom and in the clinic, and to scrutinize the approach to lawyering we model through our practice and assessment.

2 Clear objectives related to ethical practice and practice of justice

Most universities require the subject outline to state the objectives of the course. We suggest that these include the development of knowledge and understanding of the ethical obligations of lawyers. We expect that most programs do include such an objective. For example, at Monash University the *Professional Practice* subject includes an objective: '(5) an understanding of

51 *Menkel-Meadow: above n.8.*

professional legal issues of ethics and morality.[52] The University of New South Wales *Clinical Legal Experience* entry in the Handbook includes the statement that the course aims 'to engender in students an appreciation of the ethical, social and practical complexity of the legal system'.[53]

At La Trobe, the students enrolled in our specialist ethics clinical course, *Legal Practice and Conduct* are encouraged: to see legal practice as socially situated and hence as ethically complex; to reflect on the nature of the lawyer's relationship with a client including issues of power and trust; to evaluate ethical conduct in a practical context using a range of frameworks including: professional rules of conduct, legal practitioner's own moral/ethical framework, legal practitioner's responsibility to administration of justice *in a manner conducive to advancing the public interest*. legal profession's commitment to serving the community, to analyse what constitutes ethical legal practice and to reflect on the level of responsibility individual legal practitioners have to pursue justice.[54]

3. Content

We suggest that the reading materials and other resources for the course should include reference to the different models of lawyering discussed earlier. Reading materials may be accompanied by questions requiring students to consider their own approach to lawyering as they practise it in the clinical context. We also suggest that in teaching communication skills – listening, questioning, interviewing, we emphasise their connection to performance of ethical duties. Without doubt, empathetic and careful listening and skilful questioning leads to a lawyer obtaining necessary information to effectively assist the client. Competence is an ethical issue.

4. Format

Clinical units should be designed in such a way as to provide regular opportunities, in group and in one on one interactions, to discuss and tackle ethical issues. Time to reflect and the flexibility to allow for this, needs to be built into the program design. The format of the day should include opportunities for questioning, thinking, challenging and identification of legal and ethical issues that might be missed or which may need further examination.

There is always a tension involved here as the demands of the day build up. There are many client issues to be settled and supervised and each student needs to gain the supervisor's time. The challenge is to balance these competing priorities and ensure that the temptation for example not to hold the all important debrief is resisted. Students can also learn from the way in which the supervisor manages to settle priorities and juggle the time but still give space to the important issues as and when they emerge.

In our view a clinic needs to have clear provision for both informal and formal discussion with students. Regular built in team discussion time, perhaps over lunch or afternoon tea, brings the focus from the specific to the broad. We suggest that each student team meet in this way with their supervisor on each clinic day. This allows the experience and insights of one student to be shared with all. Adhoc one-on-one supervision is also essential. Again in the real client clinic, this may arise in the course of client interviews or file work.

52 *http://www.monash.edu.au/pubs/handbooks/units/LAW5216.html*

53 *http://www.handbook.unsw.edu.au/undergraduate/courses/2006/LAWS2304.html*

54 *Unit Outline.*

In the externship situation where the university clinical teacher is not present on site, we believe it essential that the campus component include supervision sessions to discuss the challenges students may confront, as well as the formal class time focussing on the relevant theory.

The following scenario provides an example of how this design feature is relevant to achieving the goal of deep ethical understanding.

Conflict of interest situations are the most frequent ethical issue confronting legal practitioners. This scenario demonstrates how the supervision/teaching and clinical unit design can allow a deeper exploration of legal ethical approaches and the tensions these can create for student and supervisor alike.

> *A Conflict Scenario*
>
> *John and Mary (husband and wife) are seen together in the clinic by a student lawyer. Centrelink, the social security administrator, has raised a debt against each of them relating to their failure to declare the whole of the husband's earnings. John's wages were paid partly in cash and partly declared on a payslip. John and Mary did not declare the cash wages and as a result each continued to receive a social security benefit when they were not entitled to do so. John's social security payment has been stopped. Mary is receiving a Disability Support Benefit and John was on an unemployment related payment. Neither John nor Mary have yet been charged with criminal offences relating to the failure to disclose but a legal aid application form is completed by each and student takes responsibility for file.*
>
> *Two weeks later John and Mary return to the clinic after some more contact from Centrelink and to bring in financial information for the legal aid application. They have still not been charged with criminal offences. It is a short information exchange which includes some advice to John and Mary about the range of likely penalties if convicted on criminal charges.*

The potential for conflict of interest is easily identified by the student lawyer during the first interview.[55] At the mid first interview stage, the discussion with the supervisor focuses on the immediate situation and procedural steps. The aim is to clarify whether there is any difference of position between John and Mary and to flag the potential of a conflict. It is essentially a rule based discussion. Both John and Mary are taken on as clients for the purposes of advice and a freedom of information application.

After hearing from the student lawyer during the second interview, the supervisor believes that the matter raises serious conflict issues. In the post interview discussion the student focuses on how upset Mary was at the prospect of a serious sentence. The supervision exchange goes something like this:

> *Student*: and the husband just didn't seem to want to listen. He kept interrupting when I talked about what might happen with criminal charges. Maybe he didn't want her to hear the bad news, maybe he was just being protective.
>
> *Supervisor*: Do we know why she is on Disability Benefit? Do you have any sense of disability?
>
> *Student*: I haven't asked but she seems very fragile. Maybe she has a mental illness.

55 *In the clinical model used at La Trobe University in the real client clinics, the student (or pair of students) interviews the client alone to gather information then leaves for a mid interview discussion with the supervisor in which a preliminary view of the situation is developed. The student then returns to the client to advise, obtain further information, refer out or obtain instructions to act.*

> *Supervisor*: Let's just think about this interview and the instructions we have from each of them so far. I'm wondering if we can take the agreement of John and Mary to act together at face value given what you feel after today's interview. Do you think we are in a real conflict of interest situation here?

There follows a discussion of the facts known so far and the rules about conflict of interest.

> *Supervisor* : Well, they haven't been charged yet so we are only helping with a freedom of information application. No-one else is going to help them with that.
>
> *Student* : Maybe it's too risky and we should send them away to do it themselves. Only thing is I'm worried about Mary. She seems fragile and dependent on John. Maybe if they get a grant of legal aid when they are charged, we can send them off to private practitioners.
>
> *Supervisor* : I've had a look at their applications. They won't qualify. His wage and her benefit exceed the financial eligibility limit. Even without a conflict of interest we might not be able to act, certainly not on a plea of not guilty. In our clinic we have to work within legal aid guidelines.
>
> *Student* : But they can't afford a private practitioner. Wouldn't a private solicitor have the same conflict problem we might have? Are you saying they have to have different lawyers and pay two sets of fees – on that wage! That's ridiculous. She won't go to a different lawyer from him!
>
> Who makes up these rules about legal aid and conflicts of interest anyway? Must be the lawyers! We could just ignore all this and help them out. The clients could be seen by two different students otherwise they might not get any help. We have to do something. This is an access to justice issue!

What followed the second interview was a discussion between the supervisor and student, followed up later in the team discussion over afternoon tea, of the practical implications of a strict application of conflict rules. A range of issues was explored by the students and supervisor including: defeating lawyers' obligations to serve the community; that the obligation to the client may not involve taking the easiest option for the student lawyer; the need for the student to think through the various implications of the different actions a lawyer might take; protecting clients' right to loyalty; the possibility of more flexible application of rules by allowing separate lawyers within the same firm; lack of legal aid to working poor; structural barriers to accessing justice system (cost, complexity, ethical rules).

We consider that encouraging critical analysis alone is not sufficient. The group decides that the key to avoiding depression and defeatism lies in identifying possibilities for action and change. These include working out a way of providing legal services to these clients, perhaps through the already stretched community legal centres, working out how to address the wider ethical issues for the practitioner. Is there an organisation examining lawyer's ethical rules at the moment? Would the Bar Association or Law Society be interested in developing guidelines? Wider still, is it part of practitioners' ethical obligations to use their casework experiences in law reform? The group decides that conflict of interest rules can have the effect of limiting access to justice and lead to forced self-representation. The students discuss whether the rules are too strict and whether exceptions could be explored when the outcome of a strict application of the conflict rule may result in no legal representation.

This analysis of the practice is critical to the teaching mission. As discussed below, if the structures are in place in the clinic, the analysis can be developed into practical expressions of professional responsibility.

5 Clear Limits on file/project numbers

In a real client clinical program, management of the file load of students is a key issue in enabling space for discussion of systemic and individual ethical issues. Too many files swings the balance towards volume service delivery and away from education through service. Too few of course limits the opportunity for rich experience. Here again, the nature and objectives of the clinic are the reference point. Our view, however, is that if, in a university based clinical program, day after day passes without the opportunity for thoughtful discussion of the ethical dimension to the work, then the educational mission is not being achieved.

6 Reflective journals

The use of journals in professional education is common particularly in the health sciences and teaching disciplines. Journals are a tool for the development of the skill and art of reflection, advocated by Schon in the 1980s.[56] There is an increasing literature on reflection in education and professional life.[57] Clinical legal education, like clinical education in other disciplines is the obvious place in the curriculum for students to learn this skill. A clinical program can be designed to incorporate a compulsory journal, either for assessment or as a hurdle requirement. Setting clear goals for the journal is important as well as clear assessment criteria (if assessed) and providing clear timely feedback (modelling). The journal is an opportunity for students to explore the ethical implications of their daily practice through 'reflection on action'.[58]

In our program we use a compulsory journal, assessable in two courses and a hurdle requirement in the other. We have found that after some initial reluctance, students embrace the opportunity and report its value in enabling them to reflect on their practice and pull issues together in their mind. In our experience, journals are particularly useful in externships, allowing students to raise ethical and other issues in a general way but in a way which enables feedback.

In the West Heidelberg clinical course, where the primary focus is poverty and human rights law, the journals are used as one tool for drawing out the legal ethical dimension of the students' experience. In the journal students discuss their interviews and case progress; reflect on their performance as lawyers and how they might improve; difficulties they encountered with clients and any ethical dilemmas and tensions they face and how they might deal with them both professionally and personally. The journal gives the supervisor the opportunity to engage with the students on these issues and to follow the progress of each student.

56 *Schon, D., The Reflective Practitioner (1983) Jossey-Bass, San Francisco and his later writings*

57 *See eg: Moon, Jennifer A., Reflection in Learning & Professional Development: Theory and Practice (1999) Kogan Page and the references there.*

58 *Ogilvy J.P., 'The Use of Journals in Legal Education: A Tool for Reflection' (1996) 3 (1) Clinical Law Review 55. We drew on Ogilvy's work in designing the journal component of our program. The goals of the journal in our ethics clinic are: To provide regular student feedback to the supervisor on the student's progress in understanding the role of a lawyer, ethical duties, professionalism; To identify gaps in the student's understanding; To promote reflective behaviour; To exploit the connection between writing and learning; To foster self awareness; To relieve stress.*

7 Assessment

Educational research clearly shows that students see the assessment in a course as a firm indicator of what is important in the content.[59] It is essential that in the clinical course, like any other course, the assessment is closely related to the stated objectives of the course. The clinical environment offers a range of assessment opportunities consistent with university requirements. The written course material should inform the students how the assessment is designed to assist them achieve the course objectives. Importantly the performance assessment needs to integrate ethical development with other skills' development

One way to do this is to formulate the assessment criteria in the language of ethical duties and ethical practice. As stated earlier, our view is that every aspect of legal practice illustrates the ethical nature of the lawyer-client relationship. Criteria for assessment of written communication skills, for example, might include a criterion such as "demonstrates knowledge and understanding of rules of confidentiality" and "demonstrates understanding of relationship of trust". At assessment time, the ongoing record keeping easily identifies a student whose work fails to meet these measures. Given the natural importance of assessment to students, it is only fair that the clinical teaching support this approach.

Written assessment must, as stated above, align with course objectives. However, no matter what the specific context of the clinical program, an assessment piece which requires students to think about law in its public operation, and legal practice as a public activity, is assessment which encourages students to a wider and hopefully richer understanding of their ethical obligations as lawyers.

As an example of this approach to assessment, we redesigned one of our real client programs giving it a human rights focus and introducing a law reform project as the key written assessment. The renovation came about from an evaluation of the course which included listening to the students' views. The students were clear that simply doing the casework, even with discussion about its implications, was not enough. They felt strongly that the casework raised an obligation – ethical obligation – to address the broader issues emerging.[60]

Modelling Ethical Practice

We return to our third assumption, namely, that clinical law teachers are role models for their students. A clinical program and clinical units with the design features we propose stand as a clear statement to the student participants by the law school that a deep understanding of the ethical dimension to legal practice is a fundamental skill required of lawyers.

We argue that ethical practice goes beyond mere adherence to rules and requires a lawyer to consider the implications of those rules for access to justice. While not every busy practitioner can engage in law reform activities personally, the most recent edition of the Public Interest Law Clearing House (PILCH) newsletter noted that "lawyers in the private profession are expanding

59 *Johnstone and LeBrun, (1994) The Quiet Revolution:Improving Student Learning in Law (Sydney Law Book Co.) and Johnstone, R., (1996) Printed Teaching Materials: A New Approach for Law Teachers Cavendish Publishing Limited pp.42–46. In Australia the Commonwealth Government has funded research into assessment in higher education and development of practical resources. See: Assessing Learning in Australian Universities project: http://www.cshe.unimelb.edu.au/assessinglearning/about.html*

60 *Curran, L., 'Innovations in an Australian Clinical Legal Education Program: Students Making a Difference in Generating Positive Change', above n. 16.*

their pro bono involvement beyond case work for clients to include submission-writing, advocacy and law reform on behalf of clients in their own right" It is observed that this is a "significant contribution to access to justice."[61]

In the clinical environment, however, law reform activities provide a practical method of using time, assessment, file work and journal reflection to experience and examine immediate access to justice issues. This enables the students to identify issues they consider the legal profession, ethically, should respond to so that 'the legal system can be fine tuned and improved'.[62] In the clinic at the West Heidelberg Community Legal Service students must identify an issue emerging in their casework that is in need of law reform or exposure and discussion. Topics have included: Mentally Ill Offenders and the Criminal Justice System, Self Represented Litigants, Breach of Confidentiality in Children's matters, Youth Debt.[63] The students work in teams of four and in consultation with community legal centre staff. Once completed and if to a high standard, the work is released as a law reform submission to government and other relevant bodies.

The report entitled: *Unrepresented Litigants: At What Cost?* resulted from one student's difficulties in obtaining representation for a client before a tribunal. As with the practical scenario described earlier, there was discussion in clinic of the reasons for the situation. The assessment project provided the opportunity to do something about this issue and improve access to justice. The student and her clinic team conducted research and published a report which was sent to people the students decided were key decision-makers.

The students in writing the report had to grapple with many issues related to the role of a lawyer vis a vis their client and the administration of justice. In essence the question raised was the extent of the lawyer's professional ethical obligation when confronted with inadequacies and deficiencies in the law and legal system? Specifically, what should a lawyer do if they see an unrepresented person in court who is clearly struggling? What should a lawyer do where legal aid has run out, they have been acting – do they act pro bono? What is the judicial officer's role where parties are unrepresented and clearly struggling? If they try to help what does this mean for the administration of impartial justice? What are the broader implications of acting pro bono in encouraging the withdrawal of adequate funding for legal aid or for the client? How can these choices be made? What mechanisms should be considered to enhance access to justice?

There can be limitations in using case-work alone to achieve a just result in client cases. Physical court structures, uncertainty of outcome, delay and issues of cost can work as an incentive to give up on a case despite its merits. Where a lawyer observes the law as problematic and as a revolving door of negative consequences for many individuals, it may be that by simple legislative amendment the situation can be avoided. We refer to our earlier stated assumption about the role of lawyers in the public arena and argue that ethical practice includes a recognition of this role.

Where clinic assessment and design includes a law reform or similar community focussed legal research,[64] the student has to struggle with the requirements of their duty as a lawyer to act only

61 *PILCH Matters, Issue 6, May 2004, Public Interest Law Clearing House, Melbourne.*

62 *Press Release: Brett Walker QC, President of the Law Council of Australia, Lawyers Must keep Driving Justice reform, to Ensure Sensible Change, above n.47.*

63 *Curran, E., (2004) 'Responsive Law Reform Initiatives by Students on Clinical Placement at La Trobe Law' 7(2) Flinders Journal of Law Reform 287; for a list of reports see Appendix A.*

64 *For example, Murdoch University; Monash University; La Trobe University; University of New South Wales; Griffith University; University of Technology Sydney.*

on instructions and with the temptation to engage in cause lawyering which might be at the cost of their clients.[65] They confront the complexities of ethical conduct in this situation but realise that they have the option also of contributing towards improving the justice system.[66]

For supervisors and teachers in clinical programs we can assist the students in developing the skills that may help them in becoming ethical lawyers of the future and thus have the satisfaction of a possible succession plan as our students, working as lawyers, provide good ethical role models for the younger lawyers with whom they also come into contact in later life.

Conclusion

Clinical legal education is a well-respected method of teaching about law and the legal system. However the potential of clinical legal education in enhancing and promoting ethical legal practice is yet to be fully explored. Particularly in Australia where the links between clinical programs and the access to justice movement remain strong, there is a risk of complacency in the clinical fraternity about the teaching of ethical legal practice.

If clinical legal education is to be more than practical legal training, clinical teachers and program designers should be wary of the easy option of simply perpetuating an uncritical acceptance of the law of lawyering. There is a need to look again at the stated objectives of our courses, the content of what we teach in the classroom and in clinic, the approach to lawyering we are modelling through our practice and through the assessment, and importantly how carefully we structure the clinical experience to allow for opportunity for engagement among students and with clinical teachers.

We argue that clinical teachers, concerned about engendering a deep appreciation of ethical lawyering in their students, need to focus on certain key design features within their clinical program. In developing these features, clinical teachers can assist students in obtaining a deeper understanding of issues involved in ethical decision-making and the various paradigms of lawyering. Within the clinical environment, students can begin to critically analyse the law of lawyering including the various codes of practice and their rationales within a framework of access to justice issues, a client centred approach and a recognition of the public role of a legal practitioner.

65 *A Sarat, and S Scheingold (1998) (eds) Cause Lawyering: Political Commitments and Professional Responsibilities. Oxford: OUP.*

66 *In another recent example La Trobe students published a report on youth debt66 due to a concern about the number of their young clients enticed into credit debt and mobile phone debt. The chapter on mobile phone debt generated public interest from 40 national media outlets within twenty-four hours and mobile phone companies issued press releases responding to the concerns raised in the student report. State and Commonwealth Government responded directly to the student recommendations and are exploring improved regulation of the telecommunications industry. Follow up meetings with ministerial staff and advisers and the students occurred. The students were staggered to think that they might just make a difference and more young people in the public arena might exercise caution and be aware of their rights as a result of their modest law reform project: Youth Debt: A project of the La Trobe University law students and the West Heidelberg Community Legal Service, January 2004.*

APPENDIX A

Since July 2002, the La Trobe Law students have published the following reports which are available from the West Heidelberg Community Legal Service: http://www.bchs.org.au/html /community_legal_service.html

1. *Unrepresented litigants, at what cost: a report into the implications of unrepresented litigants in the Magistrates Court of Victoria (2002)*
2. *Citizens Rights and their Rights: A Report into the Public Transport System and Citylink (2002)*
3. *An Investment in the Future: The Juvenile Justice System in Victoria (2002)*
4. *Police Prisons: conditions, overcrowding and length of stay in police cells (2002)*
5. *Working Together to Break the Cycle: a discussion of current treatment and sentencing initiatives for drug dependent young people in Victoria (2003)*
6. *To Breach or Not to Breach: Confidentiality and the Care and Protection of Children (2003)*
7. *A Report into Youth Debt (2004)*
8. *The Crimes (Family Violence) Act 1987: A Review of Intervention Orders, (2004)*
9. *The PERIN Court: A Discussion Paper, (2004)*
10. *The Mentally Ill and the Criminal Justice System, (2004)*
11. *Another Poke at the Pokies: Gambling and its Legal and Social Impact on the Community. (2005)*
12. *The Impact of Law and Social Policy on the Newly Arrived Somali Community: Crossing the Cultural Divide. (2005)*

Seeing Things As We Are. Emotional Intelligence and Clinical Legal Education

*Dr Colin James**

Introduction

We do not see things as they are, we see things as we are.[1]

Is there room for happiness in legal practice? Should lawyers expect to be reasonably satisfied in their work? If we want to answer yes to these questions can we as clinical legal educators help law students to develop the personal skills, not just the legal skills they will need in practice? Some research shows that lawyers tend to be thinkers rather than feelers, and those lawyers who are thinkers are more satisfied in their work than those who are feelers.[2] Other research shows that many lawyers are unhappy at work and that dissatisfaction can reduce the quality of legal practice.[3] What can clinicians do to help students cope with stress after they enter legal practice, to make appropriate decisions about career directions, and to still focus on being good lawyers?

Emotional intelligence is no longer a new concept. Those who have read nothing about it can imagine it probably means an intelligent use of our emotions. In fact few are aware of how much their emotions inform their 'rational' decisions, not just their 'irrational' behaviour. Emotions not only affect how we think but also the values we hold and the attitudes we choose. Becoming aware of the inevitable emotional influences helps us to understand ourselves and others, to anticipate and to interpret behaviour and attitudes in ourselves and others. Developing our emotional intelligence primarily involves improving our self-awareness in ways that will benefit our interactions with clients, judges, juries, colleagues, senior partners, friends and family. It is not too grand to suggest that encouraging law students to improving their emotional intelligence will help them both to be better lawyers and to enjoy their practice.

* *University of Newcastle Legal Centre, Australia.. A version of this paper was presented at the Third International Journal of Clinical Legal Education Conference & the Eighth Australian Clinical Legal Education Conference in Melbourne, 13–15 July 2005.*

1 *Anais Nin*

2 *See Susan Daicoff (1997), 'Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism', 46 Am. U. L. Rev. 1337, at pp.1361–62, 1365–66 and 1392–93.*

3 *See below at nn.3–5, and accompanying text.*

This paper considers the relevance of emotional intelligence for the cognitively dominated law school. I describe the crisis in the American legal profession and suggest how those problems are likely to be replicated in Australia. I examine what little we know about the impact of law schools on students and find the extant research is not encouraging. The paper considers how clinical legal education provides the best opportunities to engage with students on levels that could make a difference to their inner wellbeing in practice. I then look briefly at our developing understanding of emotional intelligence and its relevance in clinical legal education. The last part considers specific opportunities already in many clinical programs for encouraging students to develop their emotional capacities.

If we want to produce confident and competent graduates for the long haul, they must also be balanced and happy in themselves. Actively recognising emotional intelligence in clinical legal education will ultimately enhance those personal qualities that help lawyers cope with stressful situations. Helping students to develop their emotional competencies will help them to survive in legal practice, to enjoy their work, and it will make them better lawyers.

Lawyer Burnout

Law is a dangerous profession. Over the past two decades studies in America have shown that lawyers suffer significant levels of depression, other mental illnesses, alcoholism, drug abuse and poor physical health, in addition to high rates of divorce and suicidal ideation.[4] A Johns Hopkins study in 1990 found that lawyers were 3.6 times more likely to suffer a major depressive disorder than others of the same social demographic.[5] Some American researchers have described a 'tripartite crisis' in the legal profession, consisting of a decline in professionalism, a decline in the public opinion of lawyers and a decline in the wellness and satisfaction levels of practicing lawyers.[6]

In Australia there is less local data, but what information there is suggests deterioration in the wellbeing of lawyers. High staff turnover is an obvious indicator and a growing concern for law firms who receive the majority of law graduates.[7] Another signal of problems is the high rate of lawyers leaving the profession. It seems fair in part to blame inflexible working conditions making it difficult for lawyers with parenting responsibilities. In 1989 a survey on the satisfaction of Victorian lawyers showed that in one year 6% of male practitioners and 12% of women practitioners did not renew their practising certificates.[8] The main reason given by men was 'Lack

4 *American Bar Association, 'The Report of "At the Breaking Point": A National Conference on the Emerging Crisis in the Quality of Lawyers' Health and Lives – Its Impact on Law Firms and Client Services' 5–6 April 1991; Amiram Elwork and G Andrew H Benjamin (1995), 'Lawyers in Distress', Journal of Psychiatry & Law, (Summer), 205–229; J A Connie, J A Beck et al. (1995–96), 'Lawyer Distress: Alcohol – Related Concerns Among a Sample of Practicing Lawyers', 10 Journal of Law and Health, Vol.1, 1995–96, p.50.*

5 *William W. Eaton et al. (1990), 'Occupations and the Prevalence of Major Depressive Disorder', 32 Journal of Occupational Medicine, p.1079, at 1081–83.*

6 *Susan Daicoff (1998), 'Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes', 11 Geo. J. Legal Ethics 547; Martin Seligman, Paul Verkuil and Terry Kang (2005), 'Why Lawyers are Unhappy', Deakin Law Review, 10(1).*

7 *Olivia Prodan (2003), 'Turn and turn about: Employee turnover in legal firms can be predicted and steps taken to avert this loss of human capital', 77(4) Law Institute Journal (Law Institute of Victoria) 90; John Quinlan, (2003) 'Human Resources: Minding the Family' Law Institute of Victoria, 77(12) p.96;*

8 *Law Institute of Victoria, 'Career Patterns of Law Graduates', Law Institute Journal, May 1990, p.342–43.*

of Satisfaction' (shared with 'Personal/Lifestyle'). Women gave 'Personal/Lifestyle' as the biggest reason, followed by 'Family Commitments' then 'Lack of Satisfaction'.[9] Another Victorian study in 1999 showed up to 30% of private practitioners were considering leaving their jobs.[10] By 2000 44% of lawyers in Sydney and Melbourne were considering leaving their present firm.[11] Also in 2000 an experienced legal recruiter in Queensland warned that the majority of lawyers were unhappy at work and were looking for change.[12]

An Australian survey of lawyers in 1995 found that their most frequently needed skills were oral and written communication.[13] Necessary interpersonal skills like communication are not taught in law schools, except for those with good clinical legal education programs. Similarly a study in Western Australia in 1999 identified communication failures within the firm as the biggest cause of dissatisfaction among legal practitioners.[14] The study found also that solicitors had inadequate control over factors which impacted on their work, there was unfair allocation of "interesting work", expectations were not communicated, there was no clear vision and direction from firm partners, and salary was inadequate compared to the level of responsibility.

In New South Wales as early as 1991 the Law Society of NSW was sufficiently concerned about stress levels in the profession it established LawCare, a counselling service for practitioners and their families. By 1998 solicitors were working 'excessively long hours', more than in other professions, and it was impacting on their family and personal lives.[15] In 2001 the Professional Standards Department of the Law Society of NSW found that unacceptable numbers of solicitors faced personal difficulties such as depression, alcohol dependency, gambling, stress and even serious illness.[16]

These difficulties impact not only on the quality of life among lawyers but on the quality of their work. Complaints about legal practitioners, including failure to respond to clients' enquiries and excessive delays in handling matters led to the creation of a new service for lawyers called the Lawyers Assistance Program Inc.[17] Subsequent studies commissioned by the Law Society of New South Wales from 2001 to 2004 show between 13% and 18% of responding solicitors were either dissatisfied or very dissatisfied with their jobs.[18] In 2004, 52% of NSW respondents indicated that

9 *Ibid.*

10 *Victorian Women Lawyers Association, Taking up the Challenge, May 1999, p19*

11 *Lucinda Schmidt, "Law is hell", Business Review Weekly, 29 September 2000, p70; while this statistic does not necessarily indicate dissatisfaction with the practice of law, it reflects poorly on stability in the profession and legal firms' capacity for staff retention. In 2001 the Young Lawyers' Section of the Law Institute published some 'horror stories' from complaints by young lawyers over a number of years about the employment conditions in some Victorian law firms: Law Institute of Victoria, Young Lawyers' Section, Thriving and Surviving, April 2001, p1.*

12 *'Queensland Lawyers Looking to Leave', Lawyers' Weekly, 15 December 2000, p.2.*

13 *Sumitra Vignaendra (1998), Australian Law Graduates' Career Destinations, Centre for Legal Education, Commonwealth of Australia. In 2000 another government survey of employers found that communication skills were still among the biggest deficiencies of graduates: A C Nielsen Research, (2000). Employer satisfaction with graduate skills. DETYA: EIP. Report No. 99/7.*

14 *Law Society of Western Australia & Women Lawyers of Western Australia, (ibid 1999), p.22.*

15 *'Quality of Life in the Legal Profession Report', Law Society of NSW 1999; 'Quality of Life: New Momentum Brought to Legal Workplace Reform', Law Society Journal (NSW Australia), September 1999, 37 (8) p.40.*

16 *Louise Aaron (2001), 'Members Services News: A New Program to Help Members in Difficulty', Law Society News, April 2001, p.26*

17 *http://www.lap.com.au/lap_background.html on 22 February 2006.*

18 *Law Society of New South Wales, Remuneration and Work Conditions Report, 2001, 2002, 2003, 2004, Mercer Human Resource Consulting, Sydney.*

stress at work had increased over the previous 12 months and about a third reported experiencing discrimination, harassment, intimidation or bullying.

Stressors on the legal profession include the perceived demands for growth, deregulation and competition and the effects of globalisation and changing technology. Law firms may concentrate on these issues at the expense of their solicitors, many of whom are stressed from high workloads, competitive billing, hierarchical workplaces and inflexible work practices. In addition, some have to cope with distressed clients, aggressive colleagues, hostile lawyers for other parties and difficult judges. Law schools without clinical programs assume that Practical Legal Training, the College of Law or Articles Training Programs are sufficient to provide the skills and personal development for graduates to practise successfully.

In Australia since 1983 the *Lawyers Practice Manual* has helped steer many lawyers in the right direction when they are unsure about legal practice or have a particular type of matter for the first time.[19] However knowing the law, and knowing about legal process is not enough. As Neil Rees indicated in 1980, many lawyers suffer burn-out because they frequently work with people experiencing distressing problems and are often the harbingers of bad news in their advice; they have to communicate with people at a deep level but get no training in interpersonal skills; and some are very sympathetic with their clients but tend to over-commit and take every loss personally.[20]

Recognition of these problems helped the growth of clinical legal education, which has made inroads in Australia since the 1980s.[21] Many clinical programs provide students with experiences that help them develop their interpersonal skills. However the combined impact of clinical legal education so far on the Australian legal profession may not be enough to stave off a crisis.

Most academics and practitioners would agree that practical legal training helps graduates entering the profession as well as benefiting their employers and the community they serve. However, the debate has been dominated for too long by a continuum between doctrinal legal education and practical legal training.[22] It appears that existing education and training of law students is insufficient to equip graduates adequately to enter the profession without significant distress for the lawyer and risks for clients. There may be no improvement in the levels of satisfaction, the quality of service or the long-term survival rates of practitioners until law schools recognise the importance of personal development in the preparation of law students for the legal profession.

19 *The Lawyers Practice Manual is an updated loose-leaf service available for most Australian States though Thomson Law Book Co.*

20 *Neil Rees (1980), 'Legal Services: Coping With Burnout', Legal Services Bulletin, April 1980, pp.80–84.*

21 *The first clinical legal education program began at Monash University in 1975 and the second through the University of New South Wales in 1981; Simon Rice with Graeme Ross (1996) refers to several unpublished reports on the early development of legal clinics in Australia A Guide to Implementing Clinical Teaching Method in the Law School Curriculum, Centre for Legal Education, Sydney at pp.5–6.*

22 *Rice cautioned against confusing practical legal education with clinical legal education (ibid 1996, p.9).*

The Damage of Law School

Education: what is left when the facts are forgotten.[23]

There has been increasing concern in America as more researchers conclude that traditional legal education contributes to depression among law students and alienation in the legal profession.[24] Krieger and Sheldon found that law students with normal mental health patterns at orientation by second year display significant anxiety, depression and reduced motivation:

> *The data reveal additional changes that are very troubling, including dulling of student motivation and goal-directed striving, and shifts away from initially positive motivation and altruistic values toward external, imposed values and motives.*[25]

There is little empirical research on the well-being of Australian law students but the similarities between the legal systems in Australia and America are enough for concern. In both countries the conventional and primary role of law schools is to inculcate doctrinal legal theory and to teach legal analysis. Both systems encourage students to 'think like a lawyer', without clarifying that that form of critical and pessimistic analysis is a limited tool for specific purposes.[26] Both systems focus on academic honours as the primary, if not sole, determinant of success. Neither system addresses the negative public image of lawyers as being fundamentally self-interested nor emphasises the socially positive contributions by lawyers, including community work, human rights and public interest cases and social reform agendas.

There are important differences however, including the significant presence of legal clinics and externship programs in American law schools compared with the Australian system. American legal education is a graduate system involving only three years while most Australian law students enter law school as undergraduates, attending from four to five years, and are typically younger and potentially more vulnerable to stressors.

A 1979 study found that causes of stress among Australian law students included a heavy work load, high level of competition, isolation and loneliness, emphasis on professionalism narrowly defined rather than humanistic or philosophical issues, and 'a paucity of ongoing positive feedback reinforcement'.[27] Since then a significant body of research has confirmed the importance of

23 *G. Gibbs, (1990), 'Twenty terrible reasons for lecturing', Oxford Centre for Staff and Learning Development.*

24 *Kennon M Sheldon and Lawrence S Krieger (2004), 'Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being', 22 Behavioral Sciences and the Law, 261–286; Linda G Mills (2000), 'Affective Lawyering: The Emotional Dimensions of the Lawyer-Client Relation', in Dennis P Stolle, David B Wexler and Bruce J Winnick (eds) Practicing Therapeutic Jurisprudence: Law as a Helping Profession, Carolina Academic Press, Durham NC; Matthew M Dammeyer & Narina Nunez (1999), Anxiety and Depression Among Law Students: Current Knowledge and Future Directions', 23 Law and Human Behavior, 55 at 63; Duncan Kenndy (1992), 'Legal Education as Training for Hierarchy', in David Kairys (ed.) The Politics of Law: A Progressive Critique, Basic Books, New York; William Brennan Jr (1988), 'Reason, Passion, and The Progress of Law', 10 Cardozo L. Rev. 3.Lynne Henderson (1987), 'Legality and Empathy', 85 Mich. L Rev. 1574;*

25 *Lawrence S Krieger (2002), 'Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence', 52 Journal of Legal Education, 112 at 114.*

26 *'Thinking like a lawyer' among other things is deeply pessimistic. It includes not just critical analysis of all possibilities, but envisaging the worst case scenario to ensure protection for the client.*

27 *Phyllis W Bexk, J D & David Burns, MD (1979) 'Anxiety and Depression in Law Students: Cognitive Intervention', 30 Journal of Legal Education, 270, at 285–86.*

feedback to students.[28] However in law schools it seems only clinical programs provide enough feedback for students to maximise their opportunities for personal development and minimise the damaging effects of anxiety over performance.[29]

The new focus in Australian legal education in recent decades is towards practical legal training. Several enquiries have recommended that law schools introduce practical legal training into their curriculum, despite opposition from some universities, some governments and some in the legal profession.[30] The most recent report was by the Australian Law Reform Commission in 1999 which called for legal education to focus on what lawyers need to do rather than traditional notions of what they need to know.[31] Universities were generally unresponsive and by 2001 large law firms had commenced their own in-house practical legal training for newly employed lawyers. However the Law Council of Australia complained there was no coordination or monitoring of standards, and accused the Commonwealth Government of starving law schools of funds at a time when studying law was becoming very popular.[32]

In the meantime, Clinical Legal Education was becoming more established in Australian law schools and many of these clinics are part of the community legal centre movement.[33] Arguably the defining characteristic of good clinical legal education in Australia has not been skills training, although that is important, but involves ethical and personal development of the student under legal supervision.[34] Because legal clinics embrace the 'real world' of legal practice with live-client situations, they serve as a bridge between the legal academy and the legal profession.

Legal education is only one ingredient in the creation of professional and happy lawyers, although an important one. Personality issues are also relevant and it is likely that law students 'self-select' according to popular preconceptions of what legal practice is about. American research in 1967 showed that while law schools attracted students of all personality types, most law students were inclined towards a 'thinking' perspective rather than 'feeling', and those who were inclined to feeling were more likely to drop out of law school.[35] A 1995 study found that 78% of first year

28 *A Mutch (2003), 'Exploring the practice of feedback to students', Active Learning in Higher Education vol 4 no 1; W Huitt (2004), 'The importance of feedback in human behavior', Educational Psychology Interactive. Valdosta, GA: Valdosta State University.*

29 *Victor M. Goode (2000), 'There Is a Method(ology) to This Madness: A Review and Analysis of Feedback in the Clinical Process', 53 Okla. L. Rev. 223; Daniel J. Givelber, Brook K. Baker, John McDevitt & Roby Miliano (1995), 'Learning Through Work: An Empirical Study of Legal Internship', 45 J. Legal Educ. 1 (1995).*

30 *The Pearce Report (1987), the McInnis and Margison Report (1994) and the Australian Law Reform Commission Report (1999), see next footnote. Dennis Charles Pearce, Enid Campbell, Don Harding. 'Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission', Canberra, AGPS, 1987; Craig McInnis and Simon Marginson. 'Australian Law Schools After the 1987 Pearce Report', AGPS, 1994.*

31 *Australian Law Reform Commission Report No.89, 'Managing Justice: A Review of the Federal Civil Justice System', December 1999 at para 2.21.*

32 *Law Council of Australia, '2010: A Discussion Paper – Challenges for the Legal Profession', Executive Summary, September 2001, also p.74.*

33 *Mary Anne Noone (1997), 'Australian Community Legal Centres – The University Connection', Jeremy Cooper and Louise G Trubeck (eds) Educating for Justice, Ashgate, Sydney, 257–284. There are currently about 160 members of the National Association of Community Legal Centres, see http://www.naclc.org.au/*

34 *Rice (op cit 1996, pp.30–32) discusses the importance of personal development as a part of professional development.*

35 *Paul VanR. Miller (1967), 'Personality Differences and Student Survival in Law School', 19 Journal of Legal Education 460–467, at 465–66. These findings were supported by research in 1994 finding that lawyers prefer thinking to feeling compared with the general population, in Lawrence R Richard, Psychological Type and Job Satisfaction Among Practicing Lawyers in the United States, 22 (1994) (unpublished Ph D dissertation, Temple University, Philadelphia).*

law students were 'thinking types' as opposed to 'feeling types' on the Myers-Briggs Type Indicator.[36] Other research on lawyer wellbeing suggests it is precisely the thinking types who need guidance on how to manage their feelings.[37]

In 2002 Barrette critiqued extant research in legal education for ignoring the importance of self-awareness arising from experiential learning.[38] He argued that almost all researchers focused on what he called the lowest level of legal content and legal process; some researchers examined the second level, encouraging students to understand the application of legal theories and making the experience intelligible. The third level Barrette found had received virtually no attention: how our attitudes, beliefs, values and perspectives affect us as lawyers. He asks:

> *How can a student learn from an experience when the adrenaline is pumping so strongly that the student does not recall even speaking to the court, oblivious to what or how any dialogue may have taken place?*[39]

Some may be unconcerned that some students and lawyers who are inclined to 'feeling' drop out because they may be unsuited to legal practice. However our failure to support the broad range of aspiring lawyers would aggravate at least two of the problems identified in the 'tripartite crisis': the decline in professionalism broadly defined and the decline in the public opinion of lawyers and the legal profession. There is a case for changes in both legal education and legal practice to attract and support broader entry to the profession, perhaps especially for those inclined to feeling, who appear to be at greatest risk.

Law schools collude with legal systems and corporate employers to continue privileging intellect over other human qualities. Most law schools offer academic medals that reward intellectual achievement as the primary goal. They ignore the early research suggesting that IQ differences have no relationship with performance in law schools.[40] Empirical research is yet to be done measuring the emotional intelligence of law students and graduates, but there are studies in education that demonstrate enhancing emotional intelligence improves academic performance.[41] Should we now ask whether clinical legal education can make a difference?

36 *V R Randall (1995), 'The Myers-Briggs Type Indicator, First Year Law Students and Performance' 26 Cumb L Rev 63 at 108; Randall also found that 68% preferred judgment and 22% preferred perception.*

37 *Susan Daicoff (1997) discusses several studies in 'Lawyer Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism', 46 Am. U. L. Rev. 1337, at 1361–62, 1365–66 and 1392–93.*

38 *Joseph A Barrette (2002), 'Self-Awareness: The Missing Piece of the Experiential Learning Puzzle', 5 T M Cooley Journal of Practical and Clinical Law, 1–12.*

39 *Ibid p.2.*

40 *D. Bligh (1977), What's the Use of Lectures? Exeter DA: Intellect (5th ed. 1998); Hugh Brayne (op cit 1996), at p.46.*

41 *Joseph E Zins, Michelle R Bloodworth, Roger P Weissberg and Herbert J Walberg, (2004) Building Academic Success on Social and Emotional Learning: What Does the Research Say? Teachers College, Columbia University; R W Blum, C A McNeely and P M Rinehart, (2002) Improving the Odds: The Untapped Power of Schools to Improve the Health of Teens. Minneapolis, MN: University of Minnesota, Center for Adolescent Health and Development; K F Osterman, (2000) 'Students' Need for Belonging in the School Community', Review of Educational Research,70; C C Lewis, E Schaps and M S Watson, (1996) 'The Caring Classroom's Academic Edge', Educational Leadership, (Alexandria VA) Vol.54, 16–21.*

The Hope of Clinical Legal Education

> *The lawyer who behaves like a jerk in court is not an 'aggressive advocate' with an 'assertive strategy', but a jerk.*[42]

Good legal clinics encourage students to fully engage with the complexities and ambiguities of legal practice, and to think about the political situation of their clients, including opportunities for addressing the public interest and the need for law reform. As Hugh Brayne opined: 'It is not enough to teach law students how legal concepts and arguments fit together, they should be encouraged to question why.'[43]

Currently there are 30 law schools in Australia, of which less than half offer clinical legal education and less than half of those have an in-house legal clinic.[44] The School of Law at Murdoch University for example runs a strong clinical program at the Southern Communities Advocacy and Legal Education Service Inc. (SCALES), at Rockingham, Western Australia, which guides students in managing their own cases under supervision in a general legal practice and an advanced clinical program in immigration law.[45] Another very successful clinical program is offered by the University of Newcastle Legal Centre which engages students on major public interest cases, involving not just the gathering and analysis of facts but reflecting on their implications in systemic failures and drafting submissions to inquiries, commissions, law reform bodies and coronial inquests.[46]

The Australian experience suggests the closer supervision, focus on reflection and regular feedback of the in-house legal clinic can provide the best opportunities of *integrating* the personal, theoretical, analytical, and ethical goals with the cognitive knowledge and practical skills necessary for a rounded legal education.[47] The integration is critical because if law students practised the way we conventionally taught them doctrinal law, they would tend to ignore everything except the basic facts. In order to deliver the 'correct' legal answer some would ignore the client's background and cultural context, the opportunities for 'non-legal' assistance, the influence of policy and current developments, personal nuances involving the client's situation, perhaps even what the client wants.[48]

Brayne argues we can encourage 'deep learning' by creating opportunities for students to feel a

42 *Daniel R Coquillette (1994), 72 N C L Rev 1271*

43 *Hugh Brayne (1996), 'Getting By With a Little Help From Our Friends', 2 Contemporary Issues in Law, No.2, pp.31–51.*

44 *Law Council of Australia (op cit 2001); Edith Cowan University in Western Australia has opened a law school since this report listed 29 law schools in Australia at p.79.*

45 *On 10 December 2002 SCALES was awarded the Human Rights Award in Law from the Human Rights and Equal Opportunity Commission. See http://www.hreoc.gov.au/media_releases/releases_2002.html*

46 *Ray Watterson, Robert Cavanagh and John Boersig (2002), 'Law School Based Public Interest Advocacy: An Australian Story', International Journal of Clinical Legal Education, June 2002, 7–36.*

47 *Mary Anne Kenny, Irene Styles and Archie Zariski (2004), 'Looking at You Looking at Me: Learning Through Reflection in a Law School', E Law No 1, Vol 11, http://www.murdoch.edu.au/elaw/issues/v11n1/kenny111.html ; 'No other learning experience in law school combines the extraordinarily varied and dramatic context of real cases and problems with the opportunity for intensive teaching, supervision, growth and reflection', Robert D. Dinerstein (1992), Report of the Committee on the Future of the In-House Clinic, 42 Journal of Legal Education,. 511, 517.*

48 *Peter B Knapp (2003) observed that some students were unable to prepare advice for a client because they were so conditioned by concentrating on the historical facts of appeal court cases in class they could not anticipate future outcomes because the facts had not happened yet. 'From the Law School to the Classroom: Or What I Would Have Learned if I Had Been Paying More Attention to My Students and Their Clients', 30(1) William Mitchell Law Review, pp.101–108.*

need to make sense of the world.[49] Clinical legal education does this by exposing students to the chaotic or 'built in dissonance' of life, where nothing is predictable, unlike facts in legal text books. The many elements of real-life legal problems often do not make sense at first, yet we pretend otherwise in the doctrinal classroom. Brayne's description of the highest form of educational development that can happen in the legal clinic evokes emotional intelligence:

> *It might involve a new outlook on life, a change in political direction, a re-ordering of personal priorities, an increase in judgment and wisdom. A lot of growing up takes place in higher education... The challenge is to introduce the students to curricular experiences while learning law that matures them.*[50]

The more mindful we as clinicians are of the student experience the better we can support them through stressful experiences and help them to reflect, to learn and develop competence and confidence. Ideally students should be informed and engaged in the process, so that personal development is no longer in the background, happening unconsciously or by default. Whether we call it deep learning, personal growth, or a maturing process, it involves developing emotional intelligence.

The Discovery of Emotional Intelligence

> *The emotions are not skilled workers.*[51]

Emotions were largely ignored during the first century of modernist science.[52] After 1912 when Wilhelm Stern proposed the term 'intelligence quotient' (IQ) as a universal measure of intelligence, others began to dissect it into components.[53] One part, called 'social intelligence', was defined in 1920 by the American scientist Thorndike as 'the ability to understand and manage men and women, ... to act wisely in human relations'.[54]

Thorndike's notion of social intelligence was overlooked for several decades although scientists seemed perplexed about why many people with high IQ performed poorly at work and were less happy than people with average IQ.[55] Some argued that personality types explained the differences in how people used their intelligence. During the 1950s various personality tests were created to help explain individual propensities but like theories of IQ, most theories behind personality tests were rigid and tended to assign people into categories.[56]

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49 *Hugh Brayne (op cit 1996), at p.45.*

50 *ibid*

51 *Ern Malley (aka Harold Stewart and James McAuley)*

52 *The word 'emotion' does not appear in the index of the 1978 edition of Abnormal Psychology by G C Davison and J M Neale, New York, Wiley; K T Strongman provides a good summary of the main theories of emotion in The Psychology of Emotion: From Everyday Life to Theory, 5th ed. 2003, Wiley, Chichester.*

53 *Wilhelm Stern (1912), The Psychological Methods of Intelligence Testing Baltimore, Warwick & York, 1914; other important works included Alfred Binet, Théodore Simon and Clara Harrison Town (1912), A Method of Measuring the Development of the Intelligence of Young Children,Lincoln, Ill., Courier; Baltimore, Williams & Wilkins, republished by Williams Printing Co. Nashville, Tenn. 1980; Lewis Terman(1906), Genius and Stupidity, Arno Press, New York, 1975.*

54 *E I Thorndike (1920), 'Intelligence and its Use', 140 Harper's Magazine, pp.227–235, 228.*

55 *David C McClelland, 'Testing for Competence Rather than Intelligence' (1973) 46 American Psychologist; see also Ronald E Walker and Jeanne M Foley (1973), 'Social Intelligence: Its History and Measurement' 33 Psychological Reports, 839–864.*

56 *There are at least six theories of personality in Western psychological discourse, each providing its own set of measurements: Bender-Gestalt Test, Californian Psychological Inventory, Maudsley Personality Inventory, Minnesota Multiphasic Personality Inventory, Myers-Briggs Type Indicator and Repertory Grid Technique. R M Ryckman (2000, 7th ed.), Theories of Personality, Belmont, CA., Wadsworth.*

A breakthrough came in 1990 when Salovey and Mayer published their concept of emotional intelligence based on a set of social skills and abilities.[57] However, the concept did not capture the public mind until 1995 when psychologist Daniel Goleman published his best-seller *Emotional Intelligence: Why it can matter more than IQ*.[58] Goleman's book popularised the concept of emotional intelligence, although it has been Salovey and Mayer's definition that has most influenced the scientific community.

Currently there are as many theories of emotion as there are different schools in psychology. Some focus on biological and physiological notions and others are based on cognitive assumptions, relating to what and how we think.[59] Some consider emotions to be a product of culture or the social environment.[60] Other theories are about specific emotions such as anger, anxiety, happiness, sadness, grief, love and shame, although there appears to be a lot more research done on the negative emotions than positive ones.[61]

The popular view of emotions sees them as 'feelings', but this ignores their cognitive components which tie them strongly to our values and beliefs.[62] Emotions appear to arise in the limbic system of the brain which includes the amygdala and the hippocampus. Daniel Goleman and others pointed out that when we sense something our logically competent cortex never receives pure

57 *P Salovey and J D Mayer (1990), 'Emotional Intelligence', 9(3) Imagination, Cognition and Personality, pp.185–211. The authors adapted the last two of Howard Gardner's 'multiple intelligences' from his Frames of Mind, Basic Books, New York, (1983) 1993, which were inter-personal and intra-personal intelligence. See also J D Mayer, M T DiPaolo & P Salovey (1990), 'Perceiving affective content in ambiguous visual stimuli: a component of emotional intelligence', 54 Journal of Personality Assessment, pp.772–782. The first use of the term 'emotional intelligence' seems to be in a 1985 doctoral dissertation by Wayne Leon Payne titled 'A Study of Emotion: Developing Emotional Intelligence; Self-Integration; Relating to Fear, Pain and Desire (Theory, Structure of Reality, Problem-Solving, Contraction/Expansion, Tuning In/Coming Out/Letting Go)', The Union for Experimenting Colleges and Universities, Cincinnati, OH 45206-1925.*

58 *Daniel Goleman (1995), Emotional Intelligence: Why it can matter more than IQ, New York, Bantam Books. Many authors have applied Goleman's concept of EI to management practices in the workplace: Hendrie Weqsinger(1998), Emotional Intelligence at Work, San Francisco: Jossey-Bass; Emily Sterrett (2000), The Manager's Pocket Guide to Emotional Intelligence, Amherst, Mass.: HRD Press; Robert Cooper and Ayman Sawaf (2000), Executive EI : Emotional Intelligence in Business, Texere: London and New York.*

59 *For examples of biological and physiological theories see R M Nesse, 'Evolutionary explanations of emotions', Human Nature, 1990, Vol.1 pp.2651–289; R Plutchik, 'The Nature of Emotions', American Scientist, 2001, Vol.89, pp.344–356. For examples of cognitive theories see S Schachter J Singer 'Cognitive, Social and Physiological Determinants of Emotional State', Psychological Review, Vol 69, pp.370–399; R S Lazarus, Emotion and Adaption, New York: Oxford University Press, 1991; K Scherer, 'Neuroscience Projections to Current Debates in Emotion Psychology', Cognition and Emotion, Vol.7, I, pp.1–41.*

60 *S A Shields, Speaking from the Heart: Gender and the Social Meaning of Emotion, Cambridge, Cambridge University Press, 2002; N M Ashkanasy, C E J Hartel & W J Zerbe (eds), Emotions in the Workplace, Westport, CT: Quorum Books, 2000; M Hjort and S Laver (eds) (1997), Emotion and the Arts, Oxford: Oxford University Press.*

61 *Theoretical and empirical research on discrete emotions can be found in M Lewis & J M Haviland-Jones (eds), Handbook of Emotions, New York: Guilford Press, 2000 and other references can be found in Chapter 8 'Specific Emotions Theory' in K T Strongman, The Psychology of Emotion: From Everyday Life to Theory, 5th ed., 2003, John Wiley & Sons, Chichester.*

62 *Adele B Lynn (2005) argues unpersuasively that emotions have three components, cognitive, physiological and behavioural, in The EQ Difference: A Powerful Plan for Putting Emotional Intelligence to Work, Amacom, NY, see Chapter 4.*

stimuli, but information via the amygdala which contributes an emotional meaning to the data, and can change the hormonal balance, further influencing the cortex.[63]

Sometimes in an emergency our emotions seem to take over; fear can cause a 'panic attack' such as a 'fight or flight' reaction, and anger can cause one to want to 'shoot the messenger'. Goleman called this 'amygdala hijacking'.[64] In these cases the amygdala 'causes' a person to act irrationally, contrary to their initial intention or how they would normally act, and sometimes contrary to their values. Extreme hijacking can cause a traumatic experience with long-term consequences, but can sometimes be resolved with the help of psychotherapy, cognitive or behaviour therapy. Some theories claim that people can develop and refine their emotional responses to improve their lives, to be more resilient or to achieve an improved level of personal fulfillment, or 'self-actualisation'.[65]

So what is emotional intelligence? One way to view it is as a partnership between our rational brain and the limbic brain. A working definition would be that emotional intelligence is what enables us to manage ourselves and our relationships with others so that we truly live our intentions.[66] Understanding that emotions inform every decision, it makes no sense to talk of isolating emotions from 'rational' thought. Our emotional intelligence is our level of awareness of how our emotions affect all our thoughts and behaviour.

A common analogy is that when life hands you lemons, your emotional intelligence determines whether you get stuck in bitterness or make lemonade. While IQ can measure skills in analysis and strategic thinking, it is emotional intelligence that motivates a person, helps determine their values and attitudes, enables empathy, understanding of others, effective communication and drives the 'X factor' that holds it all together. There are some analogies here with Maslow's early theory of self-actualisation, which he described as the coming together of the person.[67]

Salovey and Mayer claimed in 1990 that emotional intelligence involved three categories of adaptive abilities: appraisal and expression of emotion, regulation of emotion and utilisation of emotion in solving problems.[68] In 1997 they revised their model by emphasising the cognitive components of emotional intelligence.[69] The new model has a different focus and consists of four parts:

- perception, appraisal and expression of emotion

63 *Daniel Goleman (ibid 1995). p.297; Joseph E LeDoux and Elizabeth A Phelps (2000) distinguish the 'high road' taken by stimulus that travels from the thalamus through the cortex to the amygdala, from the 'low road', the short-cut when the thalamus communicates directly with the amygdala, for example in threatening situations; 'Emotional Networks in the Brain', in Lewis and Haviland-Jones (op cit 2000), pp.157–172, at 159–160.*

64 *Goleman (ibid 1995) pp.94–95; others have called it 'emotional hijacking', or 'limbic hijacking'.*

65 *Abraham Maslow coined the term 'self-actualisation' as the apex of his pyramid of human needs. A H Maslow (1943), 'A Theory of Human Motivation', 50 Psychological Review, pp.370–396.*

66 *Lynn (op cit 2005), p.2.*

67 *Maslow described the self-actualised person as 'more integrated and less split, more open for experience, more ... fully functioning, more creative, ... more ego-transcending, more independent of his lower needs, etc.' Abraham H Maslow (2nd Ed, 1968), Towards a Psychology of Being, Princeton, NJ, Van Nostrand, p.97.*

68 *Salovey and Mayer (op cit 1990), p.190–91, Figure 1.*

69 *J D Mayer & P Salovey (1997), 'What is Emotional Intelligence', in P Salovey & D Sluyter (eds) Emotional Development and Emotional Intelligence: Educational Implications, New York, Basic Books, pp.3–31. The 1997 Mayer and Salovey model has been recognised as the standard by 'scholars working in the field of emotions' according to Australian management academics Peter Jordan, Neal Ashkanasy and Charmine Hartel (2003), in 'The Case for Emotional Intelligence in Organizational Research', 29(2) Academy of Management Review, pp.195–197.*

- emotional facilitation of thinking
- understanding, analysing and employing emotional knowledge and
- reflective regulation of emotions to further emotional and intellectual growth.

In the intervening years Salovey and Mayer became convinced through further research that people's emotional processes are intrinsic to their cognitive processes and neither should be understood as operating in isolation from the other. Their revised model is more process-oriented and incorporates continuing emotional development as part of intellectual growth and personal development. However the original model is favoured by some researchers as suitable for measuring an individual's current level of emotional development.[70]

Having established the new discourse of emotional intelligence the scientific community is now investigating how to use it to improve our understanding of human experience.[71] A significant body of research is growing on the application of emotional intelligence in management and business studies as well as education.[72] While some remain sceptical, defending their intellectual high ground, there is little doubt that emotional intelligence is now 'a pivotal area of contemporary psychology'.[73] Some education researchers claim it offers opportunities for significant reform across primary, secondary and tertiary levels of schooling, while others more cautiously acknowledge it has at least accelerated recognition of emotional literacy into education programs.[74]

Emotional Intelligence in Clinical Legal Education

> *The professional practice of law often requires non-legal answers to human problems whose very existence seems not to be recognised by the legal curriculum.*[75]

Given the apparent dangerousness of legal practice one could argue that law schools have an obligation not to just teach legal units, but to prepare students for legal practice at emotional as well as intellectual levels. Consequently there is a growing body of research on incorporating

70 *Lynn (op cit 2005) proposed a simpler model using five components: Self-awareness; Empathy; Social Expertness; Personal Influence and Mastery of Purpose and Vision, p.28; see also Nicola S Schutte et al, (1998), 'Development and Validation of a Measure of Emotional Intelligence', 25 Personality and Individual Differences, 167–177.*

71 *John D Mayer, David R Caruso and Peter Salovey, 'Emotional Intelligence Meets Traditional Standards for an Intelligence', (2000) 27 Intelligence, 267–298.*

72 *For empirical research on emotional intelligence in managerial and educational psychology see: Jordan, Ashkanasy and Hartel (op cit 2003); M Zeidner, R Roberts and G M Matthews (2002), 'Can emotional intelligence be schooled? A Critical Review', 37 Educational Psychologist, pp.215–231; Peter J Jordan et al (2002), 'Workgroup emotional intelligence scale development and relationship to team process effectiveness and goal focus', 12 Human Resource Management Review, pp.195–214; Abraham Carmeli (2003), 'The relationship between emotional intelligence and work attitudes, behavior and outcomes', 18(8) Journal of Managerial Psychology, pp.788–813.*

73 *Moshe Zeidner, Gerald Matthews and Richard D Roberts (2004), 'Emotional Intelligence in the Workplace: A Critical Review', 53(3) Applied Psychology: An International Review, pp.371–399, at 372.*

74 *Zeidner, Roberts and Matthews (2002 et al), pp 221 and 229.*

75 *Bernard L Diamond (1997), 'Psychological Problems of Law Students', in Stephen Gillers (ed.) Looking at Law School, pp.69–70.*

emotional awareness in legal education, most of which relates to the activities that typically occur in legal clinics.[76]

In the conservative legal profession many practitioners would construe emotions conventionally as a potential distraction from clear thinking or the intellectual use of reason.[77] However they would be more open to accepting that legal practice involves fundamental issues of human rights and discrimination between individuals, including the world of beliefs and principles. Philosopher Martha Nussbaum argues for a strong cognitive view of emotions, saying that 'emotion is identical with the full acceptance of, or recognition of a belief'.[78] We often call our strong beliefs principles and while both principles and emotions influence the decisions we make, neither has inherent priority.

It is irrational to critique emotions for being irrational, because emotions do not eschew cognitive influence. It is only the 'hijacked' eruption of intense emotion that is irrational in that sense. It is also irrational to try to deny emotional input in our decisions, as all decisions involve both cognitive and emotional influence. It would seem wiser, in legal practice for example, to be aware of how we feel about our client, the witness, or the judge, so we can know the influences on the decisions we make about the case.

Personally, we may prefer our own lawyer to work on a cognitive analysis of our legal situation rather than emotive, but we would also prefer that our lawyer empathised with our life situation, agreed with our principles and felt strongly about the same things as we do. The good lawyer then would have a sound knowledge of the law, be very skilful in legal practice, and importantly have the ability to communicate, empathise, understand and relate. Lawyers can be emotionally open with clients in helpful ways that do not compromise the 'objective' fiduciary and professional qualities of the relationship.[79] Rarely are such topics discussed in doctrinal law school courses.

Clinical legal education can provide ideal opportunities for broad and deep discussions with

76 *Peter Reilly (2005), 'Teaching Law Students How to Feel: Using Negotiations Training to Increase Emotional Intelligence', 21 Negotiation Journal, pp.301–314; Ann Juergens (2004), 'The Role of Emotion and Community in Lawyer's Professional Excellence', New York Law School Clinical Research Institute, Research Paper Series No 04/05-2; Hugh Brayne (2002), 'Learning to think like a lawyer: one law teacher's exploration of the relevance of evolutionary psychology', 9(3) International Journal of Legal Education, 283–311, where he suggests that much of what purports as rational thought is really rationalisation of emotional preference; Marjorie A Silver (2000), 'Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship', in Stolle, Wexler and Winnick, (op cit 2000), pp.357–417; Linda G Mills (2000), 'Affective Lawyering: The Emotional Dimensions of the Lawyer-Client Relation', Stolle, Wexler and Winnick, (op cit 2000), pp.419–446; Larry Richard (2000), 'The Importance of Hiring 'Emotionally Intelligent' Associates', 18 Pennsylvania Lawyer, pp.1–5; Marjorie A Silver (1999), 'Emotional Intelligence in Legal Education', 5(4) Psychology, Public Policy and the Law, pp.1173–1203; Melissa L Nelken (1996), 'Negotiation and Psychoanalysis: If I'd Wanted to Learn About Feelings, I Wouldn't Have Gone to Law School', 45(3) Journal of Legal Education, pp.420–429; Sandra Janoff (1991), 'The Influence of Legal Education on Moral Reasoning', 76 Minnesota Law Review, 193–238.*

77 *Thomas L Shaffer and James R Elkins (3rd 1997), Legal Interviewing and Counseling , St. Paul, Minn. West Pub., p.56; see also Daicoff (op cit 1997). p.1405; however Carrie Menkel-Meadow (1989) argues that women entering the legal profession have introduced an ethic of care that is more responsive to clients' needs, 'Portia Redux: Another Look at Gender, Feminism and Legal Ethics, 2 Virginia Journal of Social Policy and the Law, p.75.*

78 *Martha Nussbaum, 'Narrative Emotions: Beckett's Genealogy of Love', in Love's Knowledge: Essays on Philosophy and Literature, New York, Oxford University Press, 1990, pp.286–313, at 292.*

79 *Simon Tupman (2000) discusses several creative examples of how lawyers can connect better with their new and existing clients in Why Lawyers Should Eat Bananas: Inspirational Ideas for Lawyers Wanting More Out of Life, Byron Bay, Simon Tupman Presentations.*

students on the emotional issues of legal practice. Students in clinical programs will feel their own anxiety and probably notice the stress of their clients. Supervisors should seize these opportunities to talk with students about the happiness of 'winning', the grief of 'losing', the anxiety of confusion and the common frustrations and satisfactions of legal practice as they arise in the student, or as the student reports noticing them in the client.

Since the 1950s there have been several attempts to 'humanise' legal education in America by introducing to law schools courses on 'human relations',[80] and 'psychotherapeutic insights',[81] course texts on the psychology of legal interviewing,[82] supplementary texts on legal interviewing incorporating transference,[83] counter-transference,[84] informing students on cognitive stress-management techniques[85] and familiarizing clinical law students with the various schools of psychotherapy.[86] The benefits of these modifications of legal education have been modest at best, given the current statistics of lawyer's depression, dropping out, suicide and divorce rates.

There have been more significant reforms in legal practice which have reduced the negative effects of the adversarial system of dispute resolution. These developments are reflexive, open to the emotional implications of real life disputes, and come from the intersections between alternative dispute resolutions,[87] therapeutic jurisprudence,[88] preventive lawyering,[89] affective lawyering,[90] lawyering with an 'ethic of care',[91] and 'Creative Problem Solving'.[92] Legal education typically

80 *Howard R Sacks (1959), 'Human Relations Training for Students and Lawyers', 11 Journal of Legal Education, 316, p.317.*

81 *Andrew S Watson (1958), 'The Law and Behavioural Science Project at the University of Pennsylvania: A Psychiatrist on the Law Faculty', 11 Journal of Legal Education, 73; (1963), 'Teaching Mental Health Concepts in the Saw School', 22 American Journal of Orthopsychiatry, 115 at p.120.*

82 *Andrew S Watson (1976), The Lawyer in the Interviewing and Counselling Process (Contemporary Legal Education Series), Bobbs-Merrill.*

83 *Thomas L Shaffer (1976), Legal Interviewing and Counseling in a Nutshell, St. Paul, Minn. West Pub..*

84 *Thomas L Shaffer and James A Elkins (1987), Legal Interviewing and Counseling in a Nutshell, St. Paul, Minn. West Pub..*

85 *Lawrence et al (1983), 'Stress Management Training for Law Students: Cognitive-Behavioral Intervention', 1(4) Behavioral Sciences & The Law, 101–110.*

86 *Melissa L Nelken (1996), 'Negotiation and Psychoanalysis: If I'd Wanted to Learn About Feelings, I Wouldn't Have Gone to Law School', 46 Journal of Legal Education, p.420; Robert M Bastress and Joseph E Harbaugh (1990), Interviewing, Counseling, and Negotiating. Little Brown & Co Law & Business.*

87 *Lani Guinier, Michelle Fine and Jane Balin (1997), Becoming Gentlemen: Women, Law School, and Institutional Change, Beacon Press, Boston, referring to law schools' need to start emphasizing the teaching of mediation and negotiation, not just litigation, at p.69–70.*

88 *David B Wexler (1993), 'New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Law Scholarship', 10 N Y Law School J Human Rights, 759; Dennis P Stolle, David B Wexler and Bruce J Winnick, (eds), Practicing Therapeutic Jurisprudence: Law as a Helping Profession, Carolina Academic Press, Durham NC.*

89 *Dennis P Stolle, David B Wexler, Bruce J Winick and Edward J Dauer (1997), 'Integrating Preventive Law and Therapeutic Jurisprudence: A law and Psychology Based Approach to Lawyering, 34 Cal W L Review, p.15.*

90 *Linda Mills (1996), 'On the Other Side of Silence: Affective Lawyering for Intimate Abuse', 81 Cornell Law Review, 1225; Carrie Menkel-Meadow (1994), 'Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report – Of Skill, Legal Science and Being a Human Being', 69 Washington Law Review, 593 at pp.606–07.*

91 *Daicoff (op cit 1997), at n.30, see pp.1398–1400; Theresa Glannon (1992), 'Lawyers and Caring: Building an Ethci of Care into Professional Responsibility', 43 Hastings Law Journal, p.1175; 'Ethic of Care' derives from Carol Gilligan (1982), In A Different Voice¸ Cambridge, Mass. : Harvard University Press, pp.62–63.*

92 *Janeen Kerper (1998), 'Creative Problem Solving vs. The Case Method: A Marvellous Adventure in Which Winnie-the-Pooh Meets Mrs Palsgraf', 34 Cal W L Rev, p.351; James M Cooper (1998), 'Towards a new Architecture: Creative Problem Solving and the Evolution of Law' 34 Cal W L Rev, p.297.*

continues to privilege and emphasise litigation-as-law and has not kept pace with these initiatives in legal practice. Improving our educational strategies to acknowledge the emotional side of legal practice may not only help lawyers survive better in the profession but ultimately provide clients with better legal services.

It is likely that emotional intelligence can be 'taught' in the sense that we can encourage individuals to develop their emotional capacities. We can improve our self-awareness, our emotional regulation and our appraisal of emotional states in others by training and practice, providing we have first accepted the value of emotional awareness.[93]

On the basis it can be taught, many schools especially in the United States have integrated programs on 'Social and Emotional Learning' and 'Service-Learning'.[94] While it is not clear to what extent such programs could be adapted to non-American societies and contexts, research suggests that improved emotional intelligence leads to enhanced academic performance.[95] Consequently about one third of American schools are combining service-learning with social and emotional learning to maximize students' academic achievements and to ensure their learning is based on an understanding of real-life issues.

In legal education we can no longer assume personal competencies will develop spontaneously in those who are meant to survive in legal practice. The next step is to recognise that clinical legal education programs offer ideal opportunities for teaching in ways that encourage students to develop self-awareness and the related capacities that make up emotional intelligence.

Methods of Incorporating Emotional Intelligence into Clinical Legal Education

Emotion and passion signify evil, danger, and threat of disorder.[96]

Ideally we should introduce clinic students to the concept of emotional intelligence at the beginning as part of the curriculum. Some students may be sceptical; however they may be more interested when they learn of the connections between emotional intelligence and academic performance, and how it may help them to be better lawyers. We should also inform students of the dangerousness of legal practice, and why many lawyers suffer depression and many drop out. We could also discuss the popular image of lawyers as self-serving, untrustworthy and lacking

93 *Zeidner, Roberts and Matthews (op cit 2002).*

94 *SEL programs teach five core competencies: self-awareness, social awareness, self-management, relationship skills and responsible decision making. Joseph E Zins, Michelle R Bloodworth, Roger P Weissberg and Herbert J Walberg, (2003) 'The Scientific Base Linking Social and Emotional Learning to School Success', in Zins et al, Social and Emotional Learning and School Success. New York, Teachers College Press. Service Learning is based on community service, but it is more structured, diverse and integrated into the classroom curriculum. Shelley Billig, (2000) Service-Learning Impacts on Youth, Schools and Communities: Research on K-12 School-Based Service-Learning 1990–1999, Denver, CO: RMC Research Corporation.*

95 *Joseph E Zins, Michelle R Bloodworth, Roger P Weissberg and Herbert J Walberg, (2004) Building Academic Success on Social and Emotional Learning: What Does the Research Say? Teachers College, Columbia University; R W Blum, C A McNeely and P M Rinehart, (2002) Improving the Odds: The Untapped Power of Schools to Improve the Health of Teens. Minneapolis, MN: University of Minnesota, Center for Adolescent Health and Development; K F Osterman, (2000) 'Students' Need for Belonging in the School Community', Review of Educational Research,70; C C Lewis, E Schaps and M S Watson, (1996) 'The Caring Classroom's Academic Edge', Educational Leadership, (Alexandria VA) Vol.54, 16–21.*

96 *Martha L Minow & Elizabeth V Spelman (1988) 'Passion for Justice.' 10 Cardozo Law Review 37–68.*

integrity, and ask if that is a reputation we should laugh about, endure or change.[97] Just discussing emotional intelligence openly in terms of human experience and competencies may have a positive effect on some students.[98]

It may help also to overcome the anti-emotion bias in those students who like to see themselves as 'thinkers' by suggesting they consider the research on emotion showing we never make purely cognitive decisions, that emotion informs everything we do.[99] When confronted with the science on emotional intelligence even 'thinkers' may reconsider their position and begin thinking about how they're feeling.

This section considers specific opportunities in many clinical programs for encouraging students to develop their emotional capacities. As they become more emotionally aware they will better understand what lies behind their intellectual decisions and eventually those of other people. These insights may help the students to continue developing in ways that lead to identifying and changing what they can in their lives, including their professional lives, and to accepting what they can't.

(a) Reflection

> *Reflection makes the difference between thirty years of experience, and one year of experience repeated thirty times.*[100]

What makes clinical legal education so valuable from a developmental perspective is the opportunity for students to reflect on real-client experiences and role-plays. Reflection leads to self-awareness which is fundamental in all models of emotional intelligence.[101] It is highly likely that reflection on clinical experiences improves self-awareness and fosters the kind of integration that further develops emotional intelligence.

The value of experiential learning is well known, but it seems the learning actually happens through the reflection during and after the activity.[102] Students need guidance on reflective

97 *In the 2002 Lawyer's Lecture at the St James Ethics Centre Chief Justice of the Supreme Court of NSW http://tinyurl.com/ooxvh The Hon J J Spigelman AC asked 'Are Lawyers Lemons?' and said inter alia 'it was time that time-based charging which rewards inefficiency, became ubiquitous.' On the public opinion of lawyers and the decline in professionalism among lawyers in America see the references and discussion in Daicoff (op cit, 1998) from nn.34 to 48.*

98 *Lawrence S Krieger (1998) found that students responded quickly to the theories of self-actualisation when espoused by a role model, 'What We're Not Telling Law Students, and Lawyers, that they Really Need to Know', 13 Journal of Law and Health, 1 at p.22.*

99 *Charles Lawrence (1987) discussed why lawyers may be especially resistant to acknowledging the power of the unconscious, 'The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism', 39 Stan. L Rev, 317, p.329.*

100 *Adele B Lynn (2005) The EQ Difference: A Powerful Plan for Putting Emotional Intelligence to Work, Amacom, NY.*

101 *Self-awareness was fundamental to Maslow's (op cit 1968) theory of self-actualisation and Herzberg's (1959) theory of motivation. (New York, Wiley; London, Chapman & Hall.) See Barrette (op cit 2002) who emphasised the need for research on ways to develop self-awareness through experiential learning.*

102 *David A Kolb for example found that effective learning requires 'reflective observation', (1984), Experiential Learning: Experience as the Source of Learning and Development, Englewood Cliffs, NJ: Prentice-Hall, p.30.*

practices to find out what works best for them and to develop good habits of reflection as part of their legal practice.[103]

Reflection is not about regret; it is not about rationalising or justifying; nor is it about reflecting solely on our feelings. We should reflect on the facts: what happened, what we did, including what we perceived, which includes what we perceived about how others felt about what happened. Reflecting on the facts enables us to analyse and connect disparate parts, to see how possible answers might fit the question. 'Brainstorming' is one method of using elimination that can produce answers that would rarely be considered feasible by 'rational' processes. Our feelings help us use intuition about possibilities and provide answers that are not obvious to our logical intellect.

Opportunities for retrospective reflection are common. One analysis states that good reflective practice involves:

a. direct experience of a situation

b. thoughtful examination of existing beliefs, knowledge or values, and

c. the systematic contemplation of observations and potential actions.[104]

However reflection is not always retrospective. Donald Schön distinguished between spontaneous reflection-in-action and retrospective reflection-on-action.[105] The former often happens when a lawyer comes upon a new situation and decides that routine or familiar responses are not appropriate. The lawyer might try new methods to test new insights and understandings.

Another theory recognises three levels of reflection:

1. technical – the application of skills and technical knowledge

2. conceptual – the understanding of theoretical bases for practice, and

3. critical – the examining of moral and ethical implications of decisions.[106]

Both these theories are useful but inadequate because they ignore opportunities for reflection on feelings. Reflection on feelings and emotions helps us to understand the choices we make 'not thinking' and why we think as we do when we are. Good reflective practice that includes reflection on feelings does not diminish the value of cognitive processes but helps to prioritise our ideas because we know more about their source. It may involve attempts to answer the 'why' question: why do I – why does the client – feel this way? We may not be aware of the *reasons* for our emotive responses at the time. It is sufficient at first to be aware of the feelings as they arise. Thinking, for example: 'I'm feeling angry. I'm not sure why yet, but I better be careful what I say.'

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103 Kimberly E. O'Leary, 'Evaluating Clinical Law Teaching – Suggestions for Law Professors Who Have Never Used the Clinical Teaching Method', 29 N. Ky. L. Rev. 491 (2002); Gerald F. Hess, 'Learning to Think Like a Teacher: Reflective Journals for Legal Educators', 38 Gonz. L. Rev. 129 (2003–03); Donald A. Schön, 'Educating the Reflective Legal Practitioner', 2 Clin. L. Rev. 231 (1995). Linda G Mills (2000) 'Affective Lawyering: The Emotional Dimensions of the Lawyer-Client Relationship', in Stolle, Wexler and Winnick, (op cit 2000), pp.419–446.

104 Dawn Francis (1995), 'The Reflective Journal: A Window to Preservice Teachers' Practical Knowledge', 11 Teaching and Teacher Education, 229 at 230.

105 Donald A Schön (1987), Educating the Reflective Practitioner: Toward a New Design for Teaching and Learning in the Professions, San Francisco : Jossey-Bass, c1987, p.26.

106 Max Van Manen (1992), 'Linking Ways of Knowing with Ways of Being Practical', 6 Curriculum Inquiry, 205 at 226–27.

In clinical practice students would benefit from discussing how reflective practice works, such as helping make the unconscious conscious, and helping lawyers to be more mindful of their assumptions before acting on them. Reflective practice could help a lawyer to acknowledge a bias or other emotional response that could lead to difficulties and jeopardise the fiduciary relationship, ideally before a problem develops. A lawyer may feel 'uncomfortable' about a client, and upon reflection decide it may be countertransference, such as a strong attraction or feelings of hostility towards the client. In either case, discussing the feelings with a trusted colleague might be useful, or with a therapist, and if the emotional response continues it may be necessary to cease acting and refer the client elsewhere.

Marjorie Silver gives the example of a psychiatrist who, when during his analysis of a patient whom he described as a highly attractive young woman, became aware of his unusually correct posture, his formal approach and lack of spontaneity.[107] On deeper reflection he found he was defending against his patient's charms by creating physical and emotional distance that led to a sterile analytic stance that would produce an inadequate analysis of the patient's situation. When he recognised how he was treating her differently to his other patients, he was able to resolve his anxiety enough to work with her more effectively.

Silence plays an important role in legal practice that can be best understood through reflection.[108] Lawyers are not known for their capacity to be silent, however used carefully, silence is a powerful tool in negotiation, mediation and litigation. It gives time for both sides to reflect, enabling deeper communication and understanding of the other's position. Reflective silence has interpersonal and 'textual' functions and can be used strategically in litigation and compassionately in interviews.[109]

Joint reflection among students in small groups enables the students to discuss their inner experiences, sharing their opinions, ideas, observation, and feelings on particular events and situations. Peer sharing helps them discover they may not be alone in having an emotional reaction or sympathetic response to a client's situation. It is an opportunity for the students to discuss their attitudes and values, and the reasons for them, and can lead to very productive learning situations and long-lasting relationships.

Students in clinical legal education courses sometimes have confronting experiences that contradict their expectations about legal practice. The experience may be challenging and can cause them to re-evaluate their attitudes or even their world-view. Education theorists refer to a process called cognitive dissonance, where a person learns from having to work with the tension of two apparently contradictory 'facts'.[110] These learning opportunities have been discussed by Hugh Brayne: 'Change is up to the student; but the more experiences he or she has in which their sense of reality is tested, the more likely it is that, at some point, personal growth will occur.'[111]

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107 Marjorie A Silver (2000), 'Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship', in Stolle, Wexler and Winnick, (op cit 2000), pp.405–406.

108 Stefan H. Krieger, 'A Time to Keep Silent and a Time to Speak: The Functions of Silence in the Lawyering Process', 80 Or. L. Rev. 199 (2001).

109 The textual function refers to establishing the relevance of communications by giving them a context. See Michael A K Halliday (1978), Language as Social Semiotic: The Social Interpretation of Language and Meaning, Baltimore, MD: University Park Press, pp.112–13; Adam Jaworski (1992), The Power of Silence: Social and Pragmatic Perspectives (Language and Language Behavior) SAGE Publications, Thousand Oaks, Ca..

110 See Leon Festinger, Henry W. Riecken, and Stanley Schachter (1956), When Prophecy Fails, New York: Harper and Row, pp. 27–28.

111 Hugh Brayne (op cit 1996), p;45.

The unpredictability of a clinic provides ideal opportunities for emotional development through reflection with the support of a supervisor.[112] For some the best kind of reflection is when the individual student and teacher reflect together, especially in the early stages of practice. It can improve student motivation and the student can model the process later to develop more independent reflection.[113] The successful 'teaching' of reflective practice could be demonstrated by for example the students showing how awareness of their feelings or emotional responses helped by producing a better or deeper understanding of a particular case.

(b) Negotiations

Stupidity is not a lack of intelligence, it is a lack of feeling.[114]

Negotiation is a core skill and fundamental to legal practice. The large majority of disputes are resolved through negotiation techniques at some level. The standard legal skills may not be helpful in negotiations, such as logical analysis, memorised case law and forceful advocacy. However a good negotiator will have well-developed personal capacities such as integrity, reliability, honesty, communication skills and persuasiveness. A very good negotiator will have a highly developed emotional intelligence, especially self-awareness and a capacity to understand another's emotional position.

Most clinical legal education programs give students practical experiences in negotiating, either in role plays or in real-client situations, and students often enjoy the activity and many report how much they learned from it. I submit that students will learn better and develop more quickly if they understand the importance of self-awareness and the capacity for understanding the emotional position and inner motivations of the other party.

Negotiation is not a new skill as we negotiate all the time to get what we want. Law students will have many years of experience to draw on. However negotiation role-plays can help students learn a lot about themselves, as well as how to identify other people's feelings and intentions. Specifically, negotiation practices teach about the cost of being too assertive: alienating the other party or achieving a short-term victory at the expense of other more substantial gains or a potential long-term relationship.[115] An aggressive approach might cause the other party to react and 'stone wall' by adopting a rigid position or refusing to continue discussions. Even when winning, a good negotiator will sense the feelings of the other party and gauge the need to make concessions to allow them to 'save face' in accepting a potential loss.

Rather than encouraging students to be assertive and 'tough negotiators', which can lead to bullying behaviours, reactive responses, bad relationships, inoperable solutions and even failures to

112 *The Brazilian educator Paulo Friere advocated the 'dialogical empowerment' of the student through the student and teacher working together and reflecting on their observations; Paulo Freire (1974) Education for Critical Awareness, NY, Crossroad Publishing Company. Roy Reekie (1991), 'Creating Partners: The Art of Being a Clinical Law Teacher (Part 1): Towards a Counter-Socratic Method, via Dialogical Empowering for Critical Awareness', 9(2) Journal of Professional Legal Education, pp.137–148.*

113 *The most important factor for student motivation is frequent student-teacher contact, according to the empirical research in America in the 1980s and 1990s examined by Gerald F Hess (1999), 'Seven Principles for Good Practice in Legal Education: History and Overview', 49(3) Journal of Legal Education, pp.367–370.*

114 *- Robert Musil.*

115 *Leonard Greenhalgh (1987), 'The Case Against Winning in Negotiations', 3 Negotiations J.,167; Melissa L. Nelken (1996), 'Negotiation and Psychoanalysis: If I'd Wanted to Learn About Feelings I Wouldn't Have Gone to Law School', Journal of Legal Education, Vol 46, No 3, 420.*

reach outcomes, a more enlightened approach would frame the process as a conversation.[116] Many disputes can be resolved in part, if not wholly, by the cooperative approach of exchanging information to assist each side to understand the issues from the other point of view. On the other hand, assertiveness is necessary on occasions. Negotiators can use their emotional intelligence to decide what approach is best in each case and how to change tack during the negotiation without losing credibility.

Psychoanalysis theory suggests that everyone develops mechanisms for suppressing awareness of their inner conflicts which are typically ambiguous in their meanings and ambivalent in their affects.[117] When law students interact in negotiation role-plays, their inner conflicts including hopes and fears are aroused at some level, often creating new experiences and opportunities for insight. Most are unaware of how much their own personal needs and conflicts inform their decisions and behaviour in the negotiation process.[118] If negotiators have more self-awareness, they may find the process easier, avoid reacting to provocation, and be better able to understand the position of the other party. That could improve communication, increase the level of trust, improve the integrity of the process and the chances of a mutually beneficial outcome.

Law schools may expect students to develop a competitive approach to problem solving, given the adversarial system and the doctrinal focus on litigation. On the other hand students are confronted with the reality that most disputes are resolved though negotiations and other more cooperative practices. Ideally students will come to understand through clinical practice that the central purpose of all advocacy is persuasion, and self-awareness and skilful use of other emotional capacities contribute significantly to successful dispute resolution.

(c) Journal keeping

> *The best advice I can possibly give if you are interested in developing greater emotional intelligence is to begin to journal every morning.*[119]

First used pedagogically by the ancient Greeks, student reflective journals have become accepted practice in many legal clinics since the early 1990s.[120] A journal is typically a regular, written communication from a student to a teacher about the student's experiences in the course. Students may write an entry daily, weekly or as agreed, and the contents may be factual, analytical, philosophical or emotional.

Keeping a journal helps students to reflect on the learning potential of their experiences in a clinic placement and to develop habits of self-directed learning. It can also assist the assessment process, especially in externships where the clinician is not in regular contact with the student.

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116 *Peter Reilly, 'Teaching Law Students How to Feel: Using Negotiations Training to Increase Emotional Intelligence', (2005) Negotiation Journal, April 2005, 301–314 at 308.*

117 *General introductory texts on psychoanalysis include Sigmund Freud (1933), New Introductory Lectures on Psychoanalysis, trans. James Strachey, London 1964, and Charles Brenner (1913), An Elementary Textbook of Psychoanalysis, (revised editions 1957, 1974) New York, International Universities Press.*

118 *William L F Felstiner &Austin Sarat, (1992), 'Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions', 77 Cornell L. Rev. 1447.*

119 *Bernard L Diamond (2005), op cit.*

120 *Den Autrey (1991), 'Toward a Rhetoric of Journal Writing', 10 Rhetoric Review 74 at 75; J P Ogilvy (1996), 'The Use of Journals in Legal Education: A Tool for Reflection', 3 Clinical Law Review, 55–107, and Michael Meltsner (1999), 'Writing, Reflecting and Professionalism', 6 Clinical Law Review, 435–467.*

Journals have many developmental functions. They can help people cope with stressful experiences as well as maximise the benefits of positive experiences. Reflection in writing helps students to acknowledge their emotional responses to events, such as anger, frustration, joy, embarrassment, attraction, repulsion, or annoyance. Their self-awareness is likely to develop as a result of simply acknowledging their experiences, and will happen more to the extent they can reflect on and have insights into these emotional responses.

Clinic students may need to resolve issues that arose during an interview or a court appearance. Sometimes the anxiety can cause the reflective thoughts to be circular and unproductive. Exploring the feelings by writing them down can relieve frustration and help the student reach a degree of clarity on what happened.

Journals can help creativity and original thought.[121] They can also promote skills in critical thinking.[122] Some clinical programs set students optional topics for writing about such as a title and some anecdotal guidance to get them thinking.[123] Other programs are relatively unstructured and allow students to write about what is important to them. Students may explore their deeper thoughts about the implications of cases and new avenues to explore.

Journals can be used in conjunction with 'mind-maps' for solving problems, exploring possibilities and learning new methods of thinking. Journals provide some students with a safe space to explore issues they feel less confident about and unable to raise in a class. They can also help a teacher identify difficulties with particular students such as anxiety, confusion or misunderstandings before they lead to bigger problems.

After more than a decade of teaching clinical legal education using student reflective journals J P Ogilvy proposed what he called an 'idiosyncratic and tentative' list of goals for his students' journal assignments:

- To encourage the exploitation of the demonstrated connection between writing and learning
- To nurture a lifetime of self-directed learning
- To improve problem-solving skills
- To promote reflective behaviour
- To foster self-awareness
- To allow for the release of stress
- To provide periodic student feedback to the teacher.[124]

Most of these goals are relevant to developing emotional capacities in students. Many students learn to use a journal for their own purposes, and they realise enough benefits to continue journaling during their careers.

121 *Julia Cameron (1992) The Artist's Way; A Spiritual Path to Higher Creativity, Tarcher (Penguin).*

122 *C Degazon and M Lunney (1995), 'Clinical Journal: A tool to foster critical thinking for advanced levels of competence', 9(5) Clin Nurs Special, pp.270–274*

123 *Meltsner (op cit 1999) suggests topics like: How Did I Get Here? On Friendship? How Have I Changed? What do I think about working with someone I don't like? – at p.460.*

124 *Ogilvy (op cit 1996), p.63.*

(d) Interviewing

In the last analysis, skilful interviewing is intimately related to self-awareness.[125]

Good interviewers know themselves well. In *The Lawyering Process*, Bellow and Moulton argue that a good lawyer will bring her own values and emotions into her practice, rather than deny them in favour of cognitive analysis and decision making.[126] She will be able to understand the subjectivity of her client so as to practise with empathy. Students should be encouraged to remain open to the client's values and attitudes in order to accept the client and empathise with their situation. Rigid views or narrow beliefs will stifle a student's capacity to accept the client and may lead to the student becoming judgmental. Empathy can't be forced and students have to work through these obstacles personally.

Emotional intelligence is crucial for the good interviewer, because she must be sensitive to nuance, and be ready to accept or resolve the ambiguities in the narrative and the ambivalence in the feelings that arise in herself and the client. The interviewer 'owns' the interview, because there is a professional responsibility to obtain the information necessary to help the client. However legal interviews should be 'client centred' and not structured for the comfort of the lawyer.[127]

Several techniques can be employed. When a client is distressed for example, the interviewer may decide to share something of her own life, to help the client realise the interviewer's humanity and allow for a more positive connection. The interviewer might say that she still feels ambivalent about a similar or related experience in the past, or that the process was difficult or stressful, or how hard it was to decide. This may help the client accept the reality of her own situation and the normality of her feelings. However, it is essential the interviewer doesn't feel a need to disclose to the client.

Most clients are very emotional about their case. Just as emotions can't be separated from cognitive processes, they can't be kept out of the interview room. An 'objective' interview is not possible, and interviewers will always have an emotional response or range of responses to every interview situation. Interviewers need to exercise their emotional intelligence carefully in revealing their responses to the clients. However, attempts to hide all emotional responses will likely alienate the client who will be unimpressed by the lack of engagement for their case and uninspired by the lack of confidence for a resolution.

Practising mindfulness, or conscious reflection on the current moment, during the interview can help the student concentrate, remain focused, and really hear what the client means to say. It involves simultaneous deep listening while observing non-verbal communications and being self-aware. The interviewer not only hears the client's words but notices the attitude and apparent values of the client, all while remaining sensitive to her own inner state, being relaxed but aware should something arise such as anger, fear, hostility or attraction. None of these are a problem in themselves unless they dominate the interviewer and distract her from listening.

Emotional intelligence involves trust and trust is crucial. The student must learn to trust the client and not give in to feelings of doubt that may be based on her attitudes or prejudices. If the student

125 *Andrew S Watson (1965), op cit.*

126 *Gary Bellow and Bea Moulton (1978), The Lawyering Process: Materials for Clinical Instruction in Advocacy, Mineola, NY: Foundation Press, pp.158–162.*

127 *Linda F Smith, 'Interviewing Clients: A Linguistic Comparison of the "Traditional" Interview and the "Client-Centered" Interview ', 1 Clin L Rev 541 (1995).*

has good reasons to doubt the client she should discuss it with her supervisor with a view to confronting the client with those reasons.[128] As well, the clinician must determine how much to trust a student's capacities without compromising the client's interest. In addition, the student has to trust herself, acknowledging her feelings and not criticising herself for various feelings that may arise, such as over-sympathising or being angry. Arguably the client has the biggest task as she must trust the student, the student's supervisor and the clinic's processes.

(e) Empathy

Knowing others is wisdom, knowing yourself is enlightenment.[129]

Empathy is essential in a client-centred practice. It forms part of the professional relationship with the client and should pervade all legal practice with personal clients. Practising empathy is an exercise in emotional intelligence because it involves feeling and understanding the world from the client's point of view. Lawyers need to be aware of their own biases, attitudes, beliefs and values in order to be able to put them aside to enter partly into the experience of the client and understand their decisions and behaviour.[130]

Ideally empathy has both emotional and cognitive elements. It requires an understanding of the client's position from both a factual and a feeling level and then a communication of that understanding to the client. Medical schools teach doctors to develop skills in empathic communication with patients because an emotionless and detached stance creates a distorted perspective of the information needed for effective and appropriate action.[131] Similarly with legal practice, clients may not be forthcoming if they sense the lawyer is not affected by their instructions so far. They may distort their narrative by exaggeration, or hold something back in embarrassment. Developing empathy will facilitate the information flow and help the client relax, feeling more supported and affirmed.

Clinical students can learn about empathy through group reflections and journal assignments on their experiences in role-plays. Interview role-plays for example will give students genuine opportunities to 'practise' empathy, because in many cases empathy will arise if the students participate with sincerity.[132]

Empathy is likely to happen when lawyers practise with an ethic of care. It is an important feature of therapeutic jurisprudence where legal practice is oriented more towards solving problems than winning cases. Empathy is a nuanced quality, and yet it can be a strong force in empowering the lawyer to assist the client and strengthen the professional relationship. The client will appreciate the lawyer's empathy if it is genuine and will have confidence that the lawyer understands her situation.

128 *Evans, Powles, Fagg and James 2005, 'Dishonest or Misleading Client' section in chapter titled 'Interviewing', Lawyer's Practice Manual New South Wales, Redfern Legal Centre, Thomson Law Book Co.*

129 *Lao Tzu*

130 *David A Binder, Paul Bergman and Susan C Price (1991), Lawyers as Counselors: A Client-Centred Approach, St. Paul, Minn. West Pub. Co., p.40.*

131 *Jodi Halpern (2001), From Detached Concern to Empathy: Humanizing Medical Practise, Oxford University Press, pp.39–77.*

132 *Dan Page (2003), 'UCLA Imaging Study Reveals How Active Empathy Charges Emotions; Physical Mimicry of Others Jump-Starts Key Brain Activity', UCLA News, April 7 2003. J F Kremer and L L Dietzen (1991), 'Two Approaches to Teaching Accurate Empathy to Undergraduates: Teacher-Intensive and Self-Directed', Journal of College Student Development 32, pp.69–75. Hugh Brayne (1998), 'Counselling Skills for the Lawyer: Can Lawyers Learn Anything From Counsellors', 32 The Law Teacher, 137–156.*

Empathy can be developed also through reflection on a client's case and appreciating the client's world view, whether or not it is shared by the lawyer. Some theorists have argued that feeling empathy for a client is not just another skill but should incorporate making a political commitment to side with the client by rejecting the economic or policy environment that contributed to the client's situation.[133] Others have argued that lawyers should extend their empathy to include expressions of *approval* in their communications with clients.[134] Yet others have critiqued both those positions as misuses of empathy because they could be misinterpreted and lead to actions not sought by the client.[135]

Engaging clinical law students with this debate would help them decide how they can best develop empathy in their practice and require them to reflect on their own emotional capacities to do so. That reflection itself would help them develop their skills and propensities to incorporate their emotional intelligence into their legal practice.

The lawyer's responsibility to the client may include encouraging the client to reconsider her motivations for taking legal action, and to consider broader interests, such as those of society or of other people who may be affected. Marjorie Silver cites the case of a man who challenged his mother's will which gave the house to his sister.[136] The man was relatively rich and his sister, with whom the mother was living when she died, was relatively poor. In dismissing the case the judge told the man that just because his mother did not include him in her will doesn't mean she did not love him very much. Upon which the man broke down in court and cried. Silver says that a lawyer advising the mother from the perspective of 'therapeutic jurisprudence' would have encouraged her to explore the likely effect on her son of being excluded from her will without explanation. A similar approach in advising the son would have encouraged him to explore his motivation for challenging the will.

(f) Mentoring

Wisdom is not a product of thought.[137]

Mentoring is an efficient way to monitor and guide a student's emotional development in their legal practice. It enables students to discuss their anxieties and confusions about their practice with someone who has more experience, and who cares. Consequently it can help students identify every experience in their clinic placement as an opportunity to develop their professional skills, including especially their emotional capacities.

Ideally the mentor will be willing and able to discuss with students what is important to them, be committed to listening with empathy, encourage reflection and be able to give constructive feedback. The mentor relationship can help clinical students make sense of their thoughts and feelings which may be confusing or overwhelming. In some cases the mentor can motivate the student by serving as a model of best practice and demonstrating empathy.

133 *Peter Margulies (1999), 'Re-Framing Empathy in Clinical Legal Education', 5 Clinical Law Review, p.605, 616.*

134 *Stephen Ellmann (1992), 'Empathy and Approval', 43 Hastings Law Journal, 991, 993.*

135 *Laurel E Fletcher and Harvey M Weinstein (2002), 'When Students Lose Perspective: Clinical Supervision and the Management of Empathy', Clinical Law Review, 9:135, 140.*

136 *Silver (op cit 2000), p.396.*

137 *- Eckhart Tolle (2003) Stillness Speaks, Hodder.*

The mentor can be an academic[138], a practitioner[139] or a more experienced student.[140] The role of the mentor can be wide and flexible, providing feedback and guidance, coaching particular activities and serving as a confidant and guide in times of personal crisis.

Mentors should be genuine, relaxed and willing to learn from their experience with students. Ideally the mentor relationship should not be too formal, and the mentor should not pose as a fount of all knowledge. They should be open minded, sensitive to context and able to engage with students' experiences to show there are often several ways to address a problem. Mentors should be able to identify students who are struggling or depressed and help them decide if professional counselling is indicated.

There are obvious advantages to peer mentoring, since student-to-student communication allows for more trust, shared values and freedom of expression. The University of Newcastle Legal Centre runs a mentoring program that provides every first year student with a fifth year student to guide them in preparation for a first year moot. Many first year law students report feeling isolated and some are alienated by the heavy work demands. The mentor is available to discuss issues generally and help resolve problems and anxieties that first year law students often experience. The mentor's role is assessable by a reflection exercise, and they are provided with a training workshop and a written mentor's guide.

So far the UNLC mentoring program is proving to be beneficial for both mentors and first year students. The first year student receives guidance and moral support from an experienced student who has 'been through the ropes' and is prepared to listen to their concerns. The fifth year students get personal satisfaction from seeing the other student develop and improve as a result of their influence.[141]

(g) Mindfulness

Wherever you go, there you are.[142]

Practising mindfulness means to maximise awareness, to be fully conscious of the current moment: being here and now. Mindfulness is more than just concentrating, which involves mostly cognitive

138 *In-house clinical supervisors (typically lawyer/academics) are often in the role of mentoring clinical students individually, although many students would benefit from having a mentor who is not their supervisor to enable them to more freely reflect on their experiences including their relationship with their supervisor.*

139 *Liz Ryan Cole (1994) describes a program at Vermont Law School where 20 students were selected by ballot to spend a semester with a judge or an attorney as a mentor, who ensured the students were exposed to a wide range of activities in their area of practice: 'Lessons from a Semester in Practise', 1 Clinical Law Review, 173–185. Similarly in externships, legal supervisors are expected to mentor the students working with them, although often supervisors have difficulty with that task, as discussed by Cynthia Batt and Harriet N Katz (2004) in 'Confronting Students: Evaluation in the Process of Mentoring Student Professional Development', 10 Clinical Law Review, 581–610.*

140 *The program at the University of Newcastle Legal Centre involves peer mentoring of first year students by fifth year students. See Jenny Finlay-Jones and Nicola Ross (forthcoming), 'Peer Mentoring for Law Students – Improving the First Year Advocacy Experience'.*

141 *A Brockbank (1998) discusses the often unrecognised benefits to the mentor in 'Mentoring', in I McGill and A Brockbank (eds), Facilitating Reflective Learning in Higher Education, Buckingham, Philadelphia: Society for Research into Higher Education and Open University Press. Finlay-Jones and Ross (op cit) report the experience of the large majority of fifth-year student mentors in the Newcastle program was very positive: 'excellent experience for all involved', 'I thoroughly enjoyed the mentoring experience', 'most worthwhile', 'very fulfilling'.*

142 *- Jon Kabat-Zinn, supra.*

effort. It engages both cognitive and emotional functions so that the mind is fully present, open and awake. Mindfulness includes sensitivity to the context of the situation, which may include the environment, the background, the history, and the personalities involved especially the emotional state of both the self, that is the person practising mindfulness, and any others involved. Understood this way, *actual* mindfulness would require enlightenment, however 'practising' mindfulness is the best way to approach every aspect of legal practice.

Mindfulness offers benefits similar to those of yoga and meditation, which help people to relax and to identify what is important in their lives.[143] Mindfulness leads to a high level of personal integration through awareness of the body, mind and emotions. Clinic students can learn through mindful practice that by taking care of themselves, they are taking care of business. As they learn to manage their emotional responses, they can improve their powers of concentration, among other things. Steven Keeva refers to the work of Tarthang Tulku, who wrote *Skillful Means*, and who developed specifically for lawyers a successful stress-reduction course that was approved for credit by the continuing legal education authority in California.[144]

Practising mindfulness can help us not only improve our work but cope better when things go wrong. Eckhart Tolle advises people who are overworked or in emotional distress not to identify with the anxiety but to stay present: 'Become aware not only of the emotional pain but also of "the one who observes".'[145] The same process can be used in mentoring students, encouraging them not to identify with their feelings of fear, anxiety or confusion as these emotions will pass. Recognising the emotion enables it to be named and observed as separate from oneself, contingent and temporary. Once identified: 'Ok, that is the anxiety', the student/lawyer will be better able to get on with the job, reflect on the issues, note the dilemma, be aware of the context (including the feelings of anxiety), make a decision to get help or not, and make a decision to act or not, rather than be paralysed with indecision or confusion.

Some legal education discourages mindfulness by concentrating on single-goal directed behaviour. While goal-directed behaviour is a powerful motivator, its over-use or abuse can be destructive. A significant part of the enculturation of lawyers involves maximising ambition, promoting egos and winning the case at all cost. As there can never be a perfect lawyer, the closer the goal gets to being perfect, the greater will be the disappointment. Rather than winning every case or becoming a High Court Judge, we could encourage law students to develop their *intentions* for how they practise law, as part of how they live their life. Whether or not it contains specific goals, it should always be a work-in-process.

143 *Jon Kabat-Zinn (1995) founder of the Stress Reduction Clinic at the University of Massachusetts Medical Center explores the connections between mind and body and describes how to use 'practiced mindfulness' to calm anxieties without blunting feelings and emotions. Full Catastrophe Living, Piatkus, London.*

144 *Steven Keeva (1999), Transforming Practices: Finding Joy and Satisfaction in the Legal Life, Contemporary Books, Chicago, 1999, p.78–79; Tarthang Tulku (1978), Skillful Means: Patterns for Success (Nyingma Psychology Series, 5), Berkeley, Calif. : Dharma Pub.*

145 *Tolle (op cit 1999), p.33.*

Conclusions

Optimism and a positive attitude not only distinguishes happy lawyers from unhappy ones, it may also typify truly professional lawyers from those simply meeting their obligations. Emotional competency is a good indicator of positive attitude, and while it does not preclude a healthy scepticism, ironic appreciation or sense of humour, it is necessary for successful, happy and enduring legal practice. Consequently, helping lawyers improve their emotional intelligence will impact on the quality of their work and their overall wellbeing.

Initially, clinicians should inform students of the risks of practising law. We should then discuss how it is possible to survive happily, as both a good lawyer and satisfied in the profession. We could discuss the concept of emotional capacities and introduce students to emotional intelligence, not as a new discovery but perhaps a new perspective, and something we should consider carefully. We could then discuss options for looking after one's own intellectual, emotional and physical wellbeing.

The students could then be introduced to the clinic's practices such as reflecting, journaling, interviewing, negotiation role-plays and mentoring, as opportunities to develop their emotional capacities, among other specific benefits. Even doctrinal law units have opportunities for students to exercise their insight, to imagine and discuss how case law and principles may impact on the lives of real people. We can be guided to some extent by the experience of others, and there are many publications that help us understand the problems of legal practice and provide guidance on how to teach students about surviving them.[146]

On a cautionary note: given the economically 'rationalist' trend towards Quality Assurance, clinicians should take seriously the suggestion by Brayne and Evans to devise clinical QA processes before they are imposed.[147] There is a growing need to demonstrate in institutional terms that clinical aims and objectives are consistent with planned outcomes. The ideal outcomes of clinical legal education can be clearly described and would include not only the conventional skills but capacities like emotional intelligence that reflect the student's inner development. Difficulties with identifying and assessing these outcomes using 'objective minimum standards' should be addressed broadly and directly, and not used to deny their relevance.

146 *I recommend Keeva (op cit 1999, 2004); Tulku (op cit 1978, 1991); Kabat-Zinn (op cit 1996); Tupman (op cit 2000); Lani Guinier, Michelle Fine and Jane Balin (1997), Becoming Gentlemen: Women, Law School, and Institutional Change, Beacon Press, Boston; Hugh Brayne, Nigel Duncan and Richard Grimes (2002), Clinical Legal Education: Active Learning in Your Law School, Blackstone Press.*

147 *Hugh Brayne and Adrian Evans (December 2004), 'Quality-Lite for Clinics: Appropriate Accountability within 'Live-Client' Clinical Legal Education', 6 International Journal of Clinical Legal Education, 149–161.*