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CONTENTS

v	EDITORIAL	<i>Professor Pat Leighton</i>
	ARTICLES	
1	The Role of Legal Education, Regulation and Government in Protecting Access to Justice	<i>Simao Paxi-Cato and Yvonne McDermott</i>
8	Access to Justice as a Threshold Concept	<i>Liz Heffernan</i>
17	Suppose the Class began the Day the Case Walked in the Door . . . Educating to Expand Access to Justice in the American First-Year Doctrinal Classroom	<i>Jennifer E Spreng</i>
33	Social Justice – Making it come alive and a reality for students, and enabling them to become engaged future ethical practitioners	<i>Elizabeth Curran</i>
48	Whose Access to Whose Justice? The Contextualisation of Administrative Law on Undergraduate Programmes	<i>Jenny Gibbons</i>
62	Studying Law in a Digital Age: Preparing Law Students for Participation in a Technologically-Advanced, Multidisciplinary and Complex Professional Environment	<i>Ann Thanaraj</i>
82	A Rosy-Fingered Dawn for Legal Education? Insights from a Corpus Linguistic Perspective on Text	<i>Jenny Kemp</i>

EDITORIAL

I am delighted to introduce this special edition of the Nottingham Law Journal (Volume 27(2)), which brings together contributions from the two recent Centre for Legal Education Conferences, hosted at Nottingham Trent University in 2015 and 2017. We welcomed academics, practitioners and students from across the world, who were warm and generous in sharing their research and expertise with everyone.

The theme of the 2015 Conference was ‘Legal Education and Access to Justice’. We open this edition of the NLJ with a keynote speech from the Conference, prepared by Simao Paxi-Cato and Yvonne McDermott, and presented on the day by Simao. Liz Heffernan offers a compelling argument for access to justice as a threshold concept in legal education, embedded in the first year curriculum. Jennifer Spreng follows this with her engaging account of an innovative Introduction to Civil Procedure module, which uses a complex simulation to provide an authentic context for law students. Liz Curran explores how ethics and values of law students can be reinforced by involving students in access to justice content, and clinical and legal practice experience. Jenny Gibbons asks the question ‘Whose access to whose justice’, investigating how ongoing changes in legal education and the globalisation of law impact upon the concept of access to justice and how it is framed in the undergraduate curriculum.

I had the privilege of providing the official Closing Remarks to this Conference.

First of all, can I say that the 2015 conference was not only truly international, raising some challenging as well as very important issues, but particularly welcome was the focus on the practical as well as wider policy issues concerning access to justice. The aims of the event were both fascinating and met. They were to ask how best to equip law students with an understanding of the issues surrounding access to justice, perhaps one of the most important matters for all law students. In 2015, we already had experience to draw on, such as the long-running Hillsborough disaster, but since then access to justice has become an even more pressing issue with continuing financial scandals, concerns around accountability, for example, for the Grenfell Tower fire, historic sexual abuse claims, along with UK government intervention in 2015 to make access to, say Employment Tribunals (ETs), if not impossible, certainly riddled with obstacles. The highest fees were imposed on the most serious claims, including equality claims and unfair dismissal. In 2015, we could see the dramatic impact of introducing fees and compulsory conciliation, with a 75% decline in claims

In June 2017, in perhaps one of the most important cases in English Law, the Supreme Court re-stated that access to justice is not just a matter for litigants but for justice itself and, importantly, for the development and clarification of law. Businesses, communities, governments as well as ordinary citizens are stakeholders in legal processes. In a strange way, the magnificent judgment of Baroness Hale in the ET case, was a very fitting response to much of the discussion at the 2015 Conference.

The theme of the 2017 Conference was ‘Legal Education and Technology’. We enjoyed an impressive diversity of papers, two of which are now presented here. Ann Thanaraj argues for the imperative of inculcating the theoretical knowledge and professional skills necessary for students to thrive in a multidisciplinary, global and technology-rich environment. Our final paper is Jenny Kemp’s fascinating account of the complex

process of language acquisition and the importance of incorporating corpus linguistic tools into legal education.

The role of research

One of the underpinning issues for both conferences was the availability of robust and relevant research: Research which really grapples with the issues, adopts appropriate methodologies and really informs us as to what is happening and its implications. Although research is established on the use of technology in legal education, not least as to how it can improve the learning process, research into access to justice has so often been undertaken by non-law academics. Of course, they have vested interest in the topic, but then so have we. It may be that our pre-occupation with the pathology of law-legal disputes, problem solving, critiques of case-law and legislation, as opposed to policy development and law making makes these contextual issue less attractive for research and writing. However, since 1993, the Legal Education Research Network (LERN) has aimed to support and equip law teachers in undertaking, especially, empirical research. Undertaking research can be quite daunting and it is rare for university law schools to run their own training programmes. LERN runs workshops, provides mentoring, a useful website and other facilities. Check it out at [Its website is kindly hosted by the Institute of Advanced Legal Studies.\(ials.sas.ac.uk/lern\)](http://ials.sas.ac.uk/lern)

I would like to extend my gratitude to all the contributors, reviewers, subscribers and readers of the Nottingham Law Journal. Particular thanks are extended to Jane Ching and Pamela Henderson, the guest editors for this edition of the journal, and to the regular editor, Janice Denoncourt, for her guidance and support. Finally, my sincere thanks to our administrative assistant, Kerri Gilbert, for her invaluable assistance.

PROFESSOR PAT LEIGHTON

ARTICLES

The address for submission of articles is given at the beginning of this issue.

We are delighted to publish this paper based on one of the keynote addresses at our 2015 conference.

THE ROLE OF LEGAL EDUCATION, REGULATION AND GOVERNMENT IN PROTECTING ACCESS TO JUSTICE

SIMAO PAXI-CATO and YVONNE MCDERMOTT***

The Legal Services Act 2007 introduced “improved access to justice” as one of eight regulatory objectives.¹ The term “access to justice” is difficult to define,² but at its most basic level, there are clearly two components. The first, the “access” part of access to justice, refers to the possibility of vindicating one’s rights through court or other processes if needed.³ In order to make court processes and other dispute resolution mechanisms accessible to all, the barriers to such processes – including financial, psychological, technical, and informational barriers – must be recognised and ameliorated.⁴ The second, the “justice” part, may refer to procedural justice – where like cases are treated alike, and in accordance with due process;⁵ to distributive justice – where resources are distributed equitably,⁶ or to substantive justice – where the outcome is fair and legitimate.⁷ Our focus in this paper is principally on the first prong – the “access” part of access to justice, but will address the second prong where relevant.

Of course, the two components of access to justice are not necessarily easy to separate – procedural justice, for example, touches on issues pertaining to accessibility of court procedures to litigants. In many ways, procedure is normatively prior to substantive

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¹ Legal Services Act 2007, s 1(1)(c). See further, Nick Robinson, ‘When Lawyers Don’t Get All the Profits: Non-Lawyer Ownership of Legal Services, Access, and Professionalism’ (2015) 29 *Georgetown Journal of Legal Ethics* 1, 18; John Flood, ‘The Re-Landscaping of the Legal Profession: Large Law Firms and Professional Re-regulation’ (2011) 59 *Current Sociology* 507.

² The term “access to justice” is attributed to Mauro Cappelletti, *Access to Justice* (Sijthoff/Noordhoff: Giuffrè Editore/Alphen aan den Rijn, 1978).

³ Mauro Cappelletti and Bryant G. Garth, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ (1978) 27 *Buffalo Law Review* 181, 182.

⁴ Gary Blasi, ‘Framing Access to Justice: Beyond Perceived Justice for Individuals’ (2009) 42 *Loyola Law Review* 913, 935.

⁵ HLA Hart, *The Concept of Law* (3rd ed, Oxford University Press, 2012) 164.

⁶ John Rawls, *A Theory of Justice* (revised edn, Harvard University Press, 1999), 4–7.

⁷ D J Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press, 1996).

rights,⁸ insofar as a right becomes illusory unless there are proper means to enforce and vindicate those rights. As Michael Mansfield QC has pointed out:

Access to justice is a much broader concept than access to the courts and litigation. It encompasses a recognition that everyone is entitled to the protection of the law and that rights are meaningless unless they can be enforced. It is about protecting ordinary and vulnerable people and solving their problems.⁹

In this paper, we argue that legal education, regulation and government each have an important role to play in protecting access to justice. We examine the place of law school initiatives in promoting access to justice, and how attitudinal approaches within legal education can have a lasting and very real impact on litigants' access to justice mechanisms. We also discuss how regulation, including the so-called "cab rank rule" can promote access to justice, as well as the role of governmental policies on individuals' abilities to vindicate their rights and/or resolve disputes through proper legal remedies.

This study is particularly timely, given the cuts to legal aid imposed by the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 and changes to the costs regime for civil litigation. In 2014, the Law Society estimated that up to 600,000 litigants could not access civil legal aid as a result of these changes, and that lawyers were more reticent to become involved with low-value, complex cases.¹⁰ The areas that were worst affected by these changes included family law (with the exception of domestic violence cases); welfare law; immigration law and housing law, and as such, some of the most vulnerable members of society were affected.¹¹ *Pro bono* legal services, such as citizens' advice bureaux and law centres, have been expected to do more with less.¹²

LEGAL EDUCATION

The role of legal education, at its most basic, is to provide students with the foundations of legal knowledge and the skills that will stand them in good stead in their later professional lives, regardless of their ultimate career paths. The Legal Education and Training Review (LETR), completed in 2013, identified the need for legal education to provide students not just with academic and research skills, but also to "clinical skills", defined as "a general familiarity in law with professional legal processes and office skills and . . . a broader understanding of the professional context within which a task is located".¹³ The report noted a general lack of knowledge of what "real legal work in an office environment" entailed.¹⁴ Access to justice requires access to the legal professionals who will ultimately defend the claimant's right to justice. Without competent lawyers, test cases could not be identified and individuals may not be made aware of any legal remedies that might be available to them, and the time limit to bring cases

⁸ Paul Roberts, 'The Priority of Procedure and the Neglect of Evidence and Proof' (2015) 14(2) *Journal of International Criminal Justice* 479; Yvonne McDermott, *Fairness in International Criminal Trials* (Oxford University Press, 2016), 26.

⁹ Jon Robins, 'Access to justice is a fine concept. What does it mean in view of cuts to legal aid?' *The Guardian*, 6 October 2011.

¹⁰ Andrew Caplan, 'Access to Justice Day' (Law Society of England and Wales, 8 September 2014) <<http://www.lawsociety.org.uk/news/speeches/access-to-justice-day/>> accessed 14 May 2018.

¹¹ Justice Select Committee, 'Impact of Changes to Civil Legal Aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 – Justice' (2015) <<https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/31102.htm>> accessed 14 May 2018; Conclusions and Recommendations, para. 11.

¹² *Ibid.*, para. 5.

¹³ Julian Webb and others, 'Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales' (2013) <<http://letr.org.uk/the-report/index.html>> accessed 14 May 2018, para. 478.

¹⁴ *Ibid.*

in, if applicable. Thus, legal education plays a key role in ensuring access to justice by creating the skilled legal professionals of the future who will represent litigants.

Moreover, perhaps, legal professionals must be willing to represent litigants from a broad range of backgrounds. There is a danger, however, that students may not be aware of training opportunities outside of the commercial legal sphere or with the largest city law firms. While law schools have a role in informing students about alternative legal careers,¹⁵ and professional legal training could do more to teach future practitioners about the funding of litigation, there is a broader issue on the cost of education. The average law graduate can expect to have to repay over £90,000 of student loans, not including any commercial loans that they may have taken out at less favourable rates to pay for professional training.¹⁶ Young Legal Aid Lawyers, in their 2013 *One Step Forward, Two Steps Back* report, found that high levels of debt made legal aid work unsustainable for lawyers from lower socio-economic backgrounds.¹⁷ Unlike the United States of America, where new graduates can avail of loan waivers if they take on public interest work,¹⁸ graduates from British law schools are not incentivized to carry out *pro bono* activity in exchange for a fee waiver.

While access to justice may not form part of the curriculum in many undergraduate law degrees,¹⁹ a new wave of extra-curricular student projects and co-curricular activities play a crucial role in ensuring justice for all, as well as providing students with invaluable practical experience. Many law schools in the United Kingdom are home to StreetLaw projects, which aim to inform members of the public of their rights under the law. Students deliver presentations to community groups to provide information about the law to members of the public who would not otherwise have access to legal education.²⁰ A large number of UK law schools also host miscarriages of justice projects, which carry out reviews into cases of alleged wrongful convictions. In recent years, there has been an astronomic rise of legal clinics within law schools, providing free legal advice to members of their local communities.²¹ Courtroom closures may see an increase in trials being held in university courtrooms designed for mock trials.²² Law schools have become increasingly responsive to the needs posed by cuts to legal aid – Keele University, for example, founded the Community Legal Outreach Collaboration Keele (CLOCK) project in 2012, which trains students to become legal companions to litigants in person.²³ While legal companions do not offer legal advice, they can

¹⁵ A number of universities host “Alternative Law Fairs”, where law firms, *pro bono* organisations and charities talk to students about alternative legal careers.

¹⁶ Claire Crawford and Jin Wenchao, ‘Payback Time? Student Debt and Loan Repayments: What Will the 2012 Reforms Mean for Graduates?’ (Institute for Fiscal Studies 2014) IFS Report R93 <<https://www.ifs.org.uk/comms/r93.pdf>> accessed 14 May 2018, 38–42. At the time of writing, fees for the Bar Professional Training Course varied from between £13,800 and £18,500, depending on the provider. The Legal Practice Course typically costs between £10,000 and £15,000, again depending on the provider.

¹⁷ Young Legal Aid Lawyers, ‘Social Mobility & Diversity in the Legal Aid Sector: One Step Forward, Two Steps Back’ (Young Legal Aid Lawyers 2013) <<http://www.younglegalaidlawyers.org/sites/default/files/One%20step%20forward%20two%20steps%20back.pdf>> accessed 14 May 2018, paras. 36–51.

¹⁸ Deborah L. Rhode, ‘Access to Justice: An Agenda for Legal Education and Research’ (2012–2013) 62 *Journal of Legal Education* 531, 539–540.

¹⁹ *Ibid.*, 545.

²⁰ For more information on the StreetLaw project, see further, Richard Grimes, ‘Legal Literacy, Community Empowerment and Law Schools—Some Lessons from a Working Model in the UK’ (2003) 37(3) *The Law Teacher* 273.

²¹ Orla Drummond and Gráinne McKeever, ‘Access to Justice through University Law Clinics’ (Ulster University Law School/Legal Education Foundation 2015) <https://www.ulster.ac.uk/_data/assets/pdf_file/0003/132654/Access-to-Justice-through-Uni-Law-Clinics-November-2015.pdf> accessed 14 May 2018.

²² Tom Whitehead, ‘Criminal trials to be held in universities after closure of one in five courts’, *The Telegraph*, 11 February 2016, available online at <http://www.telegraph.co.uk/news/uknews/law-and-order/12152716/Criminal-trials-to-be-held-in-universities-after-closure-of-one-in-five-courts.html>, last accessed 14 May 2018.

²³ Keele University, ‘Community Legal Outreach Collaboration Keele (CLOCK)’ (*Keele University*) <<https://www.keele.ac.uk/law/legaloutreachcollaboration/>> accessed 14 May 2018.

signpost further avenues for legal support, and also provide practical support to litigants in person, by assisting them with form-filling, note-taking, and practical support. The CLOCK initiative has now been rolled out across the United Kingdom, with partner law schools in Brighton, Liverpool, Essex, Birmingham, and elsewhere.²⁴ Clinical legal education can also be developed to address specific unmet legal needs – for example, the Children’s Legal Centre at Swansea University was developed in recognition of the fact that Wales was the only nation in the United Kingdom to not have a dedicated children’s rights law advisory service, despite significant developments in devolved Welsh legislation on children’s rights.²⁵

REGULATION

Early legal positivist philosophers argued that the normativity of law derived from its essential coercive features.²⁶ Whilst others have argued that coercion plays a marginal role in law fulfilling its social function,²⁷ it is clear that (assuming that justice is inherent in laws, customs and practices), laws must be followed, and this where the regulation of lawyers plays an important part.

The role of legal regulation in ensuring access to justice is clear from the foreword to the second edition of the Bar Standards Board Handbook:

Justice requires that people appearing before a court should have a fair hearing. This in turn means that they should be able to have their case presented by skilled advocates who will do so fearlessly, independently and in the best interests of their client.²⁸

To this end, the Handbook contains a number of Core Duties expected of barristers, including the duty to act with honesty and integrity,²⁹ to provide a competent standard of work and service,³⁰ and to observe their duty to the court in the administration of justice.³¹ These duties are also incumbent on solicitors, and are reflected in the Solicitors Regulation Authority handbook.³²

The so-called “Cab Rank Rule” plays an important part in ensuring that even unpopular clients can secure legal representation. Akin to the manner in which a cab driver cannot (subject to limited exceptions) refuse to carry a passenger, lawyers may not withhold their services on grounds that are “inherently inconsistent with their role in upholding access to justice and the rule of law”.³³

²⁴ Keele University, ‘Keele’s Legal Outreach Initiative Goes National to Tackle Legal Aid Cuts’ (*Keele University*). <<https://www.keele.ac.uk/pressreleases/2015/keelelegaloutreachinitiativegoesnationaltotacklelegalaidcuts.php>> accessed 14 May 2018.

²⁵ The Rights of Children and Young Persons (Wales) Measure 2011, 2011 nawm 2, requires Welsh Ministers, whenever they exercise their functions, to have due regard to the requirements of the UN Convention on the Rights of the Child. More information on the Children’s Legal Centre and Swansea University’s clinical legal education initiatives can be found online at Swansea University, ‘The Swansea University Legal Centre’ (*Swansea University*) <<http://www.swansea.ac.uk/law/legalcentre/>> accessed 14 May 2018.

²⁶ John Austin, *The Province of Jurisprudence Determined* (first published 1832, revised edn. Weidenfeld & Nicolson, 1954).

²⁷ HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press, 1994) 82.

²⁸ Sir Andrew Burns, Chair of the Bar Standards Board, ‘Foreword’, Bar Standards Board, *The Bar Standards Board Handbook* (2nd edn, Bar Standards Board 2015) <https://www.barstandardsboard.org.uk/media/1731225/bsb_handbook_sept_2015.pdf> accessed 14 May 2018.

²⁹ ‘The Core Duties’ in *Ibid*, 22, Core Duty 2.

³⁰ *Ibid*, Core Duty 7.

³¹ *Ibid*, Core Duty 1.

³² Solicitors Regulation Authority, ‘SRA Handbook’ (Solicitors Regulation Authority 2017) Version 19 <<http://www.sra.org.uk/solicitors/handbook/welcome.page>> accessed 14 May 2018, Part 1: SRA Principles.

³³ *The Bar Standards Board Handbook* (n 28), 43, ‘Guidance on Rule C28’.

This rule is particularly pertinent today, where traditional media and social media alike can be used to vilify particular defendants or litigants.³⁴ The Bar Standards Handbook makes it clear that a barrister must not withhold his or her services on the grounds that the case is somehow objectionable to the barrister or to the public, nor can such services be withheld solely because the client's views, opinions, or conduct are deemed objectionable either to the individual barrister or to the wider public.³⁵

The sole difference between the Cab Rank Rule as it applies to cab drivers and to barristers is that, in the legal context, the Rule does not operate to limit client choice. While the customer waiting for a cab must take the first driver in the queue at the cab rank, and the cab driver cannot refuse his or her services, the client searching for a lawyer may choose any competent lawyer to represent them. The Cab Rank Rule denies individuals and organisations exclusivity to the best talent at the independent Bar simply because of their greater financial resources.

The requirement not to discriminate between clients goes much further than the general duty under equality legislation not to discriminate on the grounds of age, disability, gender reassignment, marital status, pregnancy and maternity, race, religion, sex, or sexual orientation.³⁶ The obligation not to discriminate in the provision of legal services applies regardless of whether or not the client is a member of one of those protected groups under the Equality Act 2010. It means that barristers cannot deny their services on the grounds that they somehow find the client, case, or legitimate source of funding for the case objectionable in some way.³⁷

A further benefit of the Cab Rank Rule to lawyers themselves is the fact that it provides some degree of immunity for those barristers representing unpopular clients. Regardless of whether in fact the barrister is happy to represent the client, he or she can always rely on the mandatory nature of the rule to justify taking on a case to third parties who might not understand why it is important that there should be access to good lawyers to everyone going through the court process. Despite the number of high-profile miscarriages of justice over the years, these cases are very quickly forgotten in the public consciousness, and the public may be quick to judge the intentions of those barristers who provide a robust representation of clients who are not broadly popular. The Cab Rank Rule means that lawyers do not have to justify their motivation in representing a particular client.³⁸

GOVERNMENT

In view of the comments above on the role of legal education and regulation in securing access to justice, it is clear that government has a very large role in protecting access to justice. There are three main ways in which the actions and motivations of government can impact upon access to justice.

Firstly, Parliament drafts laws and legal reforms are typically driven by the ministerial agendas of the executive branch. The judicial branch of government also has a role in

³⁴ Ray Surette, *Media, Crime, and Criminal Justice: Images, Realities and Policies* (5th edn, Cengage Learning, 2015); Yvonne Jewkes, *Media & Crime* (3rd edn, Sage Publications, 2015).

³⁵ *The Bar Standards Board Handbook* (n 25), 43 – 44, Rules rC28 and rC29.

³⁶ Equality Act 2010 s. 4.

³⁷ By contrast, solicitors' duty not to discriminate is construed more strictly, in line with the Equality Act: *SRA Handbook* (n 32), 'Code of Conduct – Equality and Diversity'.

³⁸ Michael McLaren QC, Craig Ulyatt and Christopher Knowles, 'The "Ban Rank Rule": A Fresh View' (Bar Standards Board 2012) <https://www.barstandardsboard.org.uk/media/1460590/bsb_-_cab_rank_rule_paper_28_2_13_v6___final_.pdf> accessed 14 May 2018, paras 16–20.

holding the other branches to account. This is perhaps best illustrated by the Court of Appeal judgment in *R (Gudanaviciene) v The Director of Legal Aid Casework and The Lord Chancellor*,³⁹ where it was held that the Lord Chancellor's guidance on exceptional case funding was unlawful, and that three of the five litigants who had been denied legal aid had been wrongly deprived of such funding. More recently, the Supreme Court found that the Lord Chancellor acted *ultra vires* in introducing a residence test for civil legal aid, which meant that only those who had been lawfully resident in the United Kingdom for a continuous period of 12 months could be eligible for civil legal aid.⁴⁰ The Court found that s 9 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 did not give the Lord Chancellor the power to exclude whole groups of people from legal aid eligibility based on circumstances that had nothing to do with the nature of the case or the claimant's individual need, or ability to pay, for the services.⁴¹ These, and other similar cases,⁴² highlight the judiciary's role in upholding access to justice when the impact of legal reforms hit those most in need of effective legal representation.

Secondly, government's role in funding education and deciding on such issues as tuition fees for University courses can have wide-reaching consequences, as highlighted by the Young Legal Aid Lawyers *One Step Forward* report.⁴³ Because law graduates are less likely to go straight into employment upon completion of their university degree,⁴⁴ largely because further professional training is needed to join one of the regulated legal professions, all students, particularly those from lower socio-economic backgrounds, may well be less inclined to amass a large amount of debt to follow a career path in the legal professions. Those that do opt to study law may be more likely to seek more financially stable legal careers with large commercial firms or as in-house counsel for companies, meaning that there is a smaller pool of qualified legal professionals available to disadvantaged claimants relying on legal aid.

Thirdly and perhaps most importantly, the law-making power of parliament shapes the structure of legal services, as can be seen from the impact of changes to legal aid and civil litigation funding. This, in turn, can have a knock-on effect on training opportunities,⁴⁵ and can drive providers to focus their practice on certain, more profitable, areas of law. In the words of one barrister, cuts to legal aid have driven talented barristers away from publicly-funded cases:

Which means that people that require the best representation . . . are not necessarily going to get it because many chambers are saying well let's look at disciplinary work, let's look at branching into other areas of work. I think that is a threat to the Bar in the sense that the Bar should be seen as providing the best representation for the most vulnerable members of society. It should be able to say to the public: that's what we are here for. And unfortunately there are only certain sets with a particular ideological view that are actually willing to say we'll take the hit and just do publicly funded work.⁴⁶

³⁹ [2014] EWCA (Civ) 1622, 15 December 2014.

⁴⁰ *R (on the application of The Public Law Project) v Lord Chancellor* [2016] UKSC 39, 13 July 2016.

⁴¹ *Ibid*, [29].

⁴² See e.g. *R (on the application of London Criminal Courts Solicitors Association) v Lord Chancellor* [2014] EWHC 3020 (Admin), on legal aid for criminal cases.

⁴³ (n 17).

⁴⁴ Statistics from the Destinations of Leavers from Higher Education (DLHE) survey reveal that graduates from courses such as medicine, dentistry, veterinary science, and education to have higher rates of employability for graduates after six months (77–81% in sustained employment) than law graduates (66% in employment). See further, Department for Education, 'Graduate Outcomes, by Degree Subject and University' (Department for Education 2016) <<https://www.gov.uk/government/statistics/graduate-outcomes-by-degree-subject-and-university>> accessed 14 May 2018.

⁴⁵ Julian Webb and others, 'Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales' (2013) <<http://letr.org.uk/the-report/index.html>> accessed 14 May 2018 (n 13), para. 3.27.

⁴⁶ *Ibid*, 86.

More broadly, such decisions impact upon the efficiency of the justice system, because a higher number of litigants in person can lead to less efficient cases, and that in turn can cause delays in accessing court processes. Without legal aid, a large number of high-profile cases could never have reached the courts, but aside from those *causes célèbres*, the biggest casualty of legal aid cuts are probably those rather mundane or everyday cases, such as housing, benefits and family cases, which are now being left to claimants without legal training or skills to fight for themselves as litigants in person.⁴⁷

CONCLUSION

It is clear that accessing justice is as, if not more, difficult today than at any stage in recent legal history. Some of the difficulties faced by claimants in accessing justice noted in this paper reinforces the point that the fact that rights exist under the law is insufficient unless there are adequate means in place for individuals to vindicate those rights. The role of legal education, regulation, and government cannot be underestimated in this respect. All three aspects, working together and individually, can ensure greater accessibility, not just by litigants to legal processes, but also to the legal profession by the next generation of lawyers who will continue to strive to protect the right to justice of some of the most vulnerable people in society.

⁴⁷ Gabrielle Garton Grimwood, 'Litigants in Person: The Rise of the Self-Represented Litigant in Civil and Family Cases in England and Wales' (House of Commons Library 2016) Commons Briefing papers SN07113 <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07113>> accessed 14 May 2018.

ACCESS TO JUSTICE AS A THRESHOLD CONCEPT

LIZ HEFFERNAN*

INTRODUCTION

Many of the dynamic ways in which law students explore the theme of access to justice, for example through clinical legal education, taught modules on public interest law and research on human rights, operate on the assumption that students develop an understanding of the relationship between law and justice in the early stages of undergraduate education. This paper analyses access to justice as a threshold concept in legal learning and critically assesses the educational objective of embedding access to justice within the first year curriculum.

THRESHOLD CONCEPTS

The term “threshold concepts” is used in higher education to capture core ideas within a particular discipline that are fundamental to thought and practice. A threshold concept is a landmark on the road to disciplinary knowledge in the sense that comprehension paves the way to progressive learning. Its reach is potentially more profound, however, in so far as it denotes a transformation in understanding and possibly a realignment of a student’s world-view. Threshold concepts occupy a prominent place in the hierarchy of “concepts”, a ubiquitous term in the *lingua franca* of higher education.¹ It is the essentially catalytic quality of threshold concepts that distinguish them from the basic concepts that are the bread and butter of undergraduate learning in any particular discipline.

The idea of threshold concepts as an approach to disciplinary learning was introduced by Meyer and Land in 2003:

A threshold concept can be considered as akin to a portal, opening up a new and previously inaccessible way of thinking about something. It represents a transformed way of understanding, or interpreting, or viewing something without which the learner cannot progress. As a consequence of comprehending a threshold concept there may thus be a transformed internal view of subject matter, subject landscape, or even world view.²

Huxley-Binns has used the metaphor of a “light bulb moment” to connote the crossing of a conceptual threshold while acknowledging at the same time that the transformation in learning (the “whether, when and how” of the shift in understanding and perspective) is personal to each student and that “not all legal learning epiphanies are obvious or indeed even sudden”.³ The light bulb may switch on in a variety of ways, at any number of times, and in a range of contexts. A student may cross the threshold when reading a case, preparing for a moot court, problem-solving with peers, attending a

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¹ Jan H F Meyer, “Threshold Concepts and Pedagogic Representation” (2016) 58 *Education & Training* 463, 465.

² Jan Meyer & Ray Land, *Threshold Concepts and Troublesome Knowledge: Linkages to Ways of Thinking and Practicing within the Disciplines* (ELT Project, Occasional Report 4, May 2003) 1 <<http://www.tla.ed.ac.uk/etl/docs/ETLreport4.pdf>> accessed 7 March 2018.

³ Rebecca Huxley-Binns, “Tripping over Thresholds: A Reflection on Legal Andragogy” (2016) 50 *The Law Teacher* 1, 3 and 11.

court visit or meeting with a client in a clinical setting. Perhaps the shift in cognition or perception may occur not at any single defining moment but rather at the crest of a gradual wave of realisation. Indeed, presumably the transformative insight may be gleaned subconsciously overtime (like the gradual turning of a dimmer switch) so that it is only with hindsight that a student can say that her understanding of her discipline has been transformed. Because they alter the way a student thinks, threshold concepts are irreversible for the most part. The personal and epistemological implications of crossing the threshold may be uncertain but the light bulb cannot be simply extinguished and the knowledge unlearned or the experience forgotten.

Why is it useful and important to classify learning in terms of threshold concepts? The configuration of threshold concepts clearly sheds light on “cognitive organization and perspective” within a particular discipline.⁴ The resulting insight can be a boon to curriculum design and pedagogical practice, honing our sense of how teachers can most effectively support learning within the disciplines. The approach may inspire critical reflection on theories of legal education and prompt debate about the efficacy of existing law curricula and teaching strategies.

The threshold concepts paradigm plays a special role in informing our understanding of, and framing our response to, aspects of learning that are troublesome or problematic. Some students may struggle to grasp the defining attributes of their chosen discipline and may languish in a state of liminality, a disorientating period in which true understanding is suspended.⁵ Identifying these barriers may prompt teachers to devise teaching strategies and make pedagogical adjustments that will support student learning. Other students may cross a threshold with relative ease and, as noted, between these two extremes, cognitive transformations may occur at various times and in different ways. The resulting variation in the student experience of learning may pose a problem for educators over and above the challenge of illuminating the collective student path through the portal.⁶ The timing, impact and intensity of the crossing of a threshold may vary considerably from one student to the next. And whereas the transformation may be liberating or exhilarating, the experience may prove confusing or unsettling and this in itself may be a further source of difficulty.

ACCESS TO JUSTICE

In order to assess the credentials of access to justice as a threshold concept in legal learning, we must give some consideration to what we mean by the term. “Access to justice” is a linguistic umbrella that shelters practically any idea or experience associated with protected rights and legal process. As Zander has commented:

The phrase ‘Access to justice’ has become a term of art signifying the arrangements made by the state to ensure that the public at large and especially those who are indigent can obtain the benefits available through the use of law and the legal system.⁷

Assessments of the sufficiency of such arrangements tend to emphasise the accessibility of the courts in terms of location, financial cost, time, and complexity of procedures.⁸

⁴ Meyer & Land (n2) 5.

⁵ *Ibid*: H Carr et al, *Developing Threshold Concepts in Legal Education* (Workshop Learning in Law Annual Conference, 2010), <<http://www.ials.sas.ac.uk/library/archives/ukcle>> accessed 13 July 2016; Huxley-Binns (n3).

⁶ Julie Timmermans, “Changing our Minds: The Developmental Potential of Threshold Concepts” in Jan Meyer et al (eds), *Threshold Concepts and Transformational Learning* (Sense Publishers 2010) 3.

⁷ Michael Zander, *The State of Justice* (Sweet & Maxwell 2000) 6.

⁸ *Ibid* 7.

Chief among these concerns is the availability of legal aid and legal assistance as a gateway to civil and criminal justice.⁹ But the benefits of law also reside within the authority of the other branches of government – legislatures, administrative bodies and executive officers. Of course, accessing justice is not necessarily limited to gleaning benefits in the narrow sense but may also connote the capacity to use the law and legal system as a shield against unwarranted interference by the state or others. Arguably it stretches further still to the notion of individual and collective participation in the system of justice in all its myriad forms.

The phrase “access to justice” has a particular association with the enforcement of rights and in that realm is redolent of the gulf that sometimes exists between law and practice. Every legal system plays host to a myriad of circumstances in which the letter of the law is not matched by its application at the coalface. This is especially true of the recognition and enforcement of socio-economic rights which, by their very nature, affect not only individuals but entire communities.¹⁰ The subject thus raises important questions about the relationship between law and societal disadvantage, the significance of collective rights, and the role of the legal profession in promoting a just society. Legal process is an omnipresent theme in so far as the absence of education, resources, procedures and remedies stymies the realisation of law’s promise.

These various strands of access to justice are linked necessarily to the normative question of the relationship between law and justice, a matter that surely occupies a prominent, constant space within legal education. Conceptions of justice are many and varied but tend to be constructed around the core idea of a corpus of general legal rules that are applied equally to all members of society through a fair and effective system of enforcement.¹¹ Access to justice has a distinct conceptual identity although there is no bright-line that demarcates it from the broader notion of justice. Underpinned by the philosophy of law in action, it is grounded in concerns about the equal application of law and the redressing of injustice.

It is these simple but powerful features of access to justice that collectively justify treating it as a distinct theme in the context of legal education. Clearly there is no blueprint for its potential elucidation in legal education and ample scope for pedagogical variation. At its broadest construction, access to justice is a conduit to acknowledging the contexts – social, economic and political – in which law operates¹² and the related idea of law as the product of society, shaped by controlling elites in ways that protect some interests to the neglect of others. Learning about law in this sense involves recognising inequality in people’s experience of justice and a corresponding disparity in the realisation of law’s benefits and protection.

ACCESS TO JUSTICE AS A THRESHOLD CONCEPT

One way in which the educative role of access to justice can be measured is to consider whether it meets the criteria that a threshold concept is likely to possess: is it (a) transformative, (b) (probably) irreversible, (c) integrative, (d) (possibly) bounded, and (e)

⁹ Tom Cornford, “The Meaning of Access to Justice” in Ellie Palmer et al (eds) *Beyond the Policies and Politics of Austerity* (Hart 2016) 27, 28.

¹⁰ Mauro Cappelletti and Bryant Garth (eds) *Access to Justice, Volume 1: A World Survey* (Giuffrè Editore/Alphen aan den rijn 1978) 7.

¹¹ Zander (n7); Cornford (n9); David Lloyd, *The Idea of Law* (Penguin Books 1981) 126–27; Michael D A Freeman, *Lloyd’s Introduction to Jurisprudence* (8th ed, Sweet & Maxwell, 2008) ch 7; John M Kelly, *A Short History of Western Legal Theory* (Clarendon 1992) 414–18.

¹² Graham Ferris, “The Legal Educational Continuum that is Visible through a Glass Dewey” (2009) 43 *Law Teacher* 102, 106.

potentially troublesome? First identified by Meyer and Land, these features of threshold concepts have been explored in the literature.¹³

Transformative

A threshold concept is characterised above all by its transformative quality. The effect on student learning is to occasion “a significant shift” in the perception of a subject or part of a subject. Indeed, in certain powerful instances, the transformative effect may involve a “reconstruction of subjectivity” extending to aspects of personal identity such as values, feelings or attitude.¹⁴

For most students exploring the subject of access to justice, the transformation stems from the realisation that there are substantial inequalities across society in the experience of law and, specifically, the protection of rights. This realisation is linked to the insight that the normative premise of equality is belied by the inaccessibility of legal protection for many members of society. Inequality in the law comprises a vast, complex mosaic, and just as the instances of disparate treatment are many and diverse, so too are the contexts that may spur transformative learning.

For example, reading about or discussing cases of direct and indirect discrimination may prompt reflection on the contribution of law to a just society. Attending a court visit may press home the reality of the trial as a human event in which important decisions must be reached within constraints of information, time and process. Participating in the “real world” environment of clinical legal education may illuminate how financial, cultural and other barriers render the law beyond the reach of disadvantaged members of society.

A student’s view of the law may be transformed by the realisation that legal rules can inhibit the recognition and enjoyment of rights, and that law can be used as an instrument to perpetuate injustice. At the same time, through these and other experiences, students may grasp law’s boundless potential as an instrument to promote democratic values, stability and societal well-being. Learning and world view may be altered by a shift in student perception of the role of law in shaping society, whether as a framework for conducting relationships, a bedrock for maintaining order, a force for preserving traditions, a vehicle for promoting advancement, an instrument for reversing injustice, or a process for promoting reform.

Probably Irreversible

The image of a student stepping through a portal to a new understanding of her subject carries with it the implication that the step is irreversible. Having seen the subject in a new light, the student probably cannot roll back the clock and return to her previous perspective. The characteristic of irreversibility goes hand-in-hand with the attribute of transformative effect in so far as it underscores the significance of the epistemological experience – the ‘eureka moment’ possibly (although not invariably) occasioned by threshold learning. Of course, it is questionable whether newly acquired knowledge can ever be entirely “blanked out”. Threshold concepts are not merely points of “no-return”, however. Precisely because it may be difficult for a student to re-imagine the perspective she held prior to crossing the threshold, these concepts are markers of progressive integration within disciplinary learning.¹⁵

¹³ Meyer & Land (n2); Aidan Ricketts, “Threshold Concepts in Legal Education” (2004) 26 *Directions: Journal of Educational Studies* 2; Huxley-Binns (n3).

¹⁴ Meyer & Land (n2) 5.

¹⁵ Huxley-Binns (n3).

Although the threshold of access to justice may be crossed in multiple ways and to varying degrees, the realisation of law's inherent relationship with social and political forces cannot be simply forgotten or 'unlearned'. Unlike other threshold concepts, access to justice may be a motivation for a particular learning stream or ultimate career path. Students may choose specialist modules or clinical programmes and may go on to pursue public interest careers or pro bono projects. Equally, the transformative effect of crossing the threshold may extend no further than the immediate pedagogical context. Learning about access to justice may affect the way a student thinks about law without disturbing her support for conventional wisdom within the discipline or influencing her educational choices and professional ambitions. Whether the impact of learning about access to justice is slight or profound, it is likely to shape a student's understanding and perception of her discipline to some demonstrable degree.

Integrative

Threshold concepts are said to be integrative in the sense that they expose the previously hidden inter-relatedness of subject matter. They enable students to "join the dots" thereby revealing an overarching picture of the discipline or a particular aspect of the discipline.

Presumably the dominance of the integrative characteristic varies depending on the discipline in question and the particular concept at issue. One might argue, for example, that the amorphous nature of access to justice reduces its capacity to promote this kind of broader cognition; after all it is difficult to identify points of relatedness if access to justice means different things to different people. The elasticity of access to justice is undoubtedly a pedagogical challenge but it need not inhibit deep, integrative learning. If crossing a threshold is a subjective educational experience, then the transformative connections – the previously hidden vision of relatedness – must surely be personal to each student.

From a more objective standpoint, it can be said that crossing the threshold within the discipline of law necessitates seeing access to justice through a distinctly legal lens; lawyers sew common threads when exploring this academic terrain that sociologists, for example, may not. It is also a truism that common features in the way law is created, interpreted and applied allow students to explore relatedness even across very different subject areas. The cognitive embrace of access to justice is one of many points in legal education at which students may perceive the inherent connections, whether complementary or contradictory, between seemingly disparate rules, procedures and contexts.

Bounded

A possible attribute of a threshold concept (although apparently a non-essential attribute), is that it is bounded in that "any conceptual space will have terminal frontiers, bordering with thresholds into new conceptual areas".¹⁶ This element in the threshold paradigm has particular resonance in curriculum design because it can assist in demarcating the boundaries between concepts and disciplines. There are dangers, of course, in striving to confine learning within prescribed limits. Nevertheless, recognising the relatedness of concepts can be a boon to progressive learning within a discipline particularly when dealing with knowledge that is in some way troublesome for students.

It is debatable whether access to justice is bounded in this sense. Indeed, precisely because it taps into law's multidisciplinary subtext, access to justice has a somewhat malleable, seamless quality. Nevertheless, it cannot be gainsaid that access to justice has

¹⁶ Meyer & Land (n2) 5.

a core connotation that affords it a distinct place within the law curriculum. Moreover, it is bounded in that it co-exists with other fundamental concepts, notably the nature of the judicial system and the protection of rights. There is no firm frontier between these areas of legal learning but, although separate, they tend to be viewed as mutually re-enforcing.

Potentially Troublesome

Threshold concepts are associated typically, although not invariably, with aspects of learning that are in some sense problematic. Although identifying threshold concepts and distinguishing them from other ideas enhances our understanding of learning and nourishes the construction of effective curricula, a further potential benefit of this approach is the impetus it provides for devising effective pedagogical strategies to deal with areas of troublesome knowledge. The notion of troublesome knowledge has generated a literature of its own and commentators acknowledge that the sources of problematic learning are many and varied.¹⁷

Learning about access to justice may not be troublesome in the conventional sense that students find the subject matter complex or incoherent. When compared with the doctrine of judicial precedent or the scheme of statutory interpretation, the terrain of access to justice may seem relatively accessible for students in the first year of undergraduate studies. Nevertheless, crossing the threshold may be problematic for a number of more nuanced reasons.

The impact on students of transformative learning related to access to justice is an obvious source of concern. Perceiving the law in its broader social and political context, grasping the full extent of inequality and injustice, and discovering the limits of legal redress and law reform – these and other transformative insights may empower some students but demoralise others. For teachers, the challenge of supporting threshold learning includes devising effective strategies to enable students to cope with the unsettling aspects of new or transformed knowledge. The task is exacerbated by variation in the student experience, i.e. the “when, how and to what degree” each student gains an understanding of these essential attributes of the discipline. Supporting learning may be further complicated if students come to the subject with preconceived ideas about justice and equality. Reconciling tensions between prior knowledge and present learning may be problematic for individual students and may have a spill over effect on group learning, for example in the context of class discussion. It is important to recall that students initially encounter themes relating to access to justice in the first year of legal education, a time when they may be grappling with the transition to university learning, and a stage at which teaching tends to be conducted predominantly in large group settings.

One of the ways in which the concept of access to justice plays a fundamental role in legal education is that it prompts teachers and students to question the very nature and purpose of law as a discipline. This supports learning within the discipline because it challenges entrenched orthodoxy and promotes critical thinking. As such, the concept of access to justice may act as a foil against “loaded knowledge”, itself a form of troublesome learning. Ricketts explains that loaded knowledge occurs where “the discipline itself attempts to mandate the acceptance of ideological or philosophical assumptions which privilege certain world views over plausible alternatives”.¹⁸ Taking law as an

¹⁷ David Perkins, “The Many Faces of Constructivism” (1999) 57 *Educational Leadership* 6; Meyer & Land (n2); Ricketts (n13).

¹⁸ Aidan Ricketts, “Threshold Concepts: ‘Loaded Knowledge’ or Critical Education?” in Jan H F Land et al (eds), *Threshold Concepts and Transformational Learning* (Sense Publishers 2010) 45, 47.

example, he notes that “[l]ying beneath the surface rules in the legal discipline are deeply embedded and mostly unconscious assumptions about the ordering of the social, political and economic world”.¹⁹

The fact that law is a professional discipline may render it particularly susceptible to the dominance of orthodoxy. The emphasis on tradition and the influence of conventional wisdom within the profession may stifle the development of critical or non-conformist perspectives and this may in turn foster a sense of alienation among some students. Learning about access to justice can play a part in promoting a critical curriculum, countering unquestioned conventions and challenging political elites. But to the extent that it involves confronting loaded knowledge and contesting orthodoxy within the discipline, the cognitive awakening may be complicated and troublesome for students.

THE FIRST YEAR

Views are likely to differ among students and educators about the space that access to justice should occupy in legal education; certainly, no blueprint exists as to when, where and how it should be designed within the undergraduate curriculum. Nevertheless, given its significance within legal education and its transformative potential, there is a strong argument in favour of recognising access to justice as a threshold concept and firmly embedding as such it within the first year curriculum.²⁰ Whatever role the concept may play in subsequent stages of legal education, the first year provides a unique opportunity to unlock learning about access to justice and lay a foundation for its subsequent development. The potential for rooting ideas within the first year is particularly significant in countries where law is not taught at secondary level because the novelty of the discipline creates both a blank canvass and a level playing field that can be a benefit to learning in the first year.²¹

Among the foundational questions that first year students typically consider is the very nature of law. First year learning can move beyond the transmission of information about how the legal system operates to a more profound consideration of its ontological and normative impact. With a foothold within the first year curriculum, access to justice can exert an integrative effect on learning, weaving together seemingly disparate elements of legal study. At the same time, the concept can promote deep learning by supporting discourse and reflection on a range of questions relating to law, justice and ethics.²² The potentially transformative effect is particularly important because historically the discipline emphasised law as an objective force. Access to justice exposes tensions and contradictions within the law and may stimulate self-awareness of a student’s relationship with her chosen discipline.²³ It also counterbalances the emphasis on simplified, hard and fast rules (traditionally a regular feature of first year pedagogy) by introducing students to the compromises, limitations and qualifications

¹⁹ Ricketts (n18) 49.

²⁰ Anna Huggins, “Incremental and Inevitable: Contextualising the Threshold Learning Outcomes for Law” (2015) 38 UNSW LJ 264, 286–87.

²¹ This characteristic of the study of law may have less force in jurisdictions such as England and Wales, where some students may have prior experience of law through GCSE, A level or BTEC in Law.

²² Lord Woolf, “The Education The Justice System Requires Today” (2001) 34 Law Teacher 263; W Wesley Pue, “Legal Education’s Mission” (2008) 42 Law Teacher 270; Seow Hon Tan, “Teaching Legal Ideals Through Jurisprudence” (2009) 43 Law Teacher 14.

²³ Anthony Bradney, *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century* (Hart 2003) 86–87; Hugh Brayne, “A Case for Getting Law Students Engaged in the Real Thing – The Challenge to the Saber-Tooth Curriculum” (2000) 34 Law Teacher 17, 26–27.

that are a constant feature in the application of the law. In short, an exploration of the foundations of law that includes an examination of access to justice holds the promise of the sort of transformative understanding of law that is inherent in the notion of a threshold concept.

Sowing the seeds of a broader approach to learning in the first year is essential if students are to yield the potential to explore these themes in the later stage of their undergraduate studies. For a minority of students, the transformative effect of learning about access to justice may be more akin to floodlight than a lightbulb. These students may go on to choose specialised modules in public interest law and perhaps ultimately pursue careers in the field. Changes in legal education in recent years have seen the organic integration of human rights and justice into the law curriculum and the flourishing of clinical programmes. Locating a secure space for access to justice within the first year is likely to nurture interest and understanding thereby supporting opportunities for more advanced, diverse learning at later stages in the curriculum.

A POSSIBLE MODEL

Access to justice forms one of the themes in a “Foundations of Law” module that is taken by students in their first semester at my own law school at Trinity College Dublin. Although the first year curriculum has always been woven with threads along the seam of justice, affording *access to justice* a dedicated and prominent place within the School’s pedagogical architecture was one of the objectives of a substantial re-design of this module some years ago.

In terms of module structure, the segment on access to justice features at the halfway point in the module, when the students are fully immersed in the legal system and have experimented with a range of learning activities. In particular, access to justice is designed to follow a detailed exploration of the role of the courts in which students are encouraged to look beyond the nuts and bolts of jurisdiction, procedure and precedent. By the time students engage with access to justice, they have already reflected on judicial attributes, debated the relationship between law and justice, analysed mechanisms for enforcing rights, and conducted research on the role of the Supreme Court in Irish society.

The component on access to justice builds on these themes by locating the law within a broad socio-economic setting. In a series of lectures and small group seminars, students study the court system through the lens of equality. Using diverse learning strategies, they probe the social, educational and financial obstacles that impede the recognition and enforcement of the rights of disadvantaged groups and individuals. The chequered history and controversial provision for civil legal aid in Ireland forms a particular focus. Drawing on the landmark decision of the European Court of Human Rights in *Airey v Ireland*²⁴ students debate a lack of financial resources as a barrier to accessing justice in the courts. The exploration of legal aid moves beyond service models, however, to strategic models that target other obstacles to accessing legal services. Students analyse additional methodologies such as political lobbying, public education and community action. The component on access to justice feeds directly into the next segment within the module on reform of the legal profession, a subject that is closely aligned in Ireland with the issue of the cost and funding of legal services.

²⁴ *Airey v Ireland* (1979–80) 1 EHRR 524.

There is scope to further develop first year learning in relation to access to justice. Students currently conduct court visits and discuss their experiences with their peers in small group settings. They also conduct town-hall style debates on recent legislative and judicial developments. Through guest lectures, students hear from litigants, activists and lawyers who have played a direct role in landmark cases or legislative reform. The experiential dimension of the module could be expanded to include simulations of law clinics in which students provide basic advice to clients about avenues for redress of socio-legal problems. Similarly, assessments could be varied to encompass case-study research on the evolution of specific rights. For example, students could chart gradual legal recognition of LGBT rights in Ireland from the court challenges of the 1980s²⁵ to the passing of a referendum in 2015 to protect marriage equality within the Irish Constitution.²⁶

At the same time, in an era of growing expectations about the range and extent of disciplinary knowledge, the possibility of curriculum overload is a pressing concern. There is a danger that introductory modules become so tightly packed that they offer students no more than a smorgasbord of disciplinary insight. Promoting deep learning of foundational content is all the more challenging given the reality of large class sizes in the first year and necessary reliance on lectures as the principal point of contact. Nevertheless, learning objectives can be achieved by resisting the temptation to over-extend content and striving instead to promote depth of knowledge and diversity of learning activity in selective areas. This strategy assumes the alignment of learning objectives across first year modules, a constructive roadmap for progressive learning within degree programmes, and the provision of resources such as small-group teaching and e-learning support.

CONCLUSION

The approach of threshold concepts is a useful way of thinking about learning within disciplines and can be a stimulus for reflection and debate about pedagogical philosophy and practice. Its emphasis on student experience of learning is an attractive feature but one that highlights, at the same time, its variable and potentially ambiguous qualities. Because ‘light bulb’ moments in learning are individual to each student, identifying threshold concepts within a discipline can be challenging and possibly contentious. The task is further complicated in the context of law because both the academy and the profession are stakeholders in the design and delivery of legal education. In this regard, a strong case can be made that the concept of access to justice is threshold because it links academic and professional worlds of learning in a particularly fruitful way.

Grappling with access to justice is – and should be – an inherent aspect of learning for all students, regardless of their educational or professional ambitions. Indeed, it is difficult to envisage a contemporary model of legal education in which access to justice would be absent or neglected; aside from engendering a myopic view of law, the deficit would rob students of a defining aspect of the discipline and an opportunity for transformative moments in learning. Its distinct, dynamic qualities and pedagogical potential suggest that it should be characterised as a threshold concept and, as such, afforded a special place within the first year of undergraduate learning.

²⁵ *Norris v Attorney General* [1984] IR 36; *Norris v Ireland* [1988] ECHR 22 (26 Oct 1988).

²⁶ *Zappone & Gilligan v Revenue Commissioners* [2006] IEHC 44; Thirty-Fourth Amendment of the Constitution (Marriage Equality) Act 2015 (inserting a new s4 into Art 41 of the Constitution).

SUPPOSE THE CLASS BEGAN THE DAY THE CASE WALKED IN THE DOOR . . . EDUCATING TO EXPAND ACCESS TO JUSTICE IN THE AMERICAN FIRST-YEAR DOCTRINAL CLASSROOM

JENNIFER E. SPRENG*

INTRODUCTION

Suppose the class began the day the case walked in the door.

It is the first day of the first semester of the first year.

The professor announces that “the firm” has scheduled an initial consultation with a new client in two weeks, and everyone needs to get ready.

Meet Lee Taylor. And her husband, George.

Lee is a forty-something mother of two from the American “State of Euphoria” who decided to lose twenty pounds before her daughter’s wedding. A doctor at her fitness club prescribed “Aspire”, the most recent fictitious blockbuster diet drug of the equally fictitious leading pharmaceutical manufacturer, Kimberly-Robb, Inc. Her long-time pharmacist filled her prescriptions.

Lee lost the weight, but she did not attend the wedding. Instead, she suffered a heart attack. The peculiar injuries to Lee’s mitral valves were identical to those depicted in a disturbing *New England Journal of Medicine* report about heart patients never previously diagnosed with valve damage who had taken Aspire for more than six months. Rumors swirl about a prestigious “University of San Marino Hospital” Cardiac Surgery Department study supporting associations between valve damage and “pessimiscin”, a compound related to Aspire’s active ingredient, “optimiscin”, both of which are products of the shadowy “Andorran Pharmaceutical Group”. Neither Aspire’s label nor package insert associates Aspire with heart valve damage.

Or so Lee alleges.

The class, divided into separate “law firms” of four attorneys each, interviews Lee and the prospective defendants. Plaintiffs’ firms draft initial allegations for a personal injury complaint that may establish the State of Euphoria courts’ jurisdiction to enter an enforceable judgment against an international array of defendants. Defendants’ firms ponder how to establish the subject-matter jurisdiction of the United States District Court for the District of Euphoria via the theory that Lee’s pharmacist had no duty to warn her about risks from taking Aspire.

Students stumble onto intriguing “connections.” A seller in the business of placing products into the “stream of commerce” may be liable in tort for injuries arising from such a defective product,¹ which also has a role in determining if an American state’s courts have jurisdiction to enter a judgment against a non-resident defendant.² Varying strains of “foreseeability” determine whether defendants had duties to exercise reasonable care, whether they breached those duties, and whether those breaches are the legal cause of Lee’s injuries,³ as well as whether a court has personal jurisdiction

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¹ Charles J Nagy Jr, ‘Strict Liability – Stream of Commerce’ in *American Law of Products Liability* (March 2018 update, Clark Boardman Callaghan, 3rd edn, 2014) 5:9.

² *J McIntyre Machinery Ltd v Nicastro* 564 US 873, 881–83 (2011).

³ Dan B Dobbs, Paul T Hayden and Ellen M Bublick, *The Law of Torts* (June 2017 update, 2nd edn, Thomson West 2011), 159, 199, 256.

over those defendants.⁴ “The law” is not subjects, but is rather an almost seamless web of principles, rhythms and connections.

If you see those things happening in a first-year American law school classroom, you may have just stumbled into Introduction to Civil Litigation, an innovative, ten-credit, year-long, first-year prototype course integrating topics in civil procedure and torts with an extended litigation simulation. The model’s power lies in education theory: a student is more likely to retain, retrieve, and transfer well-structured knowledge to solve problems in new contexts if hewn in part in an authentic context.⁵ These cognitive capacities are what American law schools must help students develop to produce future bar passers, practitioners, and expanded access to justice.

Introduction to Civil Litigation may seem analogous to courses in certain other jurisdictions, for example modules of the Legal Practice Course in England and Wales, but key characteristics distinguish them. Introduction to Civil Litigation is a large module for the very first year of legal education, equivalent to an English or Welsh student’s early undergraduate experience, when teaching substance with practice-oriented activities is rare in common law legal education.⁶ The Legal Practice Course occurs near the end of formal legal education, akin to the third year of an American J.D. program, when students satisfy experiential course requirements.⁷ Further, the primary purpose of a first-year integrated course is not to teach practice skills, but to teach doctrine through legal reasoning applied in practice-oriented activities, even if introducing practice skills is a secondary goal.

Direct practice preparation is a heightened priority in American legal education and may have a profound impact on access to justice. There is no access to justice if the lawyer cannot do the research, get the evidence excluded, prepare the agreement, argue the motion or otherwise solve the client’s problem, and American jurisdictions do not require on-the-job training for qualification. There is also no access to justice if the lawyer cannot pass her jurisdiction’s bar examination, which has sidelined so many recent American law graduates that schools are beefing up their preparation programming pre-matriculation through post-graduation.⁸ While the American Bar Association has recently imposed experiential course requirements on American law schools,⁹ the Solicitors Regulation Authority in England and Wales is en route to eliminating the path to qualification through the Legal Practice Course.¹⁰ Consequently, practice-oriented experiences in early legal education may be increasingly valuable in both systems to ensure new lawyers hone sufficient practice skills to provide effective representation timely.

Part II of this article describes the movement for better practice preparation in American law schools. Part III explains a signal problem: as delivered, the traditional

⁴ *World-Wide Volkswagen Corp v Woodson* 444 US 286, 297 (1980).

⁵ Text and notes 80–95.

⁶ But not non-existent. E.g. York Law School, ‘An Introduction to Problem-Based Learning for Law Students’ <https://www.york.ac.uk/media/law/documents/pbl_guide.pdf> accessed 2 May 2018, 5 (University of York, UK); Lisa Westcott and Mandy Shircore, ‘The Experience of a Small Regional Law School in Preparing Students for a Journey Through Law’ (2006) 13 *James Cook U LR* 81, 92–99 (James Cook University, Queensland, Australia); Lloyd C Anderson and Charles E Kirkwood, ‘Teaching Civil Procedure with the Aid of Local Tort Litigation’ (1987) 37 *J Legal Educ* 215 (1987) (University of Akron, Ohio, USA).

⁷ C.f. American Bar Association Section on Legal Education and the Practice of Law, *Standards and Rules of Procedure for Approval of Law Schools 2017–2018* (ABA 2017) stds 303, 304 (2017 *ABA Standards*).

⁸ Louis N Schulze Jr, ‘Alternative Justifications for Academic Support II: How “Academic Support Across the Curriculum” Helps Meet the Goals of the Carnegie Report and Best Practices’ (2012) 40 *Cap ULR* 1, 22.

⁹ 2017 *ABA Standards* stds 303(a)(2), (3).

¹⁰ Solicitors Regulation Authority, ‘Consultation – A New Route to Qualification: The Solicitors Qualifying Examination (SQE)’ (25 April 2017) <<http://www.sra.org.uk/sra/consultations/solicitors-qualifying-examination.page>> accessed 2 May 2018, 32, 149.

first-year curriculum neglects reasoning capacities that optimize the chance students will retain, retrieve, and transfer their knowledge to problem solving in upper-class experiential coursework or practice. Part IV shows how one first-year “integrated course” prototype, Introduction to Civil Litigation, may improve retention, retrieval, and transfer capacities by helping students make connections and structure their knowledge productively. This article concludes that integrating subjects and authentic learning experiences can fuel early practice preparation and therefore expand access to justice.

ON THE VERGE OF CHANGE? TRADITIONAL AMERICAN LAW SCHOOL CURRICULUM AND INSTRUCTION

“American legal education” is graduate education but has notable parallels to its English or Welsh undergraduate counterpart. The first year of the normally three-year, full-time American Juris Doctor program is “academic”, focusing on common law subjects, criminal law, civil procedure, constitutional law, and research and writing, making it, with portions of the second year, roughly analogous to the first two years of an English or Welsh LLB program or the Graduate Diploma in Law.¹¹ “Civil procedure” does not evince a practice orientation but rather the need to facilitate case dialogue teaching, instruct novice students in foundational jurisdiction and choice of law issues in a federal system, and prepare students for heavy testing on most states’ bar examinations.¹² The last year of an American J.D. program provides wide latitude to explore additional subjects and complete the now-required experiential coursework, crucial in the absence of a pre-qualification work experience requirement.¹³ Therefore, the latter half of an American J.D. program is becoming analogous to the last part of the English or Welsh LLB plus the Legal Practice Course.¹⁴

Yet American legal educators’ attention to professional capacities is a recent phenomenon. Traditionally, mainstream American legal education was neither well-suited nor intended to increase access to justice.¹⁵ University law schools focused on educating students to represent corporations in large, elite firms that “finished” their new associates for practice themselves.¹⁶ On the fringes, schools emerged to train otherwise underserved student populations¹⁷ who would primarily represent individuals,¹⁸ but the mere mission of educating future personal plight practitioners did not necessarily

¹¹ C.f. Andrew Boon and Julian Webb, ‘Legal Education and Training in England and Wales: Back to the Future?’ (2008) 58 *J Legal Educ* 79, 80; William M. Sullivan and others, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Foundation for the Advancement of Teaching 2007) 63 (*Carnegie Report*).

¹² Mary Brigid McManamon, ‘The History of the Civil Procedure Course: A Study in Evolving Pedagogy’ (1998) 30 *Ariz LJ* 397, 432–36, 437–38; Ashley Heidemann, ‘Which Subjects Are Tested on the Uniform Bar Exam?’ (*JD Advising*, 15 March 2016) <<https://www.excellenceinlaw.school.com/which-subjects-tested-uniform-bar-exam/>> accessed 2 May 2018.

¹³ Roy Stuckey and others, *Best Practices for Legal Education: A Vision and A Road Map* (CLEA 2007) 24 (*Best Practices*); 2017 *ABA Standards* std 303(a)(2), (3).

¹⁴ C.f. Boon and Webb (n 11) 80–82.

¹⁵ Jerold Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (OUP Pbks 1977) 74–129.

¹⁶ *Ibid* 18–39, 74–101; see also American Bar Association Section on Legal Education and the Practice of Law, *Task Force on Law Schools and the Profession: Narrowing the Gap* (ABA 1992) 75–82 (*MacCrate Report*).

¹⁷ Robert B. Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (UNC Press 1983) 73–84; Kemit A. Mawakana, ‘Historically Black College and University Law Schools: Generating Multitudes of Effective Social Engineers’ (2011) 14 *J Gender Race and Justice* 679, 683–94; Joyce Sterling, Ronit Dinovitzer, and Bryant Garth, ‘The Changing Social Role of Urban Law Schools’ (2007) 36 *Sw ULR* 389, 390–94.

¹⁸ E.g. John P Heinz and others, *Urban Lawyers: The New Social Structure of the Bar* 58 (U Chi P 2005).

mean a school was educating *for* personal plight practice.¹⁹ Most new lawyers learned to practise law by doing so, often in solo or smaller firm employment.²⁰

Eventually all American Bar Association-accredited law schools adopted the first-year curriculum and teaching methods that Dean Christopher Columbus Langdell implemented at elite, corporate-oriented Harvard Law School 140 years ago.²¹ First-year courses still have the names Langdell borrowed from classifications “legal science” scholars created as they sorted the chaotic mass of American law into fields that had not existed in practice: Civil Procedure, Contracts, Criminal Law, Real Property, and Torts.²² Langdell’s case dialogue method also became legal education’s signature pedagogy despite its tenuous connection to practice.²³ Harvard of the late 1800s was not a practitioner’s world. Today, American law schools increasingly are.

The history of legal education since Langdell has until recently been the history of its increasing academicization, punctuated by occasional rumblings for more practice preparation. “Not rules, but doing is what we seek to train men for,” the realist Professor Karl Llewellyn argued controversially in the 1930s,²⁴ but clinical legal education only took off in the 1970s.²⁵ Required, professionally taught, first-year legal research and writing courses did not become the norm until the end of the twentieth century.²⁶ Only in this century have American legal educators recognized that lawyers are professional life-long learners who need direct training in profession-specific learning and reasoning capacities.²⁷

The most recent movement to integrate more authentic learning experiences arose²⁸ just as law schools experienced the 2008 “Great Recession’s” shocks to the legal services market in their admissions departments.²⁹ Large firms shuttered in-house training programs³⁰; hiring attorneys demanded applicants with immediate productivity potential; and new graduate hiring declined precipitously.³¹ Soon afterwards, bar examination pass rates also plummeted.³² Many states adopted a new practice-oriented hurdle to bar membership, the Multistate Practice Test,³³ and the American Bar Association’s

¹⁹ Randolph Jonakait, ‘The Two Hemispheres of Legal Education and the Rise and Fall of Local Law Schools’ (2006/07) 51 NYLR 864, 901–04.

²⁰ Bryant Garth and Joanne Martin, ‘Law Schools and the Construction of Competence’ (1993) 43 J Legal Educ 469, 482–88.

²¹ Stevens (n 17) 191–99.

²² G. Edward White, ‘The Impact of Legal Science on Tort Law, 1880–1910’ (1978); 78 Colum LR 213, 223, 232–36; Bruce A Kimball, ‘Students’ Choices and Experience During the Transition to Competitive Achievement at Harvard Law School 1876–1882’ (2005) 55 J. Legal Educ. 163, 171–72.

²³ *Carnegie Report* (n 11) 74–79, 81–82.

²⁴ Karl Llewellyn, ‘On What Is Wrong with So-Called Legal Education’ (1935) 35 Columbia LR 651, 654.

²⁵ Stevens (n 17) 213–16, 240–41.

²⁶ David S Romantz, ‘The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum’ (2003) 52 U Kan LR 105, 134–36.

²⁷ E.g. American Bar Association Section on Legal Education and the Practice of Law, *Standards for Approval of Law Schools and Interpretation* (ABA 1995) std 302(a) (last year *not* specifically requiring law schools offer instruction in legal reasoning, problem-solving, and research); 2017 *ABA Standards* interp. 302–1 (self-evaluation); Schulze (n 8) 36–38 (self-regulated learning).

²⁸ E.g. *Carnegie Report* (n 11) 117–25; *Best Practices* (n 13) 16–18.

²⁹ Law School Admissions Council, Archive – End-of-Year Summary, Applicants, Applications & Admissions <<https://www.lsac.org/lisacresources/data/aba-eoy/archive>> accessed 24 March 2018 (documenting a 35 percent drop in number of law school applicants between 2010–15); Deborah Jones Merritt, ‘What Happened to the Class of 2010? Empirical Evidence of Structural Change in the Legal Profession’ [2015] Mich St LR 1043, 1063–1086, 1102–21.

³⁰ Robert W Hillman, ‘Professional Partnerships, Competition, and the Evolution of Firm Culture: The Case of Law Firms’ (2001) 26 J Corp L 1061, 1076–80.

³¹ Merritt (n 29) 1063–75.

³² ‘2016 Statistics’ (2017–18) 86(1) Bar Examiner 14, 30–33.

³³ Ben Bratman, ‘Improving the Performance of the Performance Test: The Key to Meaningful Bar Exam Reform’ (2015) 83 UMKCLR 565, 577–81.

(ABA) Task Force on the Future of Legal Education urged schools to do what it took to reduce costs and focus on practice preparation.³⁴ The ABA also now requires that American law students take upper-class writing and “experiential course(s)”, such as clinics, externships and simulation courses and that law schools provide more formative feedback,³⁵ likely to occur in and therefore requiring more practice-referenced activities in non-experiential courses.³⁶ An unprecedentedly compelling storm is pushing American law schools to prioritize practice preparation and qualification.

EARLY PRACTICE PREPARATION: STRUCTURING KNOWLEDGE FOR PROBLEM SOLVING

Much of the value of knowledge is in its structure.³⁷ Knowing that there is a “Whitton Station” and a “Richmond Station” in the London suburbs is not very useful in the abstract. More useful is knowing the connection between them: both are on the Reading to Waterloo rail line. Better is knowing that if you board a train at Whitton Station on Platform 1 you will pass, in order, through Twickenham, St Margaret’s, Richmond, North Sheen, Mortlake, Barnes, Putney, Wandsworth Town, Clapham Junction, Queenstown Road, and Vauxhall Stations, before arriving at London Waterloo Station, a group of stations connected by a particular relationship: their order on the Reading-to-Waterloo line. To understand how the stations are related is to have a structured knowledge of the line.³⁸

Structure makes knowledge useful in problem-solving.³⁹ Consider the problem of how to get from Whitton Station to Richmond Station. The relevant knowledge properly structured – the names of the stations in the order a train will reach them – is the tool for solving the problem: board a train from Platform 1 at Whitton Station; watch two stations go by (Twickenham and St. Margaret’s); and alight at the third, Richmond Station.

Want more problem solving power? Learn more, which means to connect more concepts. Knowledge structures’ size, complexity, and integration determine their problem-solving power.⁴⁰ For example, making connections between a station and its geographic location dramatically expands the locus of navigation problems solvable with the knowledge. Whitton Station is located on Whitton High Street in the town of Whitton. Richmond Station is a brief walk from Richmond University (the American International University). Someone in Whitton High Street who wants to go to Richmond University can take the train from Whitton Station to Richmond Station and proceed from there.

³⁴ American Bar Association Task Force on Future of Legal Education, *Report and Recommendations* (ABA 2014) 11–17, 22–28.

³⁵ American Bar Association Section on Legal Education and the Practice of Law, *Standards and Rules of Procedure for Approval of Law Schools 2014–2015* (ABA 2014) stds 303(a)(2) (upper-class writing), 303(a)(3) (experiential courses), 314 (formative feedback).

³⁶ Jennifer E. Spreng, ‘Suppose the Class Began the Day the Case Walked in the Door: Accepting Standard 314’s Invitation to Imagine a More Powerful, Professionally Authentic First-Year Learning Experience’ (2018) 95 U Det-Mercy LR _____, _____ (forthcoming).

³⁷ Jerome Bruner, *The Process of Education* (Harv UP 1960) 5–8, 17–18; Gary L Blasi, ‘What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory’ (1995) 45 J Legal Educ 313, 336–37.

³⁸ Bruner (n 37) 7.

³⁹ Blasi (n 37) 335–48.

⁴⁰ Susan A Ambrose and others, *How Learning Works: 7 Research-Based Principles for Smart Teaching* (Jossey-Bass 2010) 49–54.

Structured knowledge facilitates making connections.⁴¹ A student of the Waterloo-to-Reading line might “notice” that on a map of Greater London, Richmond is farther east than Whitton and deduce that a traveller from Whitton Station to Richmond Station will be going east and therefore to get to Richmond Station, the traveller must board an east-bound train at Whitton Station.⁴² Central London is even farther east than Richmond, so to get to Richmond, the traveller at Whitton Station boards a train headed toward London, instead of relying on her memory of whether the train to Richmond stops on a particular platform.⁴³ Make more connections – rail stations are, after all, hubs for many services – and suddenly knowing the stations is to be able to solve a vital practical problem akin to obtaining access to justice: how to get where you want to go.

Well-structured knowledge even challenges superficial understandings of what it is to be knowledgeable. The person who answers “How do you get from Trafalgar School in Twickenham to Richmond Station?” with “Take the 490 bus to Richmond Station” sounds more knowledgeable than one who says, “You can catch a bus along the Staines Road and get within walking distance”. But the opposite is more likely true. The first person may simply have memorized that the 490 service to Richmond Station stops on the Staines Road. The second may be reasoning that multiple bus services run along the Staines Road, part of a major Twickenham thoroughfare that eventually becomes “Richmond Road” and therefore likely passes from Twickenham into Richmond, where at Richmond Station, a regional Transport for London hub, many bus services converge. If so, the second person is more knowledgeable in the way that matters most: having an interconnected knowledge she can retrieve and use to solve new navigation problems.⁴⁴

The difference between unstructured and highly structured knowledge is the difference between a step-by-step list of directions from Twickenham Green to St Pancras Station and an integrated understanding of transport services so you still make your Eurostar train to Brussels despite closure of the Underground’s Northern Line service north of Waterloo.⁴⁵ The step-by-step list is mere “rules without reasons” learned mostly by rote and useful only in a particular context; the integrated understanding of National Rail and Transport for London services is “knowing both what to do and why” and often the product of active, deep learning activities.⁴⁶ The more complex and densely integrated a person’s knowledge structures, the more likely the person will retain the knowledge, transfer it to other contexts, and retrieve it when needed.⁴⁷

Lawyers have a discipline-specific, professionally authentic way of learning that replicates knowledge construction: legal reasoning.⁴⁸ They deconstruct legal texts and legally meaningful events into raw analytical product (legal and factual analysis).⁴⁹ Then, they make conceptual connections between pieces of analytical product and

⁴¹ Bruner (n 37) 7; Ambrose and others (n 40) 52–53.

⁴² C.f. Susan M. Barnett and Stephen Ceci, ‘When and Where Do We Apply What We Learn? A Taxonomy for Far Transfer’ (2002) 128 *Psych Bull* 612, 634 (speculating “noticing” is part of “transfer across domains,” an intellectual-growth process).

⁴³ Bruner (n 37) 25.

⁴⁴ Ambrose and others (n 40) 44–46.

⁴⁵ Richard R Skemp, ‘Relational Understanding and Instrumental Understanding’ (1978) 26(3) *Arithmetic Teacher* 9, 14.

⁴⁶ *Ibid* 9; Jennifer E Spreng, ‘Spirals and Schemas: How Integrated Courses in Law Schools Create Higher-Order Thinkers and Problem Solvers’ (2015) 37 *U La Verne LR* 37, 47–48, 52–53.

⁴⁷ Bruner (n 37) 11–12, 17–18, 25; Skemp (n 45) 12–13; Shirley Lung, ‘The Problem Method: No Simple Solution’ (2009) 45 *Willamette LR* 723, 745–48.

⁴⁸ Kenneth J Vandeveld, *Thinking Like a Lawyer: An Introduction to Legal Reasoning* (Routledge, 2nd edn, 1996) 2.

⁴⁹ *Ibid* 2, 37–50. C.f. RJ Spiro and others, ‘Knowledge Acquisition for Application: Cognitive Flexibility and Transfer in Complex Content Domains’ (Tech Rep No 409, U of Illinois Center for the Study of Reading 1987) 7.

reconstruct it into structured knowledge (synthesis).⁵⁰ Finally, lawyers apply structured knowledge to solve legal problems.⁵¹ Structured knowledge is a lawyer's "expertise".⁵²

Therefore, legal reasoning, which produces structured legal knowledge, is perhaps *the* foundational practice skill.⁵³ Successful fact investigation starts with a deep understanding of the underlying claims and defences.⁵⁴ Both rapport and doctrinal knowledge that cues relevant questions are vital to successful interviewing.⁵⁵ Creativity will not make a brief persuasive if its argument has flaws.⁵⁶ Legal reasoning is essential to legal problem solving and therefore expanding access to justice.

In theory, legal reasoning is the foundation of American legal education's first year. First-year students primarily study appellate case opinions and statutes.⁵⁷ Professors devote most classroom time to deconstructing legal texts into "facts", "issues", "holdings", "policies", "rules", "elements", "reasoning", "factors" and other pieces.⁵⁸ With probing questions and hypotheticals, professors guide students through microscopic inspection of this raw intellectual product.⁵⁹

But halfway through the legal reasoning process, this theoretical ideal breaks down. First, professors all but ignore *reconstruction* of the raw intellectual product into structured knowledge applicable to legal problems.⁶⁰ Such synthesis is fruit not of the classroom but of "outlining" in the study room: creating, editing, and as students internalize concepts, even erasing their original, hopefully structured outlines of the law of the course from their case briefs, class notes, and course materials.⁶¹ What little professional guidance students receive will come not from their doctrinal course professors but academic support personnel.⁶² Outlining, American legal education's knowledge structuring process and signature "study skill", is rarely taught, supervised, and perhaps completed.⁶³

Second, few professors actively teach application of structured legal knowledge to a complex set of facts.⁶⁴ Professors do guide students through application of individual principles with relatively short hypothetical questions such as can fit on a PowerPoint slide,⁶⁵ and edited casebook opinions are similar to "worked problems" that are effective for teaching problem-solving to novices.⁶⁶ But neither is representative of

⁵⁰ Vandavelde (n 48) 57–65. C.f. Spiro and others (n 49) 7–8.

⁵¹ Vandavelde (n 48) 91–93.

⁵² Blasi (n 37) 342–43.

⁵³ C.f. *MacCrate Report* (n 16) 135.

⁵⁴ *Ibid* 164–65; Stephan Krieger, 'Domain Knowledge and the Teaching of Creative Legal Problem Solving' (2004) 11 *Clinical LR* 149, 187.

⁵⁵ Krieger (n 54) 187–88.

⁵⁶ *Ibid* 166, 173–75, 186.

⁵⁷ C.f. Richard B Cappalli, 'The Disappearance of Legal Method' (1997) 70 *Temp LR* 393, 415.

⁵⁸ *Carnegie Report* (n 11) 50–54, 57, 63–74.

⁵⁹ *Ibid* 59–74.

⁶⁰ C.f. Jennifer M Cooper, 'Smarter Law Learning: Using Cognitive Science to Maximize Law Learning' (2016) 44 *Cap U LR* 551, 587–88.

⁶¹ Karol Schmidt, 'Learning from the Learners: What High-Performing Law Students Teach Us About Academic Support Programming' (2010) 4 *Phoenix LR* 287, 304–05; Spreng, 'Spirals and Schemas' (n 46) 55.

⁶² Spreng, 'Spirals and Schemas' (n 46) 56.

⁶³ Schmidt (n 61) 304–05; Elizabeth Bloom, 'Teaching Law Students to Teach Themselves: Using Lessons from Educational Psychology to Shape Self-Regulated Learners' (2013) 59 *Wayne LR* 331, 345–47; Cooper (n 60) 587–88.

⁶⁴ *Best Practices* (n 13) 104–09.

⁶⁵ *Carnegie Report* (n 11) 62; Larry O. Natt Gantt II, 'The Pedagogy of Problem-Solving: Applying Cognitive Science to Teaching Legal Problem Solving, (2012) 45 *Creighton LR* 699, 752–53 (citing research showing that short hypotheticals are insufficient to develop expert problem-solving capacities).

⁶⁶ See Paul A Kirschner, John Sweller and Richard E Clark, 'Why Minimal Guidance During Instruction Does Not Work: An Analysis of the Failure of Constructivist, Discovery, Problem-Based, Experiential, and Inquiry-Based Teaching' (2006) 41 *Educ Psych* 75, 80.

final examination questions or practice scenarios.⁶⁷ Students rarely benefit from the cognitive apprenticeship of watching an expert professor apply structured knowledge to problems,⁶⁸ nor do they receive much feedback on their own efforts.⁶⁹ Without understanding the types of problems lawyers solve or the examinations law schools set, even very motivated students may misapprehend how dense and complex their legal knowledge structures must be to succeed.⁷⁰

Further, when novice law students do not know how they will eventually use legal knowledge, they cannot structure it productively.⁷¹ Not all structures are equally useful, and experts structure knowledge based on the way they will ultimately use it.⁷² Consider the student choosing between alphabetical or geographical order when structuring knowledge of rail stations. A student who does not know that the purpose of learning about the Reading to Waterloo line is figuring out how to get from, say, Whitton to Richmond, may unwisely choose to brave a multi-page examination fact pattern and its call to “discuss all transportation issues you see” with an alphabetical list of the Reading to Waterloo line stations, the names of which she will no doubt immediately excise from memory after that harrowing experience.⁷³

Ideally, professors would prioritize scaffolding students making conceptual connections to accelerate their knowledge construction, application capacities, and acquisition of expertise. One hallmark of expertise is the ability to retrieve information applicable to a problem.⁷⁴ Students with densely interconnected knowledge structures have more pathways to their knowledge and are more likely to retrieve it when needed,⁷⁵ though students often need direct guidance to make connections and appreciate their significance.⁷⁶

Students also need guidance with another hallmark of expertise, the elusive “transfer” of knowledge from one context to apply it to problems in another. Transfer is also a function of connections: connections between the knowledge and the transfer task as well as the similarity between the circumstances in which knowledge was acquired and must be applied.⁷⁷ These circumstances are often not similar, such as when transferring knowledge acquired during school to real world problems.⁷⁸ Therefore, transfer is neither certain nor often “spontaneous” without external prompting.⁷⁹

⁶⁷ Herbert N Ramy, ‘Moving Students from Hearing and Forgetting to Doing and Understanding: A Manual for Assessment in Law School’ (2013) 41 Cap ULR 837, 849–50.

⁶⁸ C.f. Lung (n 47) 757–58.

⁶⁹ *Carnegie Report*, note 11, 162–67.

⁷⁰ Spreng, ‘Spirals and Schemas’ (n 46) 58–62. See also Graham Gibbs and Claire Simpson, ‘Conditions Under Which Assessment Supports Students’ Learning’ (2004–05) 1 *Learning and Teaching in Higher Educ* 3, 4–5, 14–16; Tim Speicher and Marijke Kehrhn, ‘Analogical Reasoning: A Process for Fostering Learning Transfer from the Classroom to Clinical Practice’ (2009) 5 *Intl Forum of Teaching and Studies* 52, 55.

⁷¹ Ambrose (n 40) 48–49.

⁷² *Ibid* 42, 48–52, 55.

⁷³ *Ibid* 48–49. If you doubt that anyone would make the mistake of choosing “alphabetical order” for structuring knowledge of rail stations, I invite you to review first-year law student “outlines” and observe the number organized based on the date the professor presented each topic as opposed to examination problem-solving schemes. C.f. Jessica Elliott, ‘Teaching Outlining for Exam Preparation as Part of the First-Year Legal Research and Writing Curriculum’ (2003) 11(2) *Persp: Teaching Legal Res & Writing* 66.

⁷⁴ Blasi (n 37) 318, 333–344.

⁷⁵ Ambrose (n 40) 49–52.

⁷⁶ *Ibid* 53–54, 62–64; Lung (n 47) 750–53.

⁷⁷ National Research Council, *How People Learn: Brain, Mind, Experience, and School* (John D Bransford, Ann L Brown, and Rodney R Cocking eds, expd edn, Nat Acad Press 2004) 62–66; Dale Shunk, *Learning Theories: An Educational Perspective* (6th edn, Pearson 2011) 318–19.

⁷⁸ *Ibid* 73–77.

⁷⁹ *Ibid* 66.

Aspects of the traditional first-year curriculum do facilitate retention and transfer. Students are more likely to retrieve and transfer knowledge acquired in the context of solving brief problems when they encounter similar problems later.⁸⁰ Students instructed with multiple solved examples are more likely to produce knowledge structures that transfer spontaneously to new problems than are students instructed only with only one.⁸¹ Transfer is even more likely if those students are also instructed with abstract principles.⁸² First-year law courses use all three: case opinions (solved examples), hypotheticals (brief problems), and black-letter law and commentary (abstract principles). Professors can prompt students to make connections⁸³ (“where have we seen a court rely on ‘foreseeability’ before?”⁸⁴), recognize structurally deep features in cases or problems⁸⁵ (“how is ‘foreseeability’ different when analyzing duty versus causation?”⁸⁶), and improve problem solving⁸⁷ (“when considering if the defendant could ‘foresee’ that its product would end up in the forum state, consider if the product is designed for activities unique to the state”⁸⁸).

More authentic learning opportunities improve transfer. Knowledge acquired in authentic learning environments is more likely to transfer, especially to analogous problems.⁸⁹ Learning in multiple contexts, such as from a combination of abstract of principles and authentic activities, also facilitates transfer.⁹⁰ Authenticity may motivate students to deep learning activities that produce transferable knowledge,⁹¹ and it shows students what they must learn and transfer for later experiential coursework and practice.⁹²

Introductory legal education could be more authentic, such as by anchoring some instruction in an extended litigation or transactional simulation. Anchoring instruction is “an approach in which the study of many concepts and skills is situated in a single context for an extended period of time.”⁹³ An extended simulation provides a factually rich learning environment and multiple opportunities for students to acquire, structure, use and explore the relevance of knowledge to solve problems.⁹⁴ When juxtaposed with abstract instruction, authentic simulation can facilitate construction of transferable knowledge without overburdening novice students’ cognitive capacities.⁹⁵ Therefore, anchoring some first-year doctrinal instruction in a simulation would support practice

⁸⁰ Lea T. Adams and others, ‘Memory Access: The Effects of Fact-Oriented Versus Problem-Oriented Acquisition’ (1988) 16(2) *Memory & Cognition* 167, 172–73.

⁸¹ Richard Catrambone and Keith J Holyoak, ‘Overcoming Contextual Limitations on Problem-Solving Transfer’ (1989) 15 *J Experimental Psych* 1147, 1154.

⁸² Mary L Gick and Keith J Holyoak, ‘Schema Induction and Analogical Transfer’ (1983) 15 *Cog Psych* 1, 25–31.

⁸³ Ambrose (n 40) 62–63.

⁸⁴ C.f. *World-Wide Volkswagen Corp* (n 4) 297–98 (personal jurisdiction); *Happel v Wal-Mart* 766 NE2d 1118, 1123–24 (Ill 2002) (duty).

⁸⁵ Ambrose (n 40) 62–63.

⁸⁶ C.f. *Schooley v Pinch’s Deli Market, Inc* 951 P2d 749, 752–56 (Wash 1998) (en banc).

⁸⁷ Lung (n 47) 751–52.

⁸⁸ C.f. *Nicastro* (n 2) 889 (Breyer J concurring).

⁸⁹ R Scott Grabinger and Joanna C Dunlap, ‘Rich Environments for Active Learning: Problem-Based Learning’ (1995) 5(2) *Alt-J* 5, 11; Shunk (n 77) 318–21, 323.

⁹⁰ CTGV, ‘Anchored Instruction and Its Relationship to Situated Cognition’ (1990) 19(6) *Educ Res* 2, 3–4; Spiro and others (n 49) 8, 11; Yiasemina Karagiorgi and Loizos Symeou, ‘Translating Constructivism into Instructional Design: Potential and Limitations’ (2005) 8 *J Educ Tech and Soc* 17, 20.

⁹¹ Judith T.M. Gulikers and others, ‘The Effect of Practical Experience on Perceptions of Assessment Authenticity, Study Approach, and Learning Outcomes’; (2008) 18 *Learning and Instruction* 172, 173–74, 182–83.

⁹² C.f. Speicher and Kehrhn (n 70) 55.

⁹³ Susan M Williams, ‘Putting Case-Based Instruction into Context: Examples from Legal and Medical Education’ (1992) 2 *J Learning Sci* 367, 373.

⁹⁴ Grabinger and Dunlap (n 89) 7–8, 11.

⁹⁵ C.f. Spiro and others (n 49) 11; Kirschner (n 66) 80.

preparation, development of expertise, and access to justice better than traditional instruction alone.

ONE SOLUTION: INTEGRATING SUBJECTS AND SIMULATION IN INTRODUCTION TO CIVIL LITIGATION

The 2013–14 Introduction to Civil Litigation prototype was an innovative two-term, ten-credit, first-year course integrating tort and civil procedure topics and anchoring substantial instruction in an original drug product liability litigation simulation. Enrolment was forty students and the entire teaching load for a full-time, tenure-track professor. Ten credits were one third of a student’s first-year course load.

Students worked in four-member “law firms” representing one of the parties in the *Taylor v McDaniel* simulation. They interviewed clients; drafted and amended pleadings; briefed motions; prepared for scheduling conferences, and propounded discovery. The factually rich simulation raised collateral issues that prompted collateral activities such as interviewing witnesses, meeting prospective clients, and arguing discovery objections. Each student produced a portfolio of firm and individual work.

Introduction to Civil Litigation integrated traditional doctrinal, writing, and skills instruction. Monday and Wednesday classes covered torts and procedure topics in a case-dialogue-and-hypothetical format. On Fridays, students attended simulation-driven workshops for honing legal reasoning capacities and coaching students through simulation activities.

CHART ONE: TAYLOR v MCDANIEL SIMULATION ACTIVITIES

INTRODUCTION TO CIVIL LITIGATION I (first semester)	INTRODUCTION TO CIVIL LITIGATION II (second semester)
Joint Defense Agreement (D)	Ticket to Top Gun School (individually)**
Elementary Complaint (P) and later consolidation (P volunteers)	Answer (D)**
Service of the Complaint (P)	Consolidated amended complaint (P volunteers)
Motion/Memoranda in Support/Response to Dismiss for Lack of Personal Jurisdiction**	Answer consolidation (D volunteers)
Notice of Removal (D)	Rule 26(f) Report (all firms collaborate to produce one document)
Motion to Remand (P)	Initial Disclosures
Memoranda in Support/Response to Plaintiff’s Motion to Remand**	Discovery Requests (P) and Responses (D)
	Motion to Dismiss and in the Alternative, for Summary Judgment and Memoranda in Support/Response**

(** graded assignment)

The syllabus evolved from “The Spine” (see Chart Two). Each vertebra in The Spine connects a tort topic and a procedure topic (a “point of integration”) in the context of

CHART TWO: “THE SPINE” OF INTRODUCTION TO CIVIL LITIGATION

PROCEDURE TOPIC	TORT TOPIC	POINT OF INTEGRATION	SIMULATION ACTIVITIES
Long-arm statutes in personal jurisdiction	Concept of tort, elements, and injury	“ <i>Tortious Act</i> ”: <i>Gray v American Radiator</i> holds that a “tortious act” in a long-arm statute defining a state court’s jurisdiction over a defendant exists only when all elements necessary to render the defendant liable have occurred, including the injury. ^a	<u>Both parties</u> : Client interviews. <u>Plaintiffs</u> : Elementary cause of action drafting <u>Defendants</u> : Joint defense agreements.
Personal jurisdiction	Products liability	“ <i>Stream of commerce</i> ”: A person in the business of selling has a duty to place into the “stream of commerce” only safe products, and a seller in the stream of commerce that anticipates its product being sold in the forum state may be subject to the jurisdiction of that state’s courts. ^b	<u>Defendants</u> : Motion/Memorandum to dismiss claims against drug ingredient manufacturers and licensors for lack of personal jurisdiction. <u>Plaintiffs</u> : Responses to Defendants’ Motion to Dismiss.
Subject-matter jurisdiction	Duty	<i>Fraudulent Joinder/Removal</i> : To guarantee a state rather than federal forum, a plaintiff sometimes joins a “non-diverse” defendant (who is a citizen of the same state as the plaintiff). If the plaintiff lacks a colorable claim against that defendant, such as where a tort defendant clearly had no duty of care, a federal court may determine it has jurisdiction without reference to that defendant. ^c	<u>Defendants</u> : Notice of Removal to federal court based on fraudulent joinder of non-diverse pharmacist defendant who allegedly has no duty to warn of drug dangers. <u>Plaintiffs</u> : Motion/Memorandum to Remand removed action to state court for lack of federal subject-matter jurisdiction, because Plaintiff has colorable failure to warn claim against the defendant pharmacist. <u>Defendants</u> : Response to Motion to Remand.

PROCEDURE TOPIC	TORT TOPIC	POINT OF INTEGRATION	SIMULATION ACTIVITIES
Pleading (and discovery)	Cause-in-fact	<i>Pleading Cause in Fact:</i> Pleading cause in fact requires that students draft very precise factual allegations to establish link by link a cause in fact chain to comply with the new “plausibility” pleading standard of <i>Bell Atlantic v. Twombly</i> . ^d	<u>Plaintiffs:</u> Amend complaint <u>Defendants:</u> Answer complaint with failure to state a claim defense. <u>Both parties:</u> Prepare Federal Rule of Civil Procedure 26(f) meeting report and propound/ respond to discovery for causation evidence.
<i>Choice of Law</i> ^e	Premises Liability	<i>Erie Railroad v Tompkins</i> ^f : The seminal premises liability case holds that state substantive law applies in a federal court with jurisdiction based solely on the parties’ state citizenships. ^g	See Causation/Summary Judgment below.
Summary Judgment	Causation	<i>Causation and Summary Judgment:</i> Iconic causation cases illustrate ^h both causation theories and fact analysis to help teach application of the standards for entering judgment as a matter of law. ⁱ <i>Choosing the Summary Judgment Standard:</i> Though it is well-established that federal and not state standards for entering summary judgment apply in federal court, reasons are not, and if differing state standards did apply, the requisite quantum of causation evidence to defeat the motion might change. ^j	<u>Defendants:</u> Motion/ Memorandum for Summary Judgment with three-issue architecture: Whether the original complaint’s causation allegations comply with modern pleading standard. Whether state or federal summary judgment standard applies. Whether Defendants are entitled to summary judgment of general causation based on paucity of evidence that Aspire causes heart valve damage. <u>Plaintiffs:</u> Memorandum in Response to Defendants’ Motion.

a simulation or other practice-oriented activity. The Spine gives the course structural coherence and informs virtually all instructional delivery.⁹⁶

⁹⁶ C.f. R Oliver and others, ‘Curriculum Structure: Principles and Strategy’ (2008) 12 Eur J Dent Educ 74, 77 (calling “curriculum structure” a “skeleton” of a course).

PROCEDURE TOPIC	TORT TOPIC	POINT OF INTEGRATION	SIMULATION ACTIVITIES
Defenses and Apportionment	Joinder	“ <i>Transactional Relationships</i> ” and <i>Joinder</i> : Teaching procedure topics of joinder, supplemental jurisdiction and preclusion together with defenses, indemnity, contribution and apportionment, which are so conceptually and practically interrelated as to be almost inseparable in fact. ^k	Extended in-class hypotheticals based on joinder and liability of parties in <i>Taylor v. McDaniel</i> .

^a 176 NE2d 761, 763 (Ill 1961).

^b *World-Wide Volkswagen* (n 4) 297–98 (personal jurisdiction); Nagy (n 1), 5:9 (product liability).

^c Charles Alan Wright and others, *Federal Practice and Procedure* (April 2017 update, Thomson West, 3rd edn, 2016), 3641.1.

^d 550 US 544, 555-57 (2007); Spreng, ‘Spirals and Schemas’ (n 46) 84–87.

^e A later version of the course integrated premises liability and choice of law.

^f 304 US 64 (1938).

^g Spreng, ‘Spirals and Schemas’ (n 46) 95–96.

^h E.g. *Celotex Corp v Catrett* 477 US 317 (1986) (landmark summary judgment opinion in asbestos case without benefit of market share liability to satisfy causation); *Hymowitz v Eli Lilly & Co* 539 NE2d 1069 (NY 1989) (market share liability adopted on appeal of summary judgment).

ⁱ E.g. *Lavender v Kurn* 327 US 645 (1946); *Rogers v Missouri Pacific RR Co*, 352 US 500 (1957).

^j Matthew R Lyon, ‘Shady Grove, The Rules Enabling Act, and the Application of State Summary Judgment Standards in Federal Diversity Cases’ (2011) 85 St John’s LR 1011, 1032–55.

^k Spreng, ‘Spirals and Schemas’ (n 46) 92–95.

The course adjusted traditional topic order and emphasis to accommodate The Spine.⁹⁷ Traditionally, categories of claims based on culpability determine the topical progression in American torts courses, which begin with intentional torts and then proceed to negligence torts, strict liability, and beyond.⁹⁸ *Taylor v McDaniel* demanded students have basic knowledge of strict products liability quickly, so Introduction to Civil Litigation re-imagines the subject as a set of elements universal to all torts: “duty,” “standard of conduct,” “breach,” “causation,” and “injury”.

Integrating normally siloed course subjects with the simulation gave Introduction to Civil Litigation a “spiral curriculum”. A spiral curriculum/course starts with intuitive exploration of foundational concepts and then “turns back on itself” to revisit topics with ever-increasing sophistication and authenticity, so that through continual re-examination, students make connections that broaden, deepen and integrate their knowledge structures.⁹⁹ Introduction to Civil Litigation begins with the holistic “Universal Tort” and related principles (e.g., “foreseeability”) and after more detailed consideration of each element, separately and in combination, students apply the knowledge in simulation activities. Therefore, a spiral course facilitates students learning like lawyers through the *complete* process of deconstructing, reconstructing and applying legal knowledge.

⁹⁷ C.f. James R Morgan and Robert W Bolton, ‘An Integrated First-Year Engineering Curriculum’ (Nov. 1998) Proc. Frontiers in Education Conference 3–4.

⁹⁸ E.g. Thomas C Grey, ‘Accidental Torts’ (2001) 54 Vand LR 1225, 1228; Thomas C Galligan Jr and others, *Tort Law: Cases, Perspectives and Problems* (4th rev edn, LexisNexis 2007).

⁹⁹ Bruner (n 37) 13, 52–54; Ronald M Harden, ‘Planning a Curriculum’ in John A Dent and Ronald M Harden (eds), *A Practical Guide for Medical Teachers* (Churchill Livingstone 2001) 13, 16–17.

CHART THREE: “UNIVERSAL TORT” SCHEMATIC

	INTENTIONAL TORTS	NEGLIGENCE TORTS	STRICT PRODUCTS LIABILITY
DUTY – to conduct oneself for the benefit of another	Do not intentionally engage in conduct harmful to another	Protect foreseeable persons from foreseeable harms	Place only safe products in the stream of commerce
STANDARD OF CONDUCT – to satisfy duty	Not intentionally engaging in conduct harmful to another	Exercising reasonable care to avoid unreasonable risk of foreseeable harm	Placing only safe products in the stream of commerce
BREACH – not conforming to the standard of conduct	Intentionally engaging in conduct harmful to another	Failing to exercise reasonable care	Product in stream of commerce is defective/ unreasonably dangerous

CHART FOUR: SELECTED TORT CONCEPT SPIRALS IN INTRODUCTION TO CIVIL LITIGATION I

UNIT	“NEW” CONCEPTS	PRIMARY CAUSE OF ACTION	REPRISED CONCEPTS
1	Introduction to all Universal Tort elements with focus on act or omission	Introductory intentional, negligence, strict liability in context of basic legal torts methods	
2	Breach as defectiveness in products liability	Strict products liability with reference to negligence	Act or omission in strict liability
3	Duty, standard of conduct, and breach in negligence	Negligence	Act or omission and duty in simulation activity
4	Standard of conduct and breach in intentional torts	Intentional torts	Standard of conduct and breach
5	Causation-in-fact and wilful and wanton conduct	Negligence, strict products liability, wilful and wantonness	All prior in pleading context
6	Legal causation	Strict products liability and negligence	All prior with emphasis on foreseeability as determining factor
7	Defenses	Primarily negligence, through the filter of plaintiff fault	All prior, especially breach and causation
8	Apportionment	All	All prior including defenses in joinder context

These features of Introduction to Civil Litigation facilitate structuring transferable knowledge and honing legal reasoning capacities and therefore support early practice preparation. First, by integrating *Taylor v McDaniel*, the course provided instruction in the multiple contexts, one authentic, that help students structure knowledge productively and improve transfer.¹⁰⁰ For example, students studied “duty” through sections of the Restatements of Torts (abstract principles) and case opinions and hypotheticals (solved examples) as in traditional courses. Through simulation instruction, students then made or responded to a motion turning on whether Lee Taylor had a colorable claim that her pharmacist had a duty to warn her about Aspire’s alleged dangers, an authentic context in which students honed legal reasoning capacities, including application of highly transferable knowledge constructed from the simulation experience.

Second, a professor guides students through the entire legal reasoning process, including reconstruction/synthesis and application. Simulation activities require knowledge reconstruction and application and therefore create opportunities for the professor to provide direct guidance during workshops and feedback on work product instead of leaving students to their own devices or implicitly delegating that task to academic support programming, which when siloed from doctrinal courses tends to be sub-optimally effective.¹⁰¹ Simulation activities address several topics that are most emphasized and oft-tested in traditional courses, so accompanying professor guidance provides expectations about what students must learn and transfer for examinations,¹⁰² adding to the simulation’s utility for honing legal reasoning capacities and facilitating knowledge transfer.¹⁰³

Retention and transfer also benefit from the course’s spiral structure and place in the school’s spiral curriculum. Though not the course’s primary purpose, students do glean insight into the culture, expectations, and processes of practical problem-solving through simulation activities. First-year introductory practice activities form a spiral with upper-class experiential courses, enhancing the practice preparation curriculum.¹⁰⁴ Introduction to Civil Litigation also embeds key conceptual and theory-practice connections in the course structure and returns to topics in more integrated contexts. These structural connections and increasingly integrated spirals provide natural opportunities for professors to highlight connections and knowledge in context and to guide students through construction of consequently more densely interconnected knowledge, which provides more paths for students to access that knowledge so they can more easily retrieve and transfer it for problem solving in practice.¹⁰⁵ Through better prepared new lawyers, spiralling enhances access to justice.

For example, the Universal Tort is a prospective, practice-oriented, structured problem-solving schema students can further de- and re-construct as they develop expertise.¹⁰⁶ Case dialogue instruction is a retrospective approach to problem-solving; cases are mostly pre-packaged into remedy-entitling categories with pre-determined

¹⁰⁰ Text and notes at 81–82.

¹⁰¹ Gantt (n 65) 717–29.

¹⁰² C.f. Speicher and Kehrhahn (n 70) 55.

¹⁰³ C.f. Gantt (n 65) 717–29.

¹⁰⁴ Bruner (n 37) 12–13; *Carnegie Report* (n 11) 107–08 (observing improvements in clinical medical education when schools began the “transition to practice at the very beginning of medical school”).

¹⁰⁵ Ambrose (n 40) 51–52.

¹⁰⁶ C.f. Donald E Richards, ‘Integrating the Mechanical Engineering Core’ (2001) Proceedings of the American Society for Engineering Education Annual Conference and Expo, 1–4, 16–17 (explaining a universal analytical model for solving engineering problems that relies on “underlying concepts and themes”); John B Mitchell, ‘Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education’ (1989) 39 J Legal Educ 275, 285–86.

answers (“Did the defendant commit an intentional tort?”). The Universal Tort focuses prospectively on “What did the defendant do wrong?” and “Does that ‘wrong’ fit into a legally recognized category that provides a remedy?” without such pre-determined answers (“Could other aspects of the defendant’s conduct be framed so the law would provide a remedy?”).¹⁰⁷

Every potential education reform has its pitfalls and challenges. Some students are – and were in Introduction to Civil Litigation – resistant to active learning, which contrasts with their prior education, distresses them, and may impede their learning.¹⁰⁸ The ideal professor guidance during the learning and knowledge structuring process to achieve course objectives and avoid cognitive overload in a course integrating two subject matters and a large-scale simulation is not clear but should not be underestimated.¹⁰⁹ To preserve the pedagogical power of simulation activities, a professor may also wish to consider which and how many to mark as opposed to giving feedback only.¹¹⁰

An unusual number of 2013–14 Introduction to Civil Litigation students self-reported, without request, positive contributions from the course to later academic or professional activities, including specific anecdotes about summer work experiences – important given the course’s potential to help expand access to justice – and being better prepared generally for upper-class coursework. Those responses are consistent with the conclusion that integration and an authentic anchor contributed to students’ knowledge structuring and transfer. They are also consistent with alternate explanations, such as an unusually “active” learning experience and professor enthusiasm for an experimental course. But in light of theoretical literature and other anecdotal evidence, those responses support continuing to explore the impact authentic first-year simulations may have on knowledge construction, practice preparation, and through them, access to justice.

CONCLUSION

The Introduction to Civil Litigation prototype harnesses authentic learning experiences even in the first year of American legal education that learning theory and research indicate maximize students’ retention, retrieval, and transfer of both doctrinal and practice-oriented knowledge for problem-solving in later professional training and practice. Integrating multiple substantive topics with an authentic, extended simulation and arranging them in a spiral course design naturally facilitates student efforts to identify conceptual connections and build highly transferable, complex knowledge structures. Early practice-oriented activities can also provide a foundation for newly required experiential coursework in American J.D. programs, just as the Legal Practice Course does for the Period of Recognized Training in England and Wales.¹¹¹ Given the Legal Practice Course’s uncertain future, attractions to educating even early English and Welsh undergraduate law students with practice-oriented activities may become apparent. Most important, early legal education with practice-oriented anchors may expand the substantive and practical expertise of new, personal plight practitioners and thereby expand access to justice.

¹⁰⁷ C.f. Lung (n 47) 748–58.

¹⁰⁸ Gerald F Hess, ‘Principle 3: Good Practice Encourages Active Learning’ (1999) 49 J Legal Educ 401, 403–04; Shannon B Seidel and Kimberly D Tanner, ‘“What if students revolt?” – Considering Student Resistance: Origins, Options, and Opportunities for Investigation’ (2013) 12 Life Sci Educ 586, 590.

¹⁰⁹ Kirschner, Sweller and Clark (n 66) 80; Lung (n 47) 748–58.

¹¹⁰ Spreng, ‘Standard 314’ (n 36) ____.

¹¹¹ Julie Brannan, ‘Training for Tomorrow: The Reform of Education and Training Requirements for English and Welsh Solicitors’ (2017–18) 86(4) Bar Examiner 17, 22.

SOCIAL JUSTICE – MAKING IT COME ALIVE AND A REALITY FOR STUDENTS, AND ENABLING THEM TO BECOME ENGAGED FUTURE ETHICAL PRACTITIONERS

*ELIZABETH CURRAN**

INTRODUCTION

This article takes access to justice as a site of legal education within an overall umbrella of Clinical Legal Education that encompasses both live client work and simulated work in classrooms designed to prepare students in skills needed for practice. It argues that, by situating students in the access to justice realm in law school, they are better prepared for the uncertainties and realities of legal practice, even if that is not the field of practice in which they ultimately find themselves. Such an approach also exposes students to their duties as lawyers and officers of the court to uphold the rule of law, and to ensure both confidence in, and integrity of, the legal system. A by-product is that students develop a sense of professionalism and become better lawyers who are more likely to keep their integrity intact. By deploying both reflection-in-action and reflection-on-action in real-world activity or strongly authentic simulation, students are engaged and enabled to bring to their study a critical approach to analysing notions of law and justice that goes beyond the level of pure doctrinal learning to a deeper understanding of the way that the law affects people and plays out in society.

This article draws heavily on my experience as a clinical legal educator with direct involvement in curriculum design, teaching and programme evaluation over the past two decades. Following some clarification of concepts and terminology, a brief overview of my teaching philosophy and reflective practice journey provides a preface to the discussion.

This discussion shows, by reference to a series of examples, how classes with an access to justice focus can address the limitations of traditional legal learning – that is, learning by case law through examination of court decisions and legal problems in legal subjects (such as torts or contract) as individual silos – which can be an impediment to students thinking broadly. These practical examples of teaching approaches, tools and strategies that I have used serve to stimulate student awareness, broaden students' skills in identifying and develop a problem-solving approach to law, by engaging them in access to justice.

CONTEXT AND TERMINOLOGY

The expression clinical legal education (CLE) is used in this article as it is in Australia, as an umbrella term for practice-related legal education, often assuming an experiential learning approach:

There are many different types of experiential education available today at law schools in Australia. Law school experiential learning courses that place students in the role of lawyers representing clients with legal questions or problems are known as clinical legal education programmes or courses. In simulation courses, or courses with simulation components,

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students assume lawyer roles, usually involving the representation of hypothetical clients. In externship courses, law students are placed in professional legal settings outside the law school where they work on real legal matters and are primarily supervised by lawyers who are not law school staff. Agency and in-house clinical courses involve law students working closely under the supervision of law school staff to provide legal assistance to clients or perform other legal tasks such as drafting law reform submissions, legislation, mediating disputes community legal education or other work done by lawyers.¹

CLE therefore includes, but is not confined to, work in a university supervised clinic or university-sponsored activities such as Street Law or Innocence Projects frequently found in the initial stages of legal education (e.g. LLB, JD or their equivalents). In Australia, many universities have CLE programmes involving external clients, where students can undertake legal practice experience under supervision as part of their university studies. This is often assessable and is treated as a subject with credit points towards their degree. I taught in a clinical programme at La Trobe University and some examples in this article are taken from this work.

CLE also, however, includes the skills-based, experiential approach using simulation and role-play classroom elements of practice oriented courses. In the Australian context, this is the Practical Legal Training course (PLT) course (otherwise Graduate Diploma in Legal Practice (GDLP)) that is the required course for students who have graduated from law to be admitted to practice with a prescribed set of competencies in a range of skills.

This article examines experiential learning² courses in external client CLE programmes and in the PLT/GDLP, the latter being a blend of simulated, face-to face and online teaching and legal practice experience. Relevant skills in both environments include approaches to dealing with the uncertainties of practice, collaboration skills, interpersonal skills, conflict resolution, negotiation and advocacy skills, interviewing skills, problem solving, acting on ethical dilemmas;³ developing strong working relationships with others including clients, colleagues, supervisors, other practitioners and judicial members with whom they will be expected to interact.

The Australian National University (ANU) GDLP course, in which I currently teach, is designed to provide students with the practical skills and professional understanding they will need as an admitted practitioner.⁴ The course is delivered largely online, although it commences with an intensive week-long series of face-to-face classes called the “Becoming a Practitioner” (BAP) course taught by practitioner teachers. Students practise advocacy, negotiation, interviewing, legal writing, drafting, problem solving and team work. They continue with electives (mostly online), then complete a Professional Practice Core component, where the compulsory subjects for admission, namely civil

¹ Adrian Evans and others, ‘Best Practices in Clinical Legal Education’ (Australian Government Office for Learning and Teaching, September 2012) 4 <<https://cald.asn.au/wp-content/uploads/2017/11/Best-Practices-Australian-Clinical-Legal-Education-Sept-2012.pdf>> accessed 5 March 2018.

² Evans and others (n1) note that ‘experiential learning’ is used by academics in several professional fields and is a mode of teaching designed to expose students to develop professional skills including critical decision-making thinking and placing classroom learning in an authentic context in fields such as law, teaching, engineering and pharmacy. They note it can take the form of clinical teaching that places law students in the role of lawyers representing clients with legal questions or problems or working on policy reform or community legal education or in courses with simulated components where students assume lawyer roles in the conduct of client legal work including interviewing, negotiation, letter writing, advice or representation.

³ Mary Gentile, *Giving Voice to Values: How to Speak Your Mind When You Know What’s Right* (Yale University Press 2010); Vivien Holmes, Liz Curran and Aneka Ferguson, ‘Enhancing wellbeing and one’s capacity to deal effectively with ethical dilemmas in legal practice’ (National Wellness for Law Forum, Australian National University, Canberra); Aneka Ferguson, ‘Creating Practice Ready, Well and Professional Law Graduates’ (2017) 8 *Journal of Learning Design* 22.

⁴ ANU School of Legal Practice, ‘Structure of the GDLP Programme’ (Australian National University, 10 August 2015) <<https://legalpractice.anu.edu.au/gdlp/structure-gdlp-programme>> accessed 5 March 2018.

litigation, commercial, property, trust accounting, legal ethics and professionalism are delivered in a 12-week online simulated transactional learning course. The GDLP concludes with a three-week capstone subject, “Ready for Practice” (RfP) and a legal work placement component Legal Practice Experience (see further below). The RfP course aims to assist students to develop their professional identity, including organisational, file management and risk management issues. They also learn about the “Giving Voice to Values” approach⁵ which assists students beyond identifying an ethical issue, to work out how they will act when they confront ethical dilemmas, and how to speak to power and manage clients’ expectations. These are often necessary skills in law and are transferable to other workplaces, and therefore relevant to employability and survival.

Evans et al describe the relationship between CLE generally and the PLT/GDLP courses as:

CLE is similar to practical legal training (PLT) courses, work-integrated learning (WIL) and service learning in several respects. All of these approaches expose students to practical aspects of legal workplaces. Each approach also reinforces for students that a knowledge of legal theory is insufficient for legal practice and that their “law school” impressions of what it is like to actually practise law will be expanded by time and a variety of experiences.⁶

In addition to completing the PLT/GDLP, or around but in close proximity to it, students are required to undertake Legal Practice Experience (LPE). This involves a placement in the legal profession under the supervision of a lawyer with at least three years of legal experience and may be described, therefore, as a cousin of the articles or training contract used in some other jurisdictions. At ANU, this practical experience comprises a 20, 50 or 80 days placement in an approved legal workplace. From July 2018, 15 of these days must be undertaken during the GDLP. LPE, consequently, in my view falls within the CLE umbrella, as an example of work with external clients.

The supervised clinic kind of CLE and the PLT/GDLP programmes are related but different in nature and aims. Student clinic programmes are designed to provide opportunities for law students to critically examine the operation of the law in practice⁷. PLT/GDLP programmes provide opportunities to acquire practice-ready skills (both in the classroom and through LPE). As such, what is being assessed in terms of student performance is likely to be substantially different in each programme. Nevertheless, the GDLP coursework in assessment tasks are structured to enable students to critically examine the operation of the law in practice, providing opportunities to engage students through role play, advice by giving students opportunities by simulation in assuming the role of lawyer and the use of scenarios and assessment to make their course come alive, encourage ethical conduct and increase access to justice awareness. Similarly, assessment in their final course in the GDLP RfP after their LPE, invites them to reflect on the experiences they have had in the real life legal practice experience and their legal journey by questions asking them to identify challenges, lessons and next steps and examine the role of the legal professional in terms of client care and their professional obligations based on their observations and experience during LPE

In my view, there is no reason why a PLT, like other CLE offerings, should not be able to offer a social justice oriented LPE experience. Exposing future lawyers to a vast

⁵ Gentile (n3).

⁶ Evans and others (n1).

⁷ Evans and others (n1) discuss this and the range of clinical programs in Australia and these are also documented in the ‘Clinical Legal Education Guide, Your Guide to Clinical Legal Education Courses Offered by Australian Universities in 2011 and 2013’, University of New South Wales. <http://www.klc.unsw.edu.au/sites/klc.unsw.edu.au/files/doc/eBulletins/CLE_GUIDE_2011_12.pdf> accessed 31 May 2018.

array of clients, especially clients who have not had the privilege that many law students have experienced,⁸ is a fabulous way of building the insights and skills necessary for legal practice. It is a matter of thinking deeply and planning strategic partnerships with the legal assistance sector. A social justice context is particularly well suited to development of the competencies required by the regulator, particularly in relation to skills. Competency standards for entry-level lawyers have been jointly developed by the Law Admissions Consultative Committee (LACC) and the Australasian Practical Legal Training Council (APLEC) as the Practical Legal Training *Competency Standards for Entry-level Lawyers* (the Standards).⁹ Standard 5.10 requires overall “Lawyers Skills”, as an entry-level lawyer should be able to demonstrate oral communication, legal interviewing, advocacy, negotiation, dispute resolution, letter-writing and drafting skills. These headline skills are then broken down into further detail in the Standards. Many of the skills identified, therefore, align with the aims of CLE in general¹⁰ and include analysing facts and identifying issues, problem solving, analysing the law, generating solutions and strategies, and providing client legal advice. At ANU, we have many examples of the potential to develop these skills in a social justice context which includes access to justice, but also the broader examination of the conditions and structures that lead to inequity and an exploration of solutions. This can occur through partnerships with Legal Aid ACT. In my view, this ability to expose students to developing the legal skills for practice through social justice LPE could be further explored in the PLT/GDLP itself, as this is the final hurdle required to gain admission to practice.

My teaching background includes seven and a half years of CLE at La Trobe, and the past seven years teaching in the ANU GDLP course. This experience has informed my approach and strengthened my motivation to shape good future lawyers. Having clarified terminology and concepts, then, it is my own philosophy to which I now turn.

AUTHOR’S TEACHING PHILOSOPHY

My teaching philosophy includes:

- a) raising student awareness of how the law works in the real world and how it impacts upon people, society and the role they might play as future legal practitioners working to ensuring the integrity of the legal system and its administration;
- b) supporting students to develop skills to act ethically;¹¹
- c) modelling good practice, clarity of goals, frequent opportunities for practice, continuous formative feedback and coaching, exploration of synergies and connection between theory and legal practice,¹² and supported student autonomy and responsibility.

Through my background in CLE in both the senses outlined above, I have adopted key characteristics of clinical teaching practice (discussed in detail elsewhere in this article)¹³ and my approach is underpinned by the centrality of clients, knowledge

⁸ David Weisbrot, ‘Recent Statistical Trends in Australian Legal Education’ [1990] *Legal Education Review* 219; David Weisbrot, ‘Recent Statistical Trends in Australian Legal Education’ [1991] *Legal Education Review* 11.

⁹ Law Admissions Consultative Committee, ‘Practical Legal Training Competency Standards for Entry Level Lawyers’ <https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/Competency_Standards_for_Entry-Level_Lawyers_-_1_July_2015.pdf> accessed 15 May 2018.

¹⁰ Evans and others (n1).

¹¹ Gentile (n3); Holmes, Curran, and Ferguson (n 3); Liz Curran, Judith Dickson and Mary Anne Noone, ‘Pushing the Boundaries or Preserving the Status Quo?: Designing clinical programmes to teach law students a deep understanding of ethical practice’(2005) 8 *International Journal of Clinical Legal Education* 104.

¹² Linda Darling-Hammond and Joan Baratz- Snowden (eds), *A Good Teacher in Every Classroom* (Jossey-Bass 2005).

¹³ Evans and others (n 1).

demands, use of evidence and judgment in practice, community and standards of practice and education for clinical practice.¹⁴

Over many years, people have collaborated and shared their experiences with me, based on relationships of trust and courage. This input continues to shape my philosophy in teaching, which includes improving service delivery by shaping existing and future lawyers, improving education and community empowerment, human rights and access to justice. Others have shared their experiences of the legal system, including Indigenous elders, clients, non-legal and legal professionals, as part of my research. I also participate in and provide professional development¹⁵ and feedback sessions with my students, as these all shape my philosophy, especially the latter, which is critical for teachers.¹⁶ Participant input from my evaluation work on legal service delivery about what works and is important for good practice also informs my pedagogy, including course aims, learning outcomes, curriculum, design, activities and assessment. It is the intersection of theory and practice of law, its challenges and imperfections that makes the learning process ongoing and not always easy.¹⁷

Undertaking reflective practice in law is a challenge as, unfortunately, unlike other disciplines (such as nursing, counselling and psychology), reflective practice is not routinely embedded and integrated in legal curricula across the world¹⁸ despite its regular appearance, as reflection-on-action, in competence statements for entry level legal practice. In my teaching, I have tried to integrate reflective practice.¹⁹ In this article, reflective practice is referred to as both a problem-solving technique as a learning approach covering “evaluative reflection” and “critical reflection”.²⁰ The first is the backward-looking evaluation of what happened. The second is oriented to the future. It therefore includes reflection-in-action (Schön’s problem-setting and problem-solving aspect) and the more contemplative and learning oriented ex post facto “reflection-on-action”.²¹ My approach sits within Leering’s conceptualization which envisages it:

as a disciplined form of reflective inquiry, [which] offers the potential to enhance law student learning and, more systematically, develop professional expertise . . . where an integrated reflective practitioner is a professional who integrates theory and practice, critically reflects on practice (what one does), and theory (what one knows), and what one believes as a self-directed life-long learner, and then takes action based on that reflection to improve their practice. This kind of professional recognizes the power of reflecting collectively.²²
[my italics]

¹⁴ Jamie Alter and Jane G Cogshall Teaching as a Clinical Practice Profession: Implications for teacher preparation and state policy (Issue Brief), (New York National Comprehensive Centre for Teaching Quality, March 2009) <<https://files.eric.ed.gov/fulltext/ED543819.pdf>> accessed 5 March 2018.

¹⁵ Susan Ball, Cindy Wong and Liz Curran, ‘Health-Justice Partnerships Development Report 2016 (Victorian Legal Services Board & Commissioner 28 July 2016) <http://www.lsb.vic.gov.au/documents/Report-Health_Justice_Partnership_Development-2016.PDF> accessed 5 March 2018.

¹⁶ Stephen Dinham, ‘The Quality Teaching Movement in Australia Encounters Difficult Terrain: A Personal Perspective’ (2013) 57(2) Australian Journal of Education 91.

¹⁷ Michele M Leering, ‘Integrated Reflective Practice: A Critical Imperative for Enhancing Legal Education and Professionalism’ (2017) 95 Canadian Bar Review 47.

¹⁸ Liz Curran, ‘Reflections on Practice and Recent Research to Enable Future Practitioners to Learn About Working Collaboratively Across Disciplines to Better Help the Community’ (2017)12 (1 Autumn) Journal of Commonwealth Law and Legal Education, 46.

¹⁹ Michele M Leering, ‘Conceptualizing Reflective Practice for Legal Professionals’ (2014) 23 Journal of Law and Social Policy 83.

²⁰ Anne Brockbank and Ian McGill (2007) *Facilitating Reflective Learning in Higher Education*, (Maidenhead: SRHE and Open University Press).

²¹ Elizabeth Anne Kinsella, ‘The Art of Reflective Practice in Health and Social Care: Reflections on the Legacy of Donald Schön’ (2010) 11(4) Reflective Practice 565.

²² Michele M Leering, ‘Integrated Reflective Practice: A Critical Imperative for Enhancing Legal Education and Professionalism’ (2017) 95 Canadian Bar Review 47, 49.

Teachers of subjects in the GDLP use constructive feedback, debrief and portfolio questions to get students to think more deeply and at different levels, including not just personal, professional, but systems-wide (triple loop learning).²³ We provide a safe space for students to take risks, develop areas they identify as challenging, scary or a weakness, with multiple opportunities for constructive feedback and sharing of approaches. In doing so, skills in clinical reasoning (allied with reflection-in-action) can be developed incorporating four key elements:

- a) respectful and reciprocal dialogue;
- b) iterative use of data and evidence;
- c) probing personal assumptions and theories; and
- d) articulating reasoning (visible thinking).²⁴

As well as having a commitment to legal education, I am a practising solicitor and have also, as indicated above, been an active researcher on access to justice and human rights for over a decade, with numerous research projects, reports and articles on effective legal practice, ethics and access to justice. I wrote about the benefit of this dual role in a 2008 article for the *Alternative Law Journal*, noting that “from this vantage point, being an academic and a practitioner, a constructive interplay occurs where theory can inform practice and vice versa”.²⁵ It is this interplay which can make a valuable contribution to policy debates, student learning and development by involving all in working for justice and the rule of law. From such a vantage point, universities in their teaching and research and policy makers can tap into evidence-based information on the real-life experience of the day-to-day dilemmas facing the members of the community for whom survival, emotional and physical wellbeing can be precarious. Reflections from my experience practice have presented ideas to help deepen student learning,²⁶ enhance the understanding of the nature of problems, client contexts and holistic problem solving²⁷ especially skills in collaboration, and interpersonal skills.²⁸

Key to this article is the fact that my research (discussed further below) has found that access to justice can be improved by removing barriers to advice-seeking behaviour. This can be achieved through working with other professions and appreciating the contexts that cause and exacerbate problems with access to justice, and improving intake,

²³ Paul Tosey, Max Visser and Mark NK Saunders ‘The Origins and Conceptualizations of “Triple-Loop” Learning: A Critical Review’ 43(3) *Management Learning* 291.

²⁴ Jeana Kriewaldt and Dagmar Turnidge, ‘Conceptualising an Approach to Clinical Reasoning In The Education Profession’ 2013 38(6) *Australian Journal of Teacher Education*, article 7.

²⁵ Liz Curran, ‘Human Rights: Making them Relevant to the Vulnerable and Marginalised in Australia’ (2008) 33(2) *Alternative Law Journal*, 70, 71.

²⁶ Curran, Dickson and Noone (n 11).

²⁷ Liz Curran, ‘Making Connections: The Benefits of Working Holistically to Resolve People’s Legal Problems,’ 12, *E Law* (Murdoch University Electronic Journal of Law) www.murdoch.edu.au/elaw/issues/v12n1_2/Curran12_1.html accessed 8 June 2018; Liz Curran, ‘Relieving Some of the Legal Burdens on Clients: Legal Aid Services Working Alongside Psychologists and Other Health and Social Service Professionals’ (2008) 20 (1) *Australian Community Psychologist* 47.

²⁸ Liz Curran, ‘First Research and Evaluation Report Phase One Consumer Action Law Centre Project: Responding Effectively to Family Violence Dimensions of Debt and Credit through Secondary Consultations & Training with Community Professionals’(Consumer Action Law Centre, Victorian State Government, Justice and Regulation, 2017) <<https://workers.consumeraction.org.au/wp-content/uploads/sites/12/2017/12/Final-CALC-FV-Research-Evaluation-Report-Phase-One-29-November-2017.pdf>> accessed 5 March 2018; Curran, ‘Reflections on Practice and Recent Research’ (n 18); Liz Curran, Isobel Ryder, and Caroline Strevens, ‘An Interdisciplinary Student Clinic at University of Portsmouth (UoP): Future Practitioners Working Collaboratively to Improve Health and Wellbeing of Clients’ (Presentation slides, International Journal of Clinical Legal Education and European Clinical Legal Education Network Conference, July 5, 2017) <<https://ssrn.com/abstract=2997597>> accessed 5 March 2018; Liz Curran, ‘A Research and Evaluation Report for the Bendigo Health–Justice Partnership: A Partnership between Loddon Campaspe Community Legal Centre and Bendigo Community Health Services (Loddon Campaspe Community Legal Centre 2016) <<https://ssrn.com/abstract=3076407>> accessed 5 March 2018; Liz Curran, ‘Final Evaluation Report on the “Why Didn’t You Ask?” Project of the Family Violence Project of Loddon Campaspe Community Legal Centre’ (Australian National University 2015) <<http://lclce.org.au/wp-content/uploads/2015/05/Final-Evaluation-Report-LSB-Family-Violence-Curran-14-May-2015.pdf>> accessed 5 March 2018.

assessment and interviewing skills, drawing on the strengths of different disciplines and breaking down professional stereotypes.²⁹ These barriers may be absent or occluded in more “conventional” legal practice which informs practical legal education on courses such as the PLT/GDLP, especially where it is often tailored towards sophisticated clients and commercial practice. The demands of working in the access to justice context highlight, and therefore facilitate, the development of, the reflective approach that is needed, I suggest, by all lawyers. Law school and media representations of lawyers create a perception that legal practice is all about court rooms and competition.³⁰ This is removed from the realities of modern day legal practice. Our students will find themselves working with clients who have expectations which may be unrealistic, or with people who experience vulnerability and disadvantage. Students need to be equipped and prepared in a way they feel is safe, and which enables them to practise new skills *before* they face real clients. This is especially desirable to be introduced early in their programme to better position them in their LPE. Their clients will be relying on them to have the skills, including the key creative skill of reflection-in-action – for the necessary trust to develop for students to be able to be effective and responsive to their clients’ needs.³¹

Finding ways that interest and engage students and encourage reflection in both senses sits within the approach advocated by Dinham, and can be key in assisting student learning.³² As Evans et al have observed:

Consistent with Dewey’s curriculum theory³³ and the power of experiential learning,³⁴ clinical experience is concerned to produce graduates who can deal effectively with the modern world. At the same time, it focuses on lawyers’ roles in achieving social justice, and is strongly developmental in strengthening future lawyers’ emotional awareness and sense of ethical behaviour. CLE is vocational because of its context, but will only be truly effective if its academic dimensions are in constant connection with the substantial or “black-letter law” curriculum.³⁵

Social justice is, I suggest, of itself a means of engaging students. Its context is, however, by no means a “soft option”. Research in the field has shown that clients often have not one, but multiple, and cascading, legal problems.³⁶ In the GDLP subjects, students are exposed to teaching materials I have designed jointly with my colleagues using scenarios

²⁹ Curran, ‘First Research and Evaluation Report Phase One Consumer Action Law Centre Project’ (n 28); Curran, ‘Final Evaluation Report on the “Why Didn’t You Ask?” Project’ (n 28).

³⁰ Janine Griffiths-Baker, ‘The Good, the Bad and the Ugly: Lawyers in Film and Fiction’ (Inaugural Dean’s Lecture, Nottingham Trent University, 19 June 2016) <https://www4.ntu.ac.uk/nls/about/the_dean/index.html> accessed 9 March 2018.

³¹ Curran, ‘Reflections on Practice and Recent Research’ (n 18).

³² Dinham, ‘The Quality Teaching Movement in Australia Encounters Difficult Terrain’ (n 16).

³³ Dewey’s curriculum theory is that a student should be prepared for the modern world in their education and that make connections between the student and life, with the student having an active role (i.e. interaction). This could include “hands on” learning or experiential learning considers the individual learning process. John Dewey, *How we Think*, (D C Heath and Co Publishers 1910)

³⁴ Experiential learning is the process of learning through experience, and is more specifically defined as “learning through reflection on doing”. Unlike rote or didactic learning with more concrete issues including practice and relates to the learner and the learning context. It relates back to Aristotle who noted that we learn often by doing.

³⁵ Evans and others (n 1).

³⁶ Christine Coumarelos and others, ‘Access to Justice and Legal Needs Legal Australia-Wide survey: Legal Need in Australia Volume 7’ (New South Wales Law and Justice Foundation 2012) <www.lawfoundation.net.au/ljf/app/&id=F6F890AA7D0835ACA257A90008300DB> accessed 5 March 2018; Alexy Buck, Nigel J Balmer and Pascoe Pleasance, ‘Social Exclusion and Civil Law: Experience of Civil Justice Problems Among Vulnerable Groups’, (2005) 39(3) Social Policy & Administration 302; Pascoe Pleasance and others, ‘Mounting Problems: Further Evidence of the Social, Economic and Health Consequences of Civil Justice Problems’, in Pascoe Pleasance, Alexy Buck & Nigel J Balmer (eds), *Transforming Lives: Law and Social Process* (Stationery Office 2007); Pascoe Pleasance and others, ‘Reshaping Legal Assistance Services: Building on the Evidence Base’ (Law and Justice Foundation of NSW 2015) <www.lawfoundation.net.au/ljf/app/&id=D76E53BB842CB7B1CA257D7B000D5173> accessed 5 March 2018.

that are authentic and acknowledge real life complexities and contexts of this kind. These scenarios deliberately seek to develop in students the necessary skills – including responsiveness, effective communication, inter-relational skills, good interviewing – to identify problems that might intersect with several legal and non-legal issues and collaborative skills. They are authentic because they draw on my own research and experience in removing barriers to justice, in fostering non-adversarial approaches to reflective problem solving and in addressing the failings of conventional legal practice for the most vulnerable.

Evidence base for the GDLP programme

My research and evaluation provide the course, therefore, with an evidence base that is explicit in its focus on effective and quality legal practice.³⁷ It encourages collaborative practice³⁸ and requires constructive improvement-oriented feedback³⁹ through journals, feedback on written and oral assessment, reflective debriefs, and case study exercises.

In this design model, therefore, I consciously both support our students' learning and teach law differently. It is, I suggest, critical to expose students to new approaches of lawyering to make them more effective in practice and able to deal with the changing demands on lawyers and improvements to the legal system and practitioner responsiveness. This is particularly significant in the social justice context, where my ongoing research reveals that many disadvantaged people are not turning to lawyers with their current and multiple legal problems due to their poor previous experiences with lawyers or the legal system. This finding has been replicated in a number of my and other studies across Australia, Canada and the United Kingdom.⁴⁰

What emerges from the qualitative data from non-lawyers – namely the client interviews, health/allied health professional interviews and interviews with relationship holders – is that their previous experiences with lawyers and the legal system have often been poor or confusing. This is a factor which has a negative impact on client engagement, professional engagement and the health/allied health professionals' preparedness to refer to a lawyer.

YES. I'm just glad that [this] lawyer has helped me. Lawyers can leave you in limbo and they say [things] in terms that make your issues unclear. You don't pay for it [community legal services] so that makes life easier and [this] lawyer is a lovely person. If I have not got an appointment she will find time to speak to me. (Interview with Client at a Community Legal Centre)⁴¹

Health/allied health professionals noted in their interviews that they would once have been reticent to hand a vulnerable client over to a lawyer for this reason, in line with their "duty of client care" for fear of "further re-traumatising" their client. Participants speculated that it is possibly a result of an adversarial system which can be "harsh", "unsympathetic" and "judgmental of clients" who experience disadvantage.

There are lots of clients historically who have been in the criminal system or are still in it who have had drug problems. The drugs have been used sometimes because of that involvement in the criminal justice system as it is so traumatic. This use has an impact

³⁷ Liz Curran and Tony Foley, 'Integrating Two Measures of Quality Practice into Clinical and Practical Legal Education Assessment: Good Client Interviewing and Effective Community Legal Education' (2014) 21(1) *International Journal of Clinical Legal Education*, 69.

³⁸ Mark F Harris and others, 'Interprofessional Teamwork Innovations for Primary Health Care Practices and Practitioners: Evidence from a Comparison of Reform in Three Countries' 9 *Journal of Multidisciplinary Healthcare* 35.

³⁹ Dinham, 'The Quality Teaching Movement in Australia Encounters Difficult Terrain' (n 16).

⁴⁰ Curran, 'Human Rights: Making them Relevant to the Vulnerable and Marginalised in Australia' (n 25).

⁴¹ Curran, 'First Research and Evaluation Report Phase One Consumer Action Law Centre Project (n 28).

on their health and so the legal system is not disconnected from their health. Here at the HJP [Health-Justice Partnership] my clients have had a better experience of lawyers than they have ever had before. I have to be frank: most have not had a really great experience of lawyers. One client told me his lawyer suggested he plead [guilty] and he had not done anything but it was just easier, yet the ramifications for the client were ongoing. (In-depth interview with health/allied health professional)⁴²

In 2015, I evaluated a Family Violence project in a regional area, and analysed a data collection tool (The LCCLC Family Violence Collaborative Survey Tool). This research again highlighted the problematic relations that can arise between lawyers and non-lawyers and a need for new approaches to lawyering that break down such barriers.⁴³

These barriers have serious implications for access to justice. The consistent evidence from many studies, some still underway, suggests that clients feel “judged”, “alienated” and “mystified” by the legal system and lawyers and that this is a deterrent to seeking legal help. Law schools are an important place to ensure better lawyering can occur by shaping better future lawyers. My aim is to prepare student practitioners for the often chaotic and complex world of being a professional lawyer. Legal problem solving is not a linear process, as students have been led to believe by the traditional way undergraduate law is taught through case law and statute.⁴⁴ Although that approach will help students to develop the critical skills of interpretation and legal reasoning, they also need to be enabled to develop insight and a coherent framework for the human interactions they will encounter in practice. The key is to show them ways they can deliver holistic, joined up problem solving in context. Clients come in all colours and persuasions, from different cultures and with varied and sometimes complex and multiple needs. One approach that can be used, in the simulated PLT/GDLP classroom, is that of role play.

CLE IN SIMULATION: ROLE PLAY, INTERVIEWING AND GROUP DYNAMICS

In this section, I discuss some examples of my teaching philosophy and the ways in which I embed the findings of my real-world research, in the classroom.

Role play

Research⁴⁵ highlights that scenario-based learning and role play rooted in real client experience can benefit students, as shown in the study of medical students by Nestle and Tierney who noted:

... key aspects of helpful role play were opportunities for observation, rehearsal and discussion, realistic roles and alignment of roles with other aspects of the curriculum but it must be done effectively with role play including adequate preparation, alignment of roles and tasks with level of practice, structured feedback guidelines and acknowledgment of the importance of social interactions for learning.⁴⁶

⁴² *Ibid*; Tom Willcox, Jillian Williams and Liz Curran ‘Evaluating Consumer Action’s Worker Advice Service’ (Consumer Action Law Centre 2016) <<http://consumeraction.org.au/evaluating-consumer-actions-worker-advice-service/>> accessed 8 June 2018.

⁴³ Curran, ‘Final Evaluation Report on the “Why Didn’t You Ask?” Project’ (n 28).

⁴⁴ V Pualani Enos and Lois H Kanter, ‘Who’s Listening? Introducing Students to Client–Centered, Client–Empowering, and Multidisciplinary Problem–Solving in a Clinical Setting’, (2002) 9(1) *Clinical Law Review* 83; Curran, ‘Reflections on Practice and Recent Research’ (n 18).

⁴⁵ Debra Nestel and Tanya Tierney, ‘Role-Play for Medical Students Learning About Communication: Guidelines for Maximising Benefits’ (2007) 7 *BMC Medical Education* 3 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1828731/>>.

⁴⁶ *Ibid*.

Using role play with law students highlights the complexity of the legal system and services for the most disadvantaged clients. This exposure informs, and better prepares them for professional practice and policy engagement. As I noted with my colleagues in 2015:

We conclude that if clinical legal education is to be more than practical legal training, clinical teachers and program designers need to be wary of the easy option of simply perpetuating an uncritical acceptance of the law of lawyering. We submit that unless clinical law teachers make the intellectual and practical effort to articulate their own approach (model) to legal practice and communicate this to their students, they have little chance of engendering a deep understanding of ethical lawyering in their students. In our vision of the role of the clinic in ethics education, we aim to provide future lawyers with a range of conceptual, analytical, critical and practical skills with which to engage in the ongoing professional project of exploring what is an ethical legal practitioner.⁴⁷

In graduate and undergraduate teaching, be it in clinical, experiential or even traditional law subjects, there are opportunities to engage students in this way. I have used role plays based on real life situations when teaching core subjects at undergraduate level and have found that this adds the human dimension to learning and helps foster further important skills including improved communication capacity and a critical consideration of the law and its application.

In my “traditional law teaching”, I am transparent with students about my use of real life cases as scenarios in tutorial problems. Also, instead of having a question and answer component, I have had students interview each other and advise on the tutorial problem. I explain that this approach is derived from my “real life practice”, and always debrief with students. Notably, I am still able to cover the same level and amount of content as a traditional tutorial. This is often an argument put forward by teaching staff against introducing new approaches because of an already “overcrowded curriculum”. However, in my view, it just requires a different approach – easily integrated – and mindset. Student feedback on my classes has confirmed that this approach is more engaging and fun, with a flavour of real practice, and that it makes learning “less abstract” and more relevant. This integration of real life into students’ tutorial problems gives students a real sense of client problems, as they are faced with fresh and recent contexts that are not just legal but also social. This offers a further argument for cross-fertilisation across faculty of practitioner teachers and other academic staff. It also encourages possibilities to be identified within traditional legal subjects for integrating problem-based learning without too much difficulty.

Many GDLP subjects have been refreshed to include de-identified scenarios for students. These scenarios are based on my real-life client work, adapted to activities which help develop and hone students’ practical skills. For example, group dynamics exercises that expose students to team work, conflict resolution and client interview scenarios (which address the interviewing skills component and cross-cultural skills competencies in the curriculum). The rubric and assessment criteria also implement standards of best practice.⁴⁸ This scenario and role play-based learning offers a window into actual situations students may encounter. As one student commented in feedback on undertaking client oral advice: “Geez, I never knew this could happen in real life. The truth really is stranger than fiction”. More recently, I have integrated the learning and best practice from my research findings into my educational pedagogy and curriculum development with colleagues in the new capstone developed RfP course.

⁴⁷ Curran, Dickson and Noone (n 11); Curran, Ryder and Strevens (n 28).

⁴⁸ Curran and Foley (n 37). Evans and others (n 1).

Learning practical skills to prepare students as they progress to real life practice equips them with skills that can make them not only effective practitioners, but skilful communicators, with the capacity to understand and help their clients and colleagues. Such skills include approaches to dealing with the uncertainties of practice, developing strong working relationships with others including clients, their colleagues, supervisors, other practitioners and judicial members with whom they will be expected to interact. Significantly for access to justice, they are enabled to help in improving the legal system to increase public confidence in it, in line with the oath of office they will take on admission.

This is specifically the case in interviewing client scenarios used in the RfP. This course has Advanced Skills modules that students can choose from, based on areas they identify as skill areas they need to further develop at the end of their course. These include “Interviewing” and “Cultural Skills” which are also based on my real client work. The simulated scenarios require students to step into the shoes of clients who have a number of legal and social issues, and also to examine their own biases. These activities produce some insightful reflections in students’ written assessment on how they would approach an interview with clients from different backgrounds, reflecting on how the process worked and what they might do differently. This debrief also draws on existing research and best practice guidelines, for example, on working with culturally and linguistically diverse clients. A further innovation is to focus on collaboration.

For the BAP introductory course for the GDLP, I developed the “Group Dynamics” exercise from educational materials⁴⁹ from my previous life as a high school teacher to introduce young students to collaborative group work. I have also used materials from my professional development work with the legal profession and other evidence-based materials about collaboration.⁵⁰ I designed a new activity called “Group Dynamics” which, as well as being enjoyable, would lead to other student learning outcomes including:

1. learning what sorts of behaviours hinder and help group work;
2. giving students an opportunity to see what the rest of the GDLP would expose them to, in terms of having to provide advice with quick turnaround times;
3. working in a group context with some challenges and time pressure, asking them to provide advice and to glean factors that work or do not work when they collaborate with other professionals on a task for a client or senior partner, such as through experiential learning;⁵¹
4. enabling opportunities for students to reflect on previous group work assignments and things that worked or did not work in their own experiences;
5. debriefing after each (See Case Study 1 for further examples); and
6. seeking insights into what factors led to effective group dynamics producing a higher quality of work.
7. Introducing students to scenarios based on real life using de-identified situations with ethical or social justice implications that the students in the role of lawyer advising their Principal lawyer on the course of action to adopt.

⁴⁹ Jerry Hampton, ‘Roleplay for Groups: A Group Dynamics Exercise’ (Group Dynamics and Community Building 2006) <www.community4me.com/role-play.html> accessed 8 June 2018 [with modifications by Liz Curran, Andrew Crockett and Judy Harrison in 2013, 2014 and 2018 to suit the ‘Becoming a Practitioner’ course at the Australian National University].

⁵⁰ Harris and others (n 38).

⁵¹ Evans and others (n 1).

The relevance of this activity is clear: in modern times, more and more legal work is undertaken by people working together in teams. Senior law partners have reported to me concerns that many graduates of law emerge as individually competitive from law school and do not seem to know they need to effectively work with others. The old adage “more heads are better than one” applies here, as different perspectives, knowledge or insights can enhance the quality and depth of the work that is done on behalf of clients or supervisors.

This role play exercise allows students to become mindful of some of the dynamics that may be at play when people work in groups. By taking on roles, participants in these exercises are encouraged to consider what behaviours and ways of working together might be helpful or unhelpful in achieving a quality outcome.

The scenarios in the group dynamics exercises consist of two legal situations. The first scenario raises a legal problem and a tricky but common ethical dilemma surrounding a client who wants their lawyer to lie to the court. This situation gives rise to questions for students about a practitioner’s duties to the court. The second scenario involves a client with asbestos and mould in her public housing residence that is leading to hospital admissions for her baby and family members. The second scenario calls on student to explore access to justice and legal solutions beyond legal technicalities and black letter law. The context is a free legal service, their client is impecunious, and there are housing and health imperatives to consider. As a result, students have to think outside the box to come up with practical solutions, as litigation – often what students will think of first – is not feasible.

After each scenario and with much humour, I debriefed with the group on what worked and did not work and how the students felt in each situation. Students then brainstormed about the key things that work in collaboration for a task and the nature of client care and quality work. This prompts students to discuss courteousness with colleagues, giving constructive feedback, and being ethical. All of these aspects are likely to produce competent work and to build depth and comprehensiveness in their efforts, and thereby drive quality outcomes for clients and their group. They realise that, having largely done individual tasks in their undergraduate law studies, they will need to adapt their style to ensure productive and effective team work, given different pressures and contexts. They will have to modify their thinking and responses to others, and develop skills to delegate and assist interactions with colleagues.

When this Group Dynamics exercise was trialled in January 2013, student feedback was positive and has been likewise in subsequent runs.

In the trial, on the feedback exercise, students noted that they would like to know what happened in the real-life situations the scenarios were based on, in order to gauge how they performed in the exercise. The actual outcomes are not revealed to the students until they have concluded the role plays for both scenarios. Often students are pleased to find that they identified similar issues, learn about other options, and find the actual outcomes useful, or even compelling.

The energy, engagement and noise I have witnessed in the classroom created by the exercise and students’ eagerness to participate and share their feelings and insights illustrates the value of the exercise and has been encouraging. With some refinements along the way to ensure transparency, no individual student is stereotyped. They can call on their own experiences and reflections on what they will put into their own practice in the future to enable them to be good and ethical colleagues.

Another way in which to engage students, and to provide a practicum for the necessary reflection in and on action, is, of course, the kind of CLE that engages with real clients.

CLE IN THE REAL WORLD

CLE activities in the social justice context, their materials and assessments involve students in identifying systemic trends and exploring solutions to inequity that can assist them to be responsive future lawyers, and recognise that they have a place in shaping the administration of justice more broadly. They can, however, also influence not only individual personal plight clients, but also decision-makers. They can include some exercises used to engage students in the realities of legal practice, questions of justice and injustice, reflective practice and opportunities for action.

Bridging between the classroom and the workplace

Unlike the equivalent for aspiring solicitors in England and Wales, in the PLT/GDLP course, all students are simultaneously undertaking a required number of days of LPE. In our courses the students are required to look for synergies between what they learn in course work and some of the surprises or challenges of practice.⁵² They are asked about what they like and do not like, what it means to them, and the implications for the community access to justice and the profession. They record their responses to these key questions in a portfolio that they keep over the life of the GDLP, culminating in their RFP.⁵³

In their portfolio, students record their views about professional formation and values. Teachers meet to debrief after each delivery and seek to improve the course, including reviewing and finessing the prompt questions used in the portfolios. For teachers, it has been key to take time to discuss their experience with our colleagues, learn what worked, did not work and why, and then revisit and update their own approaches and materials, and develop collaborative programme ideas and assessment rubrics. It has also been integral for teachers to challenge themselves and critique the way law is traditionally taught, recognising the limitations and implications that approach has for their students as future practitioners,⁵⁴ and, most importantly, on their performance for their clients. I have written elsewhere on students undertaking law reform projects that were sent to key decision-makers and led to law reform, in my time at La Trobe University which provides information about other activities that can be undertaken.⁵⁵

Journaling in clinic

The use of journaling by students as another tool to achieve reflective practice.⁵⁶ I have adapted the use of journaling in a number of educational settings including high school (in the decade before I become a legal educator) and in a number of higher education setting in law schools and in professional development exercises for practising lawyers as well. In the educational settings students are given guiding questions that can change as the course progresses and they encounter new experiences. This enables students to

⁵² Stephen Dinham, 'Connecting Clinical Teaching Practice with Instructional Leadership' (2013) 57(3) Australian Journal of Education 225; Leah Wortham and others (eds), *Learning from Practice: A Text for Experiential Legal Education* (3rd edn, West Academic Publishing 2016).

⁵³ Tosey, Visser and Saunders (n 11); A Georges L Romme and Arjen van Witteloostuijn, 'Circular Organizing and Triple Loop Learning' (1999) 12(5) Journal of Organizational Management, 439.

⁵⁴ Curran, 'Reflections on Practice and Recent Research' (n 18).

⁵⁵ Liz Curran, 'University Law Clinics and Their Value in Undertaking Client-Centred Law Reform to Provide a Voice for Clients' Experiences'" (2014) 12 International Journal of Clinical Legal Education 105; Liz Curran, 'Responsive Law Reform Initiatives by Students on Clinical Placement at La Trobe Law' (2004) 7 Flinders Journal of Law Reform 287; Curran, Dickson and Noone, 'Pushing The Boundaries or Preserving the Status Quo? Designing Clinical Programs to Teach Law Students a Deep Understanding of Ethical Practice' (n 11).

⁵⁶ Rachel Spencer, 'Holding up the Mirror: A Theoretical and Practical Analysis of the Role of Reflection in Clinical Legal Education' (2012) 17–18 International Journal of Clinical Legal Education 181.

capture their increasing awareness and understanding in a legal education context, this includes the nature and scope of real legal practice. In the legal education context, the guiding questions I have developed asks them to reflect on themselves in the role of lawyer: how they feel, their clients (always de-identified), their interactions with other staff, other professions in the course of clinic and the interactions of these with the broader system and client contexts, including the social justice and legal ethical considerations. This technique of using focussed guiding questions has avoided indulgent, superficial or self-congratulatory discussion⁵⁷ and promotes progression through the use of different guiding questions, which changed depending on the students' stage in their clinical programme and as their learning deepened.

In the journal students would de-identify clients and personnel and discuss their interviews and case progress; reflect on their performance as lawyers and how they might improve; describe any difficulties they encountered with clients and any ethical dilemmas and tensions they faced, barriers, injustices and how they might deal with them both professionally and personally.⁵⁸ At the end of each clinical fortnight students would leave their journal in a secured box in my locked office. I would read the journals and provide written fortnightly written feedback in each journal, signed and dated, sometimes also providing verbal feedback to support or offer suggestions.

The journal also has the advantage of giving the supervisor the opportunity to engage with the students on these issues and to follow the progress of each student individually, track their development and pick up early on any issues, including errors in case work.

Students found the journals to be a way of debriefing after a day at the clinic and, in evaluations, reported that it was "therapeutic". Recent examinations of reflection in clinic by Spencer⁵⁹ and Leering,⁶⁰ have added material that would later be integrated and provided to students. (Note, this occurs in the current GDLP portfolio tasks which are not the subject of this article.)

ASSESSMENT

It is important to find a balance between challenging students, whilst creating a safe environment for them; preparing them and being clear about aims, objectives and learning outcomes and the purposes for these; and also linking assessment. Students are trying new skills such as client interviewing, negotiation, cross-cultural skills and reflective practice, often for the first time in their law degree, so it is crucial to create a safe space for them to try new things and often try again after reflecting.⁶¹ Debriefs where time for discussion is enabled are a key measure as well as ensuring feedback is constructive and empowering by thought taken in framing feedback and as much as is appropriate, walking in the students' shoes.

In providing feedback to students, I have tended to adopt formative assessment. Formative assessment occurs during a course of study and is designed to "form" student

⁵⁷ Timothy Casey, 'Reflective Practice in Legal Education: The Stages of Reflection' (2014) 20(2) *Clinical Law Review* 317, 328. See also, for the UK context, Karen Hinett, 'Developing Reflective Practice in Legal Education' <<http://law2.wlu.edu/deptimages/Externship%20Programme/developingreflectivepractice.pdf>> accessed 15 May 2018.

⁵⁸ David Boud, Rosemary Keogh and David Walker, 'What is Reflection in Learning?' in David Boud, Rosemary Keogh and David Walker (eds), *Reflection: Turning Experience into Learning* (Routledge-Falmer 1985) 11.

⁵⁹ Rachel M A Spencer 'Holding up the Mirror: A Theoretical and Practical Analysis of the Role of Reflection in Clinical Legal Education' (2014) 18 *International Journal on Clinical Legal Education* 215.

⁶⁰ Michele M Leering 'Reflective Practice Activity, Professional Portfolio – Building a Philosophy of Practice "Professional Inventory"' (Community Advocacy & Legal Centre 2016); Leering, 'Conceptualizing Reflective Practice for Legal Professionals' (n 19) 83, 95.

⁶¹ Leering 'Integrated Reflective Practice' (n 8); Chris Argyris and Donald Schon, *Theory in Practice: Increasing Professional Effectiveness* (Jossey-Bass, 1974) at 18–19.

development.⁶² It is usually qualitative rather than numerical and typically takes the form of oral guidance by a teacher to assist a student to improve or attain their outcomes. In that sense, it is assessment for learning.

In the GDLP course, assessment is graded, or assessed on a competent/non-competent basis as the course is a PLT course and this approach is in line with industry guidelines. Detailed summative and written feedback is provided often with students resubmitting the same task and given the opportunity to operationalise their learning by applying the feedback as we understand that we often “learn by doing” and this gives them a chance to reflect on what they did and how they might adapt and improve which sits well with the reflective practice, discussed earlier in this article. In addition, in tasks involving oral skills, presentation or practising a dialogue or negotiation, immediate oral feedback is provided by the tutor and by student peers who, in my experience, have great insights and suggestions to offer.⁶³

A driving theme is assessing students’ ability to reflect critically on their own skills, interaction, responsibilities to the client and the profession, how law operates from a range of perspectives, and on their own role within the legal system. Assessment tasks are aligned with the learning outcomes and on multiple and different tasks – oral, written, reflective (portfolios, journaling and debrief) – advocacy performance and improvement over time, and adoption of new learning. Assessment is mindfully informed by quality assessment principles:

- a) assessment is valid (achieving its intended purpose)
- b) reliable (referenced to specific criteria rather than to the performance of other students), and
- c) fair.⁶⁴

To this end, my teaching colleague and I use grading rubrics and provide these in advance to our students to ensure they are aware of what their teachers are looking for in students’ work. These rubrics are referred to again in assessing and in feedback to students.

CONCLUSION

This article has discussed why it can be useful to situate law student learning in a context of access to justice. It shows how this can stimulate students’ ethical awareness and make them see the law as real and important, connected to how society operates and in how people live their lives, given that so much of daily life is impacted by the law. Teaching access to justice at law school can develop students’ collaboration skills, interpersonal skills, critical and cultural awareness, and encourage reflective practice on the place of the law, its limitations, impacts and the human elements to the law that traditional methods of teaching law may overlook. It can make the study of law come alive, be meaningful and less abstract, and present a reality for students as their skill sets enable them to become engaged ethical practitioners in the near future, whether or not they practise in a social justice field. It can also harness students’ enthusiasm and commitment to justice by resulting in law reform.

⁶² Evans and others (n 1).

⁶³ Roy Stuckey and others, *Best Practices for Legal Education: A Vision and a Road Map* (Clinical Legal Education Association 2007).

⁶⁴ Linda Darling-Hammond and others, ‘Criteria for High-Quality Assessment’ (Stanford Center for Opportunity Policy in Education, Center for Research on Student Standards and Testing, University of California at Los Angeles, Learning Sciences Research Institute, University of Illinois at Chicago 2013) <https://edpolicy.stanford.edu/sites/default/files/publications/criteria-higher-quality-assessment_2.pdf> accessed 31 May 2018.

WHOSE ACCESS TO WHOSE JUSTICE? THE CONTEXTUALISATION OF ADMINISTRATIVE LAW ON UNDERGRADUATE PROGRAMMES

JENNY GIBBONS*

INTRODUCTION

Legal educators are currently working in a period of uncertainty due in part to regulatory changes, new models of university administration and funding, a rapidly evolving and increasingly globalised legal profession and a student cohort more digitally literate than any previous generation. All these factors affect how, and even if, “social justice” and “access to justice” as concepts are framed in the undergraduate law curriculum, and the prominence they receive in the teaching and assessment approaches adopted.

One aspect of the core undergraduate curriculum, administrative law, will be explored here to evaluate the extent to which experiential learning methods, such as problem-based learning; and clinical methods, including the use of simulated clients, can enable legal educators to move their teaching away from the textbook and into the “real” world as a way to enhance students’ engagement with these important concepts. It will also propose that greater use of such approaches, and the introduction of more innovative assessment design, could help students adapt to the changing environment and facilitate the development of their sense of citizenship. The focus will be on legal education in England and Wales, with examples used from the curriculum design at York Law School (YLS), but it is hoped that the discussion will have resonance with legal educators in other jurisdictions, as many of the issues addressed are universal.

This article will seek to answer the question “Whose access to whose justice?”, or more specifically, “To what extent can teaching approaches and assessment methods for administrative law enhance students’ understanding of social justice, access to justice and citizenship?”. It will do this by exploring how ‘official’ administrative law knowledge is introduced, taught and assessed in the undergraduate law curriculum and the extent to which it can become what is evocatively labelled by Young ‘powerful’ knowledge¹. For this it speculates on how to engage the student population in what is regarded by the author as the increasingly important “bottom-up” approach to the critical evaluation of the legal interactions of citizens with the state.

THE CHANGING CONTEXT OF LEGAL EDUCATION

In the last decade there have been some important and influential factors that have led to the current period of uncertainty in legal education. Much has been written about the impact of tuition fees and the increasing development of a neoliberal and market driven model. In her insightful and wide-ranging book *Privatising the Public University: The Case of Law* Thornton sets out in depth the impact of this change on the content,

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¹ For an introduction to the term ‘official knowledge’, see Michael Young, *Official Knowledge: Democratic Education in a Conservative Age* (Routledge 1993). For more discussion about the merits of the term ‘powerful knowledge’, see John Beck, ‘Powerful knowledge, esoteric knowledge, curriculum knowledge’ (2013) 43(2) *Cambridge Journal of Education* 177 and Michael Young, ‘Powerful Knowledge: An Analytically Useful Concept or Just a “Sexy Sounding Term”?’ A Response to John Beck’s “Powerful Knowledge, Esoteric Knowledge, Curriculum Knowledge” (2013) 43(2) *Cambridge Journal of Education* 195.

delivery and purpose of university-based law programmes in a range of jurisdictions, including England and Wales.² For legal educators working in this environment the headline changes are already apparent, for example the move in many institutions to link the curriculum to the professional practice of law, the negative effect of increasing student numbers on innovative pedagogic practice, and the endemic “student as consumer” narrative.

Changes in the professional regulatory requirements in England and Wales are also having an impact on legal education. Following the Legal Education and Training Review (LETR) in 2013, both the Solicitors Regulation Authority (SRA) and the Bar Standards Board (BRB) have been involved in a process of review and consultation about the admissions standards for legal professionals in the UK.³ At the time of writing the SRA have proposed the introduction of a two-part Solicitors Qualifying Exam (SQE). The responses to the consultation on this have been largely negative due to the perceived adverse filter-down effect on the teaching and learning experience within UK law departments.⁴

Strong voices within the legal profession are also advocating change. For example, Susskind has written extensively about the need to “future-proof” legal practitioners, and about how we need to consider how technology has the potential to transform professional practice.⁵ Although his views are not universally accepted, as can be seen from both academic and policy documents, his ideas are having an impact on curriculum designers within legal education in numerous jurisdictions.⁶ This has the potential to contribute to an increasingly instrumental view of the future education of the legal profession.

One factor that appears less often in the formal and informal discussion fora about changes within undergraduate legal education is the change in the digital habits of the student body, and the influence of the use of the internet and social media on learning events within the law school. Koh, in her thought-provoking book *Motivation, Leadership and Curriculum Design: Engaging the Net Generation and 21st Century Learners*, advocates strongly for the need for educators to adapt their practices to the habits of the ‘digital natives’ in the classroom.⁷ One aspect of this influence that I adopt in this article is to consider material that is ‘a click away’, as students would do, when exploring students’ engagement with administrative law, the meanings of social justice and access to justice, and our approaches to their learning.⁸

² Margaret Thornton, *Privatising the Public University: The Case of Law* (1 edition, Routledge 2011).

³ For further details, see Julian Webb and others, ‘Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales’ (Legal Education and Training Review 2013) <<http://letr.org.uk/the-report/index.html>> accessed 5 April 2018.

⁴ Elaine Hall, ‘Notes on the SRA Report of the Consultation on the Solicitors Qualifying Exam: “Comment Is Free, but Facts Are Sacred”’ (2017) 51 *Law Teacher* 364. See also Jenny Gibbons, ‘Policy Recontextualisation: The Proposed Introduction of a Multiple-Choice Test for the Entry-Level Assessment of the Legal Knowledge of Prospective Solicitors in England and Wales, and the Potential Effect on University-Level Legal Education’ (2017) 24 *International Journal of the Legal Profession* 227.

⁵ Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (OUP Oxford 2015); Richard Susskind, *The End of Lawyers?: Rethinking the Nature of Legal Services* (Revised edition, Oxford University Press, USA 2010).

⁶ For a review, see Graham Greenleaf, ‘Technology and the Professions: Utopian and Dystopian Futures’ (2017) 40 *University of New South Wales Law Journal*, 302.

⁷ Caroline Koh, *Motivation, Leadership and Curriculum Design – Engaging the Net Generation and 21st Century Learners* (Springer 2015). For an alternative view see Markus Appel, ‘Are Heavy Users of Computer Games and Social Media More Computer Literate?’, (2012) 59(4) *Computers & Education* 1339.

⁸ For more on students’ search strategies see Marcus Soanes, ‘The Legal Questing Beast: Vocational Students’ Research Strategies, Motivations and Emotions’ (2010) 44 *The Law Teacher* 149 and Stefan H Krieger and Katrina Fischer Kuh, ‘Accessing Law: An Empirical Study Exploring the Influence of Legal Research Medium’, (2014) 16(4) *Vanderbilt Journal of Entertainment and Technology Law* 757.

This leads on to the final consideration here, which is the contemporary developments in educational pedagogy and the lessons that can be learned by legal educators from other disciplines, including sociology. Increasing numbers of legal educators are encouraged to sign up for teaching development courses either within their universities (such as Post-Graduate Certificates in Academic Practice) or externally (such as EdD or PhD programmes), and/or actively take a reflective approach to their own practice.⁹ For some this is driven by personal interest, whereas for others it is a contractual obligation. Either way, the increase in knowledge amongst legal educators concerning the variety and innovation of pedagogic practice, and the contextualisation of the teaching of law as an example of a social practice, has an influence on the content and delivery of legal education in the modern university.

For the purpose of this article I will consider the concepts of “official knowledge” and “powerful knowledge”, as articulated respectively by the sociologists of education, Apple and Young.¹⁰ For Apple, who writes mostly about the knowledge transmission within the US school curriculum, the substantive official knowledge found within textbooks is problematic as it exemplifies the complex relationships between educational policy and practice and the relations of domination and exploitation of wider society. One of his arguments is that over reliance on textbooks has the potential to reinforce the status quo at the expense of minority groups within society.¹¹ This is relevant to the teaching of administrative law, as much of what we teach has the potential to reinforce the current emphasis on the state domination of public decision-making. For Young, “powerful knowledge” is not so much about the substantive knowledge being taught but about what the knowledge can do or what intellectual power it gives to those who have access to it. As he explains, “Powerful knowledge provides more reliable explanations and new ways of thinking about the world and acquiring it can provide learners with a language for engaging in political, moral, and other kinds of debates”.¹² Both of these concepts are helpful as they enable us to continually question what administrative law knowledge we are passing on to our students and why. They also help to frame my ambition to encourage the creation of learning events, teaching approaches and assessment methods in the law curriculum that enable students to engage actively with the world they live in, and the contested conception of justice.

ADMINISTRATIVE LAW WITHIN THE UNDERGRADUATE LAW CURRICULUM

As with all the “core” law subjects in the undergraduate law programme in England and Wales, administrative law is lightly framed by the regulatory requirements of the legal profession.¹³ Beyond this, academic staff have significant autonomy about what substantive knowledge to include in their programmes, and how this is taught and

⁹ Paul Ashwin, ed. *Reflective Teaching in Higher Education* (Bloomsbury, 2015).

¹⁰ To see Michael Young discuss the concept of powerful knowledge (in the context of geography education) see <https://www.youtube.com/watch?v=r_S5Denaj-k> accessed 19 March 2018.

¹¹ Michael Apple, *Official Knowledge: Democratic Education in a Conservative Age* (1 edition Routledge, 1993); *The State and the Politics of Knowledge* (1 edition, Routledge 2003), Michael W Apple, *Can Education Change Society?* (1 edition, Routledge 2012).

¹² Michael Young, ‘From Constructivism to Realism in the Sociology of the Curriculum,’ (2008) 32(1) *Review of Research in Education* 14.

¹³ The current Joint Statement on the Academic Stage of Training produced by the Solicitors Regulation Authority and the Bar Standards Board can be found here: Solicitors Regulation Authority, ‘Joint Statement by the Law Society and the General Council of the Bar on the Academic Stage of Training’ (*Solicitors Regulation Authority (SRA)*, 1999) <<https://www.sra.org.uk/students/academic-stage-joint-statement-bsb-law-society.page>> accessed 19 March 2018.

assessed. On this basis it is surprising how often the method of delivery, primarily a lecture/seminar model, is replicated from year to year, and how timed, hand-written exams continue to be the assessment method of choice. In this article it is argued that curriculum designers have the power, and I believe the duty, to create learning events, teaching approaches and assessment methods for our students that not only fulfil the academic requirements of the programme, but also help to develop our students' sense of citizenship.

For this it is worth considering how students are traditionally introduced to administrative law in the law curriculum, and what influence this introduction has on their understanding of the subject. If I asked my first-year students to consider what is meant by administrative law, the first thing they would do would be to type "administrative law" into Google, so their response would be the following definition from Wikipedia:

Administrative law is the body of law that governs the activities of administrative agencies of government. Government agency action can include rulemaking, adjudication, or the enforcement of a specific regulatory agenda. Administrative law is considered a branch of public law.¹⁴

It is hoped (but not presumed) that they might also attach "UK" or "England" to their search, which would lead them to this:

United Kingdom administrative law is a branch of UK public law concerned with the composition, procedures, powers, duties, rights and liabilities of public bodies that administer public policies.¹⁵

These definitions are as good a starting point as any, and would enable further discussion about the meaning of the terms they contain, including "administrative agencies", "government", "public bodies" and "public policy", the difference in meaning between "rulemaking" and "adjudication", and some speculation of what "powers, duties, rights and liabilities" are likely to be subject to legal claims.

A question though is: "What would the learning event be in which this introductory conversation would arise?" Following a review of the administrative law module outlines from English and Welsh universities found online using the search term "administrative law module", it would appear that the answer to this is: "A lecture for hundreds of students just over half way through a public law module". It would appear, following a review of this data, that there is an almost universal tendency to teach administrative law after constitutional law and firmly ground it within a historical narrative. This approach is also replicated in the textbooks. As an example, by clicking through to the e-book of Bradley and Ewing's *Constitutional and Administrative Law* available as part of the university library resources, "The Nature and Development of Administrative Law" is found as the opening chapter of the Administrative Law section of the book, at Chapter 27.¹⁶

A review of the introductory sections to the administrative law content of most of the popular and widely promoted public law textbooks highlights that what is often missing is a conceptualisation of the lived experience of the citizens whose lives are

¹⁴ Wikipedia, 'Administrative Law', *Wikipedia* (2018) <https://en.wikipedia.org/w/index.php?title=Administrative_law&oldid=838358731> accessed 19 March 2018.

¹⁵ Wikipedia, 'United Kingdom Administrative Law', *Wikipedia* (2018) <https://en.wikipedia.org/w/index.php?title=United_Kingdom_administrative_law&oldid=839209443> accessed 19 March 2018.

¹⁶ AW Bradley, *Constitutional and Administrative Law [Electronic Resource]* (14th ed., Longman, Pearson Longman 2007). Administrative law is introduced in chapter 12 of Neil Parpworth, *Constitutional and Administrative Law*, (9 edition Oxford University Press, 2016). It is introduced in chapter 9 of Mark Elliott and Robert Thomas, *Public Law*, (3 edition Oxford University Press, 2017).

disproportionately affected by administrative law decisions. I would suggest that to capture the interest of the students in our classrooms, greater engagement with the lives of individuals and groups within our society has the capacity to enrich the administrative law curriculum and enhance student's appreciation of social justice and access to justice issues. For that to occur, there needs to be further debate and discussion amongst ourselves about what we want our students to know about administrative law and what methods we use to present this information about the "real" world. This focus on knowledge delivery is aligned with what is referred to as a socio-legal approach to law. It also feeds into the broader debate about the apparent conflict between the liberal and vocational approaches to the undergraduate law degree, as seen further below.¹⁷

THE "REAL" WORLD OF ADMINISTRATIVE LAW

As Thornton (amongst many others) identifies, there has been a neo-liberal turn within higher education, which has led to strong market forces entering the law school.¹⁸ This has resulted in what she refers to as the "jettisoning of the critical" in favour of linking curriculum to vocation in order to serve the market. What she identifies is that "the market" is perceived as being purely an economic market, whereas within legal practice there are a wealth of other markets, including the social.

In the current political and economic climate the need to have an educated workforce with an appreciation of social as well as economic drivers is of paramount importance. In the UK under the current and previous governments there has been a contraction of state-funded provision to support the most vulnerable, as evidenced by the funding and procedural changes brought in by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and the Criminal Justice and Courts Act 2015. As highlighted in a recent report by the Bingham Centre for the Rule of Law, the heavier procedural burdens and limitations on access to legal aid together with inhibiting access to sources of third party support significantly impact on the ability of individuals to pursue an administrative law claim.¹⁹ This highlights the fact that currently significant contentious administrative law decisions take place away from the courts, and often go unchallenged.

The case law (or lack of it) and academic commentary in this area indicates that these changes have had a dramatic influence on the "real" world of administrative law, which does not seem to be represented adequately in the majority of undergraduate law programmes. My position is that we need to take a more radical approach, and that our teaching should use the lived experience of the people within society whose lives are disproportionately affected by administrative law as the starting point for the study of the subject. This is a way to move from a "top-down" official knowledge approach to a "bottom-up" powerful knowledge approach, and in this article I will present some ideas on how this can be done. First I will set out what is meant here by social justice, access to justice and citizenship.

¹⁷ See further Jessica Guth and Chris Ashford, 'The Legal Education and Training Review: Regulating Socio-Legal and Liberal Legal Education?' (2014) 48 *The Law Teacher* 5.

¹⁸ Margaret Thornton, *Privatising the Public University: The Case of Law* (1 edition, Routledge 2011).

¹⁹ Bingham Centre for the Rule of Law, JUSTICE and Public Law Project, 'Judicial Review and the Rule of Law: An Introduction to the Criminal Justice and Courts Act 2015, Part 4' (Bingham Centre for the Rule of Law, JUSTICE, Public Law Project 2015) <https://www.biicl.org/documents/767_judicial_review_and_the_rule_of_law_-_final_for_web_19_oct_2015.pdf?showdocument=1> accessed 19 March 2018.

SOCIAL JUSTICE, ACCESS TO JUSTICE AND CITIZENSHIP

There is not enough space here to look in depth at the contested meanings of the terms social justice and access to justice. Instead I return to content “a click away” to find the following defining terms:

Social justice is a concept of fair and just relations between the individual and society. This is measured by the explicit and tacit terms for the distribution of wealth, opportunities for personal activity and social privileges.²⁰

And

In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers to account. Access to justice is the foundation of a fair and democratic society.²¹

Both of these concepts are fundamentally important to administrative law which is, in essence, a process to uphold fair and just relations between the individual and the state, and the mechanisms in place to hold decision-makers to account. They are also important in the development of citizenship amongst the student population.

For “citizenship” the focus here is on the concept as promoted within secondary schools in England and Wales by Young Citizens (formerly the Citizenship Foundation), amongst others, as this will be familiar to the majority of our law students.²²

Young people [need] to leave education with a grasp of the political, legal and economic functions of adult society, and with the social and moral awareness to thrive in it.

Undergraduate administrative law presents the perfect opportunity to build on this foundation by creating learning events that continue to identify and explore citizenship issues that are:

- a. *real*: actually affect people’s lives;
- b. *topical*: current today;
- c. *sometimes sensitive*: can affect people at a personal level, especially when family or friends are involved;
- d. *often controversial*: people disagree and hold strong opinions about them;
- e. *ultimately moral*: relate to what people think is right or wrong, good or bad, important or unimportant in society.²³

My interest in these concepts is motivated in part by respect for the requirements under the Equality Act 2010 to promote equality in society, but also by the fact that I believe there is a requirement for us to teach our students knowledge that is relevant and powerful. Very few of the student cohort will ever be employed as public lawyers. However much of the substantive administrative law knowledge they retain after they leave university will have an influence on society in a myriad of ways as a result of their social privilege.

With reference to the concepts set out here, the following sections will consider teaching approaches and assessment methods in undergraduate education and how, with a bit of imagination, these could be adapted to enhance students understand of and

²⁰ Wikipedia, ‘Social Justice’, *Wikipedia* (2018) <https://en.wikipedia.org/w/index.php?title=Social_justice&oldid=839027471> accessed 19 March 2018.

²¹ Law Society of England and Wales, ‘Access to Justice and the Rule of Law’ (*Law Society of England and Wales*) <<http://www.lawsociety.org.uk/policy-campaigns/articles/access-to-justice-and-the-rule-of-law/>> accessed 19 March 2018.

²² Young Citizens, ‘Young Citizens’ (*Young Citizens*, 2018) <<https://www.youngcitizens.org/>> accessed 19 March 2018.

²³ Young Citizens, ‘What Is Citizenship Education?’ (*Young Citizens*, 2018) <<https://www.youngcitizens.org/what-is-citizenship-education>> accessed 19 March 2018.

empathy for the lived experience of people in the real world. Before this I return to the importance of introductory learning events.

INTRODUCTORY LEARNING EVENTS

As set out above, there seems currently to be a conceptual gap between administrative law teaching and the enhancement of justice and citizenship. We as educators need to be imaginative in the context in which students start to learn about administrative law, and the way the subject is taught and assessed. Set out below are three notional suggestions for introductory learning points other than the traditional opening lecture. This is followed by alternative suggestions for teaching approaches and assessment methods.

One starting point for the study of administrative law could be an investigation into the workings of the institutions of administrative law, including the Administrative Court and the various tribunals, as these are the locations where many administrative law issues are resolved. For example, we could encourage the students to locate a local immigration and asylum tribunal, or social security and child support tribunal and visit “access to justice” in action. This would be a great way for them to experience the concept of “whose justice”, and review how day to day administrative law decisions are made and reviewed in the real world. Concerns raised by this approach include the logistical difficulties of sending large cohorts of students to tribunals and the potentially uncomfortably voyeuristic aspect this would have on the parties involved. Cases heard in these environments also tend to be on narrow, technical aspects of law so perhaps would not provide the most appropriate breadth of knowledge for an introductory learning event.

In addition, and as Halliday identifies, the bulk of administrative law decision-making does not take place in these institutions meaning that, in empirical terms, judges may be regarded as the least significant officials engaged in legal implementation.²⁴ As a consequence, commencing an administrative law module with a visit to the Administrative Court or a tribunal would provide a distorted picture of the “real” world of administrative law, and is uncomfortably close to the narrow ‘top-down’ approach to the subject I am trying to avoid.

Another option for an introductory learning event would be to encourage the students to investigate the work done by Citizens Advice (formerly the Citizens Advice Bureau) to get more of a sense of what is happening in the real world. The students would easily find the Citizens Advice website and could follow the links to find relevant information, for example about taking action against public authorities for breaches of human rights.²⁵ This approach has one factor that is both its main benefit, and its main failing: The Citizens Advice website is an exemplary example of plain English. Starting administrative law teaching this way would help the students to familiarise themselves with the key aspects of administrative law claims, but this level of simplification can have the effect of masking the legal issues. We need our law students to have access to powerful knowledge, and move beyond lay knowledge. The retelling and reframing of legal case studies on the Citizens Advice website could hinder this aspiration. This criticism could also be levelled at starting an exploration of administrative law by way of investigation

²⁴ Simon Halliday, *An Introduction to the Study of Law* (WGreen 2012), 35.

²⁵ Citizens Advice, ‘Taking Action about Human Rights’ <<http://www.citizensadvice.org.uk/law-and-courts/civil-rights/human-rights/taking-action-about-human-rights/>> accessed 19 March 2018.

of the work of the Local Government Ombudsman and the Parliamentary and Health Service Ombudsman through the medium of their websites.²⁶

A final suggestion for an alternative way to introduce students to the ‘real’ world of administrative law would be by introducing them to real clients in legal clinics, either within universities or through other *pro bono* projects.²⁷ Legal clinics are increasingly prevalent in English and Welsh universities and there is an increasing body of literature espousing the benefits of clinical legal education. Public law cases, including those involving specialist areas such as immigration, are increasingly being referred to law clinics due in part to the changes to legal aid funding introduced by LASPO. This follows a general trend, as 80% of law clinic co-ordinators reported an increase in demand for *pro bono* services in the year up to March 2017.²⁸

As with all clinical legal education, the quality of the students’ learning experience is dependent on a range of factors, including, staffing, resources and the pedagogical and ideological approach of the clinical lead.²⁹ Important factors that limit the use of legal clinics as the introductory learning event for administrative law education is the near impossibility of teaching large cohorts this way, the difficulty in achieving equality of experience, and the challenges of assessment.³⁰ For these, and many other ethical and practical considerations the use of real cases in legal clinics for core administrative law modules is not a viable introductory learning event.

REFLECTIONS ON INTRODUCTORY LEARNING EVENTS

The students joining our undergraduate programmes are adults, who come from an increasingly diverse range of backgrounds. Many will have studied some aspects of administrative law as part of law or politics options in their high school education. Others will have become familiar with the restrictions on access to justice through their own, their family’s or their friends’ experience. For the increasing numbers of international students in our classes, there may also be familiarity with alternative models of administrative justice, that could be referred to as a way to make interesting and meaningful comparison. For these reasons, the learning events that we present as introductory are often anything but. It is my belief that designing curricula that treat students’ minds as *tabula rasa* can be perceived as patronising and therefore counter-productive in the quest for powerful knowledge. Instead we should adopt teaching approaches that accommodate and build upon these differing starting points, as set out further in the next section.

TEACHING APPROACHES IN ADMINISTRATIVE LAW

The research above indicates that the majority of law schools in England and Wales introduce administrative law by first explaining legal concepts and cases in lectures, before asking students to discuss these in subsequent seminars. These sessions generally

²⁶ Respectively, Local Government and Social Care Ombudsman, ‘The Local Government and Social Care Ombudsman’ (*Local Government and Social Care Ombudsman*) <<https://www.lgo.org.uk/>> accessed 19 March 2018 and Parliamentary and Health Service Ombudsman (PHSO), ‘Welcome to the Parliamentary and Health Service Ombudsman’ (*Parliamentary and Health Service Ombudsman (PHSO)*) <<http://www.ombudsman.org.uk/>> accessed 19 March 2018.

²⁷ See, for example, <https://www.lawworks.org.uk/>. Accessed 19 March 2018.

²⁸ LawWorks, ‘LawWorks Clinics Network Report April 2016–March 2017’ (LawWorks 2017) <<https://www.lawworks.org.uk/sites/default/files/LawWorks%20Clinics%20Report%202016–17.pdf>> accessed 19 March 2018.

²⁹ See, for example, Donald Nicolson, ‘Legal Education, Ethics and Access to Justice: Forging Warriors for Justice in a Neo-Liberal World’ (2015) 22 *International Journal of the Legal Profession* 51.

³⁰ Richard Hamilton Grimes and Jenny Gibbons, ‘Assessing Experiential Learning – Us, Them and the Others,’ (2016) 23(1) *International Journal of Clinical Legal Education* 111.

take place after the cohort have been taught the substantive core content on constitutional law. In this next section three alternative approaches to teaching administrative law will be considered, ranging from the programme-level design model known as problem-based learning (PBL) to suggestions for module-level activities. This will be followed by some reflections on teaching approaches, and a consideration of assessment methods.

PBL is an experiential learning method that initially became popular in medical education and has more recently been adopted in a range of disciplines, including law. In England, York Law School (YLS) has designed its foundational curriculum using a PBL model that uses a range of legal scenarios covering a mixture of core subject areas supported by academic-led plenaries and online resources.³¹ At YLS students work in weekly cycles in small groups, known as Student Law Firms (SLFs) to identify the learning outcomes that arise from the given scenarios, and present feedback on their findings following a period of research. Considerable time is spent in induction activities to help the SLFs to form a collective identity through mutually agreed group rules meaning that safe spaces are created for discussion and debate.

Within the PBL model at YLS, administrative law is introduced throughout the first two years of the undergraduate programme, through scenarios involving the interactions between citizens and the state in a range of subject areas including housing, immigration and asylum, and welfare. The key aspects of judicial review, as well as the roles of the institutions and arenas of administrative law, are introduced to students as they arise from the scenarios. Through this model, student interest in administrative law is piqued by realistic events and supported by academic expertise. Where members of the SLF have life experience relevant to the scenario this can be included in the discussions if the students are comfortable doing this. Normative discussions arising from the scenarios and suggested readings are encouraged – and are frequently and enthusiastically undertaken – which can also help the students reflect upon their own conceptions of citizenship and justice issues.

One of the disadvantages of a PBL approach derives from its highly structured and rigid design. In most cases, for English law schools to make such a comprehensive programme-level change to an established curriculum, significant barriers would stand in the way. These include the laborious administrative procedures required for any proposed curriculum change, insufficient management expertise on alternative pedagogic models and potential staff resistance to a model that potentially interferes with individual academic autonomy. This may be why, to date, YLS is the only English law school that teaches administrative law via an integrated PBL model.

A less seismic alternative to the introduction of a programme-level PBL model is to enhance students' engagement with administrative law by adapting curriculum design at a modular level to include more use of simulation. One suggestion is to create simulated activities derived from collaborative projects with legal practitioners using anonymised versions of the documentary material they have readily available from real cases. This can, for example, include letters sent and received from local authorities or other public bodies, and documents drafted by lawyers in judicial review applications. In this way it is possible to create simulated scenarios that can be built up over a sequence of weeks and that introduce students to both conceptual and substantive legal knowledge.³² By

³¹ For a useful explanation of the PBL model used at the University of York, see Richard Grimes, 'Delivering Legal Education through an Integrated Problem-Based Learning Model – the Nuts and Bolts' (2014) 21 *International Journal of Clinical Legal Education* 228. See also Paul Maharg, 'Democracy Begins in Conversation: The Phenomenology of Problem-Based Learning and Legal Education,' (2015) 24 *Nottingham Law Journal* 94.

³² For more on the use of simulation in legal education, see Caroline Strevens, Richard Grimes and Edward Phillips (eds), *Legal Education: Simulation in Theory and Practice* (Ashgate Publishing, Ltd 2014).

maintaining contacts between the law school and the profession, this content can be revised year on year to ensure the simulations are of topical interest and are legally accurate. It is acknowledged that this approach has the potential to be rather labour intensive, and it is also contingent on receiving ethical approval for the creation of the requisite realia. Simulated tasks using this model have been used in optional modules at YLS, and continue to be popular with both module leaders and students.

As with PBL, the adoption of this approach, or other simulated activities, can help the students engage with their own conceptions of citizenship by allowing them to devise their own learning outcomes triggered by the materials. It is hoped that early exposure to the way the law is translated into documents used in practice will help students appreciate how their actions and their understanding of the law can have an influence on the wider community.

A final suggestion for module-level (or programme level) design is to introduce administrative law content to students through reference to the campaigning activities of specialist groups and public interest lawyers. As an example, at YLS for the last few years an important inductive activity has been a discussion about the private and public law issues arising from the Hillsborough disaster. This has followed the whole cohort of first year students watching a 12 minute video created by *The Guardian* media as an introduction to the tragic events at a football match in Sheffield in 1989 that led to the death of 96 people.³³ In the introduction to public law section I have shown the students the “bottom-up” “Hillsborough Law” website, and weblinks to the resources created by specialist legal practices and encouraged them to ‘click around’ for more information.³⁴ In future years it is likely this activity will be replaced by a session looking at the Grenfell Tower fire in London that led to the death of 72 people in June 2017. The focus will be on the work of the “Justice 4 Grenfell” group, with the same intention of developing the students’ understanding of campaigning groups’ attempts at improving social justice in action as a way to build powerful knowledge.³⁵

REFLECTIONS ON TEACHING APPROACHES

When considering “Whose access to whose justice”, the suggestions above place greater responsibility on the students to contextualise administrative law and relate it to their own understanding of the world in which they live than the traditional approach. Such examples of active and experiential learning can help the students to consider both the practical questions that are relevant to administrative law in the real world, and only then look for the relevant legal answers contained in the textbooks (which otherwise have a tendency to answer the questions that nobody is asking).

Examples of such practical questions, or learning outcomes, are set out below. These demonstrate how a “bottom-up” approach still has the capacity to lead students to the important “big picture” questions that are usually introduced at the outset of a “top-down” approach:

³³ David Conn and others, ‘Hillsborough: Anatomy of a Disaster – Video’ (*The Guardian*, 26 April 2016) <<https://www.theguardian.com/uk-news/video/2016/apr/26/hillsborough-inquiry-anatomy-of-a-disaster-video>> accessed 19 March 2018.

³⁴ These include <Hillsborough Law, ‘The Hillsborough Law’ (*Hillsborough Law*) <<https://www.thehillsboroughlaw.com/>> accessed 19 March 2018 and <Public Law Project, ‘Public Law Project’ (*Public Law Project*, 2013) <<http://www.publiclawproject.org.uk/>> accessed 19 March 2018.

³⁵ See further Justice4Grenfell, ‘Justice4Grenfell’ (*Justice4Grenfell*) <<https://justice4grenfell.org/>> accessed 2 May 2018.

- a. On what legal basis has this decision been taken that affects this client?
- b. What procedural steps should the decision maker have taken here, and has the correct process been followed?
- c. Can this decision be challenged, and if so, what hurdles is this client likely to face in mounting this challenge?
- d. Is the client likely to receive a remedy here, and is this remedy sufficient?
- e. Is it appropriate for this decision to be made in this way by this decision maker?
- f. What can we learn about the rule of law and access to justice in this country by looking at this scenario?

The requirement for independent research in these experiential learning approaches has the benefit of building upon the students' pre-existing knowledge and judgment and developing skills that will be useful in the future. I have been lucky enough to observe that the subsequent contributions to group discussion help individuals to engage in, and reflect upon, their previous perceptions of social justice and citizenship. This can help students to understand that the content and context of foundational concepts such as the rule of law are not givens. I believe therefore, that experiential learning approaches help students not only to know that there is a debate about legal and substantive equality in modern society, but to contribute to the debate in a safe and supportive space. These conversations have the benefit of enhancing the students' access to transferable powerful knowledge. This makes the knowledge obtained more than a sequence of discrete items to be ticked off by way of an assessment.

ASSESSMENT METHODS IN ADMINISTRATIVE LAW

To return to the second part of the research question; "To what extent can assessment methods for administrative law enhance students' understanding of social justice, access to justice and citizenship?", when looking at traditional assessment methods, the answer is "Not very much". Much of the substance of administrative law involves reviewing the notion of fair process. This makes it particularly ironic that in the assessment of administrative law in higher education there is a jarring disconnect between the approaches to learning administrative law – which focus on using tailored research to seek out primary and secondary material to facilitate critical analysis of the legal framework; and approaches to assessment – which traditionally have been based on timed exams where access to this research material is prohibited, and which often includes a problem question where the answer is pre-written.

This is significant because it is widely acknowledged in higher education that different teaching approaches impact on the depth of knowledge retention and that assessment models drive learning.³⁶ It is important therefore to consider how we can adapt our assessment methods to facilitate what is referred to as deep learning whilst also enhancing students' understanding of social justice, access to justice and citizenship.

McArthur asserts that assessment has an important position in contributing to the equality and social justice aspirations of higher education, both in the justice of the assessment itself and the role of assessment in nurturing the forms of learning that will promote greater social justice within society.³⁷ She makes a useful distinction between

³⁶ See further David Boud and Nancy Falchikov, *Rethinking Assessment in Higher Education: Learning for the Longer Term* (Routledge, 2007); Noel James Entwistle, *Teaching for Understanding at University: Deep Approaches and Distinctive Ways of Thinking* (Palgrave Macmillan, 2009). And, for a critique, Peter Howie and Richard Bagnall, 'A Critique of the Deep and Surface Approaches to Learning Model' (2013) 18 *Teaching in Higher Education* 389.

³⁷ Jan McArthur, 'Assessment for Social Justice: The Role of Assessment in Achieving Social Justice' (2016) 41 *Assessment & Evaluation in Higher Education* 967.

justice within higher education, and justice through higher education – and this has particular resonance in the assessment of administrative law and the intention to develop students' powerful knowledge.³⁸

There follow below three suggestions for assessment methods that complement the social justice aspiration of higher education advocated here. This is not a definitive list. Rather it is merely a few examples of assessments that have been utilised within the assessment framework at YLS. The use of these methods continues to result in enlightening examples of written work that demonstrates the development of students' understanding of social justice and citizenship. The first is unique to administrative law whereas the subsequent two are interconnected and used across the undergraduate programme.

As an alternative to a timed exam or coursework problem question, an assessment that has been utilised at YLS is the drafting of a public consultation response. The most recent is a task for third year students to write a submission to the Joint Committee on Human Rights consultation entitled *Human Rights: attitudes to enforcement inquiry*.³⁹ To avoid too much content being 'borrowed' from existing responses, the students are required to adopt the position of one of four fictitious stakeholders and tailor the content accordingly. In previous similar tasks students have enjoyed the opportunity to read real submissions as part of their research, and often voice how shocked they are by the evidence presented by third sector respondents highlighting social justice inequality.

This assessment type has been popular with students, who say they like the opportunity to explore real world issues and practise realistic legal writing. External examiners have commented on its merits as a way for students to develop the skill of using empirical information to develop a persuasive argument. Interestingly, some students have adapted their content from previous assessments and submitted responses to real consultations. This is a great example of the process of adapting the official knowledge they have read in textbooks and elsewhere to become the powerful knowledge they can take with them beyond law school.

A second assessment method to mention is reflective writing. Reflective practice is a fundamental aspect of experiential or active models of learning and is increasingly used as part of the suite of assessments in legal education.⁴⁰ At YLS a range of reflective tasks have been adopted across the curriculum with the current task attached to the teaching of the core subjects being an evidence-based reflective portfolio. For this, students need to collate and document their preparatory and consolidation work for PBL sessions and use this to track the development of their learning of legal concepts over time. This allows students to trace where their own views may have changed on particular issues, and reflect upon the influences on any such changes.⁴¹

The final assessment method mentioned here is the summative mark that will be awarded from September 2018 onwards at YLS for contributions to group work and

³⁸ *Ibid*, 968.

³⁹ Joint Committee on Human Rights, 'Human Rights: Attitudes to Enforcement Inquiry' (*UK Parliament*, 2018) <<https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2017/defending-rights-17-19/>> accessed 19 March 2018.

⁴⁰ As an introduction, see David Boud and David Walker, 'Promoting Reflection in Professional Courses: The Challenge of Context' (1998) 23 *Studies in Higher Education* 191; Helen Woodward, 'Reflective Journals and Portfolios: Learning through Assessment' (1998) 23 *Assessment & Evaluation in Higher Education* 415; Anne Brockbank and Ian McGill, *Facilitating Reflective Learning in Higher Education* (2 edition, Open University Press 2007); Linda Finlay, 'Reflecting on Reflective Practice' <[http://www.open.ac.uk/ocencetl/files/ocencetl/file/ecms/web-content/Finlay-\(2008\)-Reflecting-on-reflective-practice-PBPL-paper-52.pdf](http://www.open.ac.uk/ocencetl/files/ocencetl/file/ecms/web-content/Finlay-(2008)-Reflecting-on-reflective-practice-PBPL-paper-52.pdf)> accessed 19 March 2018; Henriikka Clarkeburn and Kirsi Kettula, 'Fairness and Using Reflective Journals in Assessment' (2012) 17 *Teaching in Higher Education* 439.

⁴¹ The requirement to produce evidence has changed the assessment from the version described in Jenny Gibbons, 'Oh the Irony! A Reflective Report on the Assessment of Reflective Reports on an LLB Programme' (2015) 49 *The Law Teacher* 176.

substantive law discussions in PBL sessions. Although this assessment item does not directly contribute to the development of the students' engagement with substantive social justice issues, it does act as a strong incentive for students to turn up to teaching sessions. By focusing on the broadly conceived concept of contribution, rather than performance, it rewards those who take the roles of facilitator and mediator in addition to those who position themselves in the more overt leadership roles. Reflection on this aspect of learning within the reflective portfolio mentioned above can help students to identify the role they play within the group, and therefore enhance their conception of citizenship.

REFLECTIONS ON ASSESSMENT METHODS

The three examples above illustrate how strong curriculum design can ensure that assessments do more than provide a moment in time evaluation of a student cohorts' understanding of taught material. By regarding education as a process rather than a product, the assessment of administrative law knowledge can be reconceptualized as one stage in a lifelong lesson on individual and collective interpretations of citizenship and justice. As educators we need to spend less time reproducing established, official knowledge and more time considering what powerful knowledge we want our students to have about administrative law and the functioning of modern society. Our role is not to reinforce the status quo by focusing on the descriptive elements of administrative law in our teaching and in our assessments methods but to further engage our students with their role as citizens in a normative sense. We can do this by adapting our teaching approaches and assessment methods to allow the students to interact with the knowledge as it is perceived from their unique and personal perspective. In this way, it is hoped, we can contribute to the enhancement and development of a richer understanding of equality and social justice.

WHOSE ACCESS TO WHOSE JUSTICE?

The research question here was "Whose access to whose justice?", or more specifically, "To what extent can teaching approaches and assessment methods for administrative law enhance students' understanding of social justice, access to justice and citizenship?". There is considerably more research that needs to be undertaken to answer this question, most notably a requirement to undertake a qualitative study to capture student voices on this issue, and more research on their digital habits and research strategies. On the basis of the research conducted here, and reflections on my experience of using the innovative teaching approaches and assessment methods at YLS, there is considerable scope to reconceptualise administrative knowledge as a form of powerful knowledge and work with the students' prior knowledge and ongoing experience of the real world to move away from the official knowledge found in the textbooks.

As mentioned above, very few of our students will be public lawyers, but all our students will be citizens in an ever-changing world. We want them to critically engage with this world by providing them with opportunities to develop and build their powerful knowledge about the inherent and everyday injustice in the interplay between the citizen and the state. What we want them to know, by demonstrating the legal structures and public law decision making within our jurisdiction, is that there is an imbalance of power between the citizen and the state. We want them to know that part of the role of a

legal professional is to ensure that the rule of law should be upheld, the rules of natural justice should apply, and social justice should be enhanced. We want them to know that where the rules have not been applied the citizen should be able to seek redress, and that different forms of redress are applicable for different issues. It should not be our role to reinforce the status quo. Instead we should be nurturing informed citizens who can challenge that status quo.

A key point is that no course at university can (or should) teach students *what* to think about the moral and political issues of the day. Our role is to teach our student *how* to think about them – and, particularly for law students, to illustrate the fact that we have an obligation to be thinking about them throughout the whole of our lives.

By considering alternative approaches to the conceptualisation of administrative law it is clear that it is not our role to present “justice” as a given in the law curriculum, but to create learning events that will engage students with its social character, and the inequity in access to justice in our society. All of our students have a unique set of views based on their pre-existing knowledge, their perceptiveness and their reflectiveness that should not be talked over in large group sessions, but should be explored and tested in collaborative activities and assessments within the curriculum. By being more innovative in our approach, we have the opportunity to enhance powerful knowledge and allow all our students to develop their own interpretation of social justice, access to justice and citizenship for the benefit of wider society.

STUDYING LAW IN A DIGITAL AGE: PREPARING LAW STUDENTS FOR PARTICIPATION IN A TECHNOLOGICALLY-ADVANCED, MULTIDISCIPLINARY AND COMPLEX PROFESSIONAL ENVIRONMENT

ANN THANARAJ*

INTRODUCTION

The world of professional work is changing in new and creative ways by embracing digital practices.¹ We regularly hear about advances in new technologies such as the use of artificial intelligence and algorithms in decision-making, the delivery of legal services online through encrypted virtual law offices,² the use of blockchains to manage legal transactions, in particular the execution of smart contracts, the use of big data and data analytics for discovery of evidence in criminal³ and civil matters and the piloting of virtual reality in the reconstruction of cases in jury trials.⁴ Together with these new technologies, work has been underway in our justice system piloting and testing the affordances and limitations of court processes online for small value claims, development of new procedural rules to support the online processes, online courts, online dispute resolution platforms, the use of technology in the courts and online hearings.⁵

Further, the 2017 Industrial Strategy (green paper)⁶ in the United Kingdom has flagged up the importance to universities, students and the broader economy, of graduates leaving higher education armed with the skills and attributes that employers need.⁷ In

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¹ Blair Janis, 'How Technology Is Changing the Practice of Law' (*American Bar Association Solo, Small Firm and General Practice Division*, 2014) <https://www.americanbar.org/publications/gp_solo/2014/may_june/how_technology_changing_practice_law.html> accessed 21 April 2018.

² An example is the Scott-Moncrieff law firm website: Scott-Moncrieff & Associates, 'Scott-Moncrieff & Associates Solicitors' (*Scott-Moncrieff & Associates Ltd*, 2017) <<https://www.scomo.com/>> accessed 27th April 2018; George Bisnought, 'Virtual No More: Excello Law Evolves Model with Fourth Office.' (*ExcelloLaw.co.uk*, 16 April 2015) <<https://excellolaw.co.uk/announcements/virtual-no-more-excello-law-evolves-model-with-fourth-office/>> accessed 21 April 2018. A full practice report on the development and design of a VLC can be read in Ann Thanaraj and Michael Sales, 'Lawyering in a Digital Age: A Practice Report on the Design of a Virtual Law Clinic at Cumbria' (2015) 22 *International Journal of Clinical Legal Education* 334.

³ Matthew L Williams, Pete Burnap and Luke Sloan, 'Crime Sensing With Big Data: The Affordances and Limitations of Using Open-Source Communications to Estimate Crime Patterns' (2017) 57 *The British Journal of Criminology* 320; Brandon L Garrett, 'Big data and due process' (2014) 99 *Cornell Law Review Online* 2017, <<http://cornelllawreview.org/files/2014/10/99CLRO207.pdf>> accessed 21 April 2018; Jeff Pfeifer, 'How Analytics Is Shaping the Current and Future Practice of Law' (*LawJournalNewsletters.com*, June 2017) <<http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/06/01/how-analytics-is-shaping-the-current-and-future-practice-of-law/>> accessed 21 April 2018.

⁴ Katie King, 'Juries of the Future Could Be "Transported" to Crime Scenes Using Virtual Reality Headsets' (*Legal Cheek*, 24 May 2016) <<https://www.legalcheek.com/2016/05/juries-of-the-future-could-be-transported-to-crime-scenes-using-virtual-reality-headsets/>> accessed 21 April 2018; Bruce Kaufman, 'The Next Frontier for Virtual Reality: Courtrooms' (*Bloomberg Law Big Law Business*, 18 November 2017) <<https://biglawbusiness.com/the-next-frontier-for-virtual-reality-courtrooms/>> accessed 21 April 2018; Paul Armstrong, 'Think You Could Convict A Criminal Using Virtual Reality? You Might Soon.' (*Forbes*, 3 January 2018) <<https://www.forbes.com/sites/paularmstrongtech/2018/01/03/think-you-could-convict-a-criminal-using-virtual-reality-you-might-soon/#2af7b7081423>> accessed 21 April 2018.

⁵ Lord Chancellor, Lord Chief Justice of England and Wales, and Senior President of Tribunals, 'Transforming Our Justice System' (Lord Chancellor, Lord Chief Justice of England and Wales, Senior President of Tribunals 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf> accessed 27 April 2018.

⁶ Department for Business, Energy and Industrial Strategy, 'Building Our Industrial Strategy' (*GOV.UK*, 2017) <<https://www.gov.uk/government/consultations/building-our-industrial-strategy>> accessed 11 April 2018.

⁷ Ann Thanaraj, 'Making the Case for a Digital Lawyering Framework in Legal Education' (2017) 2017 *International Review of Law* 17; UCISA Spotlight featured a debate with the motion UCISA, 'Spotlight on Digital Capabilities' (*UCISA*, 25 September 2013) <https://www.ucisa.ac.uk/groups/dcg/Events/2017/digcaps3/new_programme> accessed 11 April 2018.

2014, the House of Lords Select Committee on Digital Skills urged that, for the country to stay competitive globally, “the UK must ensure it has the necessary pool of (highly) digitally skilled graduates and others . . . to support and drive research and innovation throughout the whole economy”.⁸ It concluded that “changing demands from firms, consumers, students and communities mean that apprenticeships, vocational qualifications and degrees need to deliver more general — and also specific — digital capabilities”.⁹ A wider initiative by the European Commission has given priority to digital literacy as a major component of the European Union’s Europe 2020 strategic plan through its “Digital Agenda for Europe”, defining it in terms of “the skills required to achieve digital competence, the confident and critical use of ICT for work, leisure, learning and communication”.¹⁰ The effective and critical use of technology is “so fundamental that, like writing once did, it permeates all forms of communication, presentation and reference”.¹¹ There is indeed international motivation and encouragement to focus on digital skills and literacies within education systems to enable the successful participation and living in a digital age.

With the growth of the digital landscape and the technological disruptions in professional work and in legal practice, this presents a new and invigorating opportunity for academics to strategically and creatively consider how they can adequately prepare law graduates with the relevant knowledge, skills and attributes for working and participating in the digital world and society. It is also an opportunity to consider technology both as a tool to enhance the delivery of education and as a theoretical subject interwoven into all aspects of a programme of study. Further, the rapid and continuous emergence and improvement to technology is transforming knowledge and skills into a lifelong learning process.

Framed around the discussion on the future of the legal profession and the influence technology has on the direction of the profession, this paper advocates for the necessity for law degree programmes to raise awareness of the theoretical knowledge and professional skills necessary to thrive in an multidisciplinary, global environment, advanced and influenced by technology, beneficial for those who students who go on to undertake further study towards legal practice and those who chooses a different profession or self-employment. The paper explores the composites of digital literacies in higher education in the first section and then considers what this may mean for the necessary knowledge, skills and attitudes required to engage in the operation of the law and its practice. Drawing from the discussion on “digital literacies”, a case study is presented on preparing students with the skills and capabilities to live and work in a globalised,

⁸ An example of a rehabilitation programme consisting of training, education, preparation for work and cognitive behavioural therapy using virtual reality is Virtual Rehab, ‘Homepage’ (*Virtual Rehab*) <<http://www.virtualrehab.co/>> accessed 11 April 2018.

⁹ House of Lords Select Committee on Digital Skills, ‘Report of Session 2014–15: Make or Break: The UK’s Digital Future’ (The Stationery Office 2015) H L Paper 111 <<https://publications.parliament.uk/pa/ld201415/ldselect/11digital/111/111.pdf>> accessed 11 April 2018.

¹⁰ The European Commission has given priority to digital literacy as a major component of the European Union’s Europe 2020 strategic plan through its “*Digital Agenda for Europe*”: European Commission, ‘Digital Agenda for Europe’ (European Commission 2014) <http://eige.europa.eu/resources/digital_agenda_en.pdf> accessed 11 April 2018. In order to ensure competencies amongst its citizen’s the ‘Digital Competence Framework for Citizens identifies “information and data literacy, communication and collaboration, digital content creation, safety, and problem solving” as key competencies with 21 related competences and eight proficiency levels – see: Stephanie Carretero, Riina Vuorikari and Yves Punie, ‘DigComp 2.1 The Digital Competence Framework for Citizens’ (European Union 2017) EUR 28558 EN <[http://publications.jrc.ec.europa.eu/repository/bitstream/JRC106281/web-digcomp2.1pdf_\(online\).pdf](http://publications.jrc.ec.europa.eu/repository/bitstream/JRC106281/web-digcomp2.1pdf_(online).pdf)> accessed 11 April 2018. There is a question about how the framework will be interpreted and applied across the member states in Europe because of different needs, gaps, culture, education and sustainability levels.

¹¹ Jisc, ‘Delivering Digital Literacy- Delivering the Agenda within Colleges and Universities’ <<https://www.jisc.ac.uk/podcasts/delivering-digital-literacy-delivering-the-agenda-within-colleges-and-universities-24-apr>> accessed 11 April 2018.

creative, collaborative, technologically-advanced society and professional landscape. The paper demonstrates how a curriculum could be designed to intertwine theoretical and practical digital technology in the study of law. This is acknowledged to be simply one of the many ways in which the higher education curriculum can be designed to address the digital needs and to develop critical and capable learners with the required skills of adaptability, flexibility, responsiveness needed for a fluid and dynamic world. Although the case study given is based on a law curriculum, many of its components can be adapted for wider subject disciplines.

The paper aims to encourage collaboration with interested academics in cutting edge research and scholarship on the use and study of digital technologies, as the new normal for students¹² and to assist law academics in preparing law students to use emerging technologies in the practice of law.

QUESTIONING DIGITAL LITERACIES FOR A DIGITAL AGE OF STUDY

Digital literacies are core graduate attributes enshrined in many universities' policy principles of teaching and learning, student achievements and attainment.¹³ The definition of what it means to participate in a digital society however remains messy, uncertain and challenging.¹⁴ There are a combination of factors which may contribute to the problematisation of identifying the knowledge, skills and aptitude necessary for successful "living, learning and working in a digital society".¹⁵ This also leads to questioning the role that higher education, legal education and the legal profession may have in determining expectations of key attributes of a law graduate in a digital society. This section reviews some of the most popular theories and models of digital literacies used in higher education.

Given the fast-paced technological advances which continually seek to improve and evolve the function of digital use, then the fluidity and variations in the literacies and skills needed will depend on the technology used, the knowledge drawn upon, and the skill requirements and the need to be equipped with the necessary capabilities

¹² There appears to be a perception that the students we teach presently possess high levels of knowledge and skill on how to use different technology articulated by Mark Prensky's concept of "digital native" and "digital immigrant" to differentiate the technological skill and use between students and their tutors. He began his paper by stating that "the single biggest problem facing education today is that our digital immigrant instructors, who speak an outdated language (that of the pre-digital age), are struggling to teach a population that speaks an entirely new language". Marc Prensky, 'Digital Natives, Digital Immigrants Part 1' (2001) 9 *On the Horizon* 1. He explains that a digital native is one who has grown up with technology in all aspects of their lives whilst the digital immigrant is one who has adopted technology at some point during their lives. Eight years later, moving away from the native/immigrant dichotomy, Prensky designed the "Homo Sapiens digital" who has "digital wisdom", a higher level of knowledge and confidence achieved from a more informed and creative use of technology (Marc Prensky, 'H. Sapiens Digital: From Digital Immigrants and Digital Natives to Digital Wisdom' (2009) 5 *Innovate: Journal of Online Education* Article 1).. White and Le Cornu coined the term "visitors and residents". Here, a visitor is one who uses specific digital tools available to them to achieve a purpose; whilst a resident is one who is at ease with technology and uses them to create social and participatory presence (David S White and Alison Le Cornu, 'Visitors and Residents: A New Typology for Online Engagement' (2011) 16 *First Monday* <<http://firstmonday.org/ojs/index.php/fm/article/view/3171>> accessed 21 April 2018. These are examples of discourses attempting to identify the undergraduate learner in a digital age. Despite the academic challenges made to these dichotomies identifying and categorising the potential types of learners, these ideas remain influential (Christopher Jones and Binhui Shao, 'The Net Generation and Digital Natives: Implications for Higher Education' (Higher Education Academy 2011) <http://oro.open.ac.uk/30014/1/Jones_and_Shao-Final.pdf> accessed 21 April 2018; S Bennett, Karl A Maton and Lisa Kervin, 'The Digital Natives' debate: A Critical Review of the Evidence' (University of Wollongong 2008) <http://ro.uow.edu.au/cgi/viewcontent.cgi?article=2465&context=edu_papers> accessed 21 April 2018.

¹³ Wan Ng, 'Can We Teach Digital Natives Digital Literacy?' (2012) 59 *Computers & Education* 1065.

¹⁴ Lankshear and Knobel explain that "the most immediately obvious facts about accounts of digital literacy are that there are many of them and that there are significantly different kinds of concepts on offer" Colin Lankshear and Michele Knobel (eds), *Digital Literacies: Concepts, Policies and Practices* (New edition, Peter Lang Publishing Inc 2008), 2.

¹⁵ Jisc, 'Developing Digital Literacies' (*Jisc*, 16 December 2014) <<https://www.jisc.ac.uk/guides/developing-digital-literacies>> accessed 11 April 2018.

and agency to thrive in an advancing technological world. As such, embedding digital literacies within curriculum design will need to take into consideration the need for subject-specific and profession-specific focus and scope.¹⁶ Further, equipping students for the complexity and flux of emerging trends in technological development raises philosophical debates around the purpose of higher education, our responsibility as academics, and equipping the good citizen and its contribution to the meaning of literacies.¹⁷ These problematisations illustrate the challenges in designing a robust, authentic and meaningful curriculum to equip our students for participation in a digital society, in managing the expectations of our students, the needs of the employers and ensuring the competitiveness of the workforce in global markets,¹⁸ yet the development and continual study to enhance digital literacies are a key lifelong learning priority.¹⁹

Over the years, we have moved somewhat away from the technical²⁰ and functional definition of digital literacies, which focus on being able to use technology effectively, to a more socially constructed/participatory definition. Knobel and Lankshear define digital literacies as a way to “generate, communicate and participate, collaborate and negotiate meaningful content through technology . . . located as part of social practices and occur[ing] within culturally constructed instances or literacy events”.²¹ Consequently, learning or working in this environment will require a repertoire of skills to make and convey meaning, such as Mackey and Jacobson’s metaliteracies. This includes critical capabilities and digital agency when gathering and using information is required, in conjunction with the skills to work effectively with digital collaborative platforms, and being able to share and produce information collaboratively with others.²² The combined approach of criticality, agency and collaboration provides the learner with the capability to adapt to evolving technologically-advancing environments.

The most popular definition used by most higher education institutions was developed by JISC-UK in 2009. Their definition of digital literacies was left purposely broad to encourage and embrace the versatility and wide scoping ways in which technology is used in the education sector, stating “the range of practices that underpin effective learning in a digital age incorporating academic practices, technical literacy, social practices, information literacy, media literacy and ICT skills”.²³ In 2014, digital literacies were defined as “a set of situated practices supported by diverse and changing technologies”.²⁴ A further development on digital literacies from JISC is

¹⁶ Julia Gillen and David Barton, ‘Digital Literacies: A Research Briefing by the Technology Enhanced Learning Phase of the Teaching and Learning Research Programme’ (London Knowledge Lab, Institute of Education 2010), 5.

¹⁷ National Committee of Inquiry into Higher Education, ‘Higher Education in the Learning Society’ (1997) <<http://www.educationengland.org.uk/documents/dearing1997/dearing1997.html>> accessed 27 April 2018 (Dearing Report).

¹⁸ Jisc, ‘Building Digital Capability’ (*Jisc*) <<https://www.jisc.ac.uk/rd/projects/building-digital-capability>> accessed 11 April 2018.

¹⁹ House of Lords Select Committee on Digital Skills, ‘Report of Session 2014–15: Make or Break: The UK’s Digital Future’ (The Stationery Office 2015) H L Paper 111 <<https://publications.parliament.uk/pa/ld201415/ldselect/lddigital/111/111.pdf>> accessed 11 April 2018; European Commission, ‘Digital Competences and Technology in Education – Education and Training’ (*Education and training*, 2018) <https://ec.europa.eu/education/policy/strategic-framework/education-technology_en> accessed 11 April 2018.

²⁰ It is generally accepted that the term “digital literacy” was coined by Glister, who defined it as “. . . the ability to understand and use information in multiple formats from a wide range of sources when it is presented via computers” (Paul Gilster, *Digital Literacy* (1st edition, Wiley 1998), 1).

²¹ DJ Wilber, ‘Special Themed Issue: Beyond “New” Literacies’ (2010) 2 *Digital Culture & Education* 1; Michele Knobel and Colin Lankshear (eds), *A New Literacies Sampler* (Peter Lang Inc, International Academic Publishers 2007), 2–17.

²² Thomas P Mackey, *Metaliteracy: Reinventing Information Literacy to Empower Learners* (Neal-Schuman Publishers 2014).

²³ Jisc, ‘Learning Literacies in a Digital Age’ (Jisc 2009) <<https://www.webarchive.org.uk/wayback/archive/20140614200958/http://www.jisc.ac.uk/publications/briefingpapers/2009/learningliteraciesbp.aspx>> accessed 15 April 2018.

²⁴ Jisc, ‘Developing Digital Literacies’ (*Jisc*, 16 December 2014) <<https://www.jisc.ac.uk/guides/developing-digital-literacies>> accessed 15 April 2018.

“... those capabilities which fit an individual for living, learning and working in a digital society”²⁵ drawing upon its work on “Learning Literacies in a Digital Age” in 2009 and Sharpe Beetham’s framework in 2010. The digital capabilities are encapsulated in six areas of practices: “Information, data and media literacies; ICT proficiency; Digital creation, problem solving and innovation; Digital identity and wellbeing; Digital learning and development and Digital communication, collaboration and participation” offering a holistic, flexible and wide-ranging approach to preparing students (and staff) for participating in a digital age.²⁶ Beetham and Sharpe’s digital literacy framework identified six attributes relevant for teaching, learning and professional work: being engaged, connected, confident, adaptable, intentional and self-aware,²⁷ characterised by a “digital epistemology” for a digital world, and one which requires continuous learning and development.

Using technology encourages us to constantly review how we learn, the way we construct knowledge, the value and hierarchy placed on knowledge source, retrieval and formation, the creation of new forms of knowledge and practices for the world of work. There seem to be some evolving new epistemologies in participating in our digitally connected society.²⁸ As such, there is a need to focus on developing the “digital agency” of individuals, wellbeing, rights and responsibilities for digital citizenship. The JISC framework also made clear the need for continual development, adapting and changing to keep up with the rapid evolution of technology and its functions.²⁹ The New Media Consortium identified this citizenship as being equipped with “the responsible and appropriate use of technology, underscoring areas including digital communication, digital etiquette, digital health and wellness, and digital rights and responsibilities”.³⁰ Belshaw’s³¹ eight essential elements of digital literacies: culture, cognitive, constructive, communicative, confident, creative, critical and civic³² are a “. . . condition, not a threshold . . .”³³ of literacy and agency.

Given the challenges involved in identifying a comprehensive and all-encompassing definition of digital literacies, Belshaw³⁴ also argues that the “conditions” that govern digital literacies are in permanent flux because of the emergence of new developments, shifting what is meant and understood about a particular digital literacy within specific

²⁵ *Ibid.*

²⁶ Jisc, ‘Building Digital Capabilities: The Six Elements Defined’ (Jisc) <http://repository.jisc.ac.uk/6611/1/JFL0066F_DIGIGAP_MOD_IND_FRAME.PDF> accessed 11 April 2018; Also see Rhona Sharpe and Helen Beetham, ‘Understanding Students’ Uses of Technology for Learning: Towards Creative Appropriation’ in Rhona Sharpe, Helen Beetham and Sara De Freitas (eds), *Rethinking Learning for a Digital Age: How Learners are Shaping their Own Experiences* (1 edition, Routledge 2010), 88.

²⁷ Rhona Sharpe, ‘What’s at the Top of the Pyramid?’ (*Effective Learning for a Digital Age*, Oxford Brookes University) <<http://dlf.brookesblogs.net/archives/127>> accessed 15 April 2018.

²⁸ B Street, ‘What’s “new” in new literacy studies? Critical approaches to literacy in theory and practice’. (2003) 5(2), *Current Issues in Comparative Education*, 77, 77.

²⁹ Jisc, ‘Developing Digital Literacies’ (*Jisc*, 16 December 2014) <<https://www.jisc.ac.uk/guides/developing-digital-literacies>> accessed 11 April 2018.

³⁰ B Alexander, S Adams Becker and M Cummins, ‘Digital Literacy An NMC Horizon Project Strategic Brief’ (The New Media Consortium 2016) Volume 3.3 <http://cdn.nmc.org/media/2016-nmc-horizon-strategic-brief-digital-literacy.pdf> accessed 11 April 2018, 1.

³¹ Douglas Belshaw, ‘What Is “Digital Literacy”? A Pragmatic Investigation.’ (Ed D, Durham University 2012) <<http://etheses.dur.ac.uk/3446/>> accessed 11 April 2018.

³² Douglas Belshaw, ‘The Essential Elements of Digital Literacies’ (*Open Educational Thinking*, 2 January 2016) <<https://doughbelshaw.com/blog/2016/01/02/digilit-ebook-199/>> accessed 15 April 2018.

³³ *Ibid.*, 214.

³⁴ Douglas Belshaw, ‘What Is “Digital Literacy”? A Pragmatic Investigation.’ (Ed D, Durham University 2012) <<http://etheses.dur.ac.uk/3446/>> accessed 11 April 2018; Douglas Belshaw, ‘The Essential Elements of Digital Literacies’ (*Open Educational Thinking*, 2 January 2016) <<https://doughbelshaw.com/blog/2016/01/02/digilit-ebook-199/>> accessed 15 April 2018.

contexts or times.³⁵ This continual shift makes the learning and application of digital literacies a lifelong journey of study, updating and refreshing of skills and knowledge. This is also consistent with the idea that technological attributes are of “liquid modernity,” that society has been transformed by a move from the “solid” to the “liquid” phase of modernity³⁶ or the idea of “digital flow” where individuals embrace short-term, creative and pragmatic strategies when approaching digital technologies, rather than definitions of literacy.³⁷ Both concepts capture the uncertain, flexible, fluid and fast pace and ever changing paradigm of digital technologies, its functionality and the continual development of skills required to effectively and purposefully meet needs through technology.

Set against this messy backdrop is the need for deep levels of critical thinking³⁸ and critical understanding of the dynamic and evolving nature of digital literacies, alongside the development of digital agency for lifelong learning, attitudes, values and collaborative ways of working. The digital literacy frameworks allow students to develop their information gathering, usage and production skills within both professional and personal environments, whilst also encouraging them to be proactive in the continued development of their digital skillsets. In discussing digital literacies, alongside a strong recognition for the importance of subject and professional context and situated practices, literacies need to be observed as multidimensional concepts which are transient, multiple and evolving. They contribute towards and help shape our identity and social/professional practices.³⁹ Digital literacies are constantly evolving as technology progresses and adapt to new ways of working, with an understanding of the benefits and limitations of particular technologies.⁴⁰ This is becoming more complex with the emergence of automation and virtual reality, as well as artificial intelligence and its role in imitating human cognitive behaviour.

WHAT DOES IT MEAN FOR ACADEMICS PREPARING LAW STUDENTS TO PARTICIPATE IN A TECHNOLOGICALLY-ADVANCING PROFESSIONAL ENVIRONMENT?

The legal profession is in a state of disruption because of the use of new technologies to offer access and efficiency in delivering legal services. This is an exciting time to consider the meaning and manifestation of innovations and digital literacies within legal education. The second part of this paper aims to address how technological disruption and digitisation could be embraced in the study of a law degree, to enhance both the learning experience (digitally-enabled experience)⁴¹ through digitally-enhanced authentic learning environments, and the theoretical legal knowledge about digital technology and

³⁵ *Ibid*, 210–219.

³⁶ Zygmunt Bauman, *Liquid Modernity* (Polity Press 2000).

³⁷ A Martin, ‘Digital Literacy and the Digital Society’ in Colin Lankshear and Michele Knobel (eds), *Digital Literacies: Concepts, Policies and Practices* (New edition, Peter Lang Publishing Inc 2008).

³⁸ Thomas P Mackey, *Metaliteracy: Reinventing Information Literacy to Empower Learners* (Neal-Schuman Publishers 2014).

³⁹ JP Gee, ‘A Situated-Sociocultural Approach to Literacy and Technology’ in Elizabeth A Baker (ed), *The New Literacies: Multiple Perspectives on Research and Practice* (1 edition, The Guilford Press 2010).

⁴⁰ Colin Lankshear and Michele Knobel (eds), *Digital Literacies: Concepts, Policies and Practices* (New edition edition, Peter Lang Publishing Inc 2008).

⁴¹ Education design and delivery is changing because of the affordances of technology. Although traditional forms of teaching and learning via lectures, workshops and seminars remain vital to the delivery of an excellent education to students, the use of technology affords the creation of a varied and enhanced learning experience for students through the use of technology.

its impact on all areas of legal studies. This is already necessary for current lawyers, therefore it is an opportune time for law academics to reflect and review how we prepare students with the skills and capabilities to live and work in a globalised, creative, collaborative, technology-advanced society and professional landscape, including, but not limited to, legal practice. Consequently, this is also a time for law schools to revisit the purpose of legal education and in particular the undergraduate law degree, the epistemologies that govern legal studies and the extent and depth of knowledge and theoretical understanding of technology that will be required for competent professional practice and to engage with the needs of a digitally-networked society.⁴² Law students who may decide to train as future lawyers and those studying law for other professional work would benefit from being offered an education that (alongside all the other relevant professional and theoretical subject knowledge) develops a deep and analytical understanding, including critique on the affordances and limitations of particular technological practices commonly used in the professional sector as a core part of legal education, such as through introducing the manifestation of law subjects within a digital paradigm, alongside digital skills and knowledge needed to serve society's needs.

Therefore, the inspiration behind the proposal is two-fold: the recognition of the growing importance of technology in the professional workplace, including the emerging disruptions of technology in legal practice;⁴³ and an acknowledgement that there is inadequate attention paid to developing legal education to meet the emerging trends in practice and knowledge of digital technologies. In a 2017 paper titled, 'Making a case for a Digital Lawyering Curriculum',⁴⁴ three principles were proposed which law schools could adopt as a starting point to address the concept of digital literacy, agency and participation in a digitally-networked society:

- a. "Principle 1: The knowledge and skills to use digital tools and software to deliver alternative forms of technology-driven legal service;
- b. Principle 2: The knowledge and skills to collaborate & undertake legal services using digital tools & software articulated by appropriate e-practice, disclosure & project management; and
- c. Principle 3: The knowledge and skills to consider the safety, security, confidentiality, privacy, appropriateness and ethical issues before using digital tools for legal practice."⁴⁵

This has created an opportunity for the law curriculum to include the study of the theoretical and practical development of technology-driven service delivery, together with its professional and ethical impact on the delivery of services with a focus on developing a new conversation about competent legal practice in a digital age. In keeping with the jurisprudence of justice – the principles of fairness, transparency and equality – which underpins the study of law, these principles can be implemented across the breadth of the law curriculum encompassing both the practicalities of digital working in a professional context and to critically analysis of the effect of digital technologies

⁴² Elizabeth Masterman and Marion Manton, 'Teachers' Perspectives on Digital Tools for Pedagogic Planning and Design' (2011) 20 *Technology, Pedagogy and Education* 227; Ann Thanaraj and Steve Williams, 'Supporting the Adoption of Technology Enhanced Learning by Academics at Universities' (2016) 5(1) *Journal of Teaching and Learning With Technology*, 59.

⁴³ Online dispute resolution, the setup of HM Online Court, the use of technology in courts and the Ministry of Justice's Virtual Court pilot are examples of technological services in the legal system. Already, some law firms are investing in virtual reality, artificial intelligence and automation of services.

⁴⁴ Ann Thanaraj, 'Making the Case for a Digital Lawyering Framework in Legal Education' (2017) *International Review of Law* 17.

⁴⁵ *Ibid.*

such as the current laws, its adequacy and gaps in regulating digital living and practices, the impact on social practices online and the concept of power between people and technology.

The principles have been designed to encourage lifelong learning. Their premise is to create an attitude towards learning that encourages continual learning, updating and embracing of new ways of working, with an understanding of the benefits and limitations of particular technologies, and an appreciation for a digitally-networked environment. The principles shift digital literacy away from foundation and technical

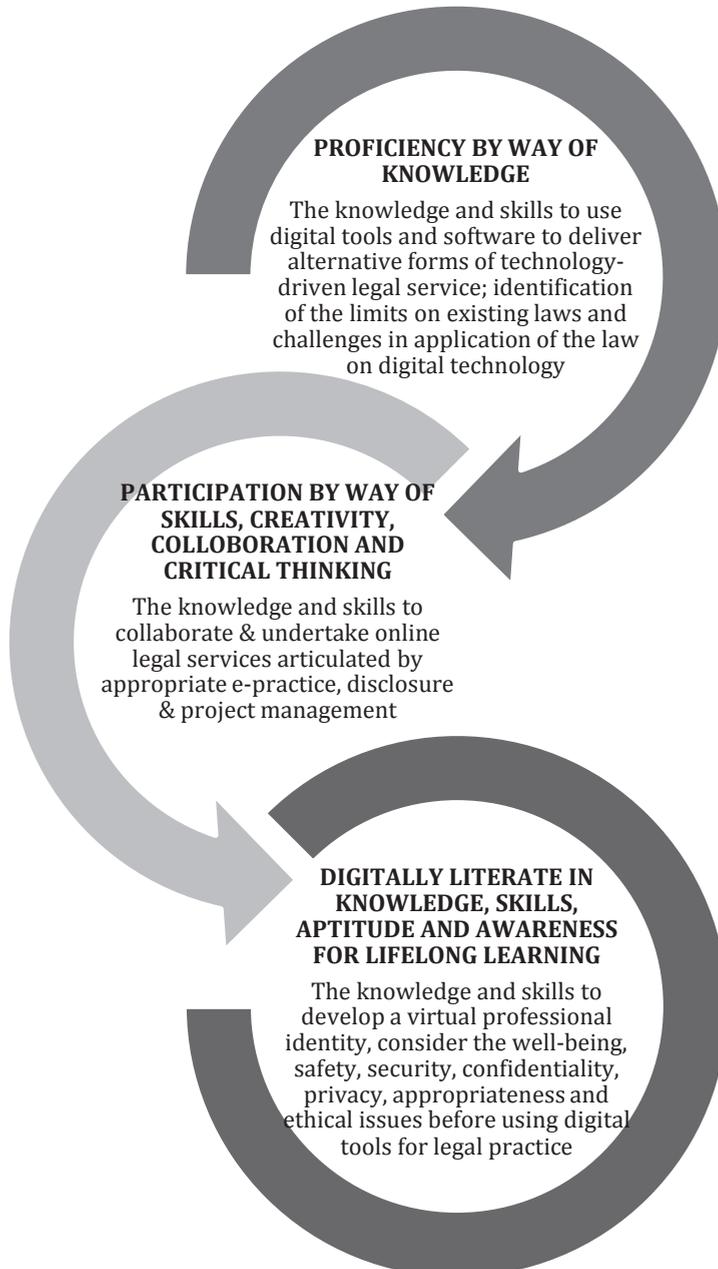


Figure 1: Principles of a Digital Lawyering Curriculum

skills in technology and instead prepare students to critique digital technologies and make informed choices about how to use them and collaborate and negotiate with each other.

The principles of the Digital Lawyering Curriculum design are implemented by way of experiential learning, where students have the opportunity to learn the theoretical aspects of digital lawyering whilst being able to apply the knowledge by way of experiencing digital lawyering skills within a legal or professional practice setting.⁴⁶ The experiential and practical learning part of the curriculum is set in an authentic learning environment, integrated with a rich tapestry of interdisciplinary learning of law through principles, theory, ethics and critique. The theory identifies gaps in knowledge, by way of study and discussion, to help students understand the complexities and affordances involved in using technology in the delivery of legal services, as well as in the application of law in the digital landscape. The balance and intertwining between theoretical study of law and a practice-based legal education helps to provide authentic real-world context to the evolving nature of law and its application, underpin by the development of functional and higher level critical knowledge, deeper reasoning and understanding of the practicalities of digital lawyering. Learning takes place also through students' own experiences, collaborative team working and observations.

The practical and theoretical components are useful for a number of subject-disciplines, not in legal education alone. The constructive reflection⁴⁷ and feedback process is most valuable in creating opportunities for continual learning based on gaps in one's knowledge and understanding identified, critiquing the limits of the law in regards to jurisprudence and its application to the regulation of digital technologies, questioning one's values, ethics, professional responsibilities on digital lawyering in a rapidly evolving legal profession and practice. These combinations of new knowledge, new ways of working, skills and behaviours are proposed as critical ways of being in a digitally-networked world.⁴⁸

In recognition of the emerging trends and practices of the online delivery of legal services, three examples from the law curriculum at the University of Cumbria will be used to show how digital lawyering literacies and practices have been embedded into the curriculum.

Raising awareness of the challenges of use of technology in a professional setting

The second year, 20 credit, LLB law module at the University of Cumbria titled "Lawyering and Dispute Resolution in a Digital Age" aims to explore contemporary online dispute resolution (ODR) practices through hands-on experience, using the digital technologies that are reshaping the profession. The inspiration behind this module came from two reports between 2015–2016 used in my original paper advocating for a Digital Lawyering curriculum⁴⁹: Richard Susskind's report on Online Dispute Resolution for low value civil claims in 2015⁵⁰ and Lord Justice Briggs' Review of the Civil Courts

⁴⁶ Examples of an experiential course can be in the form of a law clinic, virtual law clinic, simulation, problem or inquiry based learning activities, a placement in an organisation – provided there is a combination of theoretical, practical, criticality and reflection which informs the learning process.

⁴⁷ Ann Thanaraj, 'Constructive Reflection: Getting the Best out of Reflective Learning' (2017) 5 International Journal for Innovation Education and Research 40.

⁴⁸ Littlejohn Littlejohn, H Beetham and L McGill, 'Learning at the Digital Frontier: A Review of Digital Literacies in Theory and Practice' (2012) 28 Journal of Computer Assisted Learning 547; Cassie Hague and Sarah Payton, 'Digital Literacy across the Curriculum' (Futurelab 2010) <<https://www.nfer.ac.uk/publications/FUTL06/FUTL06.pdf>> accessed 21 April 2018.

⁴⁹ Ann Thanaraj, 'Making the Case for a Digital Lawyering Framework in Legal Education' (2017) International Review of Law 17.

⁵⁰ Richard Susskind, 'Online Dispute Resolution for low level claims', (Civil Justice Council, February 2015) <<https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>> accessed 4 May 2018.

Structure in 2015.⁵¹ The reports collectively advocated a transformation of the workings of the justice system to facilitate online access to legal services for tribunal matters, family cases and civil disputes. Already in legal practice and in the justice system, we can see examples of online case management systems, online law clinics, use of technology in hearings and the rise of online advisory support systems.⁵²

With this intention and motivation in mind, the module has been designed with a strong knowledge and theory syllabus to underpin the authentic ODR activities, to provide students with realistic and meaningful examples of professional and discipline-specific digital practice experience. To best understand the affordances and limitations of technology within a subject context, the use of the Virtual Law Clinic (VLC) as a training tool provide a means of practising the skills and attitudes expected of the law graduate. The practical experiential learning element of the module will take place in the VLC,⁵³ designed to allow students to explore the uses of technology and practice undertaking the many stages of a case – such as undertaking an initial client interview, legal research, developing a case strategy, managing a case, negotiating, draft pleadings and advising clients.⁵⁴ It is a training platform to facilitate the development of necessary knowledge, skills and aptitude of a professionally responsible lawyer⁵⁵ under supervision and mentoring of tutors and pro bono solicitors.

The practical experience within the VLC allows students to recognise the current trends and practices in the delivery of legal services whilst developing an awareness for the need to keep updated with knowledge of the new technologies and their use, and develop an understanding of the professional competencies required for digital legal practice, as well as the level of transformation that is already underway in the delivery of legal services.⁵⁶ The practical ODR is supported by theoretical underpinnings to encourage critical interpretation of technical knowledge and experience of working

⁵¹ Lord Justice Briggs (as he then was) Michael Briggs, 'Civil Courts Structure Review: Interim Report' (Judiciary of England and Wales 2015) <<https://www.judiciary.gov.uk/wp-content/uploads/2016/01/ccsr-interim-report-dec-15-final.pdf>> accessed 27th April 2018; and Michael Briggs, 'Civil Courts Structure Review: Final Report' (Judiciary of England and Wales 2016) <<https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>> accessed 27 April 2018.

⁵² For examples see: Ann Thanaraj, 'Making the Case for a Digital Lawyering Framework in Legal Education' (2017) 2017 *International Review of Law* 17.

⁵³ The VLC has been designed to include features such as document automation, enhanced client retrieval system of all documents and correspondence in relation to a matter which the client can track and view, intuitive legal forms for clients to complete including informative educational video tutorials on theoretical aspects of law, using integrated practice management systems with calendar and time recording to help meet deadlines and keep tasks flowing and updated, notification alerts to clients on updates made to their case file, alerting to emails, status updates, and respond to requests for information or documents, communicating with clients and other stakeholders via secure and accessible client portal through video and audio conferencing facilities, negotiating out of court settlements online, online discussion threads with clients and others in the firm, automated checks on confidentiality, conflict of interest, privacy and security. All actions undertaken on the online portal for each client is recorded, transcribed and achieved for students' review, feedback and reflection purposes. Further details from: Ann Thanaraj and Michael Sales, 'Lawyering in a Digital Age: A Practice Report on the Design of a Virtual Law Clinic at Cumbria' (2015) 22 *International Journal of Clinical Legal Education* 334.

⁵⁴ Research on some of the benefits of the VLC training initiative and curriculum can be seen in: Ann Thanaraj, 'Identifying students' perspectives on skills and attributes gained from working in a Virtual Law Clinic to create an impact on 'the whole lawyer': A grounded theory study', (2017), *US-China Law Review* [page number missing]; Ann Thanaraj, 'Understanding How a Law Clinic Can Contribute towards Students' Development of Professional Responsibility' (2016) 23 *International Journal of Clinical Legal Education* 89. Research on some of the areas for improvement in the design and learning construct embedded into the VLC can be seen in: Ann Thanaraj, 'Evaluating the Potential of Virtual Simulations to Facilitate Professional Learning in Law: A Literature Review' (2016) 6 *World Journal of Education* 89; Ann Thanaraj, 'Constructive Reflection: Getting the Best out of Reflective Learning' (2017) 5 *International Journal for Innovation Education and Research* 40.

⁵⁵ For a discussion on 'digital lawyering' see Ann Thanaraj, 'Making the Case for a Digital Lawyering Framework in Legal Education' (2017) 2017 *International Review of Law* 17.

⁵⁶ An example of an ODR exercise can be seen in: Ann Thanaraj, 'Internationalizing education: evaluating the growth of intercultural communication and competency in students through an international negotiation project using an online law office' (2016) 6(1) *Journal of Pedagogic Development*, 42. This work was recognised as a "best practice in legal education" for internationalisation efforts by the Higher Education Academy (2013 report).

collaboratively online. This includes the study of principles pertaining to the positive uses of technology, the risks to the profession and the ethical challenges posed by the use of technology in practice. The study of current law and its applicability within the areas of governance and security, safe handling of confidential client data, privacy, human rights, defamation and social responsibility, intellectual property, and data protection (in particular the new General Data Protection Regulation (GDPR) coming into effect in May 2018), whilst raising awareness of the effects of modern technology such as discussed in the current House of Lords consultations, inquiries and recommendations is also part of the syllabus.⁵⁷

Further, academic and professional critique is an essential element in preparing students to participate effectively in a digitally professional environment. Examples of critique include having the ability to carefully and systematically analyse the affordances and limitations of different technologies and their effectiveness in achieving the intended objective and purpose, a critical awareness of how the law is influenced by technology practices, and how it regulates technology practices, the extent to which access to justice is improved and enhanced by the offer of online legal services,⁵⁸ potential challenges and deterrents clients may face when accessing online legal services,⁵⁹ and the potential impact technology could have on the doctrine of justice – such as ensuring and promoting values of fairness, transparency, consistency and determining impartiality in delivering a just outcome as would a court.⁶⁰

The combined approach of practice, theory and critique in this module allows for a critical and analytical awareness of the practical application of law, the gaps within its regulations, and a recognition of the current trends in the delivery of legal services. Students begin their journey towards developing the required skills, knowledge and aptitude necessary for an agile and competent digital professional, which can help to shape and influence their future career and lifelong learning. It also allows students to contribute and shape their own perspectives on the evolving digital landscape.⁶¹

Creating a future-facing legal education – applying law in a digital paradigm

Preparing law students to participate and contribute to legal practice in the digital age will require an awareness of the application of law in a digitally-networked society and digital living and practices. As such, the study of how law interacts with technology and practice is critical. Furthermore, it is argued that a stand-alone module on digital literacies or the law on digital technologies will not sufficiently draw out the interdisciplinary

⁵⁷ House of Lords Select Committee on Communications, 'The Internet: to regulate or not to regulate?' inquiry <<https://www.parliament.uk/business/committees/committees-a-z/lords-select/communications-committee/inquiries/parliament-2017/the-internet-to-regulate-or-not-to-regulate/>> accessed 4 May 2018; House of Lords Select Committee on Artificial Intelligence (published 16 April 2018) <<https://publications.parliament.uk/pa/ld201719/ldselect/ldai/100/100.pdf>> accessed 4 May 2018.

⁵⁸ James E Cabral and others, 'Using Technology to Enhance Access to Justice' (2012) 26 *Harvard Journal of Law & Technology* 241; Jane Donoghue, 'The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice' (2017) 80 *The Modern Law Review* 995; Jena McGill and others, 'Emerging Technological Solutions to Access to Justice Problems: Opportunities and Risks of Mobile and Web – Based Apps' (University of Ottawa 2016) Submitted to: Social Sciences and Humanities Research Council <https://commonlaw.uottawa.ca/sites/commonlaw.uottawa.ca/files/ksg_report_-_mcgill_et_al_oct_13_final_to_send_to_sshrc.pdf> accessed 27 April 2018.

⁵⁹ HM Courts and Tribunals Service and Ministry of Justice, 'HM Courts and Tribunals Service Tests Fully Digital Divorce Application' (*GOV.UK*, 30 January 2018) <<https://www.gov.uk/government/news/hm-courts-and-tribunals-service-tests-fully-digital-divorce-application>> accessed 26 April 2018; Resolution, 'Resolution Comments on HMCTS's Digital Divorce System' (*Resolution – first for family law*, 31 January 2018) <http://www.resolution.org.uk/news-list.asp?page_id=228&page=1&n_id=365> accessed 25 April 2018.

⁶⁰ Tom R Tyler, 'How Do The Courts Create Popular Legitimacy?: The Role Of Establishing The Truth, Punishing Justly, And/Or Acting Through Just Procedures' (Yale Law School 2014) Paper 4991 <http://healthdocbox.com/Psychology_and_Psychiatry/66019767-How-do-the-courts-create-popular-legitimacy-the-role-of-establishing-the-truth-punishing-justly-and-or-acting-through-just-procedures.html> accessed 24 April 2018.

⁶¹ Joshua Rozenberg, 'Justice Online: Just as Good?' <<https://www.youtube.com/watch?v=a9NgGZ3YGRY>> accessed 23 April 2018.

breath of technological influence on the law and gaps in the application of current laws on technology. Instead, some examples of reimagined law modules designed for digital practice are offered to demonstrate a core set of knowledge and skills necessary for participation in a digital world.

In the Legal Systems module, students begin to question the current interpretations of existing law for application on a digital landscape through discussions such as the impact of technology on evidence and disclosure on a digital platform, the mechanisms in which traditional crimes such as theft or legal rights such as privacy and freedom of expression⁶² can be reinterpreted in a digital environment, gaps where there is a need for the development of new legal doctrine, the relationship between ethics, law, technology, and public policy and questioning the doctrine of justice when administered online.⁶³

In Practical Contract law, the new elements of the module include the study of blockchain technology, its affordances across a wide variety of industries and its formation of smart contracts. Blockchains are located cross-boundary in multi-jurisdictional online spaces. Students are introduced to complex jurisdictional issues within a simulated blockchain transaction, enabling them to discuss the consequential contractual relationships, legal certainty, applicable laws, rights and obligations.⁶⁴ Smart contracts are self-executed automatically by blockchain command once the specific criteria in the command are met. Students consider the technology which creates the command, its intelligence, affordances and possible limitations. Students then consider how the existing principles of establishing a legally binding contract through offer, acceptance, consideration and intention/capacity are capable of applying to the enforceability of a smart contract.

In Property law, students examine the paradigm shift in property ownership in a digital age. A topic of significance is the scope and enforceability of Digital Rights Management (DRM)⁶⁵ which mandates limitations on the use of electronic, multimedia and software products such as audio and e-books, online games, films, and music downloads, even when these have been bought by a consumer.⁶⁶ The philosophy of ownership in a digital age is an interesting area of study, balancing the concepts of commodity, intellectual property rights and protection, technology and ownership. As a result of

⁶² Discussion around the extent of freedom of expression online in personal websites, chat rooms, social media platforms in the case of *Yahoo Inc v LICR* 169 F. Supp. 2d 1181 (N.D. Cal. 2001); The concept of the “right to be forgotten” in Case C-131/12, *Google Spain SL & Google Inc v Agencia Española de Protección de Datos (AEPD)*; matters relating to privacy injunctions in *Von Hannover v Germany (No.2)* (2012) 55 EHRR 15; *Ntuli v Donald* [2010] EWCA Civ 1276; *CTB v News Group Newspapers Ltd* [2011] EWHC 1232 QB; *Giggs v News Group Newspapers Ltd & Anor* [2012] EWHC 431 QB; *Chambers v DPP* [2012] EWHC 2157.

⁶³ Tom R Tyler, ‘How Do The Courts Create Popular Legitimacy?: The Role Of Establishing The Truth, Punishing Justly, And/Or Acting Through Just Procedures’ (Yale Law School 2014) Paper 4991 <http://healthdoxbox.com/Psychology_and_Psychiatry/66019767-How-do-the-courts-create-popular-legitimacy-the-role-of-establishing-the-truth-punishing-justly-and-or-acting-through-just-procedures.html> accessed 24 April 2018.

⁶⁴ Hogan Lovells, ‘A Guide to Blockchain and Data Protection’ (Hogan Lovells 2017) <https://www.hlgengage.com/_uploads/downloads/5425GuidetoblockchainV9FORWEB.pdf> accessed 27 April 2018; Michèle Finck, ‘Blockchains and the GDPR’ (*Oxford Law Faculty*, 13 February 2018) <<https://www.law.ox.ac.uk/business-law-blog/blog/2018/02/blockchains-and-gdpr>> accessed 27 April 2018. See also the discussion around the extent of freedom of expression online in personal websites, chat rooms, social media platforms in the case of *Yahoo Inc. LICR* 169 F. Supp. 2d 1181 (N.D. Cal. 2001); The concept of the “right to be forgotten” in Case C-131/12, *Google Spain SL & Google Inc v Agencia Española de Protección de Datos (AEPD)*; matters relating to privacy injunctions in *Von Hannover v Germany (No 2)* (2012) 55 EHRR 15; *Ntuli v Donald* [2010] EWCA Civ 1276; *CTB v News Group Newspapers Ltd* [2011] EWHC 1232 QB; *Giggs v News Group Newspapers Ltd & Anor* [2012] EWHC 431 QB; *Chambers v DPP* [2012] EWHC 2157.

⁶⁵ BBC, ‘Q&A: What Is DRM?’ (*BBC Technology*, 2 April 2007) <<http://news.bbc.co.uk/1/hi/technology/6337781.stm>> accessed 21 April 2018.

⁶⁶ Aaron Perzanowski and Jason Schultz, *The End of Ownership: Personal Property in the Digital Economy* (MIT Press 2016); Hilary Osbourne, ‘Do You Own Your Digital Content?’ *The Guardian* (London, 3 September 2012) <<https://www.theguardian.com/money/2012/sep/03/do-you-own-your-digital-content>> accessed 27 April 2018. Case examples include: *Twentieth Century Fox Corp & Ors v Sky UK Ltd & Ors* [2015] EWHC 1082 (Ch); *Electronics (UK) Ltd Inc, v Apple Inc*, [2012] EWCA Civ 1339; *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd*, [2013] UKSC 18 (Sup Ct).

studying this module, students will be better equipped to advise clients in the future on content rights and limitations.⁶⁷

Within the study of Criminal law, there is a multidisciplinary law, criminology, ethics and forensics component. The rapid advancement of technologies is changing the types of crimes to be investigated, the ways in which evidence is collected and disclosed and also the ways of working in the law enforcement and criminal justice service. Further, given that online crimes lack physical and geographical borders, students are encouraged to critically consider the challenges to the rule of law, limitations on jurisdictional application of the law and how as law enforcers we manage our obligations under the new data protection directive for the police, balancing rights and freedoms of the public whilst protecting them, the use of algorithms and artificial intelligence and its ethical impact on decision-making in law enforcement.

Since all activities online have a digital trail, digital evidence prominently features in many investigations. The topic of electronic discovery is a recent addition to the Law of Criminal Evidence module. The module begins with an introduction to the recent case heard in the US where the prosecution requested and obtained access to a conversation at home recorded by Alexa on Amazon Echo.⁶⁸ This offers an introduction to the legal and technical aspects of digital forensic investigation, including techniques of extracting, preserving and analysing digital evidence retrieval via digital footprints, by balancing the study of computing science with legal issues such as cross-border location, accessibility and relevance of material, to better prepare students to handle evidence in digital form when in practice.⁶⁹

Presenting electronic evidence in court is a developing area of learning and practice for law enforcers, lawyers and the judiciary, and therefore becomes a necessary area of study for students, to be able to identify some of the uncertainties and challenges.⁷⁰ The e-discovery topic takes place in a virtual interactive crime scene.⁷¹ Work is currently underway to develop an experiential e-discovery search experience so that students will be able to apply the theoretical knowledge to the practical use of predictive e-discovery software. Within the virtual crime scene, students evaluate theoretical principles of admissibility⁷² of evidence and how these principles apply to digital evidence,⁷³ how digital evidence is used in trial, methods of extracting and handling of evidence using

⁶⁷ In *UsedSoft GmbH v Oracle International Corp.* [2012] ECJ C-128/11, the Court held that a copyright owner's exclusive distribution right in respect of a computer program is exhausted on its first sale, whether that is made online or on a physical medium.

⁶⁸ Carl A Aveni, 'Alexa, How Private Is My Home?' (2017) 42(4) *Litigation News*, <<https://www.cpmlaw.com/wp-content/uploads/2017/08/Aveni-summer17.pdf>> accessed 27 April 2018; Erik De La Garza, 'Charges Dropped in Amazon Echo Murder Case' (*Courthouse News Service*, 29 November 2017) <<https://www.courthousenews.com/charges-dropped-in-amazon-echo-murder-case/>> accessed 27 April 2018.

⁶⁹ House of Parliament, Postnote: Digital Forensics and Crime, Number 520 March 2016.

⁷⁰ Maria Biasiotti, A proposed electronic evidence exchange across the European Union, *Digital Evidence and Electronic Signature Law Review*, 14 (2017).

⁷¹ 'From a digital Crime Scene to a virtual courtroom: Learning about the impact of technology in policing and investigation in a digital age' – Forthcoming in Thanaraj, A. (Ed.) *Teaching Legal Education in the Digital Age*, Routledge: Using an online simulated crime scene, students will have the opportunity to learn about rapid advancement of technologies which are changing the crimes to be investigated, the ways in which evidence is collected and disclosed. It also helps students learn the many challenges facing law enforcement and other authorities in managing their obligations under the new data protection directive for the police, balancing rights and freedoms of the public whilst protecting them, the use of algorithms and artificial intelligence and its ethical impact on the public. Using game-based design theory, this chapter will explore the subject-knowledge learning and uncertainties and challenges of policing in a digital age because of the emerging technological trends in our digital society.

⁷² Admissibility of evidence is based on: relevance, authenticity, not being unduly prejudicial, best evidence and not being hearsay (a number of exceptions apply). Challenges based on unfairness fall under s78 Police and Criminal Evidence Act 1984 (*res gestae* is the common law rule) in criminal matters.

⁷³ Evidence may not be admissible because of procedural factors such as tampering, illegal search and seizure or improper methods of handling or excavation of evidence.

admissible methods for use in court, the significance and use of the metadata contained in digital evidence and the methods of recovering deleted evidences via a digital trail.

Broader issues also raise awareness of how evidence can be collected across jurisdictions and the transfer of evidence between different jurisdictions.⁷⁴ With the impending enforcement of the GDPR in May 2018, this is a question which has posed significant international discussion because the GDPR prohibits the transfer of personal data outside of the EU.⁷⁵ There are only limited exceptions to this, such as a request being based on an international treaty⁷⁶ or for law enforcement purposes such as for “prevention, investigation, detection or prosecution of criminal offences, or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security”.⁷⁷ In disclosing evidence in international civil matters, however, the GDPR possess significant challenges. The law also allows for the right to be forgotten,⁷⁸ and this could raise tension between the “necessity” argument and the need to preserve all data “for the establishment, exercise, or defence of legal claims”.⁷⁹

Understanding and challenging the use of automated technologies, algorithms and machine learning in decision-making practices

Artificial Intelligence (AI) is a global phenomenon which has recently been adopted in legal practice at a fast pace. The use of AIs in legal practice have raised interest in eye catching reports asking whether AI spells the end of lawyers,⁸⁰ whether there is a rise of “robo-lawyers”,⁸¹ and questioning the extent of transformation of the legal profession and its subsequent impact on the work of lawyers.⁸² It has been suggested that AI technology is “changing rather than replacing”⁸³ the work of lawyers.

⁷⁴ The GDPR, Regulation (EU) 2016/679, establishes six fundamental principles in Article 5(1) when handling and processing personal data. The premise underpinning the principles is a balancing act between providing adequate data protection for individuals as enshrined in Article 8 of the European Convention on Human Rights and in the interest of protection, security and cooperation, facilitating the exchange of information between law enforcement of member states. Data Protection Bill 2017–2019 UK <<https://services.parliament.uk/bills/2017-19/dataprotection.html>> accessed 4 May 2018.

⁷⁵ Article 48 Data Protection Bill 2017–2019 UK <<https://services.parliament.uk/bills/2017-19/dataprotection.html>> accessed 4 May 2018. Further, Students are made aware that Article 22 of the EU GDPR is not being transposed into UK national law and the ramifications for that in the regulations of internet activities.

⁷⁶ Article 48(3) Data Protection Bill 2017–2019 UK <<https://services.parliament.uk/bills/2017-19/dataprotection.html>> accessed 4 May 2018.

⁷⁷ Directive (EU) 2016/680 of the European Parliament and the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA – known as the ‘Law Enforcement Directive’ in the Data Protection Bill 2017–2019 UK <<https://services.parliament.uk/bills/2017-19/dataprotection.html>> accessed 4 May 2018.

⁷⁸ Article 17(1) Data Protection Bill 2017–2019 UK <<https://services.parliament.uk/bills/2017-19/dataprotection.html>> accessed 4 May 2018.

⁷⁹ Art 17(3) Data Protection Bill 2017–2019 UK <<https://services.parliament.uk/bills/2017-19/dataprotection.html>> accessed 4 May 2018.

⁸⁰ J Croft, ‘Artificial intelligence closes in on the work of junior lawyers’, Financial Times (London, April 2016) <<https://www.ft.com/content/f809870c-26a1-11e7-8691-d5f7e0cd0a16>> accessed 11 April 2018; Julie Sobowale, ‘How Artificial Intelligence Is Transforming the Legal Profession’ [2016] *ABA Journal* <http://www.abajournal.com/magazine/article/how_artificial_intelligence_is_transforming_the_legal_profession/> accessed 11 April 2018.

⁸¹ Jonathan Smithers, ‘Will Lawyers Be Replaced by Robots?’ (*Law Society of England and Wales*, 23 June 2016) <<http://www.lawsociety.org.uk/news/blog/will-lawyers-be-replaced-by-robots/>> accessed 11 April 2018; Rory Cellan-Jones, ‘The Robot Lawyers Are Here and Winning’ (*BBC News*, 1 November 2017) <<http://www.bbc.co.uk/news/technology-41829534>> accessed 11 April 2018; Jason Koebler, ‘Rise of the Robolawyers’ [2017] *The Atlantic* <<https://www.theatlantic.com/magazine/archive/2017/04/rise-of-the-robolawyers/517794/>> accessed 3 May 2018.

⁸² Blair Janis, ‘How Technology Is Changing the Practice of Law’ (*American Bar Association Solo, Small Firm and General Practice Division*, 2014) <https://www.americanbar.org/publications/gp_solo/2014/may_june/how_technology_changing_practice_law.html> accessed 11 April 2018.

⁸³ Dana Remus and Frank S Levy, ‘Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law’ (Social Science Research Network 2016) SSRN Scholarly Paper ID 2701092 <<https://papers.ssrn.com/abstract=2701092>> accessed 21 April 2018.

Unlike other forms of technology available to aid legal services, artificial intelligence involves computations which are capable of replicating or “simulat[ing] convincingly”⁸⁴ the human cognitive functions, by way self-improving incrementally through its successes and errors. Although I think it is unlikely that the online delivery of legal services will require lawyers to code technical and computational designs of software, algorithms and artificial intelligence, lawyers will require more knowledge around the functions and capabilities of these technologies and will need the ability to identify suitable and efficient technology to meet a client’s needs. Raising awareness of current and emerging practices, the affordances, limitations, design and development, and the comparisons between human cognition and the working practices of the AI is part of equipping law students with the knowledge and skills necessary for participating in a technologically-advanced, multidisciplinary and complex professional environment.

When studying the methodologies of an AI, students are encouraged to consider the methodological processes of legal reasoning in a legal matter, to help understand how an AI might be used to answer legal questions and explain its answers. Using case study examples from Employment Law, the Law of Torts and Practical Contract Law, students undertake a practical exercise describing with illustrations of a flowchart/algorithm to solve a client’s problem. The development of the algorithm requires them to think systematically about the processes for solving legal problems, by breaking down each legal issue into components, and applying a legal theory and available admissible evidence to help create a formula to solving the issue. This attempts to mimic the systematic and methodological flow of how algorithms are used by AIs in decision-making through logic and reasoning, which are key attributes in designing algorithms. The development of algorithms and learning about its complexities are an important part of the digital literacies required for students to undertake the future role of a lawyer which requires a strong understanding of technological functions, alongside its legalities and ethics.⁸⁵

The study of AIs afford interdisciplinary collaborations across a multidisciplinary environment, such as law students and computer science students undertaking research and collaboratively writing papers exploring what is AI and what it is capable of doing varies, as the technology in creating AI evolves almost daily,⁸⁶ including the sophistication of improved machine learning functions.⁸⁷ Sometimes as a relation and sometimes synonymously, AI is known as “machine learning, cognitive systems, robotics and smart machines”.⁸⁸ It has also been said that:

... some define AI loosely as a computerized system that exhibits [behaviour] that is commonly thought of as requiring intelligence. Others define AI as a system capable of

⁸⁴ Select Committee on Artificial Intelligence, ‘Report of Session 2017–19 AI in the UK: Ready, Willing and Able?’ (House of Lords 2018) HL Paper 100 <<https://publications.parliament.uk/pa/ld201719/ldselect/ldai/100/100.pdf>> accessed 27 April 2018, 15, para 14.

⁸⁵ Wendy Hall and Jérôme Pesenti, ‘Growing the Artificial Intelligence Industry in the UK’ (Department for Digital, Culture, Media and Sport’ Department for Business, Energy and 2017) <<https://www.gov.uk/government/publications/growing-the-artificial-intelligence-industry-in-the-uk>> accessed 11 April 2018.

⁸⁶ S Van Duin and N Bakshi, ‘Part 1: Artificial Intelligence Defined: The Most Used Terminology around AI’ (*Deloitte Nederland*, March 2017) <<https://www2.deloitte.com/nl/nl/pages/data-analytics/articles/part-1-artificial-intelligence-defined.html>> accessed 11 April 2018.

⁸⁷ Machine learning is whereby an algorithm learns from its successes and failures and becomes more intelligent and sophisticated in its decision-making process by creating new and varied algorithms to assist in the next decision. More on machine learning can be found by searching ‘machine learning alphr’ and ‘machine learning ars’.

⁸⁸ S Van Duin and N Bakshi, ‘Part 1: Artificial Intelligence Defined: The Most Used Terminology around AI’ (*Deloitte Nederland*, March 2017) <<https://www2.deloitte.com/nl/nl/pages/data-analytics/articles/part-1-artificial-intelligence-defined.html>> accessed 11 April 2018.

rationally solving complex problems or taking appropriate actions to achieve its goals in whatever real world circumstances it encounters.⁸⁹

Alongside identifying what exactly AI is, how it is being designed and created and its method of working, there is considerable opportunity to collaborate on areas around intellectual property protection such as patents for AI technology.⁹⁰ Law students and business students could usefully work together to explore the advantages and capacity of AI to the creation of new industries, including its use in consumer profiling and marketing.⁹¹

In raising awareness about the techno-legal practices in law and students' critical appreciation for the use of AI in legal practice, it is necessary for students to be equipped with the awareness of the gaps and emerging challenges in new areas of legal practice. Using the new concept of "legal engineering"⁹² which is becoming acknowledged as a vital role in legal practice, the following may be said to be necessary in preparing for a technologically-advancing legal practice:⁹³

- a. Understanding the mechanisms and functionalities of analytics ('Robotic Process Automation'⁹⁴ which varies from one AI to another) especially when used in reviewing documentation and increasing efficiency⁹⁵ such as the use of Technology Assisted Review (TAR) which was recently approved in England and Wales.⁹⁶ This includes developing a critical understanding for the affordances and ethical challenges computational decision-makers.⁹⁷
- b. Understanding the affordances and limitations of digital platforms, software and apps which are capable of performing some of the cognitive functions ('Robotic Process Automation'⁹⁸ and 'machine learning'⁹⁹) needed for searching, reading and comprehension without human intervention and instructions.¹⁰⁰
- c. Appreciation for the functionality behind internet-enabled chat interface such as IBM's ROSS Intelligence, a robo-legal advisor that uses machine learning

⁸⁹ Executive Office of the President, National Science and Technology Council and Executive Office of the President National Science and Technology Council Committee on Technology, 'Preparing For The Future Of Artificial Intelligence' (US Government 2016) <https://obamawhitehouse.archives.gov/sites/default/files/whitehouse_files/microsites/ostp/NSTC/preparing_for_the_future_of_ai.pdf> accessed 11 April 2018, 6.

⁹⁰ Frank DeCosta III and Aliza G Carrano, 'Intellectual Property Protection for Artificial Intelligence' [2017] Westlaw Journal Intellectual Property <<https://www.finnegan.com/en/insights/intellectual-property-protection-for-artificial-intelligence.html>> accessed 11 April 2018.

⁹¹ Wendy Hall and Jérôme Pesenti, 'Growing the Artificial Intelligence Industry in the UK' (Department for Digital, Culture, Media and Sport' Department for Business, Energy and 2017) <<https://www.gov.uk/government/publications/growing-the-artificial-intelligence-industry-in-the-uk>> accessed 11 April 2018.

⁹² Legal engineering was a phrase that first appeared in Susskind's *The End of Lawyers?* in 2010 and again in *The Future of the Professions: How Technology Will Transform the Work of Human Experts* in 2017. Requiring a combined knowledge of the law and technical knowledge, the legal engineer will undertake legal work and seek to enhance/improve the efficiency of the legal process by creatively using technology innovatively.

⁹³ Tara Chittenden, *Capturing Technological Innovation in Legal Services*, The Law Society (2017), 26–47.

⁹⁴ *Ibid*, Section 2.3, p.32.

⁹⁵ Borrowing from the case of *Rio Tinto Plc v Vale S* (2015) WL 872294 (SDNY), a key focus of e-discovery theory should be on transparency of how the coding was set up to take place and the means in which the results of the coding has been evaluated such as manual sampling and parameter setting.

⁹⁶ Courts in the UK, US and Ireland, to name a few, are now using technology-assisted review (TAR) in court processes. In the UK, the case of in *Pyrrho Investments Ltd v MWB Property Ltd*, (2016) EWHC 256 (Ch) has paved the way for its use in February 2017 following the decision in the American case *Da Silva Moore v Publicis Groupe et al. No. 1*: (2011) Document 96 (SDNY 2012) and the Irish case *Irish Bank Resolution Corp. Quinn* [2015] IECH 175.

⁹⁷ See for example the algorithm that has been found to be 79% accurate in predicting decisions from ECHR cases: Nikolaos Aletras and others, 'Predicting Judicial Decisions of the European Court of Human Rights: A Natural Language Processing Perspective' (2016) 2 PeerJ Computer Science e93.

⁹⁸ Tara Chittenden, *Capturing Technological Innovation in Legal Services*, The Law Society (2017), section 2.3, p.32.

⁹⁹ *Ibid*, Section 2.4, p.35.

¹⁰⁰ See for example 'Luminance, 'Luminance | The AI Platform for the Legal Profession' (*Luminance*, 2017) <<https://www.luminance.com/>> accessed 21 April 2018.

technology to undertake research whilst offering most updated legal information; and how this functionality differs from other search engine applications.¹⁰¹

- d. In light of the tremendous amount of data processed and held by AIs, the impact of the forthcoming GDPR in May 2018 on the functionalities of AI systems

I would also suggest that the legal implications of AI decision making, questioning how liability can be established, including gaps in the current laws, is a necessary part of students' preparation. Seminar discussions include:

- a. In the use of AI systems in the legal profession, the question of where does legal ethics and application of professional code of conduct lie – whether it is the lawyer or the AI systems themselves who is responsible, especially if an AI is able to learn from its successes and errors and intelligently undertakes tasks and makes decisions on its own initiative.
- b. A critical examination of product liability, criminal liability, negligence and contractual liability and how the current laws in this area applies to the design of AIs and establishing its responsibilities. A tricky area here is when an AI is operating after self-learning and self-improving (machine learning) or when it is interacting with other online systems (via blockchains and Internet of Things)¹⁰² because identifying where the liability lies if something goes wrong, is difficult to determine.¹⁰³ Due to the current lack of specific laws which are compatible with the functions and operations of AIs, there is a gap in the governance, privacy, fairness, transparency, accountability and determination of responsibility and liability in this area.
- c. The need for specific regulations on AIs and algorithm functions. It has been established that there is a need for “. . . careful scrutiny of the ethical, legal and societal dimensions of artificially intelligent systems . . . ”¹⁰⁴ It is also important that students develop a critical appreciation for the EU Parliament's strategy on robots and artificial intelligence¹⁰⁵ suggesting legal responsibility of AI system's action, and appreciate that the current rules are insufficient to establish responsibility, accountability and liability.¹⁰⁶ The recent 2018 report from the UK House

¹⁰¹ Tara Chittenden, *Capturing Technological Innovation in Legal Services*, The Law Society (2017), section 2.3, p.41; Other examples include a DivorceBot. See artificiallawyer, 'Meet Larissa, the Divorce Bot You Can Talk To' (*Artificial Lawyer*, 22 November 2017) <<https://www.artificiallawyer.com/2017/11/22/meet-larissa-the-divorce-bot-you-can-talk-to/>> accessed 27 April 2018.

¹⁰² Jayavardhana Gubbi and others, 'Internet of Things (IoT): A Vision, Architectural Elements, and Future Directions' (2013) 29 *Future Generation Computer Systems* 1645; Vaughn Highfield, 'What Is the Internet of Things?' (*aplhr*, 3 March 2015) <<http://www.alphr.com/internet-of-things>> accessed 28 April 2018.

¹⁰³ LexisPSL, 'What Happens When the Robots Get It Wrong?' (*LexisNexis Future of Law*) <<https://blogs.lexisnexis.co.uk/futureoflaw/2017/03/what-happens-when-the-robots-get-it-wrong/>> accessed 26 April 2018; Michael Carson, 'Artificial Intelligence Misdiagnosis: Who Is to Blame?' (*Lawyer Monthly | Legal News Magazine*, 27 February 2018) <<https://www.lawyer-monthly.com/2018/02/artificial-intelligence-misdiagnosis-who-is-to-blame/>> accessed 26 April 2018.

¹⁰⁴ House of Commons, Science and Technology and House of Commons Science and Technology Committee, 'Robotics and Artificial Intelligence Fifth Report of Session 2016–17' (House of Commons 2016) <<https://publications.parliament.uk/pa/cm/201617/cmselect/cmsctech/145/145.pdf>> accessed 27 April 2018.

¹⁰⁵ Marek TrojnarSKI, 'The Future Is Now – the Law on Robots' (*Lexology Privacy and Cybersecurity Law*, 22 February 2017) <<https://www.lexology.com/library/detail.aspx?g=3e9ffdfb-8a47-42c1-9284-c5ac12ff83c4>> accessed 11 April 2018; European Parliament, 'Civil Law Rules on Robotics' (*European Parliament*, 16 February 2017) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0051+0+DOC+XML+V0//EN>> accessed 11 April 2018; Andrus Ansip, 'Making the Most of Robotics and Artificial Intelligence in Europe' (*European Commission*, 17 November 2017) <https://ec.europa.eu/commission/commissioners/2014-2019/ansip/blog/making-most-robotics-and-artificial-intelligence-europe_en> accessed 11 April 2018; euRobotics aisbl, 'Strategic Research Agenda for Robotics in Europe' (euRobotics aisbl 2013) Draft 0v2 <https://ec.europa.eu/research/industrial_technologies/pdf/robotics-ppp-roadmap_en.pdf> accessed 11 April 2018.

¹⁰⁶ Dillon Reisman and others, 'Algorithmic Impact Assessments: A Practice Framework for Public Agency Accountability' (AI Now Institute 2018) <<https://ainowinstitute.org/aiareport2018.pdf>> accessed 27 April 2018; Ben Dickson, 'Artificial Intelligence Has to Deal with Its Transparency Problems' (*The Next Web*, April 2017) <<https://thenextweb.com/artificial-intelligence/2017/04/23/artificial-intelligence-has-to-deal-with-its-transparency-problems/>> accessed 23 April 2018.

of Lords Select Committee titled *AI in the UK: ready, willing and able?*¹⁰⁷ sought clarification on the current liability laws and its sufficiency towards AI systems. This report suggested the possibility of developing an AI Code to help mitigate the risks of AI outstripping human intelligence.

- d. A consideration of the legal and philosophical possibility and the potential ethical and social implications of “electronic personhood” bestowed upon AIs, as similar to that of corporate personhood for companies, as advocated by the EU Parliament’s draft report on robotics in 2016.¹⁰⁸

These are examples of how the law curriculum can be re-imagined to prepare students to participate in a digital age. The design of these examples has been undertaken in collaboration with students, law firms, technology companies and other stakeholders of the law programme.

CONCLUSION

This paper offers a modest suggestion on equipping law students with digital literacies suitable for legal practice, using a new “Lawyering and Dispute Resolution in a Digital Age” module. This module provides an example of contextualising the theoretical knowledge and skills to engage with the complexities of emerging technologies and practices. Even as recent as 2018, the content of law modules which have been taught and studied are most commonly found without the application of law to a digital society and its relevance. This is likely to leave students learning the law relevant to the physical dimension of the world, but without the awareness and knowledge of the realities of the digital world necessary to effectively serve a digitally-networked society and handle legal issues which take place within a digital-social context. I submit that the intertwined study of law and technology are most vital in equipping students to participate in a digitally-networked society; and in particular in preparation for legal practice.

A lawyer practising in a digital age will need to understand the affordances, limitations and functionalities of the technology being used for the delivery of legal services, and to advise a client competently on a technology breach issue. It is possible that they will also be required to provide legal advice which may require some functional knowledge, such as an awareness and understanding of how an analytics and algorithm has been designed, how it is intended to function, its decision making process, how a smart contract is executed, or jurisdictional issues. With that in mind, this paper advocates for a curriculum which has a strong focus on legal and technological critical knowledge, together with the principles of jurisprudence of the law and justice applied by way of the critical thinking, reasoning skills and problem-solving skills to develop competent graduate skills as well as skills required for legal practice, including in critical digital legal practice.

With its rapid development and the further emergence of technology and its affordances, the concept of digital literacies remains fluid and evolving. It is submitted

¹⁰⁷ House of Lords Select Committee on Artificial Intelligence, ‘Artificial Intelligence Committee – Publications’ (*UK Parliament*, 2018) <<https://www.parliament.uk/business/committees/committees-a-z/lords-select/ai-committee/publications/>> accessed 23 April 2018; Select Committee on Artificial Intelligence, ‘Report of Session 2017–19 AI in the UK: Ready, Willing and Able?’ (House of Lords 2018) HL Paper 100 <<https://publications.parliament.uk/pa/ld201719/ldselect/ldai/100/100.pdf>> accessed 27 April 2018.

¹⁰⁸ Lawyer Monthly, ‘Robots and AI: Giving Robots “Personhood” Status’ (*Lawyer Monthly | Legal News Magazine*, 3 March 2017) <<https://www.lawyer-monthly.com/2017/02/robots-and-ai-giving-robots-personhood-status/>> accessed 24 April 2018; Carl A Aveni., ‘Alexa, How Private Is My Home?’ (2017) 42(4) *Litigation News*, <<https://www.cpmlaw.com/wp-content/uploads/2017/08/Aveni-summer17.pdf>> accessed 27 April 2018; Erik De La Garza, ‘Charges Dropped in Amazon Echo Murder Case’ (*Courthouse News Service*, 29 November 2017) <<https://www.courthousenews.com/charges-dropped-in-amazon-echo-murder-case/>> accessed 27 April 2018.

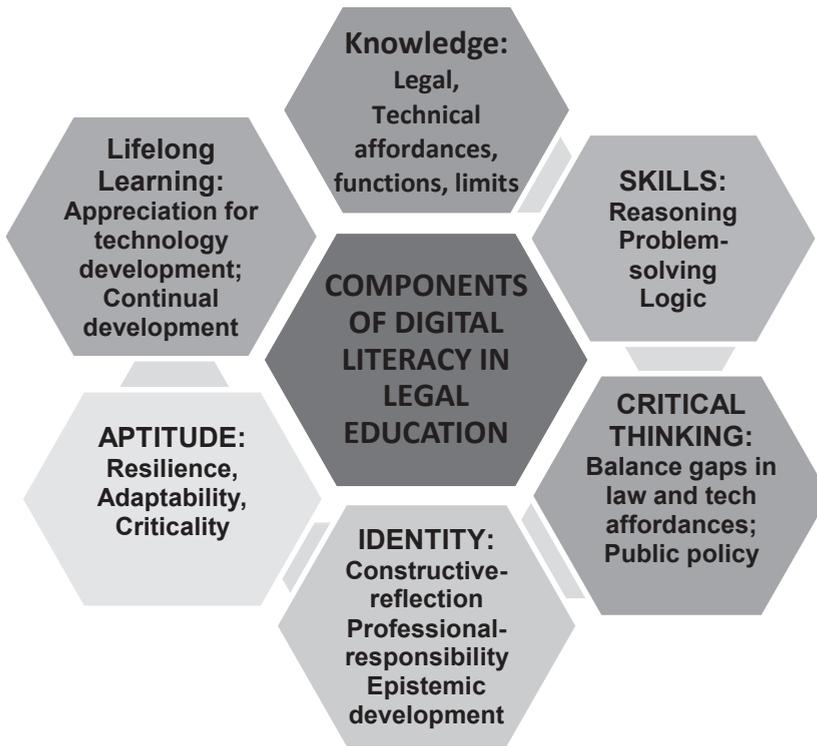


Figure 2: Key elements of digital literacy in legal education

that, in our role as academics responsible in equipping students with digital literacies, it will be necessary to focus on subject-specific and profession-specific digital awareness. This follows alongside the development of an individual's agency necessary to fully participate in all aspects of a digital society, building a digital identity, confidence and wellbeing. Digital literacy is also essential to contribute and shape discussions on challenging digital issues that we face in our professions, socially, personally and economically, because of the advancement of technology and its impact, such as public policy discussions around the legitimacy of online legal services and justice systems, limitations of technology and its lack of transparency in how it functions, and the need for the law to keep pace with technological developments. The need for a critical mindset for lifelong learning is most useful in keeping up with the emerging digital literacies, rather than promoting a fixed digital skillset, which may only effectively contribute for the more immediate demands of today's digital living.

Drawing upon experience of designing and developing digital literacy skills in the law programme, it is essential to reflect upon:

- a. The intended learning outcomes of a future-facing law curriculum, to articulate with clarity the balancing of legal subject content applied in the physical and digital landscape, taking into consideration the subject and professional needs of digital knowledge, skills and attributes to thrive in a fast-pace technologically advancing sector developments
- b. The level of practical skills and jurisprudence of digital technologies underpinning the digital lawyering curriculum and considering the need to adopt both generic and contextualised literacies appropriate for the subject and profession and to contribute towards students' digital agency

- c. Ways of capturing the influence of technology into legal practice, including the influence of technological practices on current and new laws, by identifying the gaps in the areas of law being taught at present;
- d. The need to seek out and establish collaboration opportunities with law firms and students from law programmes and from across business, computing and STEM related subjects, to question what digital literacy may mean for each of these subject disciplines, and harnessing the overlap to work collaboratively.

This paper demonstrates that there is no single overarching model or framework for digital literacies which fully addresses all of the points necessary within a discipline specific paradigm. This is an opportunity for law schools to come together and hold conversations around preparing law students for the digital world of work, and more specifically for the digital legal profession, including what this actually means. We have the opportunity to contribute towards and shape the education we offer students to live, work and learn in a digital society successfully.

A ROSY-FINGERED DAWN FOR LEGAL EDUCATION? INSIGHTS FROM A CORPUS LINGUISTIC PERSPECTIVE ON TEXT.

JENNY KEMP*

ἦμος δ' ἠριγένεια φάνη ῥοδοδάκτυλος Ἥως,
ᾠρνυτ' ἄρ' ἐξ ἐννήφιν Ὀδυσσεύος φίλος υἱὸς
εἵματα ἐσάμενος,
When the early-born appeared, rosy-fingered Dawn,
Then started from his bed Odysseus' beloved son
And put on his garments.¹

Thus opens the second book of Homer's *Odyssey*, with one of the best known Homeric collocations: “rosy-fingered dawn”. To a classicist, this is a stock epithet, a repeated phrase which helps both the reader/listener and the speaker. On the one hand, an epithet is used as a metaphor to associate certain images or to represent a particular theme. Such an association is common in both literature (e.g. upsets in nature mirroring the unnatural ruling order in Shakespeare's *Macbeth*) and music (the *leitmotif* in Wagner's *Ring Cycle*, such as the sword motif, and that which signifies Siegfried). Homer uses the adjective *rosy-fingered* (ῥοδοδάκτυλος, literally “rose-finger”)² when a protagonist is about to face a challenge or acquire worldly knowledge. At its most fundamental the use of an epithet encourages the reader to make connections between ideas and also sets up a particular expectation – both linguistic, to the extent that “dawn” or “morn(ing)” is expected to follow “rosy-fingered”; and also an expectation of what may follow in the discourse.

The second purpose of the epithet is as an aid to fluency, to enable the oral poet to compose verse in real time while his audience listened – on the hoof, as it were. This is not only true for bards: as speakers and writers, we rely on stored phrases to a large extent. Our mental lexicon contains a large number of “chunks” of language³, such as sequences used in everyday speech (“I know what you mean, but” or “Do you mind if I . . . ?”), the use of which make us more fluent⁴ in a similar way to Homer's epithets. Prescriptive legal texts are also largely formulaic in nature. In the drafting of legal documents, common chunks of language are used not only to help construct and structure text, but also as a harmonising mechanism, a means of following established practice and to facilitate a shared understanding of a particular term or concept. These patterns are not unique to each speaker or writer, but are acquired through exposure to language – purposeful and conscious, or subconsciously, over time.

Language acquisition is thus a complex process which continues throughout our lives. From birth, we encounter instances of language and store them away in the mind,

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¹ Homer, *The Odyssey*, Book II lines 1–3. Translation by the author, based on the Greek text and lexicon provided via the *Perseus Digital Library* <<http://www.perseus.tufts.edu/hopper/>> accessed 25 November 2017. I would also like to acknowledge the suggestions made by Graham Shipley, Professor of Ancient History at Leicester University.

² I have maintained the more traditional “rosy-fingered” here for its familiarity: we are “primed” for *rosy-fingered* rather than the more accurate *rose-fingered*.

³ These are not necessarily stored holistically. See Norbert Schmitt, Sarah Grandage and Svenja Adolphs, (2004) ‘Are corpus-derived recurrent clusters psycholinguistically valid?’ in Norbert Schmitt (ed), *Formulaic Sequences: Acquisition, processing and use* (John Benjamins 2004).

⁴ Andrew Pawley and Frances Hodggets Syder, ‘Two puzzles for linguistic theory: nativelike selection and nativelike fluency.’ in Jack C Richards and Richard W Schmidt (eds), *Language and Communication* (Longman 1983).

initially only producing chunks of language which are copied verbatim. Meanwhile, usually subconsciously, patterns are identified which enable us to adapt these chunks and be more creative with language. What is not necessarily apparent to the conscious mind, is the all-pervasive nature of this patterning, and the extent to which it is an integral part of our subconscious. This process of storing in the mind the lexicogrammatical, semantic and contextual associations of a word is referred to as *lexical priming*.⁵ Every word that is encountered is stored along with information about its co-text and context, and in this way the usage of each word is *primed*. Lexical Priming is a theory which accounts for the formulaic and predictable nature of language, rather than what is grammatically and syntactically possible. Currently there is no other plausible alternative hypothesis to explain the frequent co-occurrence of words.⁶

Lexis carries meaning within each domain or community of practice that shares it, and each community that an individual encounters – be it familial, educational, workplace, institutional or social – shapes that person's priming. Specialised, discipline-specific language is acquired within a community of practice. When a student first studies an area of law that they find challenging to understand due to the difficult terminology, they have recourse to various assistance – legal dictionaries, encyclopaedias of law, a lecturer or colleague – and thus their acquisition of the language concerned is, at least in part, conscious. Nevertheless, the student is still going through the same process, storing away one instance or “text” after another until the term and/or concept become clear. In time, the terms are likely to become so familiar that the first word or words will trigger the rest of the phrase, or at least build up an expectation therein, just as it may be predicted that “dawn” or “morn” will follow “rosy-fingered”. Legal examples of such triggers might be “The General Agreement on . . .”, “in accordance . . .”, “in the light . . .”. Yet lexical priming will vary between different communities of practice, as the usage of words varies in different communities. If I, as a corpus linguist, use the word “corpus”, I am using it to mean “a collection of texts, nowadays stored electronically”; I would use it in chunks such as “building a corpus”, “the corpus was analysed”, “corpus linguistics”, “parallel corpora”. However, to a medical professional, “corpus femoris” or “corpus adiposum” would be more familiar; and to a law academic, the chunks “a writ of habeas corpus”, “the Habeas Corpus Act”, “the corpus of the asset” or “Corpus Juris Secundum” would be much more likely to spring to mind. Lexical priming can also lead to interesting academic debate. While one community can build up an image of concept A and assume it to have meaning X with one set of boundaries, another group may include B as part of concept A, with a different set of boundaries. Hence the need, even on purely linguistic grounds, to have multiple clauses and/or examples in a legal document in order to make those boundaries explicit.

All this presents difficulties for a student who is studying law in a language that is not their mother tongue. The second language learner has not usually had the opportunity for a large number of encounters with concepts or terms, as they have not had the same amount of exposure to the language, or indeed to the culture. Yet learners need to encounter a word multiple times before it is “acquired” and becomes part of their lexical repertoire.⁷ Moreover, if a word is encountered in a variety of contexts this is more likely to lead to transferrable knowledge.⁸ Therefore second language students

⁵ Michael Hoey, *Lexical Priming: A new theory of words and language*. (Routledge 2005).

⁶ *Ibid* (n 6) 7.

⁷ Stephen D. Krashen, ‘We Acquire Vocabulary and Spelling by Reading: Additional Evidence for the Input Hypothesis’ (1989) 73(4) *Modern Language Journal* 440.

⁸ Karen Mezynski, ‘Issues Concerning the Acquisition of Knowledge: Effects of Vocabulary Training on Reading Comprehension’ (1983) 53(2) *Review of Educational Research* 253.

are highly likely to arrive for their studies with an underdeveloped lexical priming, and although they do have at their disposal the same physical resources as the home student – the law dictionaries and so on – what they need is to be able to accelerate the speed with which they encounter examples of a word or phrase; not by reading faster or attempting to digest more books and journal articles than other students – a likely impossible task – but by direct intervention, through the use of corpus tools and corpus data in teaching and learning.

This paper will first further explain what a ‘corpus’ is in this context, and describe the author’s own *DSVC International Law* corpus. Drawing mainly on data from the *DSVC International Law*, it will then illustrate the types of quantitative and qualitative information that a corpus yields, focussing particularly on the observable patterns in text that show how words are primed to behave. Finally, it will argue that corpus linguistics tools should be incorporated into legal teaching and learning.

CORPUS (NOUN, PLURAL *CORPORA*)

A corpus is a set of texts which are considered to be representative of a given domain and which are collected for the purposes of analysis. The examples given in this paper are all, unless otherwise stated, taken from the *DSVC International Law* corpus which is under construction by the author. This corpus has been compiled from texts taken from LLM reading lists for the purpose of identifying the law-specific vocabulary that law students need in order to cope with their LLM reading. The research will identify a *Discipline-Specific Vocabulary Core (DSVC)* consisting of words and phrases which will help support second language speakers of English studying for an LLM in International Law.

The *DSVC International Law* Corpus, which currently totals 1.9m words, can be divided two ways: by domain, and by communicative function. There are 12 domains covered, each representing an area or set of areas within international law:

1. Company Law
2. Intellectual Property & Internet Law
3. Civil & Commercial ADR
4. Sale & Carriage of Goods, Marine Insurance, & Shipping
5. World Trade & Investment Law
6. Banking & Finance
7. Conflict of Laws
8. EU Constitutional & Administrative Law
9. EU Substantive Law
10. Public International Law
11. Armed Conflict & International Criminal Justice
12. International Human Rights Law (IHRL)

The author carried out a survey of the LLM modules taught at 21 UK institutions. These modules were then grouped together with the help of a legal expert. While institutions invariably have their own areas of expertise, and academics have their own, perhaps niche, interests, the domains chosen for the *DSVC International Law* corpus reflect the main areas covered across institutions. Understandably, these are umbrella terms that are necessarily artificial due to the constraints of time and resources, but they are nevertheless broadly representative. The texts themselves were selected for inclusion in the corpus mainly on the basis of being commonly found on available reading lists; however, other factors also play a part, such as the availability of the text in a suitably

machine-readable format. In order to ensure that the list of texts for each domain is balanced, each of the 12 lists has been modified on the basis of feedback from law academics specialising in those areas, who were asked to comment on the choice of texts and topics, and to point out any imbalance or omission.

The *DSVC International Law Corpus* can also be divided by communicative function: *descriptive* texts (secondary sources e.g. journal articles, text books, practitioner texts); *prescriptive* texts (primary sources which codify the law e.g. acts of parliament, EU directives, the GATT and TFEU; and those which prescribe social behaviour e.g. codes of practice); and *hybrid* texts (primary sources which contain both descriptive and prescriptive elements – primarily law reports in this study). Existing law corpora are more limited in terms of genre. For example, BLaRC is a corpus of British law reports;⁹ the *EUR-Lex* multilingual corpus consists of prescriptive documents in the EUR-Lex database.¹⁰ The *DSVC International Law* corpus is the first corpus that tries to cover the full range of legal genres commonly read by postgraduate students. As such the *DSVC International Law* corpus is an attempt to represent, at least in part, the priming that an individual student would (or could) receive during their course through their reading.

Corpora can yield both quantitative and qualitative information. The most notable of the former is frequency information: a corpus can be used to ascertain which words are the most common in a particular field. Coxhead's *Academic Word List*¹¹ and Gardner and Davies' *Academic Vocabulary List*¹² are examples of word lists designed to help all second language students with the vocabulary they need for their studies as the lists contain words which are frequent in academia, across academic disciplines. Such lists can be useful but have limitations: for instance, the following words are all on the *Academic Vocabulary List*, but all have a legal meaning that varies from the general English meaning, and all are primed to be used in a very specific way in Law: *act, article, code, instrument, settlement*.

Frequency analysis does not need to be limited to individual words, nor to a broad 'catch-all' context. Table 1 shows word strings¹³ of 3–5 words in the current version of the 160,000-word subcorpus for the domain *Sale & Carriage of Goods, Marine Insurance, & Shipping*, which comprises one section of the *DSVC International Law*. The list is the 20 most frequent strings that appear in at least 16/33 texts.¹⁴

These word strings seem to be mainly of two types: there are the 'phrases' which are part of a more complex noun phrase and which help to make it more specific (e.g. *of the goods, the contract of*); and there are the prepositional phrases which help to structure text by relating ideas to one another (e.g. *at the time (of), (for) the purpose of*). They may not necessarily be considered discipline-specific, but they are very common and, as we shall see below, are often primed to be used in a very specific way in law texts. Frequency information can also be used for comparative purposes, to compare the frequency of an item in general English or in English for legal academic purposes; in writing vs spoken language; in the UK vs the US; in an English translation vs a Greek one.

Quantitative corpus data is more accessible with computer technology and it is

⁹ BLaRC, the British Law Report Corpus, was compiled by Maria Jose Marín. It is available through the *FLAX* website <<http://flax.nzdl.org/greenstone3/flax?a=fp&sa=collAbout&c=BlaRC&if=>> accessed 26 November 2017.

¹⁰ The EUR-Lex corpus is available through the *Sketch Engine* web interface (Lexical Computing n.d.) <<https://www.sketchengine.co.uk/>> accessed 1 December 2017.

¹¹ Averil Coxhead, 'A new Academic Word List' (2000) 34(2) *TESOL Quarterly* 213.

¹² Dee Gardner and Mark Davies, 'A New Academic Vocabulary List' (2014) 35(3) *Applied Linguistics* 305.

¹³ A word string is a series of words, here computer-generated, which may or may not have a unified meaning or be considered a "phrase" or "expression".

¹⁴ One "text" is a 5,000-word extract of a longer text; or in the case of, for example, case summaries, a 5,000-word file containing 10–20 summaries.

Table 1 Word strings in Sale & Carriage of Goods, Marine Insurance, & Shipping

Rank	Freq.	Range ¹	word string
1	183	19	<i>of the goods</i>
2	131	23	<i>in respect of</i>
3	117	24	<i>of the contract</i>
4	107	19	<i>the contract of</i>
5	85 (66) ²	23 (20)	<i>at the time (of)</i>
6	82	19	<i>in accordance with</i>
7	74	18	<i>loss or damage</i>
8	65	24	<i>part of the</i>
9	57	18	<i>in relation to</i>
10	53 (45)	19 (17)	<i>in the case (of)</i>
11	53	19	<i>the terms of</i>
12	51 (46)	19 (16)	<i>(for) the purpose of</i>
13	49	20	<i>as well as</i>
14	48	18	<i>the case of</i>
15	48	17	<i>the provisions of</i>
16	48	20	<i>the right to</i>
17	46	18	<i>on behalf of</i>
18	42	18	<i>the fact that</i>
19	40	18	<i>there is a</i>
20	39	18	<i>as to the</i>

¹The range is the number of texts in which the term is found. The higher the number, the more broadly used the term.

²The first number shows the frequency of *at the time*; the number in brackets shows the frequency of *at the time of*.

therefore unsurprising that the original corpora were compiled mainly for the qualitative information they provided. The earliest known corpora were biblical corpora, produced from the 13th century onwards¹⁵. The most famous are probably the work of Alexander Cruden. Cruden's hand-compiled *A Complete Concordance to the Old and New Testament*¹⁶ was originally published in 1737, and was dedicated to George II's wife, Queen Caroline. Cruden's purpose, as stated in the address to the Queen in the opening pages, was to "promote the study of the Holy Scriptures"¹⁷ and also to aid searches for

¹⁵ Michael McCarthy and Anne O'Keefe, 'Historical perspective: What are corpora and how have they evolved?' in Anne O'Keefe and Michael McCarthy (eds), *The Routledge Handbook of Corpus Linguistics* (Routledge 2012).

¹⁶ Alexander Cruden, *A Complete Concordance to the Old and New Testament and The Apocrypha* (first published 1737, Youngman's Edition, a modern reprint of the 1769 3rd edition of Cruden's original work, Frederick Warne and Co Ltd, no date).

¹⁷ *Ibid* Introductory address "To the Queen".

STATUTE	
<i>Exod.</i>	15. 25. there he made a s. and ordinance
	29. 9. priests' office shall be theirs for perpetual s.
<i>Lev.</i>	3. 17. a perpetual s. 16. 34. 24. 9
<i>Num.</i>	19. 21. 27. 11. it shall be for a s. of judgment, 35. 29.
<i>Josh.</i>	24. 25. and he set them a s. in Shechem
<i>1 Sam.</i>	30. 25. David made it a s. for Isr. to this day
<i>Psal.</i>	81. 4. for this was a s. for Israel and a law
<i>Dan.</i>	6. 7. captains consulted to establish a royal s.
	15. that no s. king establisheth may be changed

Figure 1 Cruden's concordance for *statute*.¹⁸

specific passages and to “compar[e] the several significations of the same word”.¹⁹ The volume took the form of a series of concordance lines, extracted lines of text organised under a keyword heading and providing just enough co-text to contextualise the keyword. Figure 1 quotes Cruden's concordance for the word *statute*; *statutes* has a separate entry, and is further subdivided into lines containing *his statutes*, *my statutes* and *thy statutes*. There is also a note stating “[s]ee judgments”, for the purposes of comparison.

The concordance is still the basic form of corpus output, though nowadays concordance lines can be produced by corpus software in a few moments. The standard format of concordance output is in Key Word in Context (KWIC) format, where the lines contain the keyword in the centre, with a fixed number of characters to the left and right providing the co-text and context. The main advantage of this format is visual, as centralising the keyword enables patterns of use to be discerned more readily. It is these patterns of use which were discussed above in relation to language acquisition and lexical priming. Indeed Hoey has referred to the mind as having “a mental concordance of every word it has encountered”.²⁰ This mental priming can lead someone to say “I know that is right, but I don't know why”, whereas concordance lines generated from a digital corpus provide linguistic evidence that can be seen and cited.

OBSERVABLE PATTERNS IN TEXT

As discussed above, words are primed for use in particular patterns and contexts, and these patterns are easily observable when a word or phrase is viewed in concordance lines in KWIC format. The main lexicogrammatical and contextual patterns that can be observed are:

- (i) collocation
- (ii) chunks and idioms
- (iii) syntactic restrictions
- (iv) semantic restrictions
- (v) semantic prosody
- (vi) genre and context²¹

These will each be explained and illustrated in turn.

¹⁸ *Ibid* 417.

¹⁹ *Ibid* Preface to the first edition.

²⁰ Hoey (n 6) 11.

²¹ This is adapted from the lexicogrammatical profile discussed by Anne O'Keeffe, Michael McCarthy and Ronald Carter, *From Corpus to Classroom: Language use and language teaching* (CUP, 2007) 14–15.

1 in recent years, particularly as **shareholder activism** has developed and b
 2 investors. More recent examples of **shareholder activism** include a revolt by
 3 is not to suggest that **shareholder activism** is always a good
 4 strategic and operational matters require **shareholder approval**, company election p
 5 board (at least without formal **shareholder approval**) from taking any
 6 to raise loan capital and **shareholder approval** is not normally req
 7 orward financing proposals that require **shareholder approval**, they will know tha
 8 which takes account of **minority shareholder interests** and does not unfa
 9 the company is to **maximise shareholder interests**. The second answer
 10 striking the right balance between **shareholder primacy** and stakeholder mana
 11 ompany, including the shareholders. The **shareholder primacy** and stakeholder theo
 12 . Accordingly, Berle was not advocating **shareholder primacy** as we understand it
 13 for approval and where a **shareholder proposal** has been made pursu
 14 have the right to submit **shareholder proposals** to a vote. If
 15 ublicising underperformance and filing **shareholder proposals** to bring about imp
 16 company elections; nor usually can **shareholder resolutions** bind the board,
 17 can be supplemented by certain **shareholder resolutions** or agreements. S
 18 on the law relating to **shareholder resolutions**, proxies and cor
 21 those concerned with transparency and **shareholder rights**, also single out quot
 22 a fight on the Draft **Shareholder Rights** Directive is going on
 23 of US accounting standards and **shareholder rights** protection; and the
 24 , as measured either by the **shareholder rights** score or by legal
 25 considerations and because it enhances **shareholder value**. The argument seems to
 26 business, that end is **maximising shareholder value**, which depends on busi
 27 with the obligation to **maximize shareholder value**. During the same p
 28 as a way of **maximizing shareholder** returns? The basic problem i
 29 with B as a **minority shareholder**, a position which may prove
 30 and thus becoming a **minority shareholder** may be such a costly
 31 the behest of a **minority shareholder**. b Practical impediments to
 32 existence of different and incompatible **shareholder voting** guidelines (5.8). 36
 33 holding periods for stock; increased **shareholder voting** influence in relation
 34 . At the same time, though, **shareholder voting** probably only operate

Figure 2 Concordance lines for *shareholder* (from the *Company Law* subcorpus).²²

Collocation

Words are considered to *collocate* when two or more words appear near one another (usually within ± 5 words on either side) with a frequency greater than chance: the higher the frequency of co-occurrence, the stronger the collocation. In concordance lines such patterns are readily discernible. Figure 2 shows concordance lines for *shareholder* drawn from the 150,000-word *Company Law* subcorpus of the *DSVC International Law* corpus. The lines in the sample all contain collocates which stand out as they are immediately to the left or right of the key word when the lines are sorted in alphabetical order.²³ Thus we can observe, for example, that *shareholder approval*, *shareholder resolutions* and *minority shareholder* are all patterns worth noting. If a similar search is done for *of the goods* (an example taken from Table 1 above), the patterns emerge which are summarised in Table 2.

A very common pairing in *Civil and Commercial ADR* texts is that between the noun *parties* and the verb *agree* (Figure 3). These concordance lines illustrate the fact that collocates may not be adjacent and therefore a keen eye is needed to observe the patterns. On closer examination other collocations are discernible, such as *free(dom)/agree*, *otherwise/agree* and *submit/arbitration*. It is worth noting here that when looking at patterns, the feature must occur at least twice, and the greater the number of occurrences the stronger the tendency for a given word or phrase to have those patterns.

²² It is not usual practice for concordance lines to have a citation to the original document for each. This is because they are considered to be extracts from a data set rather than quotations. However, further information about the sources of lines can be obtained by contacting the author.

²³ All the collocates shown in bold appear in at least three different texts in the corpus; one line is used from each text, in order to reduce text bias, where the topic of one text may influence a list drawn purely on frequency. This rule was not applied to the samples shown in the other figures, as the purpose of each illustration is slightly different. The words underlined in Figure 2 are also collocations, but they appear only twice.

Table 2 Summary of the main collocations for of the goods in Sale & Carriage of Goods, Marine Insurance, & Shipping.

(for) the carriage	
in charge	
the condition	
non-conformity	
lack of conformity	
(take) delivery	
the description	of the goods
the export	
import	
the nature	
possession	
quantity	
in respect	
shipment	
value	

1 less formal and rigid than litigation in national courts. As a result, **parties** have greater freedom to **agree** on neutral and appropriate procedural rule
2 omissions of arbitrators; appointing arbitrators if a party defaults or if the **parties** are unable to **agree** upon a presiding arbitrator or sole arbitrator; cons
3 ARBITRATION 39.01 Arbitration is a form of dispute resolution in which the **parties agree** to *submit* their differences to a *third party* or a *tribunal*
4 ast, expert determination does not necessarily involve any dispute at all - the **parties may agree**, for example, that the price to be paid under their
5 constrained procedurally. The arbitration agreement should provide that if the **parties fail to agree** on the appointment of an arbitrator, the appointment shoul
6 when one party refuses to nominate an arbitrator and/or if the **parties'** nominated arbitrators cannot **agree** on a third arbitrator. It should als
7 of the principle of party autonomy to determine the freedom of the **parties'** to **agree** on the procedure to be adopted in an arbitration can
8 institution or the arbitrators themselves, as the case may be. Unless the **parties agree otherwise**, the seat of the arbitration must be stated in the
9 of rules of procedure (1) Subject to the provisions of this Law, the **parties are free to agree** on the procedure to be followed by the
10 of the parties which have agreed to have recourse to arbitration. The **parties** to the proceeding shall **agree** to abide by the arbitration award. Arbitr
11 domestic AAA Commercial Arbitration Rules provided the fall-back rules when **parties** to international agreements had **agreed** to AAA arbitration without design
12 shall be considered as equally applicable to the present Convention unless the **Parties have otherwise agreed**. Article 32 Without prejudice to the provisions of
13 to be applied to the dispute between them. As this law, the **parties have agreed** upon Soviet law. The Commission has therefore decided the
14 a way to resolve those disputes - but only those disputes - that the **parties have agreed to submit to arbitration**.
15 district court decision confirming an arbitration award on the ground that the **parties agreed to submit** their dispute to *arbitration*, should proceed like revie
16 the parties would negate the intention to arbitrate. In that case, the **parties had agreed**, as an initial step, to *submit* their disputes to an
17 the agreement of the parties. The principle of party autonomy dictates that **parties who have agreed** to refer their dispute to an arbitral tribunal should
18 : 1) The place of the arbitration shall be fixed by the Court, unless **agreed** upon by the **parties**. 2) The arbitral tribunal may, after consultation wi
19 evidence shall be accompanied by a translation into the language or languages **agreed** upon by the **parties** or determined by the arbitral tribunal. Article 23. 5
20 fore it. Article 26. Expert appointed by arbitral tribunal (1) Unless otherwise **agreed** by the **parties**, the arbitral tribunal (a) may appoint one or more

Figure 3 Concordance lines for *parties/agree* (from the Civil and Commercial ADR subcorpus).

Therefore *otherwise/agree* is certainly a collocation worth noting, but it is less strong than *parties/agree*.

Chunks and idioms

Sometimes a collocation is so strong that it becomes fixed/semi-fixed as a chunk or idiom. Examples would be the adverbial phrases in Table 1 above (e.g. *in accordance with, in respect of*) which behave as a single unit. Other examples of phrases that have become fixed are the terms which entered the language during the Anglo-Saxon period and which combined a noun of French origin with one of English origin, so as to ensure that the law would be understood by all. These are known as binomial expressions and

1 Financial Services Authority is expected to carry out prudential financial supervision in
 2 le 23(4). Member States shall not be required to apply the 30 percent threshold where, in
 3 own funds of the financial institution and the total risk exposure amounts calculated in
 4 may disclose that it is independent where it meets the conditions laid down in
 5 far as these activities are covered by the home State's authorisation and in
 6 ; (7) management body means an institution's body or bodies, which are appointed in
 7 a bank all or part of the ownership of which has been transferred in
 8 under subsection (1) means the date specified or determined, as the case may be, in
 9 ional clients and retail clients, a firm must act honestly, fairly, and professionally in
 10 cordance with the continuity obligation; (b) activities are required be undertaken in
 11 regulatory architecture governing the activities of participants in the Lloyd's market in
 12 . However, one of the central aspects of PBR is that conduct should be in
 13 urities. Warrants can generally be traded in the secondary market and transfer occurs in
 14 and obligations of the parties to the contract), are both to be determined in
 15 (2) An authorised bank within section 210(b) may issue banknotes, but only (a) in
 16 power is exercisable only after consultation with the Governor of the Bank and in
 17 documents not properly placed in its hands to verify if they are prepared in
 18 In
 19 valid demand for re-delivery, and (c) to perform each of those obligations in
 20 hin which persons and organizations would conduct their economic and social activities in

accordance with a number of EU directives, all of which have been implemented in the
 accordance with Article 9(3)(a) of Directive 2004/109/EC, they apply a threshold of one-th
 accordance with Article 92(3) and (4) of Regulation (EU) No 575/2013 of the credit institut
 accordance with Article 22(4); (d) whether the credit intermediary offers advisory service
 accordance with Articles 19 to 21 of the Directive. A very similar provision is embedded i
 accordance with national law, which are empowered to set the institution's strategy, objec
 accordance with section 11(2)(a), 12(2)(a) or 13(2), or which falls within subsection (
 accordance with subsection (4), "group" has the meaning given by section 421 of the Finan
 accordance with the best interests of its client. A matrix of rules is then put
 accordance with the continuity obligation on specified terms. (7) A notice under subs
 accordance with the Lloyd's Acts and the Lloyd's Byelaws. Whilst the FSMA primarily
 accordance with the principles and purposes of the rules, not the letter. Here, there has
 accordance with the principles outlined above in respect of debt securities. This remains
 accordance with the proper law of the contract. (c) The question whether a contract is
 accordance with the provisions of this Part, and (b) in the part of the United
 accordance with the special procedures applying to an order under the section. These overa
 accordance with the stipulations in the credit. If the documents have been delivered neith
 accordance with the Treaty on the Functioning of the European Union (TFEU), the internal m
 accordance with the written conditions of the contract which were furnished to Mrs Frankma
 accordance with their individual interests. Implicitly or explicitly, governments and scho

Figure 4 Concordance lines for *accordance* (from the Banking and Finance subcorpus).

include phrases such as *will and testament*, *goods and chattels*, *breaking and entering*.²⁴ In lexical priming terms, collocations, chunks and idioms are all examples of psycholinguistic “nesting”: that is, the individual words are primed to have these particular collocates, but the collocations and phrases are also primed to have associated patterns, such as particular syntactic restrictions.

Syntactic restrictions

Words and phrases all conform to syntactic restrictions, including what Firth called *colligation*, namely the grammatical collocates of a word.²⁵ One typical example is the use of prepositions, such as is found in *freedom to* (Figure 3), *for the carriage of the goods* (Table 2) and *in accordance with* (Figure 4). In the latter case the noun *accordance* must be preceded by *in* and followed by *with* plus a noun phrase, and so fixed is the collocation *in accordance with* that it can be considered fixed, whereas although *with* must be followed by a noun phrase, the actual noun can vary. Notice also that preceding *in* there tends to be a verb in the passive voice (e.g. *be determined*). Closer examination of the above concordance lines for *parties/agree* also reveals that *parties* is usually preceded by the definite article *the* and furthermore that there is a strong tendency for *parties/agree* to occur in a conditional sentence – signalled by the use of *if*, *when*, *unless*, *subject to* or *in that case*. Even though some of these conditional words only occur once, they collectively signal a pattern.

Semantic restrictions

The fact that words are primed to occur with, or indeed to avoid, other particular words, extends to semantic associations, so words can be described as having a *semantic preference*.²⁶ Such preferences may be that a word only applies to animals or to talk about machines. A dog *walks to heel*, but not a child; a lift may be *out of order* if it does not function, but if a person is *out of order* it does not mean they are unwell or incapacitated. A second look at the concordance lines for *accordance* in Figure 4 will show that the phrase is usually followed by a source of authority, such as *Article _ of Directive _*, *the provisions*, *the Treaty*. That is, it is a restriction of the use of *in accordance with* in legal texts, that it should be followed by a source of (legal) authority. Thus what

²⁴ For a detailed history and other examples see Peter M Tiersma *Legal Language* (Chicago 2000) 29.

²⁵ J.R. Firth, 'Modes of Meaning' in J.R. Firth, *Papers in Linguistics 1934–1951* (OUP 1957).

²⁶ John Sinclair, 'The search for units of meaning' (1996) IX *Textus* 75. Reprinted in John Sinclair, *Trust the Text: Language, corpus and discourse* (Routledge 2004) 24.

a	protect the cosmic identity of his own solar system and (in	ACCORDANCE with <u>his religious beliefs</u>) of humanity's special
b	failures are in the order of mental operation, which is in	ACCORDANCE with <u>Richards's dominantly psychological approach</u>
c	notion of such "hidden things" or "natures" is entirely in	ACCORDANCE with <u>tradition</u> and the contemporary usage of his
d	then, Spinoza supposes that the moral virtues, and life in	ACCORDANCE with <u>the demands of a sensible morality</u> , provide
e	9. Put his name in a book / Book him. Again, this is not in	ACCORDANCE with <u>normal lexicographic practice</u> , which is, fir
f	flux values increase by a factor of 2.512 per magnitude, in	ACCORDANCE with <u>the opinion</u> that the total mass flux in each
g	<u>pils and teachers share a version of the official theory</u> in	ACCORDANCE with which the pupils can see themselves as value
h	exceptional circumstances to use this weapon unilaterally in	ACCORDANCE with <u>their own national needs</u> . But the Americans
i	position. State whether the accounts have been prepared in	ACCORDANCE with <u>applicable accounting standards</u> and give det
j	acher to rationalize that the child who is not achieving in	ACCORDANCE with <u>his known ability</u> is just plain lazy, or tha
k	o a limited extent have the number of its seats adjusted in	ACCORDANCE with <u>its magnitude</u> . Nevertheless in 1987 Dublin N
l	ribes how the West viewed Marxism as a military struggle in	ACCORDANCE with <u>Marx's prediction of revolution</u> . The West sa
m	ork to realize the benefits of modern life. For example, in	ACCORDANCE with <u>the fashion of the times</u> , most transitional
n	parties, we will reinstate hedgerows and forested areas in	ACCORDANCE with <u>the Ordnance Survey map of 1848</u> . This will p
o	about it and he told the man he just couldn't do it over in	ACCORDANCE with <u>the suggestions he had made</u> . ## It was not u
p	ons at which they voted. If votes had actually been cast in	ACCORDANCE with <u>this advice</u> the five UUC candidates would s

Figure 5 Concordance lines for *accordance* from general academic English and general English.²⁷

at first appears to be a general academic term has very specific semantic restrictions in legal texts, as can be seen when Figure 4 is compared with Figure 5, with concordance lines drawn from general academic English (a-h) and general English (i-p):²⁸ while *in accordance with* is still primed to be followed by an entity seen as a form of authority, this may be, for example, a social norm or standard. In the legal examples, there are still some instances of this broader usage, but they are rare.

Semantic prosody

Semantic prosody²⁹ refers to the fact that words tend to occur in a particular environment, and as a result may have an associated meaning or connotation. The usual example given is the verb *cause*,³⁰ which is invariably used in the context of a negative or unfortunate occurrence. Figure 6 shows a sample of the concordance lines for *cause* as a noun (lines 1–5) and as a verb (lines 6–20) drawn from the *IHRL* subcorpus. The object of *cause* is highlighted in bold, and as can be seen, all the collocates (e.g. *death*, *harm*, *pollution*) are negative.³¹ Thus the word builds up an expectation in the reader, to the extent that although line 14 does not contain the noun that the verb *cause* relates to, we know that it is something undesirable. While a student may write the grammatically correct sentence “This caused the development of the WTO”, it would nevertheless generally be considered wrong – a fact that may have to be consciously learnt.

An understanding of semantic prosody can help identify key information in law reports. The phrase *in (the) light of* was examined in a subcorpus of the *DSVC International Law* consisting of extracts from law reports totalling almost 114,000 words. There were 42 instances of the phrase, 40 of which were *in the light of* and two were *in light of*. Interestingly, while one third (14/42) were found in the context of the *need* for a judgment or assessment, or concerning the conditions of an (as yet undecided) assessment, the majority (28/42) signal an opinion or decision, and half of these were

²⁷ *Ibid.*

²⁸ Lines a-h are taken from a concordance for *accordance* drawn from the six-million word Academic General corpus accessed via the concordance tool available on Tom Cobb's *Lextutor* website <<https://lxtutor.ca/conc/eng/>> accessed 27 November 2017). Lines i-p are general English examples drawn from the combined BROWN and British National Corpus (BNC) Written corpora, totalling over two million words and accessible from the same website.

²⁹ Bill Louw, 'Irony in the text or insincerity in the writer? The diagnostic potential of semantic prosodies' in Mona Baker, Gill Francis and Elena Tognini-Bonelli (eds), *Text and Technology: In Honour of John Sinclair* (John Benjamins 1993).

³⁰ Most notably by Michael Stubbs, 'Collocations and semantic profiles: on the cause of the trouble with quantitative studies' (1995) 2(1) *Functions of Language* 1.

³¹ In the 54 lines examined, only one instance could be argued to be neutral: one line which had the noun *cause* in the sense of "fighting for a cause" – but even then it is arguable that the context, what is being fought against, is going to be an undesirable condition, and therefore something negative.

1	orders of leaders. While atrocities vary in	<i>cause</i>	and method, and perpetrators are generally
2	be put in place so that the	<i>cause</i>	of death of patients in medical care
3	the fact that migration is often the	<i>cause</i>	of serious problems for the members of
4	and in detail, of the nature and	<i>cause</i>	of the accusation against him; (b) to
5	with other important questions such as the	<i>causes</i>	and consequences of terrorism or measures
6	abstract and subjective notion, with potential to	<i>cause</i>	confusion and difficult to apply. Interpreta
7	an attack which may be expected to	<i>cause</i>	incidental loss of civilian life, injury to
8	to repair the damage it may have	<i>caused</i>	and to prevent future violations . Such meas
9	as contributing to, adverse human rights impacts	<i>caused</i>	by other parties. Complicity has both non-
10	n environmental cases where pollution is directly	<i>caused</i>	by the State or where State responsibility
11	scrimate bombing of two villages in 1994, which	<i>caused</i>	38 deaths and numerous injuries . These bel
12	industrial waste plant near her home had	<i>caused</i>	health problems for local residents includi
13	the view that these detention conditions had	<i>caused</i>	him mental and physical suffering , together
14	occurred that the business enterprise has not	<i>caused</i>	or contributed to, but which are directly
15	be independent of those alleged to have	<i>caused</i>	the loss of life , that it be
16	with such lifestyle choices: if harm is	<i>caused</i>	to others without their consent, then the
17	the wrongful practices of an entity that	<i>causes</i>	a harm . Where a business enterprise has
18	closely linked to the sovereignty element - that	<i>causes</i>	concern for some. In particular, there is
19	weapons; g. release of dangerous substances, or	<i>causing</i>	fires, explosions or floods the effect of
20	and fully absolve them from liability for	<i>causing</i>	or contributing to human rights abuses .

Figure 6 Concordance lines for *cause* (from the IHRL subcorpus).

1	the third-country national, the necessary enquiries in order to be able to assess, <i>in the light of</i>	all the specific circumstances, whether a refusal would have such consequences.
2	contained in article 2 of the Brussels Convention, for the reasons set out above. 46 <i>In the light of</i>	all the foregoing considerations, the answer to the first question must be that the
3	little substance in it. In so doing he was in my judgment entirely right. <i>In the light of</i>	my conclusions above it is clearly not possible to conclude that the words 'or sub'
4	parties to either extradite or punish a public official who committed torture; that <i>in the light of</i>	that universal jurisdiction the state parties could not have intended that an immunity
5	III:2, first sentence leads inevitably to this conclusion. Read in their context and <i>in the light of</i>	the overall object and purpose of the WTO Agreement, the words of the first
6	that the Panel erred by failing to examine the issue of de minimis differences <i>in the light of</i>	the principle of "so as to afford protection to domestic production"; the Panel

Figure 7 Concordance lines for *in the light of* (from law reports).

directly followed (in the next sentence or clause) by an opinion or decision, whether by the speaker or, occasionally, reported. Examples can be seen in Figure 7. This would be very useful information for a student to know, as it would help them negotiate the text and find the parts relevant to their search.

Genre and context

All the above occur within domain and/or genre restrictions. What is true of the behaviour of a word in the context of Company Law or in the genre of a law report may not hold for its use in another context or genre, even within law. We have seen, for instance, that *in the light of* carries with it certain restrictions when used in a law report. Thus lexical patterning can sometimes be very specific to a given context, as indeed can the choice of words. Although the verb *agree*, discussed above, occurs 125 times in the 151,000 word *Civil and Commercial ADR* subcorpus, the verb *disagree* appears only 9 times; while this broadly reflects the pattern of general English,³² the preference is more extreme, suggesting that *disagree* is dispreferred in the context of ADR, where the verb *agree* in a negative form is more likely, as in lines 2 and 5 of Figure 3.

APPLICATIONS

With such a wealth of information contained in a corpus, their potential is considerable. Corpora are already used in legal translation³³ and in forensic linguistics.³⁴ There are

³² An examination of *agree/disagree* in the *English Web 2013 (enTenTen13)* corpus revealed that *agree* is 8.5 times more likely to occur than *disagree*; this compares with 14 times more likely in the Civil and Commercial ADR subcorpus. *English Web 2013 (enTenTen13)* is available from *Sketch Engine* (n 10).

³³ See Lucja Biel, 'Corpus-Based Studies of Legal Language for Translation Purposes: Methodological and Practical Potential' in Carmen Heine and Jan Engberg (eds), *Reconceptualizing LSP. Online proceedings of the XVII European LSP Symposium*. (2010) Available from the Aarhus University website <<http://bcom.au.dk/fileadmin/www.asb.dk/isek/biel.pdf>> accessed 7 December 2017.

³⁴ See e.g. Malcolm Coulthard, 'On the use of corpora in the analysis of forensic texts.' (1994) 1 (1) *Journal of Speech, Language and the Law* (formerly *Forensic Linguistics*) 28.

also some corpus-based descriptions of language patterns available, such as Williams' discussion of verbal constructions in prescriptive legal texts.³⁵ Nevertheless, the greatest and most exciting potential lies in the use of corpora for teaching and learning. Corpus-based approaches are used in teaching English for Academic Purposes (EAP), and sometimes in teaching English for Legal or Legal Academic Purposes. They can be built into pedagogy as a source of information for teachers, to create materials for classroom use, and to foster independent learning. If teaching is corpus-informed, the lecturer may use knowledge gained from their own corpus research, or that of others, to inform their decisions regarding what to teach. For instance, a reader of this paper may decide to raise students' awareness of the communicative function of the phrase *in the light of*; or a list of frequent vocabulary items may form the basis of a syllabus design. Marín Pérez and Rea Rizzo used their *United Kingdom Supreme Court Corpus* of judgments from 2008–10 to teach Spanish university students legal terminology, specifically crime nouns.³⁶ Another method is to build corpus output into classroom materials so that students are able to see examples of actual language use. Vijay K. Bhatia is one proponent of the use of corpus tools in teaching Legal English. He argues that students need to become familiar with linguistic forms and their function and stresses the importance of raising awareness by encouraging students to analyse concordance samples for themselves.³⁷ Preshous and Kemp explain how corpora and concordances can be used to teach Law and Business vocabulary:³⁸ students can be guided to notice usage and linguistic patterns such as those discussed in this paper, and then to complete activities such as solving a gapfill task or writing their own text incorporating the target linguistic forms.

Data-Driven Learning (DDL)³⁹ is a natural development of the use of concordances in the classroom as it aims to foster independent learning by turning the learner into the researcher.⁴⁰ In hands-on sessions students are trained to use concordancing tools for themselves, so that they can use authentic data to answer their own questions;⁴¹ for instance, to answer the query "What verbs can I use with the noun 'appeal'?". This approach has grown in popularity over the last 20 years⁴² and is seen as particularly useful for teaching reading and writing skills and for developing academic literacy.⁴³ Hafner and Candlin, for instance, report on the use of online resources in Legal Analysis and Writing Skills for students on a professional Law course at City University, Hong Kong.⁴⁴ Nevertheless, DDL is still only introduced on some courses, perhaps owing to resource limitations, as well as to the shortage of expertise

³⁵ Christopher Williams, *Tradition and Change in Legal English: Verbal constructions in prescriptive texts* (2nd edn, Peter Lang, 2007).

³⁶ María José Marín Pérez and Camino Rea Rizzo, 'A corpus-based proposal for the grading of vocabulary teaching materials for the Legal English class' (2014) 3(1) *Journal of Second Language Teaching and Research* 24.

³⁷ Vijay K. Bhatia, Nicola N. Langton and Jane Lung, 'Legal discourse: opportunities and threats for corpus linguistics' in Ulla Connor and Thomas A. Upton (eds), *Discourse in the Professions* (John Benjamins 2004).

³⁸ Andrew Preshous and Jenny Kemp, 'Exploiting corpora to address the discipline-specific vocabulary needs of students' in Jenny Kemp (ed), *EAP in a Rapidly Changing Landscape: issues, challenges and solutions. Proceedings of the 2015 BALEAP Conference* (Garnet 2017).

³⁹ Tim Johns, 'Should you be persuaded: Two samples of data-driven learning materials' in Tim Johns and Philip King (eds), *Classroom Concordancing* (University of Birmingham 1991) 1.

⁴⁰ *Ibid.*

⁴¹ See for example Christoph A. Hafner and Christopher N. Candlin, 'Corpus tools as an affordance to learning in professional legal education' (2007) 6 *Journal of English for Academic Purposes* 303.

⁴² See the work of Tom Cobb and Alex Boulton in this area. For instance, Thomas Cobb and Alex Boulton 'Classroom applications of corpus analysis' in Douglas Biber and Randi Reppen (eds), *The Cambridge Handbook of English Corpus Linguistics* (CUP 2015).

⁴³ Lynne Flowerdew, 'An integration of corpus-based and genre-based approaches to text analysis in EAP/ESP: countering criticisms against corpus-based methodologies' (2005) 24 *English for Specific Purposes* 321.

⁴⁴ n 44.

in DDL methodologies. Yet students themselves do see corpus methodologies as beneficial.⁴⁵

The key to the success of DDL – that is, to the autonomous use of corpora by learners – is training or guidance,⁴⁶ without which the students will tend towards more familiar but less reliable techniques, such as using Google. It is important for training to start with more highly scaffolded tasks, where the teacher already knows what the students will find.⁴⁷ It should also be remembered that guidance is needed even with purpose-built corpus interfaces, such as the FLAX website,⁴⁸ which has open source resources, including the BLaRC law report corpus. Such guidance should include raising awareness of the limitations of the corpus that they are using. Hafner and Candlin report a tension between a focus on language with the more usual focus at the level of genre or model;⁴⁹ students therefore need to understand that DDL should be seen as complementary to other methodologies rather than replacing them.

CONCLUSION

As discussed above, the mental corpus of a second language student is likely to be much smaller than that of a native speaker.⁵⁰ Well-built, representative corpora can provide information for relevant and targeted teaching, and concordance lines provide multiple encounters with a word or phrase in a short space of time, which contributes to the individual's lexical priming. Corpus-based methodologies can also be used to raise students' awareness of linguistic patterns of use, such as those illustrated in this article. There is arguably potential for all law students, including home students, to benefit from viewing concordance lines, which are both visual and engaging. The observed patterns should facilitate reading, as a reader is better able to connect ideas in text and to predict what follows. Moreover, concordance tools lend themselves to discovery tasks and to independent learning enabling learners to see what is "safe" language – that is, what is common and natural – as opposed to what is grammatically "possible". If a writer is able to reproduce the patterns in their own text, this will mean that their writing is likely to be more acceptable as it conforms more closely to what is expected – not only in the sense that it will seem more "correct", and may be better structured, but also in the sense that it will be closer to the texts of the community of practice which the student aspires to join.

⁴⁵ Yoon and Hirvela report an increase in student confidence in writing and that students found the approach helpful (see Hyunsook Yoon and Alan Hirvela, 'ESL student attitudes toward corpus use in L2 writing' (2004) 13 *Journal of Second Language Writing* 257). A longitudinal study by Gaskell and Cobb found that students continued to use corpus tools after the DDL classes had finished (Delian Gaskell and Thomas Cobb, 'Can learners use concordance feedback for writing errors?' (2004) 32 *System* 301). Such findings are supported by student feedback from the author's non-credit DDL vocabulary module.

⁴⁶ Jennifer Thurstun and Christopher N. Candlin, 'Concordancing and the teaching of the vocabulary of Academic English' (1998) 17(3) *English for Specific Purposes* 267; Pascual Pérez-Paredes, María Sánchez-Tornel, Jose María Alcaraz Calero and Pilar Aguado Jiménez, 'Tracking learners' actual uses of corpora: guided vs non-guided corpus consultation' (2011) 24(3) *Computer Assisted Language Learning* 233.

⁴⁷ Maggie Charles, 'Getting the corpus habit: EAP students' long-term use of personal corpora' 35 *English for Specific Purposes* 30.

⁴⁸ Alannah Fitzgerald, Shaoqun Wu and María José Marín, 'FLAX: Flexible and open corpus-based language collections development' in Kate Borthwick, Erika Corradini and Alison Dickens (eds), *10 years of the LLAS elearning symposium: Case studies in good practice* (Research-publishing.net 2015).

⁴⁹ n 44.

⁵⁰ The main argument here is one of Hoey (n 6) 184. It is worth noting that the term *native speaker* is often dispreferred in this age of globalisation and multilingualism, and indeed I have generally chosen to use the term "second language speaker". However, I believe the term is rightly used here, as it carries with it connotations of cultural and educational background – an integral part of an individual's priming.