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

By DONALD NICOLSON*

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

Introduction

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

Obviously, this assumes that professional ethics matters. Here, it can be argued that, as gatekeepers to and guardians of the law, lawyers influence access to law and the quality of legal representation. Moreover, in applying, interpreting and even making law they can do great harm to opponents, third

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1 See eg R. Cranston (ed.) *Legal Ethics and Professional Responsibility* (Oxford, Clarendon Press, 1995); D. Nicolson and J. Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford, Hart Publishing, 1999); A. Boon and J. Levin, *The Ethics and Conduct of Lawyers in England and Wales* (Oxford, Hart Publishing, 2nd edn, 2008); D.R.F. O'Dair, *Legal Ethics: Text and Materials* (London, Butterworth, 2001)); the launch of *Legal Ethics* in 1998; and the references cited in nn 20, 45, 46 and 105, below.

parties, the environment, the administration of justice or law itself. How they perform these roles is, or ought to be, the subject of professional ethics. Consequently, whether one is concerned about access to justice, law's justice or simply with understanding how law operates, attention to lawyers' ethics seems essential to a liberal legal education.² Indeed, exposure to the general ethical theory behind legal ethics will develop students to grow into 'good citizens' or better persons', which many regard as the main aim of liberal legal education.³ Attention to legal ethics is even more obvious to those who reject as artificial and invidious the division between an academic and vocational legal education in favour of an earlier conception of a liberal legal education as including the preparation of lawyers for practice.⁴

Admittedly not all law graduates enter legal practice. But, in any event, many of the issues raised by legal ethics—role morality, the problem of 'dirty hands, confidentiality, conflicts of interest, etc—are relevant to other common careers for law graduates such as accountancy, financial services, the civil service and politics. Moreover, a substantial proportion of law graduates do qualify as lawyers and law schools can be said to fail them if they are not prepared for the ethical dilemmas, and the pressures and temptations to act unethically, that they will face in practice.⁵ Forewarned, graduates can seek careers which are more compatible with their moral values. This, it is argued, increases the chances of career satisfaction and decreases those of the psychological alienation and emotional stress associated with current conceptions of lawyers as amoral technicians.⁶ In any event, exposing students to a wide variety of ethical considerations and the obstacles to ethical behaviour thrown up by modern legal practice may equip them to cope more effectively with those dilemmas and obstacles they meet once in practice. Finally, raising ethical standards will enable lawyers to re-assert their professional status in the face of increasing commercialisation and bureaucratisation in legal practice. Thus, ethics education might encourage lawyers to go beyond more technical conceptions of professionalism to display what might be called *ethical professionalism*, which involves an altruistic commitment to helping those in need and treating clients in a sensitive, engaged and empathetic manner.⁷

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

3 See R. Burrige and J. Webb, 'The Values of Common Law Legal Education: Rethinking Rules, Responsibilities, Relationships and Roles in the Law School' (2007) 10 *Legal Ethics* 72, esp., at 74.

4 See eg B. Hepple 'The Liberal Law Degree' [1996] *CLJ* 474, esp. at 484.

5 E.W. Myers, "'Simple Truths" About Moral Education' (1996) 45 *American University Law Review* 823; A. Boon, 'Ethics in Legal Education and Training: Four Reports, Three Jurisdictions and a Prospectus' (2002) 5 *Legal Ethics* 34, 52–3.

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

7 For a similar vision, see C. Menkel-Meadow, 'Narrowing the Gap by Narrowing the Field: What's Missing From the MacCrate Report—Of Skills, Legal Science and Being a Human Being' (1994) 69 *Washington Law Review* 593, and on professionalism more generally, Boon and Levin, *supra* n. 1, ch. 2; Nicolson and Webb, *supra* n. 1, ch. 3.

This article explores whether these goals are achievable and, if so, how they might best be achieved in the light, first, of recent research into moral psychology and, secondly, what is possible in the current legal educational context. While previous discussions have referred to moral psychology, they have failed to commit themselves to one of the competing models of moral education.⁸ Similarly, many have made passing reference to the fact that there may be limits to what may be achieved in the current climate of legal education,⁹ but have not tailored their suggestions for reform to render them more achievable. By contrast, this article argues that to have a lasting effect on moral behaviour, legal education needs to concentrate on adapting students' moral character to enable them to face the ethical challenges of contemporary legal practice, and that the most effective way of achieving this task is through live-client law clinics. While the connection between law clinics and moral development is already well-recognised, I will propose a clinical model which addresses the reality of limited education budgets and maximises the clinical experience both in terms of student numbers and length of involvement. To begin with, however, we need an idea of existing ethical teaching.

The Current Position¹⁰

Notwithstanding sporadic calls for professional ethics to be taught at the academic stage of legal education,¹¹ only roughly a quarter of UK law schools do so on a compulsory basis.¹² Admittedly, as interest in ethics, clinical legal education and skills teaching grows, legal ethics is increasingly being taught in optional, or as part of compulsory, courses. However, most students first encounter professional ethics in the vocational stage. Not only is this experience divorced from the aims of a liberal legal education, but it is both too little and too late, especially as only barristers must include professional ethics as part of continuing professional development.¹³

8 Eg, in 'Inventing the Good: A Prospectus for Clinical Education and the Teaching of Legal Ethics in England' (1996) 30 *Law Teacher* 270, Webb adopts, albeit not uncritically, a cognitive psychological approach, whereas later he appears to be as much, if not more, attracted to the alternative Aristotelian approach: 'Ethics of Lawyers or Ethics for Citizens? New Directions for Legal Education' (1998) 25 *Journal of Law and Society* 134 (hereafter Webb 1998a); 'Conduct, Ethics and Experience in Vocational Legal Education: Opportunities Missed' in K. Economides (ed), *Ethical Challenges to Legal Education and Conduct* (Oxford: Hart Publishing, 1998) (hereafter Webb 1998b). See also J. Chapman, 'Why Teach Legal Ethics to Undergraduates?' (2002) 5 *Legal Ethics* 68, 71, who explicitly rejects the need or desirability of choosing between these models.

9 See eg O'Dair, *supra* n 1, 130.

10 This critique draws upon Boon and Levin, *supra* n. 1, ch. 6; Boon, *supra* n. 5; Burridge and Webb, *supra* n 3; Chapman, *supra* n. 8; Nicolson and Webb, *supra* n. 1, 66–70; O'Dair, *supra* n. 1, ch. 4; K. Economides, 'Learning The Law Of Lawyering' (1999) 52 *Current Legal Problems* 392; N. Duncan, 'Responsibility and Ethics in Professional Legal Education', in R. Burridge and K. Hinett, (eds) *Effective Learning and Teaching in Law* (Kogan Page; London, 2002).

11 See the reports discussed in Boon, *ibid*.

12 P. Harris and S. Beinart, 'A Survey of Law Schools in the United Kingdom, 2004' (2005) 39 *Law Teacher* 299.

13 And then for only three out of 45 hours.

*The Academic Stage: Ethics in the Hidden Curriculum*¹⁴

Ethics teaching in the vocational stage is too late because, while most undergraduates are not explicitly taught ethics, they all learn about ethics, legal practice and professional roles from what is variously called the hidden,¹⁵ latent,¹⁶ implicit¹⁷ or informal¹⁸ curriculum. These unarticulated value assumptions, which supplement and may be as powerful as those contained in formal curriculum, are communicated to students by example, teaching methods, curriculum choices as to what courses are or are not taught, at what level and for what credit points, and whether they are compulsory, and by student culture and contacts with the legal profession.

Thus, notwithstanding the shrinking dominance of black-letter scholarship and the growth of 'law and...' courses, it is probably true to say that undergraduate legal education remains focused on teaching 'the law' and 'how to think like a lawyer'. Yet, whether consciously or not, academics constantly convey messages about justice and ethics.¹⁹ Unfortunately, the lesson tends to be that such issues are unimportant. This is imparted by their low visibility in the formal curriculum, especially whenever questions about lawyers' ethics, justice and the impact of law on people's lives cry out for discussion, but are ignored, or when students are told to not to confuse their emotional or moral responses to law with the central question of what it is. This combination of the separation of law and justice, and the relegation of the latter to 'soft', and often optional, subjects like jurisprudence is likely to lead to an uncritical acceptance of law's underlying values as neutral and objective, and that law is justice and moral behaviour merely that which is legal. As an alternative to this legalistic morality, an educational focus on developing technical and argumentative skills in relation to malleable law and facts might lead students to abandon ideas of right and wrong in favour of an instrumental morality in which their only goal is success and the only constraints pragmatic. Either way, there is little to challenge the standard conception of lawyers as legal technicians, 'hired guns' or, less pejoratively, neutral partisans, whose function is confined to manipulating law and facts in

14 This sketch is of necessity a very broad-brush one. There are undoubtedly many exceptions to the picture painted, but it is believed that they are just that—exceptions.

15 R.C. Cramton, 'The Ordinary Religion of the Law School Classroom' (1977-1978) 29 *Journal of Legal Education* 247.

16 R.M. Pipkin, 'Law School Instruction in Professional Responsibility: A Curricular Paradox' (1979) *American Bar Foundation Research Journal* 247.

17 H. Lesnick, 'The Integration of Responsibility and Values: Legal Education in an Alternative Consciousness of Lawyering and Law' (1986) 10 *Nova Law Journal* 633, 634.

18 K. Economides 'Legal Ethics—Three Challenges for the Next Millennium' in Economides, *supra* n. 8, xvii.

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

the interests of paying clients,²⁰ particularly if these concepts remain unexamined throughout the course of a legal education. Equally, the concentration on legal reasoning as an exercise in dispassionate and abstract logic distracts attention away from law's human and emotional side, while the emphasis on case law portrays law as primarily a means of dispute resolution through adversarial combat²¹ and prioritises the authority of existing values over critical evaluation.

The dominant message about law, justice and ethics conveyed by the content of legal education is reinforced by the didactic style of law teaching, much of which treats students as passive learners. This and their lack of student input into the content and form of teaching and assessment encourages them to defer to authority rather than develop critical faculties. The increasingly competitive nature of legal education in terms of admissions, results and obtaining employment echoes the competitive individualism celebrated by law, while the increasing expense of a university education encourages students to see it as a short-term investment for long-term financial gain. The channelling of students into lucrative law careers rather than those devoted to helping the vulnerable is reinforced by the preponderance of law subjects involving the interests of the rich and powerful, by large law firms' dominance of the recruitment process, and by informal messages about legal careers provided by staff and fellow students. However, while many academics may portray a career in large law firms or at the Bar as the height of ambition, others may engender student cynicism by openly disparaging lawyers as mindless form-fillers and grubby money seekers. This leaves little space for the conception of lawyer as heroes, bent on seeking justice and helping those in need.²²

Absent empirical research, it is difficult to gauge the precise effect of this hidden curriculum on UK law students.²³ However, numerous studies in the US²⁴ shows that legal education there tends to undermine student idealism about using law to promote justice and to engender moral and political cynicism, and a propensity towards ethically dubious behaviour.²⁵ If UK law

20 See eg Nicolson and Webb, *supra* n. 1, ch. 6; 'Special Issue: Lawyers' Duties, Adversarialism and Partisanship in UK Legal Ethics' (2004) 3 *Legal Ethics*. This may of course lead to lawyers acting in ways which contravene their codes, but as I have argued elsewhere, on balance, this is likely to result in more ethically oriented behaviour than unthinking adherence to the codes: Nicolson and Webb, *ibid*, chs. 7–8; 'Making Lawyers Moral: Ethical Codes and Moral Character' (2005) 26 *Legal Studies* 601.

21 Acknowledging that litigation is only a last resort if other forms of dispute resolution fail is unlikely to make much difference unless legal education provides much more emphasis on such other means.

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

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

24 Usefully summarised in Chapman, *supra* n. 8, 73–9.

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

schools have a similar effect, and there is no reason to think otherwise, there seems to be little one ethics course at the vocational stage can do to counter the hidden curriculum conveyed for up to four years of an undergraduate degree.

The Vocational Stage: Too Little And Too Late

In any event, vocational ethics teaching does little more than introduce students to the formal conduct rules found in the professional codes, common law and legislation. Thus, instruction manuals almost entirely ignore academic criticism of dominant notions of professionalism and professional role morality.²⁶ Recruited largely from practice, tutors are also likely to be ignorant of this literature, while their years in practice and own legal education will have done little to encourage them to take ethics, rather than just professional norms, seriously. However, even if tutors are willing²⁷ and able to go beyond the rules, they have little time to do so. Whereas in Scotland and on some Bar Vocational Courses, professional ethics is given equal status with other subjects, and students are required to apply the rules to hypothetical factual scenarios and sometimes even in simulated practice settings, more frequently it receives a few introductory lectures, after which it is taught pervasively. This tends to result in ethics being squeezed out by skills development and other pervasive topics. Not only does this symbolically devalue ethics, but, taking their cue from the manuals on substantive subjects, which either ignore ethical issues or simply reproduce code provisions, tutors are likely to concentrate solely on ensuring that students know the rules.²⁸

Current Legal Education and the Lessons of Psychology

Leaving aside the philosophical argument that reducing ethics to 'mindless conformity' to externally set rules is an inferior form, if not a total denial of, morality,²⁹ moral psychology shows how far legal education falls short in preparing students for ethical practice. Following Rest, it has become accepted that moral behaviour (whatever its content) requires the engagement, though not necessarily consciously or chronologically, of four psychological components.³⁰

26 But cf the Inns of Court School of Law, *Professional Conduct* (London, Blackstone, 2006), which partly reproduces R. Cranston, 'Legal Ethics and Professional Responsibility' in Cranston, *supra* n. 1.

27 Cf Webb 1998b, *supra* n. 8, 280-1.

28 The Lord Chancellor's Advisory Committee on Legal Education and Training, *First Report on Legal Education and Training* (London, ACLEC, 1996), para 5.13.

29 See eg Nicolson, *supra* n. 20, 608.

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

Moral sensitivity enables individuals to recognise moral problems when they arise. Having identified a moral issue, *moral judgment* enables individuals to identify its salient features, and to select and justify appropriate responses. However, empirical research repeatedly confirms that knowing what is morally right by no means guarantees moral behaviour.³¹ *Moral motivation* is required to ensure that individuals want to put into effect the moral solution selected and elevate it over competing considerations like self-interest or organisational and institutional values. Finally, even if individuals care about converting ethical judgment into action, they require the *moral courage* to be able to resist temptations to compromise moral standards. Crucial here are moral fibre, steadfastness, perseverance, backbone, or what psychologists call ego-strength, as well as the ability to set goals and focus one's attention.³²

This suggests that current legal education only partially equips students for ethical practice.³³ *Prima facie*, knowledge and understanding of the rules should assist them to identify and resolve ethical problems. However, the codes of both Scottish professional branches and that of English and Welsh barristers eschew detailed regulation in favour of vague aspirational admonitions and general principles.³⁴ Admittedly, lawyers can seek guidance from professional bodies, but without prior exposure to specific problems this might only occur once they are already inextricably entangled. The more detailed code governing English and Welsh solicitors provide more specific guidance—though less so since its recent recasting in the form of principles rather than rules. However, even highly detailed rules are still hostage to the inevitably limited imagination of their framers, the rapidly changing nature of legal practice and society, conflicting rules, and the inherent ambiguity and vagueness of the language in which they are drafted. Moreover, even comprehensive and clear rules can never be sufficiently sophisticated to cope with the contextual nuances and particularities of every unique fact situation. Consequently, whether codes are detailed or not, moral judgment is always required to supplement and apply their norms. Here, current ethical education fails in two respects.

First, it does little to assist students develop their own sense of ethical professionalism. Without exposure to the extensive legal ethics literature, they are unlikely to grapple with issues such as the meaning of professionalism, the justification for neutral partisanship, and the limits to lawyer zeal, confidentiality and lawyer paternalism. Without exposure to ethical theories which underlie and inform professional legal ethics, students lack the

31 See eg Rest, *ibid.*, 21–22, 'Can Ethics be Taught in Professional Schools? The Psychological Research' (1988) 1 *Ethics Easier Said Than Done* 22.

32 See A. Blasi, 'Moral Character: A Psychological Approach' in D.K. Lapsley and F. Clark Power (eds), *Character Psychology and Character Education* (Notre Dame, In, University of Notre Dame Press, 2005), 74

33 Cf R. Granfield and T Koenig, "'It's Hard to be a Human Being and a Lawyer": Young Attorneys and the Confrontation with Ethical Ambiguity' (2002–3) 105 *University of West Virginia Law Review* 495, who provide some empirical support for this in the similar US context.

34 The following critique of the codes draws upon Nicolson, *supra* n 20.

intellectual tools to help resolve ethical dilemmas that are not covered by the rules or professional conventions.

Secondly, current education does little to engage students' affective capacities. Judgment is not confined to rationally working out which duty best fits a moral dilemma and how it should be applied. It also involves a 'perceptual capacity'³⁵ which enables individuals to respond to the unique circumstances of each situation by drawing upon empathy, compassion and imagination, as well as their past experiences and entire world-view.³⁶ Affective faculties also sensitise lawyers to moral issues, and motivate them to act morally³⁷ and to implement moral decisions with 'warmth, empathy, compassion, and connectedness', rather than in a 'cool, distant or autocratic manner'.³⁸

In focussing almost entirely on the professional codes, current ethical teaching fails most dramatically in relation to moral motivation. Indeed, this focus further reinforces the hidden curriculum's message about lawyer (a)morality. Most obviously, in being premised on neutral partisanship, and lacking substantial concern for the impact of lawyer behaviour on opponents, third parties or the general public, exposing students to the codes confirms that, aside from protecting clients' material interests and upholding the proper and efficient administration of justice, issues of morality, justice and unmet legal need are not central to the professional role, and require no more than adherence to formal state and professional norms.³⁹ Similarly, those norms that favour lawyers' own interests over those of clients and the general public are likely to reinforce the perception that legal practice involves making a good living rather than helping others, whereas norms which are too vague to impose real behavioural limits suggest that lawyers are free to pursue whatever course of action best suits their own interests. But even detailed codes are likely to be seen by those with an instrumental morality as simply another set of rules to be manipulated. Accordingly, professional ethics may come to be regarded as a matter of risk analysis 'as to the level of malpractice at which they should operate in any given situation'.⁴⁰ This attitude is likely to be reinforced by the knowledge that sanctions for code breaches are rare because professional regulators do not seem overly concerned to pursue and punish wrongdoers,⁴¹ and in any event are hampered by the hidden nature of much lawyer misconduct and the likely unwillingness of lawyers to risk ostracisation or career impairment by reporting their colleagues or superiors.⁴²

35 J. McDowell, 'Virtue and Reason' (1979) 62 *The Monist* 331, 333.

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

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

38 L.J. Duckett and M.B. Ryden, 'Education for Ethical Nursing Practice' in Rest and Narvaez, *supra* n.30, 61.

39 See Nicolson and Webb, *supra* n. 1, ch. 4 regarding the English and Welsh codes.

40 Practitioner quoted in Hazard, *Ethics in the Practice of Law* (New Haven, Yale UP, 1978), 153.

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

42 O'Dair, *supra* n. 1, 5; Granfield and Koenig, *supra* n. 33, 515-57.

Of course, not all students will come to see professional ethics as a question of being 'moral when [they] must and immoral when [they] can'.⁴³ Those who adopt a legalistic morality are likely to regard ethics as a matter of blind obedience to formal rules and, once in practice, to conclude that they have acted morally when they have not broken any rule, especially as this avoids the anxiety that normally accompanies moral dilemmas.⁴⁴ Moreover, merely requiring students to learn rules does nothing to help them develop the necessary moral courage to resist the many temptations to flout the rules that arise in practice. Thus, the increasing commercialisation of practice places a premium on prioritising moral over financial considerations, competition for promotion and organisational hierarchies make it difficult to challenge the moral judgment of superiors, while the increasing specialisation and bureaucratisation of law firms encourages lawyers to see moral responsibility as that of everyone but themselves.⁴⁵ These problems may be exacerbated by the deference that legal neophytes are likely to show towards experienced colleagues, especially training partners and pupil/devil-masters, and by the intense socialisation processes in practices which regularly flout the rules.⁴⁶

Legal education thus has a mountain to climb if it is going to positively influence the morality of aspirant lawyers, particularly as regards moral motivation and courage. However, a final reason why it currently does not even reach the foothills is that it lacks a plausible psychological model. Unless it is naively assumed that lawyers will obey the rules simply because they are the rules, it would seem that ethical behaviour is thought to flow from the threat of sanctions for breach. This approach is associated with various, now discredited, psychological approaches such as behaviourism and social learning theory which see morality developing from direct teaching, modelling by authority figures, and reinforcement by rewards and punishments.⁴⁷ At best, this may inculcate conformity to externally imposed standards out of habit. However, such inculcation works best with children,

43 Webb 1996, *supra* n. 8, 277.

44 Cf A.S. Watson, 'Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education' (1974–1975) *University of Michigan Journal of Law Reform* 248, 251.

45 See eg Boon and Levin, *supra* n. 1, ch. 3, esp. 89–94; Nicolson and Webb, *supra* n. 1, ch. 3 esp. 60–1; A. Francis, 'The Business Context: Legal Ethics, the Marketplace and the Fragmentation of Legal Professionalism' (2005) 12 *International Journal of the Legal Profession* 173; and for the impact of these factors on US lawyers, Granfield and Koenig, *supra* n. 33.

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

47 See eg Lapsley and Power, *supra* n. 32, *passim*, but esp. ch. 10; D. Carr, *Educating the Virtues: An Essay on the Philosophical Psychology of Moral Development and Education* (London, Routledge, 1991), 150–155; A. Kohn, 'How Not to Teach Values—A Critical Look at Character Education' (1997) 78 *Phi Delta Kappa* 428.

not young adults, and with rewards, rather than sanctions—still less with merely a threat of only irregularly imposed sanctions. Moreover, research clearly establishes that attempts to establish such extrinsic motivation are less effective than, and may actually erode, intrinsic motivation. Many resist being told what to do and even rewarding conformity suggests that morality is a means to an end rather than an end itself—a message which is reinforced in social contexts like legal practice which reward outward success rather than virtue. Attempting to develop moral motivation from ‘outside in’ is far more likely to be successful when little is at stake, social conditions are stable, and there is strong moral consensus. However, lawyers face constantly changing social conditions, myriad pressures to act unethically and a community consensus fractured by the legal profession’s fragmented nature.⁴⁸

Ethical Education and Psychological Development

The Cognitive Approach

It is widely recognised that effective ethical education helps morality to develop from ‘inside out’ rather than ‘outside in’.⁴⁹ Here, two main theories compete over how this is best achieved.⁵⁰ The first is Kohlberg’s cognitive approach.⁵¹

Influenced by Piaget,⁵² and based on numerous experiments, Kohlberg argued that individual morality develops in three levels, each with two sub-stages.⁵³ At the pre-conventional level, individuals are ruled by self-interest, motivated first by threats of punishment and later the benefits gained from

48 See references in n. 45, *supra*.

49 See eg A. Blasi, ‘Moral Understanding and the Moral Personality: The Process of Moral Integration’ in Kurtines and Gewirtz 1996, *supra* n. 30; Boon, *supra* n. 5, 57; Webb 1998b, *supra* n. 8, 284; R.S. Peters, ‘Moral Development and Moral Learning’ (1974) 54 *The Monist* 541, 560–61.

50 But cf also ego psychology and Freudian psychoanalysis, discussed by Carr, *supra* n. 47, ch. 5; P.E Langford, *Approaches to the Development of Moral Reasoning* (Hove, Lawrence Erlbaum, 1995) chs. 2–3.

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

52 See eg Langford, *supra* n. 50, ch. 4; O Flanagan, *Varieties of Moral Personality: Ethics and Psychological Realism* (Cambridge, Ma., Harvard University Press, 1991), 163ff.

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

mutually beneficial exchanges. At the conventional level, they become genuinely concerned with others' needs, first because they desire approval, and loyal and trusting relations, but later out of loyalty to social institutions, and respect for their rules and obligations. The post-conventional level involves a principled approach to morality, with stage five largely correlating with utilitarianism, and stage six with a Kantian preference for universal, impartial and rationally derivable principles of justice involving respect for others' rights.

Following a long philosophical tradition stretching back to Plato and Kant,⁵⁴ Kohlberg saw the key to moral development lying in cognition and the ability to reason about morality. He concluded from experiments that this ability can be enhanced by exposing individuals to reasoning at a higher stage than that currently displayed and by creating cognitive conflict through role plays and Socratic dialogues over dilemmas such as whether a dying woman's husband should steal drugs to save her life. However, he found very few moral agents who reasoned at his sixth stage.

This, and the fact that not everyone's morality develops in stages, has led to questions about the accuracy of Kohlberg's theory and the argument that he was over-eager to defeat ethical relativism.⁵⁵ He also has been criticised for 'taking sides' against competing ethical theories and for relegating to the conventional level the allegedly more female ethic of care, which values connectedness, subjective feeling and reducing the pain of those in need. Others join with feminists in criticising Kohlberg's focus on the form rather than content of moral reasoning, on questions of justice and rights, and life and death moral dilemmas, instead of the moral issues which arise in everyday life and particularly in interpersonal relations, and on abstract, intellectual responses to dilemmas involving imaginary characters, instead of contextually rich real-life situations where individuals are faced with myriad external and internal pressures to compromise their moral values. As already noted,⁵⁶ moral agents might know what morality requires but lack the motivation or courage to convert such knowledge into behaviour. More specifically, as also noted,⁵⁷ moral behaviour results as much from moral sentiments and emotions as rational judgment.

54 However, unlike Kant who thought that the motivation to do what is right flows simply from knowing what is right, Plato seems to require volitional motivations to become implicated in agents' sense of self: J.J. Kupperman, 'How Not To Educate Character' in Lapsley and Power, *supra* n. 32, 206–207.

55 For these and other criticisms, see eg Flanagan, *supra* n. 52, chs 8–11; Peters, *supra* n. 49; Rest *et al*, *supra* n. 30; Webb 1996, *supra* n. 8; Lapsley and Power, *supra* n. 32, *passim*; L. Thomas, 'Morality and Psychological Development' in P. Singer (ed), *A Companion to Ethics* (London, Blackwell, 1991); C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development*, (Cambridge, Ma, Harvard University Press, revised edn, 1993); J. C. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (London, Routledge, 1993); F.K. Oser, 'Professional Morality: A Discourse Approach (The Case of the Teaching Profession)' in W.M. Kurtines and J.L. Gewirtz, *Handbook of Moral Behaviour and Development* (Hillsdale NJ, L Erlbaum, 1991). See also Langford, *supra* n. 50, who criticises his methodology.

56 N. 30 and accompanying text.

57 Nn 35–38 and accompanying text.

In later years, Kohlberg and his associates have addressed some of these criticisms. Thus the idea that morality develops according to a strict hierarchy ending with abstract conceptions of justice has been loosened.⁵⁸ Kohlberg also conceded that cognitive competence does not necessarily translate into moral behaviour, but nevertheless argued that it is necessary for and a facilitator of moral action. Latterly he became more interested in moral behaviour, ethical socialisation and Aristotle's approach to moral education. This led to experiments with 'just community' schools, which were aimed at enhancing pupils' moral reasoning, creating a culture of respect for norms and values, building group solidarity by involving students in the creation and application of school rules and providing a context in which they could act on their moral intuitions and decisions.⁵⁹ Finally, Kohlberg acknowledged that emotion influences moral behaviour, although he maintained that affective development parallels, and hence can be read off from, cognitive development.⁶⁰

But even if true, Kohlberg failed to explain why affective and cognitive development are linked, and more importantly how cognition relates to other psychological processes, such as memory, information processing, and motivation, as well as how moral behaviour is affected by personal and situational variables.⁶¹ Moreover, his 'phenomenalistic' assumption that moral behaviour requires the explicit exercise of conscious judgment conflicts with evidence that much of our socio-cognitive activity is tacit, implicit, and automatic,⁶² and that individuals are often unable to explain what moral judgments motivated their actions.⁶³ Indeed, automatic or subconscious responses to moral issues are said to be essential to coping effectively with everyday life; otherwise there would be insufficient time left to deal with that which is novel and unusual.⁶⁴

The Virtues of Character

As a result, Kohlberg's cognitive approach has fallen out of favour and psychologists are joining moral philosophers in revisiting the Aristotelian

58 Rest *et al*, *supra* n. 30.

59 A. Higgins, 'Educating for Justice and Community: Lawrence Kohlberg's Vision of Moral Education' in Kurtines and Gewirtz, 1996, *supra* n. 30, 57. See also Reiner *et al*, *supra* n. 53, ch. 7; T.M. Newcomb, *et al*, *Bennington College, and its Students After Twenty-Five Years* (New York, John Wiley & Sons, 1967); C. Power, 'The Just Community Approach to Moral Education' (1988) 17 *Journal Of Moral Education* 196; F.C. Power *et al*, *Lawrence Kohlberg's Approach to Moral Education* (New York, Columbia, 1989).

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

61 D.K. Lapsley and D. Narvaez, 'Moral Psychology at the Crossroads' in Lapsley and Power, *supra* n. 32, 20.

62 *Ibid*, 26

63 *Id*, and see also D. Narvaez and D.K. Lapsley, 'The Psychological Foundations of Everyday Morality and Moral Expertise' in Lapsley and Power, *supra* n. 32.

64 R.S. Peters, *Moral Development and Moral Education* (London, George & Unwin, 1981), 56.

tradition of virtue (or aretaic) ethics.⁶⁵ Unlike the deontic tradition, exemplified by Kantian deontology but also by various forms of consequentialism, which sees ethics in terms of universally applicable principles or rules imposing behavioural duties, virtue ethics sees morality as largely a question of a person's overall moral worth and in particular their possession of relatively stable character traits, dispositions, or habits of perception, feeling and behaviour, which are regarded as virtuous. Virtue ethics recognises that individuals are not born with developed virtues, nor with the 'practical wisdom' which enables them to see how to act in practical situations. Instead, virtue, practical wisdom and a person's overall moral character are gradually developed through actual engagement with moral issues.

However, Aristotle did not dismiss moral rules as unimportant. He acknowledged that they may ground important decisions and that character development starts with an application of rules before reaching the point where it involves instinctive and spontaneous moral responses.⁶⁶ Interestingly, Aristotle's view that children first obey rules out of fear and later shame and the desire for conformity is similar to Piaget, Kohlberg and other stage theorists. However, his view of moral education and moral maturity is very different.⁶⁷ Thus, by emulating others, by trial and error, by instruction from authoritative others, by experiencing and reflecting on the appropriate pride or regret at the outcome of one's actions, moral habits or dispositions are said to gradually develop to the point that appropriate moral behaviour and feelings become embedded in the individual's character.⁶⁸ In other words, character formation results not so much from direct teaching but from experience in moral behaviour, or what might be called a 'moral apprenticeship'.⁶⁹ As William James, puts it: 'Every smallest stroke of virtue or vice leaves its never so little scar'.⁷⁰ Moreover, strong moral character is more likely to develop where individuals are subjected to difficult and sustained challenges.⁷¹

Recently, character development has been analogised to the way in which expertise is developed in other walks of life.⁷² Like other experts, those with developed moral characters tend to respond to moral issues more or less

65 See eg G. Pence, 'Virtue Theory' in Singer, *supra* n. 55, 'Recent Work on Virtues' (1984) 21 *American Philosophical Quarterly* 281; W.K. Frankena, *Ethics* (Englewood, Cliffs, NJ, Prentice-Hall, 1963), ch. 4; T.L. Beauchamp, *Philosophical Ethics: An Introduction to Moral Philosophy* (New York, McGraw-Hill, 1982) ch. 5.

66 Aristotle, *The Nicomachean Ethics* (Amherst, NY, Prometheus Books, 1987), esp. book X, ch. 10. See also Peters, *supra* n. 64, ch. 2; Kupperman, *supra* n. 54, 203; H.I. Dreyfus and S.E. Dreyfus, 'What is Morality? A Phenomenological Account of the Development of Ethical Expertise' in D. Rasmussen (ed), *Universalism and Communitarianism* (Cambridge, Mass, MIT Press, 1990).

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

68 Aristotle, *ibid*, esp. bk II, ch. I and bk VI, ch. XIII; Carr, *supra* n. 47; D. Luban, 'Epistemology and Moral Education' (1983) 33 *Journal of Legal Education* 636.

69 Carr, *ibid*, 241; Peters, *supra* n. 64, 37.

70 Quoted by Peters, *ibid*, 54.

71 Kupperman, *supra* n. 54, 214.

72 Dreyfus and Dreyfus, *supra* n. 66; Narvaez and Lapsley, *supra* n. 63.

spontaneously and instinctively. However, this does not mean that they do so without intention or other forms of cognitive control.⁷³ Indeed, Aristotle's notion of practical wisdom clearly contemplates that virtue requires mature reasoning and that habits can 'involve complex activities in which deliberation and adaptability are required'.⁷⁴ Furthermore, virtuous people know what they are doing and choose virtuous conduct for its own sake.⁷⁵

If properly developed, moral character can be said to equip individuals not just with the moral judgment and perhaps also sensitivity emphasised by moral cognitivists, but also the moral motivation and courage. Where all four moral components are developed to the extent that virtue becomes a way of life, moral behaviour is far more likely to ensue. Thus, moral 'saints', such as Gandhi, Nelson Mandela and Oskar Schindler, seem to act out of deep-seated and spontaneous feelings of compassion, empathy, etc.—by 'habits of the heart'—rather than conscious deliberation. This is confirmed by studies of moral exemplars who acted more or less automatically.⁷⁶ According to contemporary psychologists, this automaticity derives from the fact that frequent activation renders moral considerations and categories part of the easily (or 'chronically') accessible set of cognitive-affective constructs which 'encompass the person's encoding or construal of the self and of situations, enduring goals, expectations and feeling states, as well as specific memories of the people and events that have been experienced'.⁷⁷ For such individuals moral categories are 'salient, chronically accessible, easily primed and readily utilized'.⁷⁸ And on the basis of the insight that 'what we *see* depends on who we *are*',⁷⁹ and on empirical studies, it is argued that moral behaviour is more likely for those for whom moral considerations are central to their personal identity and sense of self.⁸⁰ For such individuals, immoral behaviour will diminish and moral behaviour enhance their sense of self and self-esteem. Indeed, following Aristotle, Blasi argues that where moral motivations are central to the individual's self-identity 'moral action flows from a kind of

73 Peters, *supra* n. 64, esp. 103

74 Higgins *et al*, 'Character, Responsibility, and the Moral Self', in Lapsley and Power, *supra* n. 32, 103. See also Peters *ibid*, 52; C. Power *et al*, 'The Habit of the Common Life: Building Character Through Democratic Community Schools' in L.P. Nucci (ed), *Moral Development and Character Development: A Dialogue* (Berkeley, McCutchan Publishing Corporation, 1989).

75 Carr, *supra* n. 47, 51.

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

77 Y. Shoda, S.L. Tiernan, and W. Mischel, 'Personality as a Dynamical System: Emergence of Stability and Distinctiveness from Intra- and Interpersonal Interactions' (2002) 7 *Personality and Social Psychology Review*, 316, 317. See in general Lapsley and Narvaez, *supra* n. 61, 29–31; Narvaez and Lapsley, *supra* n. 63, 146ff

78 Lapsley and Narvaez, *ibid*, 31

79 G. Meilaender, *The Theory and Practice of Virtue* (Notre Dame In, Notre Dame University Press, 1984), cited by Lapsley and Narvaez, *id*.

80 See Blasi, *supra* n. 32, Lapsley and Powers, *supra* n. 32, *passim*, but esp. chs 1, 2–4, 9 and 13; F.C. Power 'Understanding the Character in Character Education', Paper presented to meeting of the American Educational Research Association, Chicago, March 1997, <http://tigger.uic.edu/~Inucci/MoralEd/articles/powerunder.html>.

spontaneous necessity' without the need for willpower or moral courage to overcome temptations or pressures to act unethically.⁸¹

*Can Law Schools Influence Character?*⁸²

Virtue ethics⁸³ and moral psychology thus suggest that if law schools are to help make lawyers moral they need to undergo cognitive development through exposure to hypothetical dilemmas and the moral principles relevant to resolving them. They must aim to ensure that ethical constructs and motivations become central to students' self-identity and, through repeated use, their character.⁸⁴ Some,⁸⁵ however, question whether law schools can influence character development particularly at this stage of students' lives.⁸⁶ Unfortunately, partly because psychological concepts do not map neatly onto the philosophical language of character, psychological research has not directly sought to establish whether character becomes set by a particular age.⁸⁷

On the other hand, some empirical research does indirectly suggest that character development is possible in adulthood and may indeed be affected by university education. Certainly, as we have seen,⁸⁸ law schools may negatively affect student attitudes. More positively, studies by Kohlberg and his associates show that moral judgment continues to develop well into adulthood and that university education, particularly if accompanied by ethical

81 *Supra* n. 32 84–5.

82 I have already dealt with the argument that they cannot because character dispositions do not in fact exist, or at best only provide reliable behavioural dispositions in highly specific situations: Nicolson, *supra* n. 20, 624–5.

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

84 Supporters of this approach include R. Conklin 'The Moral Failure of Clinical Legal Education' in Luban, *supra* n. 6; Luban and Millemann, *supra* n. 36; Webb 1998a and 1998b, *supra* n. 8; T. D. Eisele, 'Must Virtue Be Taught?' (1987) 37 *Journal of Legal Education* 495; T.L. Shaffer, 'Lawyer Professionalism as a Moral Argument' (1990–1) 26 *Gonzaga Law Review* 393.

85 Eg Pipkin, *supra* n. 16, 265ff; J. Carlin, 'What Law Schools Can Do About Professional Responsibility' (1971) 4 *Connecticut Law Review* 459; M. Robertson, 'Challenges in the Design of Legal Ethics Learning Systems: An Educational Perspective' (2005) 8 *Legal Ethics* 222, 234. Some are even pessimistic about changing attitudes and preventing professional misconduct: D. Webb, 'Ethics as a Compulsory Element of Qualifying Degrees: Some Modest Expectations' (2001) 4 *Legal Ethics* 109; E. Schnapper, 'The Myth of Legal Ethics' [1978] *American Bar Association Journal* 202, 205; A. Evans in H. Brayne, N. Duncan & R. Grimes (eds), *Clinical Legal Education: Active Learning in Your Law School* (Blackstone Press Ltd, London, 1998), 268. For an overview of the debate, see J.E. Moliterno, 'An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere' (1991–2) 60 *University of Cincinnati Law Review* 83, 94ff.

86 But see Watson, *supra* n. 44, 249; A. Stone, 'Legal Education on the Couch' (1971) 85 *Harvard Law Review* 392, 422; W.E. Burger, 'The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility' (1980) 29 *Cleveland State Law Review* 377, 388; R. Wasserstrom, 'Legal Education and the Good Lawyer' (1984) 34 *Journal of Legal Education* 155, 160.

87 Higgins *et al*, *supra* n. 74, 110; C.A. Cunningham, 'A Certain and Reasoned Art, The Rise and Fall of Character Education in America' in Lapsley and Power, *supra* n. 32, 188.

88 *Supra* at n. 19.

instruction and involvement in community projects, can have a lasting effect.⁸⁹ Admittedly, as already noted,⁹⁰ moral reasoning does not necessarily translate into behaviour. However, there is some, albeit weak, connection between the two.⁹¹ And, if moral reasoning continues to develop at university why not other psychological components? In fact, research indicates a 'college effect' on moral sensitivity and the related capacity for moral imagination.⁹² Similarly, university provides ideal opportunities for the development of self-identity, which is so crucial to moral character, particularly as tertiary education tends to postpone important character forming events like marriage and career choice.⁹³

The potential for law schools to influence character development is further enhanced by the fact that, even if the self-identity and moral character of incoming law students are fairly well-formed, they will only have developed in relation to the sort of moral issues that arise in the family, friendships, school, sport, etc. Without exposure to the realities of legal practice, the type of ethical issues it raises and the moral considerations relevant to their resolution, students will have not begun to develop the professional identity, moral judgment and instinctive, spontaneous and habitual responses to professional moral problems that make lawyer morality much more likely. In other words, while they might have a developed *personal* moral character, they have yet to develop a *professional* moral character. And, as law teachers generally are the first to introduce them to the legal world, they have a unique opportunity to influence this process.⁹⁴

In terms of the above empirical research and commonsense 'armchair psychology',⁹⁵ Kupperman's three-stage view of character development seems plausible. He hypothesises that the outlines of character are formed in childhood. This character is then fine-tuned and filled out in late adolescence and early adulthood character. Finally later adulthood involves further fine-tuning, along perhaps with attempts at revision. If accurate, this suggests that law schools may help students begin to develop the professional moral

89 Eg Abramson, *supra* n. 51; Rest and Narvaez, *supra* n. 30, *passim*; A.G. Lind, 'Educational Environments which Promote Self-Sustaining Moral Development', Paper presented at E Division, American Educational Research Association April 1996, http://www.uni-konstanz.de/ag-moral/pdf/Lind-1996_Selfsustaining-moral-development.pdf.

90 *Supra* at n. 31.

91 Rest *et al*, *supra* n. 30, 80ff; S. Thoma, 'Moral Judgments and Moral Action: Establishing the Link between Judgement and Action' in Rest and Narvaez, *supra* n. 30; A. Blasi, 'Bridging Moral Cognition and Moral Action: A Critical Review of the Literature' (1980) 88 *Psychological Bulletin* 1.

92 See J.W. Brandenberger, 'College, Character and Social Responsibility, Moral Learning Through Experience' in Lapsley and Power, *supra* n. 32; M.J. Bebeau, 'Influencing the Moral Dimensions of Dental Practice' in Narvaez and Rest, *supra* n. 30. See also regarding general moral development, M.L. Davidson, 'Harness the Sun, Channel the Wind, The Art and Science of Effective Character Education' in *ibid*, 223

93 Stone, *supra* n. 82, 398–400; Watson, *supra* n. 44, 250.

94 N. Redlich, 'Professional Responsibility of Law Teachers' (1980) 29 *Cleveland State Law Review* 623, 624.

95 Cf D. Luban *Lawyers and Justice: An Ethical Study* (Princeton, NJ, Princeton University Press, 1988), 69.

character which fills in the details relevant to legal practice left untouched by personal moral character.

At the same time, without the sort of life-changing events experienced by those like St Francis and John Profumo, radical character transformation at university is unlikely. Students predisposed to immoral behaviour will not suddenly develop a moral conscience. And, unfortunately, research indicates that incoming law students are not predominantly altruistic, justice-oriented individuals.⁹⁶ On the other hand, research also suggest that law schools do influence students' social conscience, albeit currently in a negative direction,⁹⁷ whereas many law teachers report that there are students who can be encouraged and guided to adapt what is virtuous in everyday life to professional life.⁹⁸

Given that students will differ as to the content and obduracy of their moral outlook, we might usefully distinguish between different 'ideal types' of students. While it is probably true to say that certain predispositions, such as those of lying cheating and bullying, are almost universally regarded as immoral, the contestability of moral values means that beyond this one can only classify students according to the extent to which acting morally (however it is defined) matters to them. Using these criteria of universally accepted immorality and degree of moral motivation, one might subdivide law students into:

- *The Sinners*: a very small group, who are already inclined to lie, cheat, bully and oppress others in the service of their clients⁹⁹ and themselves;
- *The Saints*: a relatively small group of students with already developed virtuous characters in the sense that they value morality and tend to act accordingly;
- *Thatcher's Children*: possibly the largest group—they are not incorrigibly bad but tend towards amorality and the pursuit of self-interest;
- *The Moral Innocents*: probably the second biggest group—with the right conditions they may develop a sense of ethical professionalism, but otherwise are likely to adopt the current norms of amoral professionalism.

In addition to the extent to which students are already motivated to place moral considerations above others, one needs to take into account the degree to which their current dispositions are open to influence. Here, it is probably true to say that the 'Sinners' are unlikely to be subject to influence (though they might come to justify their current personal morality in terms of a 'hired gun' role morality). Similarly, given that the 'Saints' already value morality,

⁹⁶ n. 23, *supra*.

⁹⁷ n. 24, *supra*.

⁹⁸ See at nn 124 and 138, below.

⁹⁹ Admittedly, such behaviour is arguable a morally justified position (see eg Nicolson and Webb, *supra* n. 1, chs 6–8), but only if adopted after due reflection rather than as self-serving justification.

they require only to be guided as to what virtue entails in legal practice. Consequently, law schools have a good chance of providing the foundation for helping this group develop a commendable professional moral character. With regard to the other two groups, much will depend on the extent to which each individual's character is fixed on entering university, on the one hand, and the nature and intensity of ethical education, on the other. Unless students are particularly open to character development and are exposed to long-standing and highly effective educational programmes, one might predict that there is some chance of encouraging the 'Moral Innocents' to take ethics seriously, but little with 'Thatcher's Children'.

It would thus seem that the number of students whose moral characters can be influenced towards that of ethically aware and morally committed professionals is somewhat limited. However, at the same time, it is possible that starting even a small group on the road to ethical professionalism will have a knock-on effect. Students who have already commenced the journey might encourage newer colleagues to join them, whereas those in practice may provide both encouragement and role models for similarly disposed neophytes. This, in turn, may water down the generally amoral environment of legal practice and perhaps also lead to areas of practice or isolated environments within practice, such as ethical discussion groups,¹⁰⁰ which provide sustenance and support for ethical professionalism. As research shows, those who display moral character tend to be involved in ongoing relationships with others who challenge, and thus sustain and expand, their sense of morality.¹⁰¹

Reforming Legal Education

The Ideal

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

As regards illuminating professional ethics, while it is not inappropriate to continue teaching the formal rules in the vocational stage, students should be exposed to legal ethics literature in the academic stage so that they first develop the ability to critically evaluate these rules and their underlying professional role morality, apply them in ways which are sensitive to the contexts of legal practice and fill in the gaps where they are silent, vague or

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

101 See Brandenberger, *supra* n. 92, 316.

conflicting. This literature is best understood if supported by an introduction to its philosophical underpinnings and the institutional setting in which lawyers operate.¹⁰² Students will be better equipped to evaluate current professional rules and roles if they appreciate the limitations of their underlying ethical theories. Furthermore, engaging with ethical theory may encourage clarity of thought and expression, force students to examine their instinctive responses to ethical dilemmas, inspire some to take ethics seriously and guide the decision-making of those already converted.¹⁰³ Exposure to the institutional context enables students to better appreciate legal ethics debates and helps prepare them for the realities of practice. Thus existing coverage of the adversarial system, the legal profession and access to justice needs to be augmented by exposure to the ways in which the increasing specialisation, fragmentation, bureaucratisation, commercialisation and globalisation of legal practice affect lawyers' ability to act ethically¹⁰⁴ and how professional regulation might be reformed to enhance ethical behaviour.¹⁰⁵

While the professional norms and their philosophical and institutional contexts can be taught in traditional lecture format, interactive teaching methods are more likely to inspire and help students develop their own moral stance. Here, Socratic dialogue, preferably in small classes, may not only produce deeper understanding of issues through exposure to a plurality of views and develop moral judgment,¹⁰⁶ but also encourage students to see ethical dialogue and reflection as a normal part of legal work.¹⁰⁷ In addition, academic debates can be brought to life by exposure to legal biographies, fictional accounts of legal practice in literature, films and television¹⁰⁸ or even vignettes scripted and filmed by academics,¹⁰⁹ and the personal accounts of

102 Boon, *supra* n. 5, 58; Boon and Levin, *supra* n. 1, 176; Goldsmith, *supra* n. 22, 10; Myers, *supra* n. 5; Nicolson and Webb, *supra* n. 1; Webb 1996, *supra* n. 8, 277–8; D.T. Link 'The Pervasive Method of Teaching Ethics' (1989) 39 *Journal of Legal Education* 485, 487; I. Johnstone and M.P. Treuthart, 'Doing the Right Thing: An Overview of Teaching Professional Responsibility' (1991) 41 *Journal of Legal Education* 75, 83–6; D. Nicolson, 'The Theoretical Turn in Professional Legal Ethics' (2004) 7 *Legal Ethics* 17.

103 See eg D.M. Rosenthal and F. Shehardi (eds), *Applied Ethics and Ethical Theory: Ethics in a Changing World* (Salt Lake City, University of Utah Press, 1988); D. Luban, 'Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics' (1981) 40 *Maryland Law Review* 451, 475

104 See n. 45, *supra*.

105 Nicolson and Webb, *supra* n. 1, ch. 4; Boon and Levin, *supra* n. 1, chs 4–5; J. Webb and D. Nicolson 'Institutionalising Trust: Ethics and the Responsive Regulation of the Legal Profession' (1999) 2 *Legal Ethics* 148; M. Davies, 'The Regulatory Crisis in the Solicitors' Profession' (2003) 6 *Legal Ethics* 185.

106 Webb 1998a, *supra* n. 8, 148.

107 Nicolson and Webb, *supra* n. 1, 288.

108 See Johnstone and Treuthart, *supra* n. 102, 100–1; C. Menkel-Meadow 'The Sense and Sensibilities Of Lawyers: Lawyering in Literature, Narratives, Film and Television, and Ethical Choices Regarding Career and Craft' (1999) 31 *McGeorge Law Review* 1, 61, 64–6, Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics (2000) 69 *Fordham Law Review* 787.

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

local lawyers, clients and those affected by lawyer behaviour.¹¹⁰ Not only does narrative readily engage the imagination, but real or fictional legal heroes may inspire students,¹¹¹ while villains may bring home the unattractiveness of immoral behaviour.

When it comes to developing students' cognitive abilities to identify and resolve legal ethics issues, hypothetical ethical dilemmas may be useful. However, role plays and simulations are more likely to be effective in engaging their interest and emotions, introducing them to law's human dimension and requiring greater attention to context.¹¹² Active or experiential learning, in which students engage in roles, is said to have numerous educational advantages, particularly for the purposes of character development. Thus, where student experiences are more personal, immediate and realistic, and relate to the fulfilment of their future social roles, learning is more profound and likely to lead to greater self-knowledge.¹¹³ In addition, critical evaluation of performance by self and others in class and self-reflective journals may enhance understanding and develop the life-long learning skills of the reflective practitioner.¹¹⁴ The 'disorienting moments'¹¹⁵ or 'moral crises' which occur when prior assumptions and settled values jar with experienced reality in role plays and simulations may stimulate an 'engaged moral faculty',¹¹⁶ whereas reciprocal role-playing encourages participants to see issues from the 'other side', thus hopefully developing empathy. Finally, the collaboration required in role plays and simulations may combat the individualism and competitiveness so pervasive in law school.

Whereas 'fishbowl' role plays¹¹⁷ involving a few students can be conducted in front of large classes, which then discuss their performance, they are obviously better conducted in small groups so that, as in simulations, all students can participate. Moreover, simulations are preferable to role plays because students are more likely to emotionally invest in their role when the results 'count'. Where simulations are on-going and particularly where linked

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

111 Link, *supra* n. 102, 487-8; J. Mixon and R.P. Schuwerk, 'The Personal Dimensions of Professional Responsibility' (1995) 58 *Law and Contemporary Problems* 87.

112 See Lind, *supra* n. 89; N.A. Sprinthall, 'Counselling and Role Taking: Promoting Moral and Ego Development' in Rest and Narvaez, *supra* n. 30; Richards, *supra* n. 51. But cf W.Y. Penn, 'Teaching Ethics—A Direct Approach' (1990) 19 *Journal of Moral Education* 124, who argues that direct teaching is more effective.

113 See F. Bloch, 'The Andragogical Basis of Clinical Legal Education' (1982) 35 *Vanderbilt Law Review* 321 on the characteristics of adult learning.

114 See Aiken, *supra* n. 19; Webb 1998b, *supra* n. 8, 289-90; P.J. Spiegelman, 'Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web' (1988) 38 *Journal of Legal Education* 243; H. Lesnick, 'Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum' (1990) 37 *UCLA Law Review* 1157, 1184-5.

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

116 Webb, 1998b, *supra* n. 8, 290.

117 Cf Spiegelman, *supra* n. 114, 259.

to skills training, they may more accurately reflect practice, in which ethical questions of how to treat clients, other lawyers, court officials and third parties in a decent, honest and preferably also empathetic and caring way arise on a daily basis, rather than as the sort of isolated, dramatic and often irresolvable ethical dilemmas presented in hypotheticals and role plays.¹¹⁸

However, it is generally accepted¹¹⁹ that the benefits of active, experiential learning are best obtained in live-client clinics.¹²⁰ By engaging with actual clients, students are far more likely to develop empathy and emotional maturity. Lessons learnt are likely to go deeper when students bear responsibility for decisions which have consequences in the 'real' world. Whereas students might undervalue courses which abjure the 'hard' intellectual skills of legal analysis in favour of playing at being lawyers, not to mention reading, watching or listening to stories about lawyers,¹²¹ the presence of flesh and blood clients with actual problems is likely to make learning seem more useful than traditional legal education. Crucially, as we have seen,¹²² any feelings of satisfaction or regret at their actions in representing actual clients and resolving real dilemmas may affect character development, whereas involvement in community work contributes to moral development.

Law clinics have other advantages. Dilemmas arise in a realistic manner and must be resolved without the luxury of 'quiet and careful deliberation'.¹²³ Because of their perceived practical knowledge and skills, clinic supervisors may function as influential moral exemplars, modelling good client relations, concern for how their actions affect others, and an altruistic commitment to the community. In addition, perhaps most importantly, clinics reveal the extent of unmet legal need, and social and legal injustice, that legal practice can involve helping others, and that this can be rewarding as well as intellectually challenging. My own and others' experience suggests that this may inspire, or at least reinforce, altruistic aspirations in students.¹²⁴

118 Moliterno, *supra* n. 85, 107–8, 117–8; S.J. Burnham, 'Teaching Legal Ethics in Contracts' (1991) 41 *Journal of Legal Education* 105, 105, 108; M.A. Noone and J. Dickson, 'Teaching Towards a New Professionalism: Challenging Law Students to become Ethical Lawyers' (2001) 4 *Legal Ethics* 131, 135.

119 But see at n. 145, below.

120 See eg Aiken, *supra* n. 19, 47; Boon, *supra* n. 5, 60; Webb, 1998b, *supra* n. 8, 296; D.L. Rhode, 'Into the Valley of Ethics: Professional Responsibility and Educational Reform' (1995) 58 *Law and Contemporary Problems* 139, 141. See, more generally, Condlin, *supra* n. 84, 320–24; Duncan, *supra* n. 10; Luban, *supra* n. 68; Luban and Millemann, *supra* n. 36; M. Jewell, 'Teaching Law Ethically: Is It Possible?' (1984) 8 *Dalhousie Law Journal* 474, 507–10; T. Glennon, 'Building an Ethic of Responsibility' (1991–2) 43 *Hastings Law Journal* 1175.

121 See Koniak and Hazard, *supra* n. 19, 120.

122 See, respectively, text accompanying nn 68 and 89, *supra*.

123 Robertson, *supra* n. 85, 232.

124 Q. Johnstone, 'Law School Legal Aid Clinics' (1951) 3 *Journal of Legal Education* 535, 537; M. Rees, 'Clinical Legal Education: An Analysis of the University of Kent Model' (1975) 12 *Law Teacher* 125 136; M. Guggenheim, 'Fee-Generating Clinics: Can We Bear the Costs?' (1995) 1 *Clinical Law Review* 677, 683; M.J. Kotkin, 'The Law School Clinic: A Training Ground for Public Interest Lawyers' and S. Maresh, (1997) 'The Impact of Clinical Legal Education on Decisions of Law Students to Practice Public Interest Law' in J. Cooper and L.G. Trubek (eds) *Educating for Justice*:

However, even those who recommend clinics as the most effective vehicle for ethical development believe that other forms of ethics teaching should come first.¹²⁵ And here the consensus is that, while certain issues of 'macro ethics', such as the impact and appropriateness of the adversary system and problems with access to justice can be discussed in existing courses and ethical theory in jurisprudence courses, law schools ought to teach ethics both pervasively *and* in compulsory dedicated courses.¹²⁶

Addressing ethical issues as and when they arise throughout the curriculum redresses their current marginalisation, and demonstrates that they are integral to legal practice and vary according to contextual factors, such as the practice setting, the type of case and the client's status.¹²⁷ On the other hand, as Bundy argues 'by giving the pieces of legal ethics a home everywhere, it effectively deprives its core concepts of a home anywhere ...'.¹²⁸ There is therefore a need for in-depth analysis in a dedicated course of overarching theoretical and institutional issues, and multi-dimensional and interdependent substantive issues like confidentiality and conflicts of interest. Another problem with teaching professional ethics pervasively is that non-specialists may teach it in the same legalistic manner as traditional law teaching. Moreover, even well-intentioned academics might cut corners to ensure adequate coverage of their specialist topics, whereas hostile teachers may simply ignore ethical issues or make clear their disdain for having to waste precious time.¹²⁹ Against the background of the hidden curriculum, this is likely to encourage students to respond to ethical interludes with dropped pen and raised eyebrow.¹³⁰

The Possible

However, while in an ideal world law schools would teach ethics pervasively, as well as in dedicated courses, support expository teaching with critical discussion, role plays, simulations and clinical experience, this seems a distant

Social Values and Legal Education (Aldershot, Ashgate, 1997); I. Styles, and A. Zariska 'Law Clinics and the Promotion of Public Interest Lawyering' (2001) 19 *Law in Context* 65; K. Tranter 'Pro-Bono Ethos: Teaching Legal Ethics' (2002) 29 *Brief* 12, 13.

125 Duncan, *supra* n. 10, 229; Luban and Millemann, *supra* n. 36, 14–15; O'Dair, *supra* n. 1, 128; Webb 1996, *supra* n. 8, 294, 1998b, *supra* n. 8, 296.

126 See Nicolson and Webb, *supra* n. 1, 287–8; O'Dair, *supra* n. 2; Webb 1996, *supra* n. 8, 292–4, 'Developing Ethical Lawyers: Can Legal Education Enhance Access to Justice?' (1999) 33 *Law Teacher* 284, 293–4; A Paterson, 'Legal Ethics: Its Nature and Place in the Curriculum' in Cranston, *supra* n. 1. On the relative merits and drawbacks of pervasive versus dedicated ethics teaching, see further eg Boon and Levin, *supra* n. 1, 164–5; Chapman, *supra* n. 8, 81–2; Moliterno, *supra* n. 85, 119–21; Webb 1998b, *supra* n. 8, 290–1; M. Daly, B.A. Green and R.G. Pearce, 'Contextualizing Professional Responsibility: A New Curriculum For a New Century' (2004) 58 *Law and Contemporary Problems* 193, 197–8.

127 Cf Nicolson and Webb, *supra* n. 1, esp. chs 8–10.

128 S. M. Bundy, 'Ethics Education in the First Year: An Experiment' (2004) 58 *Law and Contemporary Problems* 19, 33.

129 Cf Luban and Millemann, *supra* n. 36, 39.

130 Cf Koniak and Hazard, *supra* n. 19, 120; R.W. Gordon, 'Lawyers, Scholars and the "Middle Ground"' (1993) 91 *Michigan Law Review* 2075, 2108 n.81.

dream in the current university climate.¹³¹ Academics, quite understandably,¹³² zealously guard their autonomy from outside interference. And, given the space taken up by the profession's dictation of the 'core', the argument for another compulsory course and/or for all courses to have a compulsory ethical element is likely to fall on deaf ears. There are already other more popular candidates for new compulsory subjects (such as evidence, unjust enrichment, the law of persons) or pervasive teaching (such as human rights, gender and race). Moreover, given the current 'publish or perish' pressure and the increasingly managerialist nature of universities, it is unreasonable to expect all law teachers to gain the necessary background knowledge and to rethink their courses in order to teach ethics pervasively,¹³³ while preventing omissions and overlaps requires considerable co-ordination efforts.¹³⁴ Yet, as the US experience shows, even compulsory ethics courses will be of little value if taught by 'a reluctant cadre of junior faculty and outside lecturers' and come to be seen as the 'dog of the law—hard to teach, disappointing to take, and often presented to vacant seats or vacant minds'.¹³⁵

Accordingly, perhaps the most that can be achieved is for more and more individual academics to establish optional ethics courses or incorporate ethics into existing courses, whether they be on the legal process, legal theory, substantive law,¹³⁶ legal skills¹³⁷ or involve clinical legal education. Anecdotal evidence suggests that committed and enthusiastic teachers can inspire student interest in ethics.¹³⁸ Arguably, a few such teachers are more likely to have a positive effect than many teachers on compulsory courses raising ethical issues reluctantly, or with ill-disguised or open disdain. Moreover,

131 Cf Boon, *supra* n. 5, 63–4; O'Dair, *supra* n. 1, 130, *supra* n. 2, 314.

132 Of course this does not mean that the outcome of this exercise of autonomy is always justified.

As noted in the Introduction, academics can be said to failing students by not teaching ethics. Other objections to ethics teaching are even less justified. Eg, worries about indoctrination are undermined by the fact that black-letter law teaching is itself a sustained promotion of the status quo, and by the sensitivity to indoctrination on the part of campaigners for ethics teaching, not least because it is likely to be counter-productive (eg Johnstone and Treuthart, *supra* n. 102, 75–7; Spaeth, *supra* n. 109, 161–2; Webb, *supra* n. 85, *passim*).

133 Webb, *supra* n. 85, 118; J. Giddings, 'Teaching the Ethics of Criminal Law and Practice' (2001) 35 *Law Teacher* 161, 172. But cf contra O'Dair *supra* n. 1, 118.

134 Daly *et al*, *supra* n. 126, 198; Giddings, *ibid*, 173. But cf n. Tarr in Brayne *et al*, *supra* n. 85, 312–13 who regards any repetition as valuable in deepening understanding through multiple perspectives.

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

136 See eg Daly, *et al*, *supra* n. 126; Giddings, *supra* n. 133; C. Menkel-Meadow, and R.H. Sander, 'The "Infusion" Method at UCLA: Teaching Ethics Pervasively' (1995) 58 *Law and Contemporary Problems* 129.

137 See eg Wolfson, *supra* n. 109; P. Brest and L. Krieger 'On Teaching Professional Judgment' (1994) 69 *Washington Law Review* 527; J.E. Moliterno, 'Professional Preparedness: A Comparative Study of Law Graduates' Perceived Readiness for Professional Ethics Issues' (1995) 58 *Law and Contemporary Problems* 259.

138 Daly, *et al*, *supra* n. 126, 194; Giddings, *supra* n. 133, 177; Menkel-Meadow and Sander, *supra* n. 136, 136; Tranter, *supra* n. 124, 13; P.J. Schiltz, 'Legal Ethics in Decline: 'The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney' (1997–8) 82 *Minnesota Law Review* 705, 780. See also Webb 1998b, *supra* n. 8, 281.

students who become interested may raise ethical issues in other courses, thus encouraging ethics to spread throughout the curriculum.

Moral Character and the Extra-Curricular Law Clinic

If the aim of incorporating ethics into legal education has to rely on a gradual ripple effect, the sustained immersion in ethics, and the mentoring and supervised reflection required for character development seem to be an even more remote possibility. This is because relevant opportunities are only available in sophisticated and extended practice simulations or in live-client law clinics and both are highly resource-intensive as regards staff time and money. Possibly as a result, the development of extended simulations sufficiently sophisticated to raise ethical issues in a way to contribute has yet to get off the ground in the UK.¹³⁹ By contrast, live-client law clinics are becoming increasingly common, at least in England, and hence currently constitute the best hope for the sort of moral apprenticeship that character development requires.

However, in the rest of the article I will argue that most existing clinics are not oriented so as to fulfil this potential.¹⁴⁰ This is because they are tied to assessed courses and designed to achieve a number of educational goals, such as providing students with knowledge of how law actually operates and developing practitioner skills, though possibly also introducing students to professional ethics. Such educationally-oriented clinics have a number of distinct disadvantages as regards ethical development when compared with extra-curricular clinics like the University of Strathclyde Law Clinic.¹⁴¹ Here, the aim is to ensure social justice both directly through meeting the unmet legal needs of the community and indirectly through encouraging a new generation of lawyers motivated by the same goals, with educational development being a by-product of ensuring a quality service to clients rather than a direct goal.

One advantage of extra-curricular clinics likely to appeal to law schools currently put off by the perceived expense of live-client clinics is their relatively low running costs. Not having to maximise the learning experience involved in client representation or assess student performance, extra-curricular clinics avoid the low staff-student ratios considered essential to

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

140 This argument draws and builds upon D. Nicolson, 'Legal Education or Community Service? The Extra-Curricular Student Law Clinic' (2006) *Web Journal of Current Legal Issues*, <http://webicli.ncl.ac.uk/2006/issue3/nicolson3.html>.

141 See D. Nicolson 'Access to justice: the role of the University Law Clinic' (2007) *SCOLAG Special Issue, Paths to Justice* 18. For other extra-curricular clinics, see J. Griffiths-Baker, 'Ethical Education through the Student Law Clinic', (2002) *5 Legal Ethics* 24; C. Rochester, 'Legal advice as Student Community Action: The Case of the University of Bristol Law Clinic' (2002) *2 The Journal of the Institute for Volunteering Research* 71; www.swansealawclinic.org.uk.

clinical education.¹⁴² The Strathclyde Law Clinic further reduces costs by relying on students to play a central role in its running, not just in terms of day to day management, but even training and policy direction. Consequently, the Clinic has operated with the staff input of one part-time director and occasional legal advice from academics and local lawyers, and on a budget of around £5,000, though recently it has raised additional funds to pay for the increased supervision required by the constantly increasing demand for its services. For this expenditure of money and time, the Clinic accommodates over 160 students. Moreover, many will be involved for up to five years and therefore far more likely to start the process of professional moral character development than students in curricular clinics where involvement is usually limited to a semester or possibly two and thus arguably inadequate for sort of the moral apprenticeship.¹⁴³

This length of involvement means that Strathclyde students are also much more likely to encounter obvious ethical dilemmas like those involving immoral client ends or means, as well as the more subtle ethical issues of how to treat clients with consideration, sensitivity and respect which, as already noted¹⁴⁴ arise in every instance of client representation.¹⁴⁵ In addition, by placing responsibility on an elected student Advisory Committee to resolve ethical dilemmas raised by cases, the Clinic acts as a 'just community', which according to Kohlberg leads to a greater sense of commitment to the ethical solutions reached.¹⁴⁶ While, only about a tenth of Clinic students are involved at any one time, ethical decisions and the reasoning behind them are publicised to all members. Student involvement in clinic management and policy-making also has the benefit of students taking responsibility for and hence 'owning' its overall ethos. There is thus a strong feeling amongst Strathclyde Law Clinic members that clients and social justice should take precedence over their own educational needs—even to the extent of being suspicious of recent moves, discussed below, to link clinical work to educational goals. Such an attitude is likely to be enhanced by the example of staff and local lawyers who act as significant role models by giving up their own free time to help with advice and training. By contrast, using cases as educational tools might signal to students in curricular clinics that their own interests are predominant, and that clients are means to their (now educational but later commercial) ends rather than possibly vulnerable human beings with

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

143 Robertson, *supra* n. 85, 233.

144 Text accompanying n. 118, *supra*.

145 This meets the objection that clinics do not provide a sufficiently certain supply of ethical dilemmas: Moliterno, *supra* n. 85, who accordingly argues that ethical education is best achieved through simulations. Moreover, his argument that students only need one or two exposures to actual clients, ignores the fact that live-client clinics teach lessons about unmet legal need and legal justice, and hopefully inspire student altruism.

146 See text at n 59, *supra*.

pressing material and emotional needs.¹⁴⁷ This not only reduces the opportunity to encourage the development of the sort of ethical professionalism argued for in this article, but is likely to confirm the attitude of those already disinclined towards ethical altruism.

There is one respect in which well-resourced educationally-oriented clinics seem to have the edge over extra-curricular clinics. According to educational theory,¹⁴⁸ lessons learnt from experience are likely to be far more profound and sophisticated if accompanied by reflection on the experience through dialogue with others, especially those with relevant expertise and experience, and an exploration of relevant academic literature. *Prima facie*, educationally-oriented clinics seem better equipped in this regard, particularly as the close relationship between supervisors and student allows for ethical mentoring. On the other hand, the fact that most are also, if not predominantly, designed to teach legal skills and how law operates in practice, might result in time for reflection on ethical issues being squeezed in favour of what many staff and students regard as more profitable goals. This is particularly likely where supervisors are recruited from practice and have not themselves become persuaded to take ethics seriously. Indeed, in the US it is alleged¹⁴⁹ that ex-practitioners tend to model adversarial lawyering, competitiveness, insensitivity and client manipulation, which are precisely the types of behaviour which require to be challenged by ethical education.

But even if these worries do not materialise, educationally-oriented clinics are not necessarily superior to extra-curricular clinics in creating opportunities for ethical reflection. Not being required directly to pursue other educational goals, and being expressly required to balance service to individual clients with the needs of the community as a whole, Strathclyde supervisors must, and have more time to, deal with ethical issues as and when they arise. Moreover, extra-curricular clinics can be adapted to provide for opportunities for students to reflect on ethical issues without comprising their social justice and volunteerist ethos. Thus, in terms of what may be called a hybrid clinical model, Strathclyde students who have displayed a commitment to the Clinic and their cases can take a course which is designed primarily to allow them to reflect on the ethics and justice of practice and the interrelationship between

147 Boon, *supra* n. 5, 62; Evans, *supra* n. 85, 269. This is particularly so, if as some clinics stipulate, cases will be taken on only if they have and continue to have an educational benefit: cf K. Kerrigan and P. Plowden, 'Who Benefits?—Case Management and Clinical Education (1996) 30 *Law Teacher* 315, 316.

148 See eg the work of Kolb and Schön discussed in Brayne *et al*, *supra* n 85; Maharg, *supra* n 139. See also J Webb and C Maughan (eds) *Teaching Lawyers' Skills* (London, Butterworths, 1996), esp. chs 1, 3 5, 7 and 10; R. Neuman, 'Donald Schön, The Reflective Practitioner, and the Comparative Failures of Legal Education' (1999–2000) 6 *Clinical Legal Review* 401; C Maughan and J Webb, *Lawyering Skills and the Legal Process*, (Cambridge: Cambridge University Press, 2005), chs 1 and 2.

149 Condlin, *supra* n. 84, 'Clinical Education in the 70s: An Appraisal of the Decade', (1983) 33 *Journal of Legal Education* 604; "'Tastes Great, Less Filling": the Law School Clinic and Political Critique', (1986) 35, *Journal of Legal Education* 45; but cf N. Redlich, 'The Moral Value of Clinical Legal Education' (1983) 33 *Journal of Legal Education* 613 and the more sensitive style of teaching advocated in Brayne *et al*, *ibid*.

their personal and professional moral identities, but also helps them further develop their legal skills. At seminars they discuss set reading on issues of ethics and justice, using their own cases and a growing list of those dealt with by the Advisory Committee as a focus for debate, whereas in 'case surgeries' the ethical and practical implications of their existing cases are debated. Ethical reflection is further enhanced by keeping a reflective diary which is submitted for comments, to which students then respond, and by an assessed essay requiring them to explore the ethical implications of their cases. Student diaries and course evaluations clearly reveal that they are sensitised to ethical issues not previously contemplated to the extent that some have changed their ethical orientation and even career plans.

While this hybrid clinical model reverses received wisdom that clinical experience should follow ethical teaching,¹⁵⁰ it accords with adult learning theory, which holds that adults learn best by using theory to reflect on past and existing experiences in ways which prepare them for future social roles.¹⁵¹ Equally importantly, by first requiring students to display commitment to voluntary assistance, it avoids compromising the Clinic's goal of focussing on ensuring access to justice rather than students' educational needs, and hence maintains the secondary aim of encouraging students to see their professional obligations as including service to the community.

Conclusion

In this article I have argued that the development of moral character is the most assured way to ensuring that students go into practice willing to take ethics seriously, I have also argued that student participation in extra-curricular law clinics combined with ethical discussion in clinical or other courses is the most likely means of ensuring that at least some begin a process of professional character development which incorporates ethical professionalism. Admittedly, not everyone is convinced that clinics will have this effect. Evans has argued that they can only confirm students' pre-existing ethical orientations.¹⁵² However, his more recent research tentatively suggests otherwise,¹⁵³ and significantly he and others who have reported a neutral¹⁵⁴ or

150 See at n. 125, *supra*.

151 Bloch, *supra* n. 113.

152 *Loc cit* n. 85.

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

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

a negative¹⁵⁵ impact have not looked at students' long-term involvement in extra-curricular clinics. Moreover, as already noted,¹⁵⁶ anecdotal evidence suggests that those students who join clinics merely to gain skills or pad their CVs may become committed to serving those in need once they begin to appreciate the sort of problems many face and gain satisfaction from making a difference to the lives of others. This might, of course be exceptional and such students may quickly revert to a more self-centred orientation once in practice. On the other hand, the sense of satisfaction at helping solve the problems of those in need and making correct moral decisions or the feeling of regret at making wrong decisions, and the example of academics and practitioners themselves displaying a form of ethical professionalism might start a process of professional moral character development which equips young lawyers to resist the counter-pressures of modern practice or encourages them to practice in areas more amenable to ethical professionalism.

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

155 J. MacFarlane, 'Look Before You Leap: Knowledge and Learning in Legal Skills Education' (1992) 19 *Journal of Law and Society* 293, 306.

156 See *supra* n. 138.