What is entailed by a student-centred approach to legal education?

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Abstract

This introductory chapter identifies the research question that this thesis investigates as: what is entailed by a student-centred approach to legal education? The question is explicated and an account of its genesis is given. Problems of method and methodology are discussed and my own approach, which involves a type of triangulation combined with methods derived from academic law, is explained at the beginning of the discussion of the first publication. Each of the prior publications that contribute to this thesis is described in a thematic summary, and its role in the investigating of the question is explored. The reception and significance of each publication is discussed, although this is done only once for my monograph from which three chapters are incorporated into this thesis as three separate publications. A section on each publication except the first publication discusses its connections with the earlier publications that comprise this thesis. A final section reflects on the publication's relationship with the research question, and except for the fifth publication, its connections to later publications that comprise this thesis. This chapter ends with a concluding section that demonstrates how my earlier publications and this chapter cohere to form a single thesis and demonstrating rigour and making a novel contribution to human knowledge. It does this by both collecting in one place relevant features of the publications already identified in this chapter and by identifying new features of the publications including this chapter that can only be identified through a review of the whole thesis. The thesis concludes that a student-centred approach to legal education should be adopted.

List of Submitted Publications

Introductory Chapter of c 21,000 words.

Graham Ferris and Rebecca Huxley-Binns, 'What Students Care About and Why We Should Care' in Paul Maharg and Caroline Maugham (eds), *Affect: The Impact of Emotion on Learning and Teaching the Law* (Ashgate 2011) 195-210. ISBN 9781409410263. c 7.000 words.

Graham Ferris, 'Values ethics and legal ethics: the QLD and LETR Recommendations 6, 7, 10, and 11' (2014) 48 The Law Teacher 20-32. ISSN 2327-7963. c 5,000 words.

Graham Ferris, *Uses of Values in Legal Education* (Intersentia 2015) Chapter One 3-41. ISBN 9781780681238. c 15,000 words.

Graham Ferris, *Uses of Values in Legal Education* (Intersentia 2015) Chapter Four 117-143. ISBN 9781780681238. c 10,800 words.

Graham Ferris, *Uses of Values in Legal Education* (Intersentia 2015) Chapter Eight 203-239. ISBN 9781780681238. c 14,500 words.

Statement regarding joint Authorship of 'What Students Care About and Why We Should Care'

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To whom it may concern

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Graham Ferris and Rebecca Huxley-Binns, 'What Students Care About and Why We Should Care' in *Affect: The Impact of Emotion on Learning and Teaching the Law* ed. Caroline Maughan and Paul Maharg, (Ashgate 2011) pp 195-210

Graham initiated this project after meeting with Paul Maharg and Rebecca joined the project, which was conducted as a joint enterprise as we had common interests in the subject matter of the project. The bulk of the research activity – which was concerned with the utilisation of secondary literatures across disciplines – was carried out by Graham. However, key texts were read and discussed by both co-authors. The writing was done by Graham, although we both reviewed and amended the text. We both took part in the final reviewing and proof reading in preparation for publication. The book chapter formed an early output from a longer-term collaboration between us, but we understand we do not need to review our respective contributions across all of the outputs of this collaboration, as only the book chapter is being submitted for assessment as part of a PhD by publication.

Yours Faithfully,

Rebecca Huxley-Binns

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Introductory Chapter

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1. Introduction

This thesis seeks to answer the question:

> What is entailed by a student-centred approach to legal education?

It consists of this introductory chapter and five of my previous publications:

> (1) 'What Students Care About and Why We Should Care in *Affect: The Impact of Emotion on Learning and Teaching the Law* (2011) ('What students care about'),[1]
>
> (2) 'Values ethics and legal ethics: the QLD and LETR Recommendations 6, 7, 10, and 11' (2014) ('Values, ethics and legal ethics'),[2]
>
> (3) (4) and (5) Chapters One, Four and Eight of the book *Uses of Values in Legal Education* (2015) ('*Uses of Values*').[3]

The research question contains three significant terms which merit definition as the outset.

The term "student-centred" is derived from the idea of learner-centred education which was given its classic development by John Dewey and is founded upon three insights:

[1] Graham Ferris and Rebecca Huxley-Binns, 'What Students Care About and Why We Should Care in Affect: The Impact of Emotion on Learning and Teaching the Law' in Paul Maharg and Caroline Maugham (eds), *Affect and Legal Education: Emotion in Learning and Teaching the Law* (Ashgate 2011) 195-210. As lead author with Rebecca Huxley-Binns.

[2] Graham Ferris, 'Values ethics and legal ethics: the QLD and LETR Recommendations 6, 7, 10, and 11' (2014) 48 The Law Teacher 20-32.

[3] Graham Ferris, *Uses of Values in Legal Education* (Intersentia 2015).

learning is dialectical in its processes; learners have a past that impacts upon learning; learners have a future that will be shaped by learning.[4]

The term "legal education" encompasses a range of activities and requires some further definition to be serviceable. The focus of my research is English and Welsh (UK) legal education at undergraduate level,[5] and this is the assumed paradigm where not otherwise indicated. However, legal education as a field encompasses postgraduate UK legal education, and university based common law education elsewhere especially North America and Australasia. My research often uses sources derived from or directed at graduate and postgraduate legal education across common law jurisdictions, although legal education outside of universities or other institutions of higher education is hardly touched upon here.

Legal education has features of both an education about law and an education for law.[6] In either aspect the distinctive feature is the existence of the practice of law and its importance for legal education. The co-existence of university-based legal education and legal practice creates a dichotomous division of power and authority in the epistemological

[4] See: Graham Ferris, 'The Legal Educational Continuum That is Visible Through a Glass Dewey' (2009) 43 The Law Teacher 102; John Dewey, *The School and Society & the Child and the Curriculum* (first published 1915 & 1902, Dover 2001), 112: "It will do harm if child-study leave in the popular mind the impression that a child of a given age has a positive equipment of purposes and interests to be cultivated just as they stand. Interests in reality are but attitudes toward possible experiences; they are not achievements; their worth is in the leverage they afford, not in the accomplishment they represent."; John Dewey, *Democracy and Education* (first published 1916, Simon & Brown 2001), 27: "plasticity … is essentially the ability to learn from experience; the power to retain from one experience something which is of avail in coping with the difficulties of a later situation"; John Dewey, *Experience & Education* (first published 1938, Touchstone 1997), 27: "every experience lives on in further experiences", 35: "every experience enacted and undergone modifies the one who acts and undergoes, while this modification affects … the quality of subsequent experiences", 36: "from the standpoint of growth as education … Does this form of growth create conditions for further growth".

[5] Scottish legal education has distinguishing features, including a significant civil law tradition, that makes it too different for inclusion. Smaller jurisdictions, such as Northern Ireland and Jersey, might be considered as included but do not generate a lot of legal education research.

[6] This dual aspect of legal education can have a baneful influence on legal education discourse. A binary conflict between "vocational" and "liberal" educational missions has often been used to frame discussion, see William Twining, *Blackstone's Tower: The English Law School* (Sweet & Maxwell 1994), 52 and Fiona Cownie, 'Introduction' in Fiona Cownie (ed), *Stakeholders in the Law School* (Hart Publishing 2010), 2-4, for an account of this persistent pattern in the discourse. Twining, who acknowledged that most law schools were "hybrids", identified two "ideal types" (professional service and academic) and then generated three sub-species of each type at 52-55. The issue of the educational mission of the undergraduate law degree in the UK is addressed on the first page of Graham Ferris, *Uses of Values in Legal Education* (Intersentia 2015), 3, which is reproduced below as publication 3 of this thesis. A student-centred approach subordinates reproduction of the profession to the interests of the student. However, for many students their interests will include facilitating an engagement with, and even commitment to, the profession, Therefore, the two "binaries" can inform a single congruent educational mission. Refusing the binary framing enables the thesis to uncover potential fruitful syntheses whilst keeping the educational (student-centred approach) primary in case of conflict.

and socialisation fields of action.[7] Professional practice generates novel applications of law, novel interpretations of law, and even novel law through litigation and reported judgments. Reflection upon experiences in professional practice produces a public meta-discourse about law.[8]

Professional knowledge is generated through reflection upon situated practice, and professional writers and speakers have available formal, informal, and academic sources. Legal practice thus produces its own ways of knowing and talking about the law, as well as its own idea of legal research. A view of research that is somewhat restrictive in purpose, generally in response to client needs; sources, generally restricted to legal and officially sanctioned texts; and critical content, generally adopting an assumption of good faith in the purposes and intentions of the state. Legal practice also generates its own community of those knowledgeable in the law and it is this community that many law students aspire to join.

Finally, the term "entailed" in the research question has multivalence. It looks backward towards justification, as well as forward towards both legal and educational practice.[9] Justification of making the student central to the legal educational mission, rather than the profession or the academic discipline, or the job market. It has a critical potential both for student-centred legal education and for alternative approaches to legal education. It makes the consequences of the idea of a student-centred legal education for wider stakeholder

[7] Graham Ferris, 'Understanding and teaching Different Types of Legal Research – Differentiation and Balance' paper delivered at: Connecting Higher Education: International perspectives on research-based education, London (UCL) 27-28 June 2017; Harry T Edwards, 'The Growing Disjunction Between Legal Education and the Legal Profession' (1992) 91 Michigan Law Review 34; Richard A. Posner, 'The Judiciary and the Academy: A Fraught Relationship' (2010) 29 University of Queensland Law Journal 13.

[8] Examples include: Benjamin N Cardozo, *The Nature of the Judicial Process* (first published 1921, Dover Publications Inc 2005); Clarence Darrow, *The Story of My Life* (first published 1932, Aegitas 2015); Tom Bingham, *The Rule of Law* (Penguin Books 2011); Geoffrey Robertson, *The Justice Game* (Vintage 1999); Arthur L Lipman and Peter Israel, *Lawyer: A life of counsel and controversy* (Public Affairs 1998); Stephen Sedley, *Ashes & Sparks: Essays on law and justice* (Cambridge University Press 2011); The Secret Barrister, *The Secret Barrister: Stories of the law and how it's broken* (Picador 2018).

[9] Although my research is at the level of learning and teaching delivery – the "classroom" level - a student-centred legal education would also entail a "transformative " approach to university education as this is explicated by Robert Jones and Liz Thomas, 'The 2003 UK Government Higher Education White Paper: a critical assessment of its implications for the access and widening participation agenda' (2005) 20 Journal of Education Policy 615. My aim is to facilitate both the cognitive transformations identified by Kegan in Robert Kegan, *The Evolving Self: Problem and Process in Human Development* (Harvard University Press 2009), loc 314: "Human being is the composing of meaning, including of course, the occasional inability to compose meaning", and the more affective or identity based transformations first identified by Mezirow, see: Jack Mezirow, 'An Overview on Transformative Learning' in Knud Illeris, *Contemporary Theories of Learning* (Routledge 2008).

interests a relevant concern. What is entailed raises questions of whether we want to commit to legal education that focuses upon a concern with the student who is learning, and if we do commit then how we enact our commitment.

The two terms that identify the subject matter of the research – student-centred education and legal education - have a natural meeting point in the future social roles that some students, and educators, envisage for some law students: as professional lawyers (including judges) or legal academics.[10] Thus, student-centred legal education is deeply concerned with the adoption of social roles by law students - such an approach to legal education is not merely an individual internal psychological event but an aspect of the reproduction of legal practice and legal academia.[11] Thus, one aspect of student-centred legal education looks to students' imagined future social roles. However, the other aspect looks back to the understandings, practices, and reasoning of the past that constitute the academic discipline of law.

[10] The perception that university education in law is a route for social mobility exists beyond the ranks of law students and their families: "For some, HE will be a vocational education into a prestigious profession, such as law or medicine, much as it has always been" Liz Thomas and Jocey Quinn, *First Generation Entry Into Higher Education: an international study* (OUP 2007), 2. There are serious tensions over what widening participation can and should mean for non-traditional populations: Benjamin J Richardson, 'Students as Stakeholders in Legal Education: Gaining Admission to Law School' in Fiona Cownie (ed), *Stakeholders in the Law School* (Hart Publishing 2010); Hilary Sommerlad, '"What are you doing here? You should be working in a hair salon or something'': outsider status and professional socialization in the solicitors' profession' (2008) 2 Web Journal of Current Legal Issues. Legal professional structures are resistant to transformational change as non-traditional entrants enter the profession, see: Jennifer Tomlinson, Daniel Muzio, Hilary Sommerlad, Lisa Webley, Liz Duff, 'Structure, agency and the career strategies of women and BME individuals in the legal profession' (2013) 66 Human Relations 245; Lisa Webley, Jennifer Tomlinson, Daniel Muzio, Hilary Sommerlad, and Liz Duff, 'Access to a career in the legal profession in England and Wales: race, class and the role of educational background' and Hilary Sommerlad, 'The new "professionalism" in England and Wales: Talent, diversity and a legal precariat' in Spencer Headworth, Robert L Nelson, Ronit Dinovitzer and David B Wilkins (eds), *Diversity in Practice: Race, Gender, and Class in Legal and Professional Careers* (Cambridge University Press 2016), 198 and 226. Academia can also prove resistant to non-traditional entrants, see: Nicola Rollock, 'Staying Power: the career experiences and strategies of UK Black and female professors' (University and Colleges Union 2019) available at: http://www.ucu.org.uk/media/10075/staying-power/pdf/ucu_rollock_february_2019.pdf?utm_source=lyr-campaignupdate&utm_medium=email&utm_campaign=members&utm_term=_all-members&utm_content=The+Friday+email:+08+February+2019 last accessed 20 February 2019.

[11] Graham Ferris, 'Why commitment and vulnerability are key concepts for understanding the reproduction of communities of practice and invisible colleges' paper delivered at 'A Workshop on Vulnerability and the Social Reproduction of Resilient Societies', Emory, May 29-31, 2018; Jean Lave and Etienne Wenger, *Situated Learning: Legitimate Peripheral Participation* (Cambridge University Press 1991), chapter 2.

1.1 Genesis of the Research Question

Early in my engagement with research into legal education I resolved that the structuring of the curriculum required a theoretical contribution: a need for articulation and awareness and pedagogical recognition of the epistemological and ontological commitments of the discipline of law for legal education.[12] To be understood and made useful to students legal materials, both primary and secondary, had to be organised in a way that illuminated the nature and purposes of those materials for those students. Thus, I had an idea of how to approach the task of organising the materials I would be teaching about. Identification of the necessity of either adopting or imposing some theoretically informed structure on legal materials made it obvious that I needed to consider who I was teaching this organised material to, and why I was teaching it to them.[13] It made little sense to structure the teaching without regard to what students could make use of, or without considering what they thought the learning was directed towards.

This process of reflection upon how to organise teaching led me to my research question and interest in my students as the learners. My reflections made it painfully obvious that the common sense metaphor of teaching and learning as a parcel transfer (note my earlier metaphorical use of "material" as if dealing with objects) from teacher to learner was clearly inadequate.[14] There is no transfer of any object from one body to another when something is taught and something is learnt (notice "something" also carries a metaphor of the physical object). Indeed, there is not even a transfer of information, as the understanding of the teacher is not reproduced in the learner. Rote learning (memorisation of words or numbers or figures in an order permitting reproduction of the original symbols, a process analogous to transfer of data from one computer to another) was not the aim of the students or myself.

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[12] Graham Ferris, 'We Should Look to Legal Theory to Inform the Teaching of Substantive Law' (2009) 3 Web Journal of Contemporary Legal Issues; Tony Beecher, *Academic Tribes and Territories: Intellectual enquiry and the cultures of disciplines* (SRHE and Open University Press 1993); Lee S Shulman, 'Knowledge and Teaching: Foundations of the new reform' and 'Learning to Teach' and 'Towards a Pedagogy of Substance' in Lee S Shulman, *Teaching as Community Property: Essays on higher education* (Jossey-Bass2004), 83 and 115 and 128. The importance of how legal materials are organised is captured by Watson in Alan Watson, 'The Importance of Nutshells' (1994) 42 The American Journal of Comparative Law 1.

[13] Knud Illeris, 'A comprehensive understanding of human learning' in Knud Illeris (ed), *Contemporary Theories of Learning* (Routledge 2009) 7.

[14] George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press 2003).

Once one rejects the parcel transfer metaphor it becomes obvious that teaching needs to be receptive to the qualities of the learners to be effective. The parcel transfer metaphor hides this, as an object that is being moved around from body to body is unaffected by its new position in space (the same parcel moved to a different place). Unfortunately for this simple concept there is no object and nothing that exists in space. In teaching and learning the students and I aimed at some type of understanding arising in the student, the unfamiliar material becoming both familiar and meaningful. Together we aimed at the development of new capabilities in the students that might equip them for future social roles. Any replication of my understanding would pervert the educational endeavour. I was not engaged with the materials in the same way I wanted the students to engage with them. It was my task to organise the materials in a way that facilitated meaningful learning. I did not want them to understand the materials in the way I had grown to understand them. Law students need to create their own understanding of the subject matter of legal education. Dewey had established this a hundred years before for all learners.[15] Thus, the research question arose from educational practice which led to theoretical engagement with legal materials in order to better support that educational practice.

1.2 Law as an Academic Discipline

I have sought to answer the research question by pursuing methods that are distinctive to the legal discipline and have been so since its modern origins in the twelfth-century renaissance.[16] Law as a discipline developed in response to the problem of discordant texts, specifically canons issued by the church and later between different sources of law, and the aim was principled concordance or coherence. Characteristics of doctrinal law in both civil and common law traditions are a concern with integrity (coherence or at least congruence)

[15] See (n 4). In another typical lawyerly response I went back to the "primary source", John Dewey, rather than to a more modern "progressive" educator. I have not included this as part of my disciplinary methodology in the next paragraph but finding an authoritative source (origin) is deeply ingrained in my research and scholarship. Apart from any other consideration it formed a starting point and later educationalist sources (seminal writers), such as Jerome Bruner or Karl Llewellyn or Robert Coles or Jean Lave, would have very significant and independent impacts upon the course of the research.

[16] Harold J Berman, *Law and Revolution: The formation of the western legal tradition* (Harvard University Press 1983), Berman's account identifies Gratian, *A Concordance of Discordant Canons* as the first modern legal text see: 143-151 and 202.

of the sources;[17] assumption of the adequacy of rationality for resolving conflicts between sources;[18] hierarchical resolution of conflicts between different sources;[19] an impulse towards generalisation;[20] and the testing of general assertions in specific situations (casuistic reasoning).[21] This casuistic testing of laws flows from the paradigmatic institution of legal process – the trial which expresses a faith that antagonistic rationality is an effective procedure for testing arguments.[22] All of my research including my educational research is informed by my disciplinary background, and specifically by the central characteristics of doctrinal law identified above. Thus, I adopt a working assumption that a single rational account of a set of texts or practices can be given, providing conflicts are openly recognised and a procedure for resolving them is established; but I do not trust any successful integration attained without subjecting the appearance of principled coherence to a test through application in various situations.[23]

Educational research tends towards the methodologically opportunistic,[24] and my own research has this characteristic. My sources in this research have not been primarily legal

[17] For a modern iteration and elaboration of this see Ronald Dworkin, *Law's Empire* (Fontana Paperbacks 1986) chapter 6: 'Integrity'.

[18] Berman (n 15)at 154-155, 251, and 423-424; common law trials began the shift from proofs to jury adjudications in the thirteenth century following the Fourth Lateran Council 1215, Finbarr McAuley, 'Canon Law and the End of the Ordeal' (2006) 26 Oxford Journal of Legal Studies 473, for a modern proponent of conflict resolution through structured rational communicative action see Jurgen Habermas, *Between Facts and Norms* (Polity Press 1997).

[19] HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press 1997), chapter !!!, 'The Variety of Laws' and chapter VI, 'The Foundations of a Legal System', on secondary rules of recognition.

[20] Berman (n 15). This impulse is an important source of distinctive trends in modernity and liberal democracy, as universalisation of legal personality to individuals it has led to a historically momentous extension of political and social and economic rights to classes of people. It is also a source for equality as an ideal value in justice theory, e.g. "No government is legitimate that does not show equal concern for the fate of all those citizens over whim it claims dominium and from whom it claims allegiance" Ronald Dworkin, *Sovereign Virtue* (Harvard University Press 2002), 1.

[21] This is reflected in educational practice in the centrality of case law. For casuistic reasoning see: Albert R Jonsen and Stephen Toulmin, *The Abuse of Casuistry: A history of moral reasoning* (University of California Press 1989).

[22] Habermas (n 17), the story of the influence of this procedural approach to truth on early modern scientific practice and thinking is told by Barbara J Shapiro, *Culture of Fact: England, 1550-1720* (Cornell University Press 2000).

[23] I agree with Graff that there is a degree of academic obfuscation around what academics do when they do research and that as teachers we need to find means to demonstrate and describe our activity that are approachable, see: Gerald Graff, *Clueless in Academe: How Schooling Obscures the Life of the Mind* (Yale University Press 2004), see: 'Introduction', 1-14 and Chapter 7 'Scholars and Sound Bites: the myth of academic difficulty', 134-154.

[24] As illustrated by the range of approaches showcased in the "World Library of Educationalists" published by Routledge, the series can be reviewed at: https://www.routledge.com/World-Library-of-Educationalists/book-series/WORLDLIBEDU?page=2&page=1 accessed 11 June 2019. The discipline is better defined by its subject

ones (authoritative legal texts and legal commentary) but the research of other researchers across a wide range of disciplines including the sub-discipline of legal education and the professional educational practice of myself and others. To avoid confusion, professionalism of the teachers is intended here, not of the education (professional education) or practicing lawyers (professional legal practice). Using sources from disparate disciplinary sources has forced me to try to deploy the types of reasoning and argument prevalent in those disciplines where relevant, and to incorporate a reflective attitude towards educational practice.

matter than its research practices, and it draws upon methods from a wide variety of disciplines in its investigations.

2. Publication 1: What Students Care About[25]

My colleagues Rebecca Huxley-Binns, Andrea Nicholson and I were engaged in establishing a new jurisprudence module as a final year optional module at Nottingham Law School.[26] We decided to try to incorporate a student-centred learning approach, specifically to attempt to structure the module curriculum, delivery, and assessment with a view to maximise student motivation. The hope was that we could enhance motivation thereby facilitating high student performance as reflected in academic results, as well as encouraging student wellbeing through a student-centred approach to module design.[27] 'What students care about' developed from this educational practice context. It is a chapter, in a book of collected essays considering the role of affect in legal education, and it was an early attempt of mine (2011) to view legal education from a student-centred perspective.

However, before giving a thematic account of the chapter, it is necessary to engage with some problems of methodology in the conduct of research into legal education by legally educated educational professionals. Academic law provided to us an approach to texts and practices that could be deployed to non-legal texts. Educational practice provided to us untheorized and largely "solitary" understanding and insights.[28] What was lacking was a means to utilise research outside of the disciplinary boundaries of the legal academy, a problem of methods and methodology that faces many legal educationalists.

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[25] Graham Ferris and Rebecca Huxley-Binns, 'What Students Care About and Why We Should Care', in Paul Maharg and Caroline Maugham (eds), *Affect and Legal Education: Emotion and Teaching the Law* (Ashgate 2011).

[26] It was not an ordinary optional module as it was available as an alternative to an Independent Research Project that was otherwise compulsory when the module was first established.

[27] See: Graham Ferris, Rebecca Huxley-Binns, and Andrea Nicholson, 'A Few Of My Favourite Things: Three Rules of Thumb for Module Design Informed by Self-Determination Theory' (Learning in Law Annual Conference, Warwick, January 2011); and Graham Ferris and Rebecca Huxley-Binns, 'This is why I took a law degree in the first place. This is what I thought I would be doing. It is such hard work, but I am loving it' (Association of Law Teachers Annual Conference, Cardiff, April 2011).

[28] Solitary is the term used by Shulman, see: Lee S Shulman, 'Teaching as Community Property: putting an end to pedagogical solitude' in Lee S Shulman, *Teaching as Community Property: essays on higher education* (Jossey-Bass 2004), 140. Solitude because the knowledge being generated is generally the result of activities that are not publicly accessible nor open to critical examination. Hence, one necessary and important type of educational scholarly activity is bringing professional experience and practice into the public domain for dissemination, and critical review: Shulman, at page 142, calls this: "documentation and transformation" through writing up in order to produce an "artefact" that can be peer reviewed.

2.1 Problems of Method and Methodology

My co-author and teaching colleague Rebecca Huxley-Binns and I were developing our own reflective educational practice and our starting point was fourfold. First, dissatisfaction with aspects of our own legal educational experience. Second, concern at the rising levels of self-reported distress and alienation of undergraduate law students at our law school. Third, dissatisfaction with a punishment and reward framing of the motivations of law students.[29] Fourth, a desire to generalise from and systemise our own successes at encouraging and maintaining student engagement in our educational practice. We needed to move beyond dissatisfaction, concern, and experiential insight, and to do this we needed some sort of theories and methods to enable us to move beyond the anecdotal. The books and articles we wished to use to provide our theory and method were multi-disciplinary, and this led to problems of synthesis and interpretation of the sources. An inevitable effect of an opportunistic methodological approach is a need to "translate" different disciplinary materials to enable synthesis to take place.[30]

Although the section of the chapter that dealt with these issues, under the sub-heading "methodology", was short, it represented a significant process of reflection on multi-disciplinary research into student-centred legal education. There are two aspects of this which are worth expanding upon here, as they have influenced all of my subsequent research in this area.

First, my starting point was that legal and educational professional practice may each generate new knowledge that may be capable of generalisation. The normal assumption in

[29] A framing expressed by repeated arguments in respect of student engagement of the type: "we must assess x (attendance, engagement, analysis, critical thinking, presentation skills, team working skills, employability activities) because if it is not assessed they will not do it"; and "modern students have become instrumental in their approach to education".

[30] A similar problem to the one faced by comparative law see: Konrad Zweigert and Hein Kotz, *An Introduction to Comparative Law* (2nd edn, Tony Weir tr, Oxford University Press 1987), 7, 31-33 and 43-45; and Mathias Siems, *Comparative Law* (Cambridge University Press 2014), and 25-31. Translation is used metaphorically in the text, it is not about word substitution but seeking common concepts across disciplines or legal systems. There is also a less fundamental problem of linguistic translation (utilisation of word or phrase substitution across languages) in comparative law, on which see: Siems 17-18. The two issues interact in the phenomenon of the "false friend" where familiar words mask conceptual divergence, see: Jaakko Husa, *A New Introduction to Comparative Law* (Hart Publishing 2015), 119-120.

academia is that theory and formally generalised knowledge are applied in practice.[31] It is also assumed that new knowledge is generated at the academic and theoretical level, and practice is creative only to the extent that it can incorporate this new knowledge and understanding and put it into practice. It is an essentially deductive and top-down view of knowledge production that aligns with a gratifying self-image for the research university. Rebecca and I felt this paradigm did not recognise the novel insights and potentially generalisable contributions of the experienced and reflective practitioner in law or education. We came to believe that there was an inductive and bottom-up source of knowledge and understanding arising from our educational practice.[32]

The relevant insight in the chapter was drawn from innumerable classroom encounters in which the social and emotional atmosphere of the group and its members determined the effectiveness of the learning taking place. We described this as the "co-operation of reason and emotion".[33]

Second, educational practice could not be fully analysed or understood by using the internal understandings and methods of the relevant discipline (for us law). Education is not constituted by authoritative texts, lacking authoritative institutions in the legal sense of authority, and being a performative activity. Investigation of educational practice required a multi-disciplinary range of approaches, as is reflected in the opportunistic leanings of educational research and learning theory.[34] For us as researchers this raised some problems as we were not fully versed in the disciplinary conventions for evaluating work across the many potentially relevant disciplines. However, as noted above, the problem of synthesising

[31] Stephen E Toulmin, 'The National Commission on Human Experimentation: procedures and outcomes' in H Tristram Engelhardt Jr and Arthur l Caplan (eds), *Scientific Controversies* (Cambridge University Press 1987).
[32] See: Michael Polanyi, *The Tacit Dimension* (University of Chicago Press 2009), 16-25 disputing the possibility of a fully explicit research process; Jean Lave and Etienne Wenger, *Situated Learning: Legitimate Peripheral Participation* (Cambridge University Press 1991), Chapter 1: 'Legitimate Peripheral Learning', 29-44. Lave and Wenger view learning as paradigmatically about joining a practice, 29: "A person's intentions to learn are engaged and the meaning of learning is configured through the process of becoming a full participant in a sociocultural practice." The practice is prior to the learning, situates the learning, and is the end of the learning. However, this does not entail any explicit body of explicitly stated knowledge, and much knowledge may remain tacit without frustrating learning or reproduction of the practice. Research, knowledge and learning are not dependant upon explicit statements of what is known. Practice is fundamental and theory is dependant upon practice, not the other way around. Obviously with explicit statement and theoretical elaboration knowledge can develop and new knowledge can be created, although this in turn requires a social practice (scholarship or science).
[33] What Students Care About, 195
[34] See (n 23).

discordant texts is a foundational concern of legal science. Therefore, our disciplinary background did provide us some relevant tools.

One means to address the problem that we identified in the chapter, of standards of rigour that varied across disciplinary boundaries, was to seek independent evidence for factual assertions. If the independent sources were congruent with each other then it suggested that they were identifying something real. Even if we could not be sure each source was entirely justified according to the conventions of its source discipline the congruence of findings across disciplines suggested robustness of the findings. Such an approach is sometimes called "triangulation" and this seeking out of independent mutually supporting sources for propositions of fact became a feature of my research method.[35]

We viewed these two potentially problematic issues as capable of being mutually self-correcting to some extent. If we discovered in independent sources (say our own practice, cognitive psychology, and philosophy of the will) congruent and mutually supportive findings or arguments, then it suggested the findings or arguments were robust. Thus, insights or ideas derived from our educational practice could be tested through triangulation in the same way as disparate disciplinary sources could be tested.

There is a danger in such a method of triangulation of seeking and finding confirmation for hypotheses without awareness of the natural human propensity for confirmation bias – selective attention to and recognition of confirming evidence and inattention to and unawareness of refuting evidence. Therefore, I have tried to incorporate both reflective practice, specifically reflection on practice, [36] and self-conscious openness to work that

[35] The concept of triangulation is discussed in Susan Smith, *PhD by published work: A practical guide for success* (Palgrave 2015), 91; Louis Cohen, Lawrence Manion and Keith Morrison, *Research Methods in Education* (5th ed, RoutledgeFalmer 2000), 254. An example of triangulation in my practice would be the recognition of the importance of non-principled agreement for the coordination of collective, including principled, action identified apparently independently in: Bernard Crick, *In Defence of Politics* (5th ed Bloomsbury Academic 2013), chapter 1: 'The Nature of Political Rule'; Stephen E Toulmin, 'The National Commission on Human Experimentation: procedures and outcomes' in H Tristram Engelhardt Jr and Arthur L Caplan eds, *Scientific Controversies: case studies in the resolution and closure of disputes in science and technology* (Cambridge University Press 1987); Amartya Sen, *The Idea of Justice* (Allen Lane 2009), chapter 4: 'Voice and Social Choice'. The point is counter intuitive and significant.

[36] In the sense used in the expressions "reflection on action" and "reflection in action" and as opposed to reflection in practice.

might disconfirm or contradict my working hypotheses in my research practice, as well as adopting a "critical" approach to sources.[37]

This concern with the problems of multi-disciplinary sources in researching legal education and self-consciously drawing upon what resources are provided by the legal discipline for dealing with these problems was innovative. Researchers with a legal background are prone to adopting an uncritical approach to non-legal sources, as is clearly visible in the law and economics literature, for example: "Economics provided a scientific theory to predict the effects of legal sanctions … This theory surpasses intuition, just as science surpasses common sense … In addition to a scientific theory of behaviour…".[38] This may be generated by a tendency to fall back on reliance upon authority as a central assumption of analysis and synthesis because this is a familiar aspect of legal scholarship's internal to law approach in doctrinal research. For many years comparative lawyers have been alert to the problems of reading across discourses,[39] and the problem is one recognised in the socio-legal field.[40] What was original was not wrestling with these problems but the development of a response that brought to bear the methods of doctrinal research to the problem.[41] The lack of self-consciousness has been, no doubt, linked to the paucity of discussions of research methods and methodology in the legal discipline.[42]

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[37] Graham Ferris, 'The promise and perils of positive psychology in legal education' (Society of Legal Scholars Annual Conference, Oxford, September 2016), available at: http://irep.ntu.ac.uk/id/eprint/30325/ accessed 10 June 2019.

[38] Robert Cooter and Thomas Ulen, *Law and Economics* (2nd ed, Addison-Wesley 1997), 3.

[39] Zweigert and Kotz, Siems, and Husa n 29. It was writing a review of Jane Ball, *Housing Disadvantaged People? Insiders and Outsiders in French Social Housing* (Routledge 2012) in (2012) 21 Nottingham Law Journal that fully brought the difficulty facing the comparative legal researcher home to me.

[40] The problem is aggravated by the receptiveness of socio-legal researchers to various disciplines celebrated in Roger Cotterrell, 'Subverting Orthodoxy, Making Law Central: A view of sociolegal studies' (2002) 29 Journal of Law and Society 632.The issue is discussed in the socio-legal literature, an example being Sanne Taekema and Wibren van der Burg, 'Towards a Fruitful Cooperation between Legal Philosophy, Legal Sociology and Doctrinal Research: How Legal Interactionism May Bridge Unproductive Oppositions' in Richard Nobles and David Schiff, *Law Society and Community: Socio-Legal Essays in Honour of Roger Cotterrall* (Ashgate 2014) 129, 130: "Advocating interdisciplinary research is one thing, actually doing it is another. Interdisciplinary research is not easy and there are many stumbling blocks to be found. Different disciplines know different methods, different conceptual frameworks, different objects of study, different research goals, different academic cultures".

[41] Note how Taekema and Berg, (n 39) at 129-130 subordinate doctrinal method to legal philosophy suggesting it performs the task of testing theoretical concepts and conclusion derived from sociology and legal philosophy in practical application (which mirrors the practice theory relationship assumed in academe and noted above).

[42] Recent years show a gathering awareness of the problem and publications directed towards filling the gap. See, for example, Mark van Hoecke, 'Preface' and Roger Brownsword, 'Maps, Methodologies and Critiques: Confessions of a Contract lawyer' in Mark van Hoecke (ed), *Methodologies of Legal Research: which kind of method for what kind of discipline* (Hart Publishing 2011); Terry Hutchinson and Nigel Duncan, 'Defining and

It is still unusual to abstract from the practices of doctrinal law those elements that are applicable outside of the discipline, as the actual practice of doctrinal law is often seen not as a methodology but as common sense.[43] As Hutchinson and Duncan noted: "The doctrinal method lies at the basis of the common law and is the core legal research method. Until relatively recently there has been no necessity to explain or classify it within any broader cross-disciplinary research framework." [44] Indeed, when I wrote the chapter I reverted to a similar stance,[45] and it was subsequently that I realised the importance of articulating and self-consciously utilising aspects of legal reasoning outside of the legal domain.[46] This introductory chapter is the first published articulation of my abstraction of aspects of doctrinal practice and extension of these aspects to non-legal research activity.[47]

Another point of originality, unrelated to the abstraction from doctrinal practice, was the development and use of what I have termed "triangulation" above. We did not use the term, and indeed our use of the technique was independent of its use in the educational literature. We were not seeking confirmation of data, and not engaged with the experimental paradigm and problems of generalisation. Our use of "triangulation" was two-fold. First, as noted above, to compensate for our necessary weaknesses in applying standards of rigour derived from other disciplines. Second, to seek a technique to avoid getting trapped by the framing of inquiries by other disciplines. Multiplicity of sources leads to multiplicity of framing, and a powerful resource is provided by accepting a multi-

describing what we do: Doctrinal legal research' (2012) 17 Deakin Law Review 83; Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013).

[43] Richard A Posner, *Reflections on Judging* (Harvard University Press 2013), 104.

[44] Terry Hutchinson and Nigel Duncan, 'Defining and describing what we do: Doctrinal legal research' (2012) 17 Deakin Law Review 83, 84.

[45] By adopting the stance of Harry Frankfurt in my work 'What students care about' (n1) at 196 and speaking from the perspective of philosophy. Philosophy is a discipline that has a similar problem of differentiation of its methods from "ordinary" antagonistic academic culture according to Graff: Gerald Graff, *Clueless in Academe: How Schooling Obscures the Life of the Mind* (Yale University Press 2004). Taekema and Berg (n 39) adopt a similar stance.

[46] Berman (n 15) was a book that brought the issue into a clear focus for me.

[47] There has been a partial articulation through papers delivered by me: Graham Ferris, 'The promise and perils of positive psychology in legal education' (Society of Legal Scholars Annual Conference, Oxford, September 2016) available at http://irep.ntu.ac.uk/id/eprint/30325/ accessed 10 June 2019; and Graham Ferris, 'Understanding and teaching Different Types of Legal Research – Differentiation and Balance' (Connecting Higher Education: International perspectives on research-based education, London June 2017).

disciplinary research methodology, if one is ready to work upon the problems of comparison of findings across different disciplines.

In order to "triangulate" in this manner one must seek semantic or operational equivalence of terms and concepts across disciplines. This seeking of underlying shared concepts or principles is a key feature of creative legal reasoning. Hence the importance of recognising these mutually re-enforcing aspects of originality in approaching multi-disciplinary sources: dis-embedding legal methods from law, and using these methods to facilitate the "triangulation" of disparate findings.

These methodological solutions to the methodological problems of utilising multi-disciplinary materials are demonstrated in the thematic review which follows. This introductory chapter thereby links the theory expounded above to 'What students care about'.

2.2 Thematic Summary

The chapter started by identifying the authors' concern with harnessing non-cognitive features of the learner's experience for educational ends. Student-centred educational practice seeks to engage learners by structuring educational practice so that it aligns with their interests.[48] It therefore promises to support student motivation for learning. Although undergraduate students at law school in England and Wales have committed to the educational process, they do not always manage to maintain preparation, attendance, and participation in class.[49] What is more worrying is that they can become alienated from their studies and distressed, which can impair performance and lead to dropping out.[50] These

[48] Dewey, (n 4) and John Dewey 'Interest in Relation to Training of the Will' in John J McDermott (ed), *The Philosophy of John Dewey: Two Volumes in One 1 the Structure of Experience 2 The Lived Experience* (University of Chicago Press 1981).

[49] Not only in the UK: Liesel Spencer and Elen Seymour, 'Reading Law: motivating Digital Natives to 'Do the Reading'' (2013) 23 Legal Education Review 177.

[50] My first realisation of the extent of the problems came from discussions with student support services at my law school, specifically Julie Higginbottom who provides student support as a pastoral advisor working within the law school with whom I have collaborated on several occasions (Graham Ferris, Andrew Elliott and Julie Higginbottom, 'The law student experience of anxiety' Lawyer 2B, May 12 2017; Graham Ferris, Rebecca Huxley-Binns and Julie Higginbottom, 'What Should We Care About When Teaching Law?' (poster) (Association of Law Teachers Annual Conference, Amsterdam, April 2009). For an overview of retention and differences between disciplines (including law) see: Ruth Woodfield, *Undergraduate Retention and Engagement Across the*

problems are common to all categories of students but tend to be most problematic with first generation university students.[51]

Motivation is not primarily a cognitive state, it is more a state of being or feeling with a strong emotional or affective component. Therefore, given my interest in motivation I responded to an invitation to collaborate on a book proposal coordinated by Paul Maharg and Caroline Maugham on affect in legal education.[52] I invited Rebecca, to join me in researching and writing a chapter which became: 'What students care about'. I was lead author of the chapter, and trail blazed the research, but Rebecca and I discussed the research as it developed and were able to do so within the context of designing, delivering, assessing, and trying to understand the success of our jurisprudence module (called "Critical Legal Thinking"). This chapter was one of three jointly authored publications concerned with modules designed to incorporate a conscious concern with motivation in teaching and learning.[53]

After briefly touching on methodological issues that have been discussed in depth above, the chapter introduced and explicated Frankfurt's work on the importance of what people

Disciplines (HEA 2014), 'Key Findings' 8-11. In the legal academy Bradney has recognised the importance of non-academic support staff for the modern university in Anthony Bradney, *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century* (Bloomsbury Publishing 2003), 60 n105, although he did not explore the issue in his exploration of the collegiate nature of liberal governance in chapter 6.

[51] Liz Thomas and Jocey Quinn *First Generation Entry Into Higher Education: an international study* (OUP 2007), 4: "When first generation entry is used as a lens it disrupts the taken for granted categories of all the target groups used in widening participation and helps produce much more effective approaches to targeting access and supporting student success." The authors accept that first generation status and social class are strongly linked (at 10) but argue where both cannot be taken into account parental educational attainment is the most useful variable for identifying problems and generating effective policy and institutional responses to problems of recruitment, retention, and achievement. Lorenza Antonucci, *Student Lives in Crisis: deepening inequality in times of austerity* (Policy Press 2016), Antonucci stresses welfare resources (or material rather than cultural triggers of inequality n 21 loc 3405), see chapter 6: 'Explaining inequality: the role of social origins and welfare sources' loc 2317: "Wellbeing outcomes in the present are linked to the presence of stretched or abundant welfare sources: young people who face problems of stretched welfare sources, which do not cover their present needs, face major issues of stress and anxiety. Conversely, more advantaged young people have a positive material experience with no forms of psychological distress. Future wellbeing seems to be influenced by future expectations about welfare sources and considerations regarding the perceived employability of students' degrees."

[52] Paul Maharg and Caroline Maughan (eds.) *Affect and Legal Education: emotion in learning and teaching the law*. (Ashgate 2011).

[53] Graham Ferris and Rebecca Huxley-Binns, 'Escaping the Wasteland: The Multiple Needs for an Explicit Incorporation of Values into the Core Curriculum of Contemporary Legal Education' (2009) 3(1) Journal of the World Universities Forum 63; Rebecca Huxley-Binns and Graham Ferris, 'Putting Theory into Practice: Designing a Curriculum According to Self-Determination Theory' (2013) 19(3) The International Journal of Pedagogy and Curriculum 1.

care about.[54] His disciplinary background is philosophy (analytical philosophy). This reflects both the generality of his approach and the centrality of the links between what one cares about, who one is, and how one learns. Frankfurt developed an analysis of first order and second order desires, and he stressed the importance of second order desires – desires to desire certain things (e.g. the wellbeing of a loved one, or lots of money, or sex with men). Although not articulated in terms of student-centred learning, Frankfurt's concern with what one wants to want, what things one cares about, identified the importance of anyone's including a student's value system. Concern with how the individual student was able to find significance in the subject matter being studied was thus highlighted by use of Frankfurt.

The exposition of Frankfurt's theory combined knowledge drawn from my professional educational practice with Frankfurt's explanatory theory. However, Of greater importance for my own research was the way that Frankfurt's concern with people's volitional choice leads to a concern with the identity of the individual ("student's sense of self … people have to become").[55] This connection between student-centred learning and the importance of the dynamic identity of the student became more important as the research progressed, and I will return to these issues in my consideration of the second publication that makes up this thesis.

The second source reviewed was Damasio's work which provided a remarkable confirmation of the importance of caring about something, a central aspect of Frankfurt's work - and is a good example of "triangulation".[56] Essentially Damasio identifies an organic base for the capacity to care (i.e. to regard it as serious and worth effort to pursue something). He also confirms our assertion that learning is not merely cognitive but also "emotional" or "affective", as his case studies involved people who had full cognitive functioning yet were incapable of living a purposeful life as they were unconcerned about the consequences of their actions upon themselves.

Frankfurt and Damasio were both expressed at a high level of generality, and neither had any obvious concern with education, and certainly no concern with legal education. Thus, it

[54] Ferris and Huxley-Binns (n 1), 196-199.
[55] Ferris and Huxley-Binns (n 1), 198.
[56] Ferris and Huxley-Binns (n 1), 199-200.

was necessary for the chapter to bring their abstract concerns to bear on teaching and learning. We did this by focussing on evidence of affective dysfunction in law students and those causes of this dysfunction that lay in incongruence between what students cared about and their experience of legal education.[57]

Law student distress and poor wellbeing had been reported from research in the USA over decades.[58] Raising awareness of this in non-USA discourse was itself a useful thing for the chapter to do. Of course the US data comes from a country with a different culture, where legal qualification requires a three year post-graduate degree, and where fees for students have been long established and high.[59] However, the main purposes of the account were two-fold. First, it provided another source of independent confirmation of the importance of what people care about, and second, it confirmed the importance of emotional or affective states to educative practice. It argued that in the context of legal education a "do no harm" principle may be both relevant and breached by our collective practice as shown by the

[57] Ferris and Huxley-Binns (n 1), 200-204.

[58] Studies began to notice a problem in the US in the late 70s and early 80s and the problems seem to continue: James M Hedegard, 'The Impact of Legal Education: An in-depth analysis of career relevant interests, attitudes and personality traits among first year law students' (1979) American Bar Foundation Research Journal 791; Marilyn Heins, Shirley Nickols Fahey and Roger C Henderson, 'Law Students and Medical Students: A Comparison of Perceived Stress' (1983) 33 Journal of Legal Education 511; Stephen B Shanfield and G Andrew H Benjamin, 'Psychiatric Distress in Law Students' (1985) 35 Journal of Legal Education 65; G Andrew H Benjamin, Alfred Kaszniak, Bruce Sales and Stephen B Shanfield, 'The Role of Legal Education in Producing Psychological Distress among Law Students and Lawyers' (1986) American Bar Foundation Research Journal 225; Patrick J Schiltz, 'On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession' (1999) 52 Vanderbilt Law Review 871; Lawrence S Krieger, 'Institutional Denial About the Dark Side of Law School, and Fresh Empirical guidance for Constructively Breaking the Silence' (2002) 52 Journal of Legal Education 112; Susan Swaim Daicoff, *Lawyer Know Thyself – A Psychological Analysis of Personality Strengths and Weaknesses* (American Psychological Association 2004); Susan Swaim Daicoff, 'Lawyer be yourself: an empirical investigation of the relationship between the ethic of care, the feeling decision making preference, and lawyer wellbeing' (2008) 16 Virginia Journal of Social Policy and Law 8; Susan Swaim Daicoff, 'Methods of Teaching and Forming Professional identity: Lawyer Form Thyself: Professional identity formation strategies in legal education through 'soft skills' training, ethics, and experiential courses' (2014) 27(2) Regent University Law Review 205; Lawrence Krieger and Kennon M Sheldon, 'What Makes Lawyers Happy?:A data-driven prescription to define professional success' (2015) 83 George Washington Law Review 554.
Australian law schools have also become concerned following the death of Tristan Jepson: Norm Kelk, Georgina Luscomb, Sharon Medlow and Ian Hickie, *Courting the Blues- Attitudes Towards Depression in Australian Law Students and Lawyers* (Brain and Mind Research Institute, University of Sydney 2009); Molly Townes O'Brien, Stephen Tang and Kath Hall, 'Changing Our Thinking: empirical research on law student wellbeing, thinking styles and the law curriculum' (2011) 21 Legal Education Review 149. The problem seems wider than just law students: Wendy Larcombe, Sue Finch and Rachel Sore, 'Who's Distressed? Not Only Law Students: Psychological distress levels in university students across diverse fields of study' (2015) 37 Sydney Law Review 243.

[59] A critical account of the state of US law schools is given in Brian Tamanaha, *Failing Law Schools* (University of Chicago Pres 2012), the preface gives an overview of his concerns, and chapter two 'Why is law school three years' is highly critical of the time and expense imposed by accreditation requirements for legal qualification.

research into law student wellbeing. This emphasised the importance of taking a student-centred approach. Mere attention to the intention (benign or neutral) of the teacher did not predict the effects (malign) upon many students in legal education. It was essential to attend to the student learners if one was to understand what was happening in educational processes.

The first purpose was the more significant one for this thesis. In order to make the link it was necessary to find studies concerned with student values (things students care about) and student wellbeing.[60] Such studies were identified, supporting our intuition that a sense of value disorientation was a factor in student distress, and confirming Frankfurt's emphasis on the importance of this issue. Studies based upon the theory of self-determination were the crucial sources of the "triangulation" with Frankfurt's theory.[61] This is explored below.[62]

Research into law student wellbeing and distress established the relevance and salience of previous research informed by self-determination theory to the chapter's concerns with emotion, learning, and concern with student values (and thereby student-centred education). However, it was necessary to examine this theory at greater length to establish the independence and robustness of any "triangulation" with Frankfurt's work. Therefore, a brief account of self-determination theory and its development was given.

On the foundation of the exposition of self-determination theory it was possible to link some of the concepts used in self-determination theory with concepts developed by

[60] G Andrew H Benjamin, Alfred Kaszniak, Bruce Sales and Stephen B Shanfield, 'The Role of Legal Education in Producing Psychological Distress among Law Students and Lawyers' (1986) American Bar Foundation Research Journal 225; Patrick J Schiltz, 'On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession' (1999) 52 Vanderbilt Law Review 871; Kennon M Sheldon and Lawrence Krieger, 'Does Legal Education Have Undermining Effects on Law Student? Evaluating Changes in Motivation, Values and Well-Being' (2004) 22 Behavioural Sciences and the Law 261; Kennon M Sheldon and Lawrence Krieger, 'Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory' (2007) 33 Personality and Social Psychology Bulletin 883.

[61] Ferris and Huxley-Binns (n 1), 204-207. Self-determination theory has been assembled over a period of decades by psychologists. It posits three human needs (to be able to exercise competence, to feel self-directed, and to feel part of a group or related) that when met lead to intrinsically motivated behaviour. Intrinsic motivation being both more pleasant for an actor and more effective than extrinsic motivation fuelled by rewards or punishments originating from outside of the actor.

[62] The investigation of student wellbeing would become significant in my later research concerns but is not central to this thesis - the issue is further explored in *Uses of Values* (n 3), 56-65, which forms part of chapter 2 which is not part of this thesis.

Frankfurt: autonomy with the adoption of a second order desire;[63] identified motivation with a successfully adopted second order desire (and possibly introjected motivation with an unsuccessfully adopted second order desire);[64] and wholeheartedness with self-concordance.[65] Once again we were engaged in "triangulation" and once again in self-determination theory we uncovered an independent source of support for the work of Frankfurt.

Finally, in keeping with the overall structure of the argument, the chapter returned to an example drawn from the authors' practice, and explicable in terms of the research we had explored in the chapter, specifically Frankfurt and self-determination theory. The entire chapter is an exercise in multi-disciplinary "triangulation", drawing from law (our practice), philosophy (Frankfurt), neuroscience (Damasio), cognitive psychology (self-determination theory), and educational research (student wellbeing and the student-centred focus). The core argument was that it is important to take into account the concerns of law students in the practice of legal education. This is for both positive and negative reasons. Positive as it can lead to engagement and student motivation. Negative because failure to take student concerns into account may alienate and lead to low wellbeing and distress among students.

2.3 Reception and Significance of 'What students care about'

2.3.A. Metrics and Impact

Law is not yet a bibliometric discipline, and citation and review information is not very informative when trying to assess the reception of academic work. WorldCat lists 504 libraries holding *Affect and Legal Education*.[66] These libraries are situated in 66 independent

[63] Graham Ferris and Rebecca Huxley-Binns, 'What Students Care About and Why We Should Care in Affect: The Impact of Emotion on Learning and Teaching the Law', in Paul Maharg and Caroline Maugham (eds), *Affect and Legal Education: Emotion in Learning and Teaching the Law* (Ashgate 2011) 195, 204.
[64] Ibid 205.
[65] Ibid 207.
[66] https://www.worldcat.org/title/affect-and-legal-education-emotion-in-learning-and-teaching-the-law/oclc/719673475&referer=brief_results last accessed 22 February 2019.

countries spread across all the inhabited continents in the world.[67] The book is held by libraries in civil law jurisdictions as well as common law ones. The book is more widely held in the United States and Australia than it is in the UK and it, therefore, has a truly global reach.

A search of Scopus database revealed four citations for the chapter and five citations for the book as well as one book review.[68] A search of HeinOnline data bases revealed one book review and 25 citations for the book, and three citations for the chapter.[69] It seems likely that the record of citations is incomplete, as many law journals are not on the Scopus database, but the source of citations captured again reflects the global reach of the book.[70] The Field-Weighted Citation Impact in Scopus of 2.27 is over twice the normalised average.

The chapter was foundational for this thesis, as it established a methodology for handling multi-disciplinary sources, identified important sources, and important issues. It also has informed my professional educational practice.

The chapter and subsequent publications and dissemination activities, such as attendance and delivery of papers at conferences, both established an awareness of student wellbeing as an area for research investigation in the UK, [71] and of the possible uses of self-

[67] 66 independent countries and Hong Kong and the British Virgin Islands. The 66 countries are: Australia; Austria; Bahrain; Barbados; Bosnia and Herzegovina; Botswana; Brazil; Canada; China; Colombia; Costa Rica; Cyprus; Czech Republic; Denmark; Dominican Republic; Ecuador; Egypt; Finland; France; Georgia; Germany; Greece; Guatemala; Guyana; Honduras; Hungary; India; Israel; Ireland; Italy; Jamaica; Jordan; Kenya; Kuwait; Kyrgyzstan; Latvia; Lebanon; Lithuania; Malaysia; Mexico; Mongolia; Montenegro; Morocco; Netherlands; New Zealand; Nigeria; Norway; Philippines; Poland; Republic of Korea; Romania; Russian Federation; Saudi Arabia; Serbia; South Africa; Slovakia; Slovenia; Spain; Sweden; Switzerland; Taiwan; Thailand; Turkey; United Arab Emirates; United Kingdom; United States of America.

[68] E-mail from Sharon Potter 8/12/2017

[69] Book review: Lawrence Donnelly (2012) 11 Hibernian Law Journal 207.

[70] Citations of the book from publications based in USA, Canada, Australia, Singapore, UK and Ireland. Citations to the chapter from the UK and Singapore.

[71] My own activity in this area has been extensive, including four publications: Rebecca Huxley-Binns and Graham Ferris, 'Putting Theory into Practice: Designing a Curriculum According to Self-Determination Theory' (2013) 19 The International Journal of Pedagogy and Curriculum; Graham Ferris, 'Values ethics and legal ethics: the QLD and LETR Recommendations 6, 7, 10, and 11' (2014) 48 The Law Teacher 20; *Uses of Values in Legal Education* (Intersentia 2015); Graham Ferris, Andrew Elliott and Julie Higginbottom 'The law student experience of anxiety' Lawyer 2B, May 12 2017.
Nine conference papers or contributions to panels: (1) Graham Ferris, Rebecca Huxley-Binns and Andrea Nicholson, 'A Few Of My Favourite Things: Three Rules of Thumb For Module Design Informed By Self-Determination Theory' (Learning in Law Annual Conference, Warwick, January 2011): (2) Graham Ferris and Nick Johnson, 'Why Our Approach to Student Engagement Might Be Determined by Our Answer to the Question: Is Law Merely a Business?' (Association of Law Teachers Annual Conference, Cardiff, April 2011); (3) Graham Ferris and Rebecca Huxley-Binns, 'This is why I took a law degree in the first place. This is what I thought I would be doing. It is such hard work, but I am loving it' (Association of Law Teachers Annual

determination theory in course design.[72] Law student wellbeing is now an active subject of research in the UK.[73]

2.3.B. Significance

'What students care about' had significance both for the development of my research and it added significantly to the literatures on Frankfurt, Dewey, and on legal education. It is worth capturing these aspects of the chapter here.

Once one asks: "What is entailed by a student-centred approach to legal education?" one has to think about what students as learners might hope for from legal education. Issues commonly assumed to be at the forefront of student concerns, such as economic benefits

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Conference, Oxford, April 2012); (4) Graham Ferris and Rebecca Huxley-Binns, 'For Learning's Sake' (Society of Legal Scholars Annual Conference, Bristol, September 2012); (5) Graham Ferris, 'The integration of ethics into legal education' (International Legal Ethics Conference VI, London, July 2014); (6) Graham Ferris (panellist), 'Responding to the Ethics and Values Recommendations of the Legal Education and Training Review: What and Why?' (Association of Law Teachers Annual Conference, Cardiff, March 2015): (7) Graham Ferris, 'Memory and Forgetting: What should legal education take from the past and into the future?' (Association of Law Teachers Annual Conference, Cardiff, March 2015); (8) Graham Ferris, 'The promise and perils of positive psychology in legal education' (Society of Legal Scholars Annual Conference, London, September 2016) http://irep.ntu.ac.uk/id/eprint/30325/ accessed 10 June 2019; (9) Graham Ferris, 'Law students, lawyers, wellbeing, and vulnerability Society of Legal Scholars Annual Conference, London, September 2018).
Four other dissemination or networking events: (1) Graham Ferris, 'Increasing student engagement in law tutorials' (Anglia Ruskin Law School Away Days, Chelmsford, June 2013); (2) Graham Ferris, 'On the how and why of value informed legal education' (Teaching Legal Ethics Workshop UK, London, March 2016); (3) Graham Ferris, 'T'ain't what you do it's the way that you do it – That's what gets results' (Ella Fitzgerald) (Re-Imagining Land Law, Birmingham, September 2017)); (4) Graham Ferris, 'Investigations into Law Student and Lawyer Wellbeing' (Nottingham, June 2018 I organised and hosted a joint Centre for Legal Education and Legal Education Research Network (CLE and LERN) event funded by the Health and Wellbeing research initiative at Nottingham Trent University.
Three dissemination events internal to NTU: (1) Workshop of Legal Education Group, 22 February 2012 Workshop Session: 'Values in Legal Education'; (2) Centre for Legal Education Retreat, 9-11 December 2013 Session: 'Teaching law, values, and ethics; student identity and miscellaneous'; (3) Legal Education Group Seminar, 4th February 2015 Session: 'Ethics and Identity'.

[72] For example: Caroline Strevens and Clare Wilson, 'Law student wellbeing in the UK: a call for curriculum intervention' (2016) 11 Journal of Commonwealth Law and Legal Education 44.

[73] See: Strevens and Wilson (n70); Emma Jones, 'Transforming legal education through emotions' (2018) 38 Legal Studies 450; Emma Jones, Rajvinder Samra, and Mathijs Lucassen, 'The world at their fingertips? The mental wellbeing of online distance-based law students' (2019) 53 The Law Teacher 49. Two National events have been held to link researchers interested in law student (and academic and legal professional) wellbeing: 'Investigations into Law Student and Lawyer Wellbeing' Nottingham, 15 June 2018; 'Intentional Education Design for well-being' London, 2May 2019; and a third is planned: 'Intentional Education Design for Well-being – Transition Pedagogies' London, 5 July 2019 – all three events supported by the Legal Education Research Network.

through a professional career, were not focussed upon.[74] Rather we attempted to take a holistic approach to the student as learner, one that could encompass economic ambitions but was not to be limited *a priori* to any sub-set of interests. This task was attempted by making student concern – what students cared about – the central theme of the chapter.

We kept the frame as wide as seemed feasible and asked about the human (modern human by implication) who might care about something, we made caring about something (or someone) the framing device. This led us to Frankfurt whose career has been largely devoted to the question of how people care about things and people.[75]

This framing device (making the question of what students cared about central) emphasised not the aims of the teacher or the needs of the discipline or the profession or the economy but the connection with the affective state of the students. The question was not what was in the best interests of the students as ascertained by experts but what the students cared about. To care is to be attached to, and concerned about the state of, the object of care, it is not merely a cognitive state. Much of the chapter was devoted to a deep justification of this unusual emphasis for research on legal education. Making the student central to the educational mission of the law school destabilised that educational mission by removing the focus away from subject matter or learning outcomes.

In pursuing these ends the chapter did make several original contributions to human knowledge. The use of Frankfurt's work in connection with the problems of legal education specifically and in conjunction with Damasio, research into student wellbeing, and self-determination theory were novel.

[74] For discussion of "education as human capital" in higher education generally see: Stefan Collini, *What are Universities For* (Penguin 2012), chapter 3: 'The Useful and the Useless' and chapter 5: The Highest Aspirations and ideals: Universities as a Public Good; *Speaking of Universities* (Verso 2018), chapter 6: 'Higher Purchase: The Student as Consumer'. I first contributed to a related discourse publicly when I reviewed Anthony Bradney, *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century* (Hart Publishing 2003) in Graham Ferris, 'An Account of the Twentieth Century in Legal Academe: Or Two Nations Divided by a Common Language' (2006) 15 Nottingham Law Journal 38. The two discourses – around higher education and legal education have many connections.

[75] Frankfurt has also published on Descartes's philosophy in Harry G Frankfurt, *Demons, Dreamers, & Madmen: the defense of reason in Descartes's Meditations* (Princeton University Press 2008), and famously on public discourse in Harry G Frankfurt, *On Bullshit* (Princeton University Press 2005) collected in Harry G Frankfurt, *The Importance of What We Care About* (Cambridge University Press 1998).

Frankfurt had been used as a theorist in legal discourse, but not in connection with legal education.[76] Indeed, his relevance is not obvious unless one takes a student-centred approach. However, if one does then he throws light upon one of the more obscure aspects of Dewey's theory of educational practice. Dewey argued that the educator must design the curriculum in a manner that touches upon the "interest" of the child.[77] However, his attempts to flesh out the content of this idea of interest were not transparent: sometimes it seemed to be a primordial need to persist, sometimes to lie in internal developmental processes, sometimes to be derived from a child's life situation, sometimes from the anticipated future economic role of the child, sometimes from the future wellbeing of the child.[78] Frankfurt's concern with second order desires, as explicated in the chapter, gave traction to the idea of a student's "interest", at least for the young or emerging adult student,[79] by identifying the centrality of what the student cares about.

The reflexive nature of the process explored by Frankfurt in his work - the consideration of second order desires in the light of what one knows about oneself and one's situation – helps explain the problems that Dewey had in ascertaining the nature of the student's interest. Thus, application of Frankfurt to student-centred learning generated novel insights into his work and into the work of Dewey.

In his published works Frankfurt has shown little interest in the empirical basis for his theory. His work remains predominantly conceptual in the tradition of philosophy. When I linked his work with the work of Damasio I introduced the possibility of empirical confirmation not of the processes Frankfurt describes but of the importance of caring about things for human functioning. This in turn offered novel support for some of the assertions of theorists of care ethics, whose work can be overly reliant upon assertions supported by self-reflection.[80] This linking of Frankfurt and Damasio was novel.

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[76] Meir Dan-Cohen, 'Socializing Harry' in Harry G Frankfurt, *Taking Ourselves Seriously and Getting It Right* (Stanford University Press 2006).
[77] Dewey, (n 4) and John Dewey 'Interest in Relation to Training of the Will' in John J McDermott (ed), *The Philosophy of John Dewey: Two Volumes in One 1 the Structure of Experience 2 The Lived Experience* (University of Chicago Press 1981).
[78] Ibid.
[79] On the "emerging adult" as a life stage of late modernity see: Jeffrey Jensen Arnett, *Emerging Adulthood: The Winding Road from the Late Teens Through the Twenties* (2nd edn, OUP 2014).
[80] See: Martin Buber, *I and Thou* (Simon & Schuster 2008); Nel Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (2nd edn, University of California Press 2003). Of course the main focus of ethics of

A further novel synthesis was the application of Frankfurt's theory to problems of student distress and self-determination theory. The self in self-determination theory is dynamically involved with the world and this involvement shapes development.[81] However, there is no emphasis on the self being reflexively responsive to beliefs about the self.[82] Frankfurt identifies a source of "intrinsic" motivations in the second order desires one commits to. It has been suggested that attacks upon the student's self-identity may explain low law student wellbeing.[83] The attempt to use Frankfurt's concept of the second order desire as a bridging concept emphasised the importance of beliefs about the self, commitments, and self-identity when thinking about law student motivation and wellbeing. These links were explored in later publications that form part of this thesis.[84]

Finally, we also explored congruence between the theoretical insights of self-determination theory and our practice experience. Given the earlier triangulating with Frankfurt it provided two conciliant theoretical ways to understand and generalise our insights derived from our teaching practice. This was an original articulation and development from practice to theory, or the generation of novel practice informed theory.

2.4 Reflections and Connections

The importance to the research reported in 'What students care about' of a student-centred approach to educational practice is never very clearly articulated in the chapter. This was

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care is relational caring about other people, not ideas or projects, and Damasio does not endorse this aspect of their work.

[81] Todd D Little, Patricia H Hawley, Christopher C Heinrich and Katherine W Marsland, 'Three Views of the Agentic Self: A Developmental Synthesis' in Edward L Deci and Richard M Ryan (eds), *Handbook of Self-Determination Research* (University of Rochester Press 2002), 389, 390: "An organismic approach to understanding the behaviour of individuals also involves an explicit focus on the interface between self and context … As part of their integrated functioning, individuals engage in a self-evaluative feedback process, continuously interpreting and evaluating actions and their consequences … the individual continually discovers and refines who she or he is and what she or he is capable of".

[82] For a psychological exploration of the impact of theories about the self that affect self-image (i.e. reflexive self-narratives) see: Carol S Dweck, *Self-Theories: Their Role in Motivation, Personality, and Development* (Psychology Press 2000), chapter 7: 'Implicit Theories and Goals Predict Self-Esteem Loss and Depressive Reactions to Negative Events'.

[83] Patrick J Schiltz, 'On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession' (1999) 52 Vanderbilt Law Review 871.

[84] 'Values ethics and legal ethics: the QLD and LETR recommendations 6, 7, 10, and 11' and chapter 8 of *Uses of Values in Legal Education* in particular.

partly because it was a shared perspective of the authors and informed our practice: it was too obvious to us. It was also because we did not directly address our educational assumptions, given the context of the book. Finally, it was due to our being concerned in writing the chapter to engage with what we viewed as negative assumptions held by legal educators towards any engagement with the emotions or values of law students, preferring the illusory security provided by an exclusive focus upon the cognitive.

The remaining publications covered by this introductory chapter did make the centrality of the student's developing self-identity clearer. In subsequent work I also accepted that it was necessary to challenge some of the assumptions around what the limits of the academic teaching role is.[85]

The chapter is too crowded with content. This is a problem with our attempt to deal with the problems of multi-disciplinary research by seeking out independent sources to support research findings of importance. Given the audience is unlikely to be familiar with the sources, as they do not form part of a shared disciplinary corpus, the technique requires a lot of exposition.

This problem forced some potentially valuable material out of the chapter,[86] and necessitated a rather summary approach to the exposition of the material included. However, the only solution to the problem of word limits is to engage in further publications, and this thesis represents the most recent addition to the exploration of the area.

The chapter attempted to engage with values without engaging with substantive values through the adoption of Frankfurt's position that anything a person cares about is adequate and it is not necessary to evaluate the values of people in order to analyse the process of valuing (caring about) things. Such a value-neutral posture is not supportable in legal

[85] In addition to the publications presented as part of this thesis: Graham Ferris, 'The integration of ethics into legal education' (Society of Legal Scholars Annual Conference, Bristol, September 2012); Graham Ferris and Nigel Duncan, 'Fishing For Values in Legal Education' (Association of Law Teachers Annual Conference, Nottingham, March 2013); Graham Ferris, 'Memory and Forgetting: What should legal education take from the past and into the future?' (Association of Law Teachers Annual Conference, Cardiff, March 2015); Graham Ferris and Jane Jarman, 'What makes a person morally courageous?' (Teaching Legal Ethics Workshop UK, London, July 2013); Graham Ferris and Nick Johnson 'Save the World on Your Own Time: Is the attack on professionalism an assertion of a normative imperative to maximise profits' (Workshop on Professionalism and Vulnerability, Leeds, October 2017).

[86] Such as Viktor Frankl, *Man's Search for Meaning: The classic tribute to hope from the Holocaust* (Rider 2004).

education.[87] This issue became apparent in writing 'Values ethics and legal ethics' and was substantively addressed in chapter one of *Uses of Values* as discussed below.[88]

Although 'What students care about' identified the dynamics of value adoption and tied it to self-development it did not articulate the importance of this dynamic to the developmental process young people are going through in legal education. Although the importance of the value commitments of students was recognised there was still a reluctance to see legal education as just one aspect of the student's life. This issue of the importance of the developing student identity for legal education was taken up in my next publication.

[87] For an attempt to defend such a position see: Stanley Fish, *Save the World on Your Own Time* (Oxford University Press 2012) at 19: "But neither the university as a collective nor its faculty should advocate personal, political, moral, or any other kind of views except academic views"; and at 21: "I Ignore these [professional and vocational education, residential life, and extracurricular activity] activities". The book is an elaboration of Fish's argument in his earlier piece 'Aim Low' in the Chronical of Higher Education 16 May 2003: "The authors [of *Educating Citizens: Preparing America's Undergraduates For Lives Of Moral And Civic Responsibility*] complain that students' "impatience to complete their professional or vocational training ... can make it difficult to interest them in broader goals of intellectual and personal development." Mine is the opposite fear, that the emphasis on broader goals and especially on the therapeutic goal of "personal development" can make it difficult to interest students in the disciplinary training it is our job to provide." Available at: https://www.chronicle.com/article/Aim-Low/45210 accessed 13 December 2019.
Fish took issue with Bok in 'Aim Low' and Bok was strongly critical of the argument in 'Aim Low' in Derek Bok, *Our Underachieving Colleges: A candid look at how much students learn and why they should be learning more* (Princeton university Press 2009), 59-60.

[88] The topic is also addressed by chapter three of *Uses of Values*, but chapter three is not incorporated into this thesis.

3. Publication 2: 'Values Ethics and Legal Ethics'[89]

3.1 Thematic Summary

In this article I started to address the issue of what the student learners' "interest" might be in the context of legal education. The argument was that as educators we should align our practice with the best interests of our students and not attempt to turn education into a panacea for social or regulatory ills. I did this by articulating the importance of the individual learner's self-identity, drawing upon Anthony Gidden's work on the reflexive project of the self and the concept of the third apprenticeship in the Carnegie Report *Educating Lawyers*, to elaborate on my understanding of legal education.[90]

Educating Lawyers sets out three apprenticeships.[91] First, the intellectual or cognitive apprenticeship, which is an apprenticeship in legal analysis which is devoted to developing analytical thinking and formal knowledge – or thinking like a lawyer. Second, is an apprenticeship in forms of expert practice, and is concerned with practical skills, best taught through experiential learning. Third is an apprenticeship of identity, concerned with the purpose and attitudes of the lawyer. It is the third apprenticeship with its concern with the learner's self-identity and values that was of most importance for the article.

The idea of the third apprenticeship is valuable as it avoids framing legal education as an antagonistic combat between different educational aims, cognitive (academic), skills (professional), and socialisation (identity). Rather it frames the three apprenticeships as necessary and complementary, and gives an unusually central place to the third apprenticeship as the one that integrates and makes sense of the other two. This thus both

[89] Graham Ferris, 'Values ethics and legal ethics' (n2).
[90] Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Polity 1991), 5-6, 32-34, and 214-217 provide relevant summaries; William M Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond and Lee S Shulman, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007).
[91] William M Sullivan et al, *Educating Lawyers*: 'The Three Apprenticeships of Professional Education', loc 414-449.

articulates the third or identity apprenticeship and emphasises its structural importance to the legal education project.

Gidden's articulation of the self-reflexive identity projects of people, including students, is important as a way of generalising beyond legal education as a preparation for professional practice, and beyond legal education to undergraduate education. Personal identity is constructed, and constructed within a social context by individuals, according to Giddens.[92] This is not something that should be done to students, but something students should be helped to do for themselves. Especially in an undergraduate context a legal professional identity should be offered as one possible model but not imposed upon students. Student interest is not something known *a priori* by the teacher, but something identified by the student learner with the help of the teacher.

As Giddens' analysis is highly abstract, the chapter referenced the social and organisational mediation of university learning project (SOMUL project) which generated a highly similar concept to the self-reflexive self-identity project in the "identity-projects" of students.[93] SOMUL presented the findings of qualitative research into what university students valued in their experience of university education and found personally significant relationships and formative experiences of independence were emphasised by students over knowledge or disciplinary characteristic ways of reasoning. These prosaic findings served to illustrate the ordinary and familiar contents of the self-identity project.

Finally, 'Values ethics and legal ethics' was concerned with the specifically ethical aspects of student identity, and the chapter introduced an influential analysis of the factors that lead to ethical action. The model was created by Rest and Narvaez and is known as the "four component model".[94] The four components are sensitivity, reasoning, motivation and efficacy. The model was used to highlight the personal and contentious nature of

[92] Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Polity 1991), (n 90).
[93] John Brennan, Robert Edwards, Muir Houston, David Jary, Yann Lebeau, Michael Osborne and John T E Richardson, *Improving What is Learned in University: An Exploration of the Social and Organisational Diversity of University Education* (Routledge 2010), Chapter 7, 138 and 156. Other terms are used such as: "academic identity", "subject identity", "graduate identity", "personal/self-identity/self-concept", "group identity/social identity", and "identity".
[94] James R Rest, 'Chapter 1 Background: Theory and Research' in James R Rest and Darcia Narvaez (eds), *Moral Development in the Professions: Psychology and Applied Ethics* (Erlbaum Associates Inc 1994), 23-25.

components two and three – moral reasoning and moral motivation - which are central to ethical self-identity of an individual.

Thus, my article provided a clearer articulation of what adult-student-centred (or emerging adult-student-centred) education might be about.[95] Ethical values which are a sub-set of what people care about were the thematic focus of my research, reflecting both my interest in ethical values and the importance they had been assigned in the Legal Education and Training Review (LETR).[96]

The article noted two aspects of the LETR. First, that the LETR brief reflected the perspective of regulators rather than educators, and second, the importance given in the LETR to ethics and values and professionalism (three linked terms) by stakeholders.[97] The article used these facts to inform an evaluative position, which led to a cautioning against the setting of unrealistic, or even inappropriate, objectives for legal education in a highly unstable legal services market context.[98]

LETR used the terminology and conceptual apparatus of learning outcomes.[99] Learning outcomes are congruent with the metaphor of education as transfer of a parcel or object (information or knowledge or skills),[100] but less compatible with the idea of education as learner transformation. In the transfer model what is transferred is controllable, and indeed can be described before any education takes place in terms of outcomes, and successful transfer can be assessed. The parcel transferred starts in the teacher and teaching materials, is moved into the learner, and the learner can produce it for inspection in assessment. It is not interestingly dynamic; the parcel should be consistent and stable. Transformation of the parcel through interaction with the learner is learner error. In a learner transformation

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[95] Jeffrey Jensen Arnett, *Emerging Adulthood: The Winding Road from the Late Teens Through the Twenties* (2nd edn, OUP 2014).
[96] Julian Webb, Jane Ching, Paul Maharg and Avrom Sherr, *Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales* (Legal Education and Training Review 2013).
[97] Fiona Cownie ed, *Stakeholders in the Law School* (Hart Publishing 2010).
[98] It should be noted that the LETR was *not* directed to undergraduate legal education primarily, but had a broader remit.
[99] Webb et al LETR (n 94) ix: "enhance consistency of education and training through a more robust system of learning outcomes and standards, and increased standardisation of assessment"; and paras 4.106, 4.122, and recommendations 1-5. The most pertinent discourse is the one on outcome based *regulation* rather than *learning* outcomes, see: Solicitors Regulation Authority, 'Outcomes-focused regulation - transforming the SRA's regulation of legal services' available at: https://www.sra.org.uk/sra/consultations/OFR-consultation.page accessed 11 June 2019.
[100] Discussed above at text at notes 13-14.

model the process and the final outcomes are not controllable, being inherently dialectical and unpredictable. The most important process is the development of the learner, which may be away from the law, or in a strongly critical direction within the law, or towards one of many very different models of legal professional practice.[101]

When outcomes are tied to assessment this produces the risk of reification as that assessment becomes the product of the educational process. A transfer model of learning, teaching pre-established outcomes, and demanding that assessment of those outcomes alone is permissible can support a reified and technocratic frame for analysing education. Such a vision of education is one in which students are coached in order to demonstrate that they have achieved the pre-set outcomes through successful assessment performance.[102] There is little room in this for the individual learner to develop an identity project as a lawyer or a non-lawyer, and one concern behind my research was that many law undergraduates do not work in the legal services market after graduation, and many of those who do work in that market do so as paralegals not as legal professionals.[103] Neither those students who will work outside the legal services market or those who will work outside the legal professions are well served by an education structured around these outcomes. There is little room here for the recognition of value differences as the outcomes are presumptively outside of critical examination, if they are not demonstrated then the learner has failed. There is no room for the learner to challenge successfully the outcomes within the educational process. This placing of the educational product outside of the educational discourse is why such a technocratic approach is sometimes identified as training rather than education.[104]

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[101] For an interesting investigation of what attorney career choices in the US generated wellbeing see: Lawrence S Krieger and Kennon M Sheldon, 'What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success' (2015) 83 George Washington Law Review 554.

[102] For a critical account of just such an aberration in US school education see: Diane Ravitch, *The Death and Life of the Great American School System: How testing and choice are undermining education* (revised ed, Basic Books 2016), Chapter 2: 'Hijacked! How the Standards Movement Turned Into the Testing Movement'.

[103] Hilary Sommerlad, The new 'professionalism' in England and Wales: talent, diversity, and a legal precariat in Spencer Headworth, Robert l Nelson, Ronit Dinovitzer and David B Wilkins (eds) *Diversity in Practice: Race, Gender, and Class in Legal and Professional Careers* (Cambridge University Press 2016), 226.

[104] The existence of two knowledge producing sectors, the academy and the professions, has caused a tension in legal education since the common law became a university taught subject. Sometimes the tension is argued out in a contrast between liberal arts and training; sometimes as a conflict between a theoretical or practical approach; sometimes as black letter versus contextual legal education. The substitution of the regulator for the profession in the conflict makes the centrality of power in these debates more obvious – in part it is about who gets to define and control and evaluate legal education.

Thus, the conceptual frame used in the LETR reflects a common sense approach to education expressed through the knowledge transfer metaphor of teaching and learning. The LETR was informed by the regulatory mission of the commissioning bodies. Obviously, the approach has a product (outcomes) not process focus. It naturally generates an evaluative criterion of efficiency: one should generate the outcomes at the least cost in time and resources.[105]

The article focussed on one problematic aspect of an outcomes-based approach to legal education: the risk of the marginalisation or even exclusion of non-assessable but important educational objectives from legal education, specifically from the undergraduate law degree. The idea was thereby to identify the need to counterbalance the regulatory frame with appreciation of student-centred concerns, specifically the formation of a student ethical identity. If personal ethical identity is not suitable for, or capable of, reliable assessment, then an aspect of legal education highly valued by stakeholders was at risk from the structural concepts relied upon in the report. Two specific problems posed by the conceptual frame of the LETR were examined in the article.

First, as assessment is a proxy for any learning outcome that is not a rote reproduction of material the emphasis on assessment was distortive of educational values. This problem is exacerbated when the desired outcome is a change in behaviour over time, as it is for ethics and values education. This threatened a second order problem. Responding to an assessment about values in a way that misrepresents one's true values might be instrumentally rational (obtain good assessment marks) but would certainly be hypocritical. In other words: attempts to assess might inculcate dishonesty and betrayal of personal integrity in the context of legal education.[106] This would be facilitating the internalisation of an undesirable value. This is one important reason for education to recognise the

[105] Such an approach to learning is of course familiar from the bureaucratic management of teaching and learning in the modern UK university and has developed in part as an attempt to undermine teaching and assessment that was based upon unarticulated aspects of cultural capital. For a classic account of the role of cultural capital in higher education assessments in twentieth century France see: Pierre Bourdieu, *The State Nobility* (Polity Press 1996).

[106] Ruth W Grant, *Hypocrisy and Integrity: Machiavelli, Rousseau, and the Ethics of Politics* (University of Chicago Press 1997), 62-75 where she distinguishes three types of hypocrite: cynical, complacent and righteous antihypocrite. Either the cynical or the complacent seem to be potentially in issue in ethics testing. See also: Angela Duckworth, 'Don't Grade Schools on Grit' *New York Times* (New York 26 March 2016) https://www.nytimes.com/2016/03/27/opinion/sunday/dont-grade-schools-on-grit.html accessed 17 March 2019.

educational value of learners' critical engagement with learning outcomes. Such critical engagement with the learning outcomes can, and where appropriate should, be rewarded in assessment or academic feedback. Strong and deep ethical beliefs can be forged through critical reflection upon socially endorsed values and practices.

Second, ethical and value positions are contentious. Contentious substantive ethical or value positions challenge the appropriateness of setting substantive learning outcomes in this domain. The technocratic aspect of the frame obscures the salience of this issue. Such a frame obscures valid value pluralism and makes it difficult not to confound propaganda aims with educational aims. When one sees the consideration of values, and their rejection or adoption as part of a learner's identity project this issue becomes very sensitive indeed. The dogmatic assertion, teaching, and assessment of "acceptable" value positions, whether explicitly or implicitly embedded in learning outcomes, runs directly counter to the proudest rhetoric and tradition of the liberal undergraduate degree.[107] What is needed is defence of any values necessary to legal education, and recognition of the educational validity of those values within the realm of legitimate pluralistic dispute.[108]

The proposed resolution to these problems in this article was to drop any rigid adherence to the learning outcomes and constructive alignment model of legal education in this domain and to substitute one concerned with the learner's identity project at least in the undergraduate degree. Professionalism is an aspect of identity, and professional ethics inform a professional identity. However, mere recitation and application of ethical codes to hypothetical scenarios is a weak and limited approach to values and ethics in legal education.[109] The article sketched an influential analysis of the factors required for effective

[107] Anthony Bradney, *Conversation, Choices and Chances: The Liberal Law School in the Twenty-First Century* (Hart Publishing 2003), chapter 2.
[108] An idea analogous to the idea of reasonable pluralism developed by John Rawls, *Political Liberalism* (Columbia University Press 2005), 36-38.
[109] William H Simon, 'The trouble with legal ethics' (1991) 41 Journal of Legal Education 65; Julian Webb, 'Conduct, Ethics and Experience in Vocational Education: Opportunities Missed' in Kim Economides (ed), *Ethical Challenges to Legal Education & Conduct* (Hart Publishing 1998), 271; Andrew Boon, *The Ethics and Conduct of Lawyers in England and Wales* (Hart Publishing 2014) chapter 6 'Education'. See also: Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard University Press 1993), Introduction; William H Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Harvard University Pres 1998)'Introduction'; Stuart A Scheingold and Austin Sarat, *Something to Believe In: Politics, Professionalism, and Cause Lawyering* (Stanford University Press 2004), chapter 3: 'Beating the Odds: cause lawyering and legal education'; David Luban, *Legal Ethics and Human Dignity* (Cambridge University Press 2007), Part I: 'The Ethics in Legal Ethics'.

ethical action.[110] Some (ethical reasoning and practical reasoning for efficacy) had important problem-solving cognitive elements. However, others (sensitivity and motivation) had important identity aspects and were less cognitive in nature. A strongly ethical or value led educational process would be concerned not with passing an assessment in ethics but in engaging with ethics as part of the learner's identity project. This would no doubt generate knowledge and understanding of ethical discourse and be a site for critical thinking. However, facilitating the development of self-identity is an important educational objective and is not assessable as a learning outcome.

This is connected to the final element in the article – that in the domain of values, ethics and identity a technocratic (or positivistic) approach to legal education is untenable. Values and ethics are not merely cognitive, indeed their importance to the professions and potential role in the integration of legal education depend upon this. It is possible to claim academic practice should be concerned only with argumentative form and not truth.[111] It is possible to treat legal professional ethics as mere rules that must be known and followed. However, the article argued these positions would be failures of educational duty. It argued that there is an imperative to support the learner in her identity project. Furthermore, that the fulfilling of this duty strengthens legal education, and benefits the regulation of the profession when professional ethics are internalised by neophyte legal professionals.

3.2 Relation to 'What Students Care About'

The article was part of a special issue of The Law Teacher responding to the LETR. However, the idea of the student identity project (or third apprenticeship) was a direct development of the concerns of 'What students care about'. The idea of second order desires (desires to desire) aligns with ethical motivation in Rest's four component model of ethical action.[112]

[110] James R Rest, 'Background Theory and Research' in James Rest and Darcia Narvaez, *Moral Development in the Profession: Psychology and Applied Ethics* (Laurence Erlbaum Associates 1994).
[111] Stanley Fish, *Save the World on Your Own Time* (Oxford University Press 2012), 22-37. Although Fish argues in effect that the learning outcomes must always be capable of being the subject matter of educational discourse – what he calls "academicizing". Therefore, the approach of the LETR may go further than Fish in some respects in its rejection of concern with the identity (character) of the learner.
[112] James R Rest, 'Background Theory and Research' in James R Rest and Darcia Narvaez (eds), *Moral Development in the Professions: Psychology and Applied Ethics* (Lawrence Erlbaum Associates 1994).

The rather acontextual account given by Frankfurt in his published words is placed within a developmental and educational context. The basic methodological approach is continued, and the article uses ethical, sociological and educational concepts to give some content to "the interest of the learner" as that phrase is used in student-centred approaches to education.[113]

Thus, in 'Values, ethics and legal ethics' the student who is to be at the centre of legal education in the question: "What is entailed by a student-centred approach to legal education?" is placed within a social context and so is legal education. 'What students care about' discussed a very decontextualized individual and legal education and how it should be understood never came into analytical focus.

The article also attends to the institutional context of the discussion itself. The regulatory perspective of the LETR was not an arbitrary or chance one, it was a function of the identity of the research funders. The tendency of constructive alignment to become assessment driven education is tied to the bureaucratic rolling out of the idea,[114] and its congruity with an international regulatory model of "accountability" and "transparency" in modern governance.[115]

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[113] See: Dewey, (n 4) and John Dewey 'Interest in Relation to Training of the Will' in John J McDermott (ed), *The Philosophy of John Dewey: Two Volumes in One 1 the Structure of Experience 2 The Lived Experience* (University of Chicago Press 1981).

[114] John Biggs, 'Constructive alignment in university teaching' (2014) 1 HERDSA Review of Higher Education 5; John Biggs and Catherine Tang, *Teaching For Quality Learning At University* (4th edn, Open University Press 2011).

[115] Michael Power, *The Audit Society: Rituals of Verification* (Oxford University Press 1997), chapter 1: 'The Audit Explosion'; Marilyn Strathern, 'New Accountabilities: Anthropological studies in audit, ethics and the academy' in Marilyn Strathern (ed), *Audit Cultures: Anthropological studies in accountability, ethics and the academy* (Routledge 200); Jamil Salmi, 'The growing accountability agenda in tertiary education: progress or mixed blessing' (2008) OECD Programme on Institutional Management in Higher Education available at: http://www.oecd.org/site/eduimhe08/41218034.pdf and Jamil Salmi, The growing accountability agenda in tertiary education: progress or mixed blessing (2009) Education working paper series no 16 available at: http://siteresources.worldbank.org/EDUCATION/Resources/278200-1099079877269/547664-1099079956815/EWPS16_Accountability_Tertiary_Educ.pdf last accessed 2 July 2018
Salmi identifies faculty as the problem constituency (educational professionals) at p vii 2009 and p 6 2008: "… institutional leaders often face difficulties in convincing their constituencies, especially faculty."
Jo Johnson, 'Embracing accountability and promoting value for money in Higher Education' (2017) Speech to Universities UK Annual Conference 7 September 2017 available at: https://www.gov.uk/government/speeches/jo-johnson-speech-to-uuk-annual-conference last accessed 2 July 2018. Ellen Hazelkorn, 'Reshaping the world order of higher education: the role and impact of rankings on national and global systems' (2017) 2 Policy Reviews in higher Education 4 sees the growing regulatory apparatus as a response to universities becoming civilly disengaged and, at 20 : "creating a vacuum, pushing the state, often controversially, to step back in, to (re)sume a strong(er) co-ordinating role to oversee and reaffirm the public good by way of new regulations, national strategies, frameworks and funding mechanisms.

Thus, the two pieces are tied together by the concern with the student's experience of educational processes. The book chapter articulated issues of importance at an individual level of analysis, and the article identified ways that an awareness of the importance of the learner's development illuminated problems inherent in analyses that neglected the issue. However, it also illustrated how important it is to consider both aspects of education, the teaching (outcomes and constructive alignment) as well as the learning (self-identity). This in turn highlighted how important it is to have a developed discourse on values, and specially some approach to identifying those thought necessary to the discipline and those that exist in a realm of reasonable pluralism. Finally, the importance of viewing education as a process, rather than a product, was brought home by the analysis of the inherent difficulties around assessment of certain valid educational aims. These issues were developed further in the book chapters from *Uses of Values in Legal Education* that form the final part of this thesis.

3.3 Reception and Significance of the Article

3.3.A. Metrics and Impact

The article has been cited four times according to Scopus.[116] It has a Field-Weighted Citation Impact of 1.11 which is just over the average which is normalised to 1.0. PlumXMetrics shows 101 views of the abstract, 16 full text views, 11 link-outs and 9 captures.[117] In addition I have sent one copy to an academic by personal request.

The Law Teacher is probably the most influential journal in the legal education field in the UK. Certainly, the critical stance taken of the LETR has become far more prevalent than when the article was published.[118] The article stands as a contribution to the debate over undergraduate legal education in the UK.

[116] Also, once according to Google Scholar – unfortunately, it is not possible to know if this is one of the citations picked up by Scopus or not.
[117] https://www.scopus.com/record/pubmetrics.uri?eid=2-s2.0-84893502816&origin=recordpage accessed 25 February 2019.
[118] See the special edition of The Law Teacher: 'From LETR to SQE' (2018) 53(4) The Law Teacher 379.

3.3.B. Significance

As noted above, the article contextualised the student and legal education and thereby the research question, but context is not obvious or given. Context has to be provided by credible evidence backed sources. This involved bringing several extant sources together and making connection across discourses. Thus, the article continued in the multi-disciplinary spirit of 'What students care about'. Literature from sociology, ethics, and education (legal and ethical) was reviewed.[119] An effort was made to identify common concepts that may have been hidden behind disparate terms across the disciplines. This effort facilitated a significant and novel syntheses of the sources.

This situating of Frankfurt's work in a sociologically informed context produced new understanding of Frankfurt's work. It linked Frankfurt's concern with second order desires to questions of identity. What one cares about is important in narratives of the self that constitute the reflexive project of the self that informs self-identity as these terms are used by Giddens.[120] Two things can be taken from this. First, Frankfurt illuminates an aspect of the student's emerging adult identity that looks both backward and forwards in time and is impacted by developing ideas about the student's self. Second, Frankfurt can be seen as a theorist and expositor of the reflexive project of the self that is characteristic of late modernity.

Giddens' concept of the reflexive identity project was presented as a feature of late modernity. It was not limited to ethical identity, nor work identity, but encompassed all potential social roles. Ethical motivation is part of a model for successful ethical action that is intended to be universal. Thus, if we restrict our concern to contemporary ethical character and ethical action, then, conscious ethical motivation must be developed through the self-reflexive personal narrative. Ethical action is salient across all social roles. Thus, concern with one's ethical identity is an aspect of the broader self-identity project

[119] 'Values, ethics and legal ethics' (n2), 24-30.
[120] Anthony Giddens, *Modernity and Self-identity: Self and Society in the Late Modern Age* (Polity 1991), 242-244.

generated by the loss of inherited traditional social roles and associated lifeworld.[121] Aspects of the modern lifeworld are always at risk of a reflexive examination and removal to the realm of conscious knowledge.[122] Ethics can no longer be merely accepted but require consideration and incorporation into the self-narrative.

Thus, I suggested a synthesis of the self-narrative (Giddens) with the conscious formation of ethical motivation (Rest and Narvaez).[123] This enables the placing of ethical identity within a broader context of self-identity and to bring the ethical consequences of the modern self-identity project into sharper focus.

The third apprenticeship of *Educating Lawyers* is situated in the US law school in the report. Given the structure of US legal education that means it is situated in an education designed to socialise and prepare students for legal professional practice. As such it is intended to inculcate a set of professional ethical attitudes, a process that is in part conducted through express teaching of legal ethics. *Educating Lawyers* identified this aspect of both unconscious (socialised) and conscious (self-narrative) identity formation as the third apprenticeship. I argued this third apprenticeship is the ethical aspect of the self-identity project that leads to moral motivation.

To conclude this account of the synthesis in this article: the third apprenticeship is not peculiar to professional or legal education but is part of a universal identity project in the developed world, an identity project that will influence and may determine the presence or absence of moral motivation. Thus, the third apprenticeship and a concern with ethical

[121] Lifeworld is used here in the sense it is used by Habermas: "lifeworld contexts … provide the backing of a massive background consensus … shared, unproblematic beliefs … nourished by these resources of the *always already familiar*" and The lifeworld, of which institutions are a part, comes into view as a complex of interpenetrating cultural traditions, social orders, and personal identities" Jurgen Habermas, *Between Facts and Norms* (Polity Press 1997), 22 and 23. The phrases "life world" and "life-world" as used by Peter Jarvis seem to have a similar meaning: "our own life world upon which we can presume in an almost unthinking manner", "every implication within the life-world goes on within the milieu of affairs which have already been explicated, within a reality that is fundamentally and typically familiar." Peter Jarvis, *Teaching, Learning and Education in Late Modernity* (Routledge 2012), loc 1232 and loc 1902. The key reason to prefer the formulation by Habermas is that his lifeworld is a social shared phenomenon rather than an internal phenomenon of an individual as the terms seems to be when used by Jarvis. However, it may simply be that Jarvis is explicating the individual learner's experience, and he would agree that the lifeworld is shared. The concept is important for Jarvis as it is changes to the taken for granted life world that constitute learning.

[122] To thematise lifeworld belief is to disintegrate or decompose it, Ibid 22-23.

[123] Of course not all ethical motivation is created consciously, much of it might be the product of socialisation – an aspect of the lifeworld. Thus, the two concepts overlap rather than collapse into each other.

identity is not tied to professional education per se and can be used to inform the curriculum and educational practice of undergraduate education.

This synthesis was developed and applied in the context of the LETR which used quite different framing concepts, as noted above. LETR was not focused on the practice of legal education, nor upon the extra-regulatory objectives of legal education. However, it did share a concern with ethical character formation congruent with my concerns with the learner's self-identity project, and specifically its ethical component. Bringing these two disparate approaches together permitted a critique of the conceptual approach of the LETR in the ethical realm. This critique was novel and undermined the subsequent use made of the LETR by the Solicitors Regulation Authority.[124]

The article also permitted an exploration of the purpose of undergraduate legal education. The conceptual framing had the benefit of avoiding an account based upon a contradiction between liberal or educational purposes and professional or training purposes. Clearly, professional character (suited to a legal professional) is one possible ideal outcome of an ethical self-narrative, and not a necessary one. By placing the third apprenticeship into a broader context its specificity is lost, it becomes one identity a student can endorse and adopt, not a requirement of the degree course. It also becomes an exemplar of an ethical self-identity project as part of the broader self-identity project. This frees up the possibility for critical examination of current professional ethics, as well as the exploration of alternative ethical identities. It also makes the professional identity one that is useful to offer, explicate, and explore as part of law students' education.

A student-centred approach to education makes the development of the learner the key criterion for evaluation of the educational endeavour. This focus can draw criticism as it seems to be in tension with the reproduction of the discipline and in law of the legal professions.[125] However, the application of the synthesised sources to undergraduate legal education demonstrated that any tension can be overcome. Law students choose to study law, and it is perfectly reasonable to introduce them to the demands and ethical constraints of a legal professional identity. At the same time there is no warrant, given student

[124] See: The Law Teacher (2018) 52(4), 'From LETR to SQE' a special issue devoted to the dubious development of the Solicitors Qualifying Examination (SQE) from the LETR.
[125] I explored one aspect of this tension in chapter one of *Uses of Values* (n 3), 3-4.

destinations, to insist students adopt this identity or pretend to adopt this ethical identity in assessments. An undergraduate curriculum that manages to engage with ethical identity is valuable as such,[126] and it offers support in the difficult self-identity project forced upon students by late modernity. Legal professional identity can be a vehicle for such ethical reflection.

Thus, the article shows how legal ethics and professional identity are not intrinsically aspects of a training model of undergraduate education. Rather they can be a way to explore issues of self-identity and personal growth and development, tasks characteristic of the ideal accounts of the liberal undergraduate degree. The article made this possibility apparent through its engagements with, synthesis and application of, a range of multi-disciplinary sources which were subjected to exploration using interpretative techniques drawn from academic law. This generated a novel insight and made an original contribution to the ongoing discourse on the purpose of the undergraduate law degree.

3.4 Reflections and Connections

The article left several issues under-explored.

There was no engagement with substantive values in legal education. It was established that the undergraduate degree should aim to assist law students with their personal identity projects, but beyond exploring the professional identity there was little consideration of the proper limits of such assistance. Specifically, the tension between the third apprenticeship in US legal education and its possible value in legal education in England and Wales was not considered.

Rest's four components of ethical action model was introduced, and used, but, considerations of space left the exposition thin. This was of particular importance in

[126] As argued by: Martha C Nussbaum, *Cultivating Humanity: Classical Defense of Reform in Liberal Education* (Harvard University Press 1998), Introduction; Antony T Kronman, *Education's End: Why Our Colleges and Universities Have Given Up on the Meaning of Life* (Yale University Press 2007), Introduction; Derek Bok, *Our Underachieving Collages: A candid look at how much students learn and why they should be learning more* (Princeton University Press 2009), 58-66; Kwame Anthony Appiah, *The Ethics of Identity* (Princeton University Press 2010), chapter 4: 'The Trouble with Culture'.

connection with moral motivation. An exploration would have permitted links to be made to 'What students care about'.

Happily, these issues could be and were further explored in *Uses of Values* which is the source of the final three publications that make up this thesis.

4. Publication 3: *Uses of Values* Chapter one[127]

4.1 Thematic Summary

Both 'What students care about' and 'Values ethics and legal ethics' identified the importance of reflection upon values taught and values adopted by students for legal education. 'Values ethics and legal ethics' also identified the importance of a willingness to critically examine values embedded in the curriculum for a legal education in order to avoid degeneration into dogmatic training. Hence the importance of articulating and defending the values that I proposed in my research should inform the educator and curriculum of legal education. Articulation and justification of a set of values is the subject of chapter one of *Uses of Values*. The subject overlaps naturally with discourses about the values that should inform legal education in particular and higher education in general.

To be credible, higher education must address plurality of values.[128] It would be possible to argue that there is some identifiable set of correct (true) values that should be taught, and indeed the European university had its origins in a conception of value discourse that was relatively closed (divine revelation and the church were not to be challenged).[129] However, the diversity of modern society, the loss of plausible naivety in the face of cultural difference, and sceptical challenges to certainty of values make this approach impossible to justify. Consequently, the chapter sought to justify a "starting value", followed by identifying a set of "justifiable values" for legal education. Thus, it established purposes or aims for legal education that could be broadly accepted by legal educators.[130]

The idea of a "starting value" was an attempt to recognise the need for an organising principle. An organising principle is not necessarily recognised as having hierarchical priority,

[127] Graham Ferris, *Uses of Values in Legal Education* (Intersentia 2015), 3.
[128] Pluralism as described in Isaiah Berlin, 'The Pursuit of the Ideal', in Isaiah Berlin, *The Proper Study of Mankind: An anthology of essays* (Pimlico 1998).
[129] Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983), Introduction.
[130] Values for legal education *not* values for a legal curriculum – which was considered in chapter 3 of *Uses of Values in Legal Education*.

but it serves to organise and even integrate potentially conflicting values (or aims). Identification and use of such a principle are characteristics of doctrinal academic legal scholarship that is usually directed at the corpus of legal materials.[131] The point is most easily expressed by way of an example. In teaching the law of contract a starting value (principle) for organising an exposition of contract law would be the enforcement of voluntary agreements. In other words, contracts are enforced because they represent the agreement of the parties. This principle does not close down disagreement over why the agreement is enforceable (e.g. reciprocal reliance or the force of promises or economic efficiency), nor does it mean all agreements will be enforced (public policy).[132] Finally, when the agreement comes into existence, what the terms of the agreement are, and what circumstances render it unenforceable are all open questions that appeal to values of certainty, freedom of action, and fairness.[133] The value recognised in enforcing agreements because they are agreements – giving effect to agreements entered into voluntarily despite later regret by one party – is a good starting point as it enables one to make sense of the other values recognised by contract law. Choice of a starting value (principle) is significant because the use of a different starting principle can lead to different substantive results.[134]

The starting value put forward for legal education was to pay regard to the effects of legal education upon the learner: to act in the interests of the students. The contrast was made between postgraduate legal education in the US and undergraduate legal education in the UK, as the US emphasis on preparation for the profession used in the Carnegie report *Educating Lawyers* made more sense in a US context. However, it was also argued that education should focus upon the learners and not upon social ends (e.g. social mobility, economic rejuvenation, acceptance of existing authority structures, professional standards in legal practice) because such aims were often outside of the effective influence of an educational institution. The problem posed by my suggested aim was of course the one

[131] See: Alan Watson, 'The Importance of Nutshells' (1994) 42 American Journal of Comparative Law 1.
[132] PS Atiyah, *The Rise and Fall of Freedom of Contract* (OUP 1985); Robert B Cooter Jr and Thomas Ulen, *Law and Economics* (6th ed, Pearson 2013).
[133] Following typical teaching text order of treatment (e.g. Roger Brownsword, *Smith & Thomas: A Casebook on Contract* (13 ed, Sweet & Maxwell 2015) – offer and acceptance, construction of express terms and default terms, and frustration.
[134] This can be seen in cases like *Foskett v McKeown* [2001] 1 AC 102 in which two potential organising principles were in contestation: unjust enrichment and property.

identified above with learner-centred educational theory – how does one identify what is in the interests of the student learners?

Ascertaining what values best serve the interests of the students is not straightforward. Academic paternalism was considered as a means of doing so, relying upon professional practice as an educator as a source of knowledge. However, low wellbeing of law students suggested this source had not aligned legal education with student interest in the past.[135] Consideration and rejection of the market as a source of information on student interests was postponed to a later chapter (as being too large a subject for chapter one). The only principles of selection identified were avoidance of avoidable harm, respect for learner autonomy, and regard for value pluralism – principles that operate to demand justification of teaching any value and militate against dogmatism and proselytising by educators.

Several values were enumerated, which could be pursued through educational practices as educational aims that were in the interests of the students. First, respect for and facilitation of reflection upon personal and social values, in effect valuing the academic project.[136] The chapter identified Frankfurt, Giddens, and Williams as important theorists who gave content to the idea of reflection on who the self might be and become.[137] Fundamentally, once student autonomy was given value, the question of how academics might support the students in exercising that autonomy well became salient.

Second, building capabilities of students, in particular the abilities to reason soundly and express oneself well, and to pursue truth – which linked back to reflection upon values. The concept of capabilities was taken from the work of Sen and Nussbaum,[138] with some emphasis on Nussbaum reflecting her engagement with the use of capability theory in an educational context.[139]

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[135] As discussed in 'What students care about' (n1) above, and in *Uses of Values* (n 3) at 56-64.
[136] This value of "academicizing" issues would be viewed as legitimate even by Fish, see Stanley Fish, *Save the World on Your Own Time* (Oxford University Press 2008).
[137] Williams' concept of the ground project was an important addition to the theoretical understanding, see: Bernard Williams, 'Persons, character and morality' in Bernard Williams, *Moral Luck: Philosophical Papers 1973-1980* (Cambridge University Press 1981), 18.
[138] Amartya Sen, *Development as Freedom* (Oxford University Press 1999); Martha C Nussbaum, *Creating Capabilities – The human development approach* (Belknap Press of Harvard University 2011).
[139] Martha C Nussbaum, *Cultivating Humanity – Classical Defense of Reform in Liberal Education* (Harvard University Press 1997); Martha C Nussbaum, *Not for Profit: Why Democracy Needs the Humanities* (Princeton University Press 2010).

Third, encouragement of a scholarly community of academics and students. This was justified in three ways: reproduction of the discipline, inculcation of subject identity in the students, and support for the autonomy of the students as learners. It was noted that only the third reason was truly student-centred.

In arguing that these aims were both in the interests of students and appropriate values to inform legal education it was necessary to notice discourses about the aim (what should be valued and pursued) of higher education. Legal education is, in this context, a sub-set of higher education.

The independence, role, and purposes of universities are contentious subjects in the twenty-first century developed world.[140] Discourse tends to assume a necessary tension between disinterested education and research (liberal) and education and research serving social or economic ends: employability and impact (instrumental). If the purpose of legal education, and especially undergraduate legal education, is to serve the interests of students then this offers a means to escape the liberal versus instrumental dichotomy which frames and directs the prevalent discourse. Students have personal and social interests – they are developing their self-identity and then hope to occupy postgraduate social roles. These roles will include economic ones such as jobs or careers, and caring ones such as parenthood or care of parents. Adoption of such roles is often taken to be adoption of adult roles and modern delay in taking them up has been the "objective" aspect of emerging adulthood as a life stage.[141]

4.2 Relationship to publications 1 and 2.

Chapter one of *Uses of Values* addressed the destabilizing effect of a student-centred approach to legal education upon legal education that was revealed by 'What students care

[140] Stefan Collini, *What are Universities For?* (Penguin 2012); Stefan Collini, *Speaking of Universities* (Verso 2017); Martha Nussbaum, *Cultivating Humanity – Classical Defense of Reform in Liberal Education* (Harvard University Press 1997); Stanley Fish, *Save the World in Your Own Time* (Oxford University Press 2012); Anthony T Kronman, *Education's End: Why Our Colleges and Universities Have Given Up on the Meaning of Life* (Yale University Press 2007); Derek Bok, *Universities in the Marketplace: The Commercialization of Higher Education* (Princeton University Press 2009).

[141] Jeffrey Jensen Arnett, *Emerging Adulthood: The Winding Road from the Late Teens Through the Twenties* (2nd edn, OUP 2014).

about' and 'Values, ethics, and legal ethics'. Thus, it was concerned with: What is *entailed* by a student-centred approach to legal *education*?

The progress across the publications discussed so far in this introductory chapter can therefore be schematised as: publication 1 was acontextual; publication 2 positioned the question within a macro context; publication 3 placed the question in a meso context. Of course this schematic carries some distortion: 'What students care about' had some implicit context within a discourse on legal education; 'Values ethics and legal ethics' engaged with different models of legal education – unsurprisingly legal education discourse has an implicit institutional meso level that frames the work. However, the institutional frame itself was not a focus of analysis in the earlier publications.[142]

In developing an analysis of this institutional or meso level, chapter one engaged with values at a substantive level. This was required by the link between values and non-legal norms. Norms are Janus faced: they are generated and sustained by practices; they are generated and sustained by underlying values.[143] Non-legal norms inform, guide, and give meaning to educational practice. They are why we should practise as we do from a viewpoint that is within the practice community. Taking a student-centred approach will impact upon what educational values are justifiable – on the nature of what education is about and therefore what is good educational practice.

This institutional level of analysis situates legal education within higher education. The discussion of what higher education is about is most familiarly discussed in terms of what universities are for. Thus, the purpose of legal education (what is the law school for) is a sub-set of the purpose of higher education (what is the university for) which is a subset of

[142] Institutional is used here in the way North uses "institutions" – not a focus on "organisations" (e.g. universities, legal firms, public corporations) but upon institutional structures (e.g. laws, property regimes, non-legal norms, practices of regulatory bodies or enforcement mechanisms), Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1991). Institutions frame the game and organisations play the game. Therefore, the words do not describe essences but the role of the factor in an analysis – so a state agency may play the role of institution or organisation depending on the analysis.

[143] The first aspect is captured by HLA Hart's idea of the external aspect of law; and the second part is captured by John Finnis' development of natural law from human goods (which are things of value), HLA Hart, *The Concept of Law* (2nd ed, Oxford University Press 2012), 55-58; John Finnis, *Natural Law & Natural Rights* (2nd edn, Oxford University Press 2011), chapters 1 and 4. A very illuminating discussion of norms is: Amitai Etzioni, Social Norms: The Rubicon of Social Science in Amitai Etzioni, *The Monochrome Society* (Princeton University Press 2001), 163. In Etzioni's discussion the first wing is "environmental" and the second is "intrinsic".

the purpose of education (philosophy of education). Chapter one directly addressed these questions, which are unavoidable ones that involve substantive values, in a way that 'What students care about' and 'Values, ethics and legal ethics' had avoided.

4.3 Reception and Significance

4.3.A. Metrics and Impact

As publications 3, 4 and 5 are chapters one, four and eight of my book *Uses of Values* I shall deal with the reception of the book once here, and not repeat the material again below.

A search of WorldCat shows 97 libraries hold *Uses of Values*.[144] The libraries are situated in 11 different countries.[145] The United States and Australia account for the majority of holdings indicating interest in the common law world primarily, although libraries in five civil law jurisdictions hold the book.[146]

The book has been reviewed by Rebecca Huxley-Binns.[147] Googlescholar notes four citations of the book. The Cambridge Core website records 541 full text views.[148] The book is not on the Scopus data base, so it is not possible to ascertain its Field Weighted Citation Impact.

[144] https://www.worldcat.org/title/uses-of-values-in-legal-education/oclc/935611723&referer=brief_results last accessed 22 February 2019.
[145] Australia; Belgium; Canada; Germany; Ireland; Netherlands; Switzerland; South Africa; Thailand; United Kingdom; United States of America.
[146] Belgium; Germany; Netherlands; Switzerland; Thailand. South Africa is a mixed system.
[147] Rebecca Huxley-Binns (2015) 49 The Law Teacher 411.
[148] https://www.cambridge.org/core/books/uses-of-values-in-legal-education/BC60CC3771A04F413B8440BFB6931471#fndtn-metrics accessed 1 May 2019. By way of comparison, another book about a segment of higher educational provision: Howard Thomas, Peter Lorange and Jagdish Sheth, *The Business School in the Twenty-First Century: Emergent Challenges and New Business Models* (Cambridge University Press 2013) shows 404 full text views over the same period (September 2016 to 1 May 2019). See:https://www.cambridge.org/core/books/business-school-in-the-twentyfirst-century/B69AE064BCE7A4DB643045377F22B1EA#fndtn-metrics accessed 1 May 2019.

4.3.B. Significance

Chapter one widened out the subject matter of legal education in the question: "What is entailed by a student-centred approach to legal education?" It did this by developing the idea of education (including legal education) with a specific concern with undergraduate higher education in the UK.

Chapter one set out a robust foundation for a sharable vision of legal educational practice that took seriously the need to adopt a student-centred approach. This required four tasks be carried out. First, it was necessary to destabilise the assumption that common sense and widespread practice proved there was no problem, that what universities were doing was unproblematically justified by the fact they were economically successful.[149] Second, it was necessary to make the case for a student-centred approach to the task. Third, it was necessary to establish a basis for a student-centred practice that dealt with the problem of diversity in the learning community. Finally, it was necessary to deal with concerns around value inculcation based on undeveloped assumptions around value relativism which otherwise make all value convergence seem arbitrary or genuflection before power.

The first task required engagement with economic justifications of the status quo and of educational reform. The book postponed the bulk of this discussion to chapter two, which does not form part of this thesis.

The second task required development of an idea of the abstract law student: identification of common relevant features of law students as learners. This was informed by the synthesis established in 'What students care about'. As noted above, Dewey struggled to articulate a stable account of what was in the interests of learners, and Frankfurt's analysis provided a high level abstract account that was supported (through triangulation) by Damasio and self-determination theory. This was pursued through exposition of the idea of the interests of law students: shared interests of the learners engaged in undergraduate legal education. Chapter one placed this abstract analysis within the social context of late

[149] Ferris, *Uses of Values* (n 3) chapter 2 deals with the economic common sense argument based upon an ideology of market rationality – anything people pay or must be worth what it costs (or people would not pay that price) and the market ensures it is provided as cheaply as it can be provided (or competition would lead to undercutting in the market that would reduce prices). I have dealt above with the common sense metaphor of knowledge transfer and why it is inadequate when viewed from a student-centred perspective.

modernity following the path laid down in 'Values ethics, and legal ethics'. The relevant features identified in the chapter were a reflexive self-identity project and an ambition to graduate and enter into other social roles. Thus, learners have two (not necessarily compatible) interests: in self-development and in preparation for post-education (adult) roles. Therefore, student-centred education should seek to further these ends.

The chapter placed these arguments in a new context – the aims of legal education. Here it explored one dimension of what "entailed" meant in the research question. The position argued for was differentiated clearly from an influential account of legal education that emphasised the needs of the profession by insisting upon the primacy of the student.[150] Thus, the chapter broadened the issue from one concerning undergraduate law students to one concerning undergraduate students including law students. This positioned the research question within discourses about university education, generalising the importance of the research whilst maintaining the focus upon law students.

It is obvious that the two types of interest identified: self-development and post-educational roles are easily assimilated to the two prevalent models of undergraduate education. Self-development with the liberal degree and post-educational roles with the instrumental or training degree. Therefore, the learner centred approach demands some attempt to synthesise or accommodate both models and must be informed by concepts capable of supporting this synthesis. This again reflected a development of the analysis developed in 'Values ethics and legal ethics'. The use of Giddens' sociologically based analysis in this chapter naturally permits social roles to be viewed as features of agency (the self-reflexive identity project), and structure (social roles) or as being concerned with both self-development and post educational roles. It is an analysis that makes the two aims the two sides of a single coin.

Less obvious advancing of these two interests involves a decentring of information transmission in thinking about educational practice (the parcel transfer metaphor discussed above). Any educational process (including knowledge acquisition) is justified by its service

[150] Ferris, *Uses of Values* (n3), 3. The influential account was William M Sullivan, Anne Colby, Judith Welch Wenger, Lloyd Bond and Lee S Shulman, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007).

to the learner's life projects. It is another way of describing a student-centred approach to education.

Given the abstract aim is to serve the students' life projects then there must be accommodation for the concrete and particular student's life projects. Hence the centrality of the third task identified above – the problem posed to a student-centred approach by diversity in the student cohort. A recurring problem of trying to design education that serves learners' interests is that learners have disparate interests. This problem, of diversity of learners' initial self-identity, capability, expectations, and aspirations makes pluralism an essential ingredient in curriculum design.

Pluralism raises the problem of relativism. Once one rejects the existence of a single identifiable solution to any value conflict, then it raises the possibility that all and any proposed solutions are of equal value or worth. Thus, the need for chapter one to engage with relativism and reject it.

Chapter one adds to the existing literature on the purpose of legal education.[151] It attacked the question of what is entitled by a student-centred legal education directly, although not in those precise terms. It is a sophisticated and innovative attempt to articulate a vision of legal education as a type of higher education in the modern world.

The attempt to place legal education within several overlapping but distinct discourses generated new understanding of the problematic nature of legal education. Thus, it placed the legal education binary division between liberal and professional ends into contact with the broader discourses about whether higher education should be "useless" or "useful";[152] it disentangled educational aims from non-educational aims; it suggested a plausible contemporary theory of human flourishing as the purpose of education in the capability

[151] Examples from the UK: Peter Birks (ed), *What Are Law Schools For?* (Oxford University Press 1996); Bob Hepple, 'The Renewal of the Liberal Law Degree' (1996) 55 Cambridge Law Review 470; Anthony Bradney, *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century* (Hart Publishing 2003); (2014) 48 The Law Teacher 1-135 and (2018) 52 The Law Teacher 379-534 - special editions of The Law Teacher.

[152] Stefan Collini, *What Are Universities For?* (Penguin 2012), chapter 3 'The Useful and the Useless: Newman Revisited'.

literature.[153] In developing this contextualised view the chapter asserted, and returned to the central importance of legal education serving the interest of the students.

The chapter moved beyond earlier accounts of the interest of the learner by the reflexive self-identity project typical of late modernity, and the difficulties pluralism caused for people engaged in the self-narratives and life-planning that make up the self-identity project.[154] Thus, it brought into focus difficulties posed to legal education by the culture of late modernity. Throughout the chapter the student whose interest is in question is a member of the modern diverse student population, the institutional context is one of mass higher education. Diverse students bring diverse and potentially conflicting values and tacit understandings informed by their pre-university lifeworlds.

Chapter one rejected any idea that legal education should seek to inculcate some universally valid and integrated set of values to address discordance of student values. Pluralism is the theoretical acceptance of the validity of diverse values. Self-identity is reflexive and pluralism, or its more destabilising cousin relativism, informs and can undermine the project. Therefore, the chapter engaged with pluralism, and its relationship to truth, establishing that legal education should seek truth within a pluralist setting. Thus, a further original synthesis was generated by taking seriously the interests of a diverse student body embarked upon reflexive self-identity projects.

The identification of student interest with student self-identity enabled the third apprenticeship of *Educating Lawyers* to be seen for what it is in a English and Welsh context – one possible model for a life-plan.[155] The Carnegie report has been massively influential in the United States, and elsewhere, and I was anxious to both preserve the progress in envisaging legal education as a student-centred enterprise made in the report and to carefully highlight those areas where it differed from my synthesis that focussed upon the undergraduate law degree in England and Wales.

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[153] Alejandra Boni and Melanie Walker (eds), *Human Development and Capabilities: Re-imagining the university of the twenty-first century* (Routledge 2013) shows a similar inspiration and articulates congruent vision of higher education.

[154] Using self-narrative, life planning and self-identity as the terms are used by Giddens in Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Polity 1991), 242-244.

[155] *Educating Lawyers* (n 88).

Finally, chapter one set out an original analysis that identified some previously unperceived tensions between legal education and education. The tensions are identified as lying not in the difference between liberal education and professional training but between the ethic and openness of the educator and the ethic and openness of the lawyer. Lawyers in legal practice need to be more self-protective than lawyers in educational practice, and this difference between the two professional practices (legal and legal educational) were identified as a source of confusion for legal education.

Thus, chapter one is an original work of synthesis that advances the work of Dewey on the student interest and modifies his theory making it applicable to higher education in late modernity. Modernity is characterised, in the UK at least, by student diversity, value pluralism, and mass legal education. Politically and institutionally the dominant discourse on the purpose of universities is economic, reflecting the ideological attraction of the market. The vision set out in the chapter rejected economic reductionism and through commitment to a student-centred legal education generated a vision of an education devoted to supporting the self-identity project of the student and the development of student capabilities.

4.4 Reflections and Connections

There is some ambiguity about chapter one's purpose. That is, it is not clear whether it is concerned with the values that should guide educators or about the values educators should adopt and encourage in their students. The organising starting value, to align teaching practice with the interests of students, is clearly addressed to educators. There is no attempt to inculcate the value of putting their own interests first in the students. However, such values as sound reasoning and the promotion of truth are values that, it is argued, should be internalised by educators *and* students. The value of student inclusion within a scholarly community is put forward as a mutual value, as it is only when shared by teachers and learners that it can be fully effective. The discussion that marks transition within the chapter is the advocation of the capabilities approach, and this also is the discussion that attempts to synthesise the valuable contributions of the existing discourses around liberal (educational, self-development, cultural capital, theoretical or useless, life-

long learning) and professional (training, economic advancement, human capital, practical or useful, entry to middle class labour market). Essentially the chapter could have gained in clarity if it had been divided into two chapters with some overlapping material.

5. Publication 4: *Uses of Values* Chapter 4

5.1 Thematic Summary

Chapter four developed the work on student motivation that was started in 'What students care about'. It focussed on application of motivational theory through teaching practice and curriculum design. It also identified possible interference problems that can arise from incoherent design of a learning environment. Finally, it presented a case for preferring a student-centred approach because it is an ethically superior approach to either coercive or manipulative approaches to student motivation and engagement.

The chapter provided an exposition of the genesis, the main features of, and some detail on relevant aspects of self-determination theory.[156] The genesis was necessary to support the later explanation of inconsistency between self-determination theory and behaviourist approaches to motivation. The detailed account of types of regulation was necessary to show how self-determination theory can guide the design of teaching materials and the learning environment. Types of regulation is the term used by self-determination theorists when describing the types of motivation being experienced by an individual. The exposition developed examples based in legal educational practice to help the reader to follow the distinctions between types of motivational regulation.

Having explained how self-determination theory approaches motivation, the chapter explained how behaviourist informed learning theory approached the same subject. This was necessary because behaviourist theories inform many people's common sense approach to motivational problems. If someone is not doing something that a person with power wants them to do then the person with power can motivate them by offering a reward or threatening a punishment.[157] Such motivation is external as it originates outside of the agent. In higher education this understanding of motivation can lead to trying to use assessment to control the activity of students.[158] It is important to realise that this common

[156] See: 'What students care about' (n 1), 205-207; and the text above between nn 59-63.
[157] Money is a form of power, as is institutional office, or physical strength.
[158] Marks for attendance or seminar contribution – this is a feature of much learning outcome/constructive alignment work. The problem arises when educational practice becomes assessment driven. For a critical

sense approach is based upon one or more theory of learning, and that those theories that it is based upon are deficient.[159] Furthermore, as the chapter went on to explain, the common sense approach can have strongly negative effects on learning because the efforts to manipulate or coerce interfere with learner motivation.

Given the chapter argued that common sense approaches were problematic, a message that will always run into resistance, an element of triangulation was used. Although the explanation for the genesis of self-determination theory gave a persuasive reason to reject fundamental elements of the behaviourist approach to motivation, it is relatively technical and may not be seen as having general application. It is possible to see self-determination theory as concerned with peripheral rather than paradigmatic motivational situations.[160] Therefore, the chapter gave an account of other research which has identified the interference effects, in educational theory,[161] economic theory,[162] and political theory.[163] These brief accounts focused upon the interference effect that can be caused by attempting to introduce an external motivation through reward or punishment in a situation where internal motivation exists, the effect is to reduce motivation - the relationship is antagonistic not aggregative.[164] This in turn opened up the three types of motivational intervention one might attempt, coercive, manipulative, or collaborative. These would

account see: Kohn A, *Punished by Rewards: The Trouble with Gold Stars, Incentive Plans, A's, Praise and Other Bribes* (Houghton Mifflin 1999).

[159] Two theories of learning. One is behaviourism, classical and operative conditioning. The other is in economics which has two traditions, one looking at the system features that encourage or lead to learning (with a preference for good learning – productive learning that leads to greater productivity) and one based on a mixture of axioms and utilitarian theory dealing with motivation of individual actors.

[160] This is a fallacy, as contemplation of informal learning in children makes obvious. A human baby does not learn to interact with its carers due to rewards it has received or punishments it fears, and does not learn to speak in response to external demands. See: Jerome Bruner, *Child's Talk: Learning to Use Language* (W W Norton & Co 1983); Margaret Donaldson, *Children's Minds* (Harper Perennial 2006); John Bowlby, *The Making and Breaking of Affectional Bonds* (Routledge 2005). The human baby's predilection for interaction is probably linked to evolutionary pressures that meant that such predispositions enhanced its chances of survival, but they operate on organisms over time not as motivations of individuals, see: Sarah Blaffer Hrdy, *Mothers and Others: The Evolutionary Origins of Mutual Understanding* (Harvard University Press 2011). Infancy and childhood are not peripheral to human development, and language acquisition is one of the most impressive feats of learning people accomplish. External motivation is peripheral here and intrinsic motivation is central. The primacy often given to external motivation is not warranted by the behaviours that call for explanation.

[161] Alfie Kohn, *Punished by Rewards: The Trouble with Gold Stars, Incentive Plans, A's, Praise and Other Bribes* (Houghton Mifflin 1999).

[162] Bruno S Frey, *Not Just for the Money: An Economic Theory of Personal Motivation* (Edward Elgar 1997).

[163] Ruth W Grant, *Strings Attached: Untangling the ethics of incentives* (Princeton University Press 2012).

[164]. Roland G Fryer Jr, 'Financial Incentives and Student Achievement: Evidence from Randomized Trials' (2011) 126 The Quarterly Journal of Economics 1755 gives clear evidence of the lack of efficacy of attempts to use economic behavioural motivational tools in an educational setting.

operate through threat, reward, or persuasion respectively. It was argued that persuasion, joining in a common endeavour, was not only most efficacious but also ethically superior.[165]

5.2 Relation to earlier publications

What leads to learners learning and what impedes them is clearly a subject of inquiry for any approach to education that is student-centred. Once one takes the role of the learner in education seriously the question of what they are motivated to do (what they are trying to do) is of obvious importance. Thus, chapter four took an interest in student motivation as entailed by a student-centred approach to legal education.

As noted above chapter four developed and elaborated upon theories and problems of motivation first explored in 'What students care about'. Between the two publications were several other publications and oral presentations concerned with the issues of student motivation and curriculum design.[166] The chapter was the fullest account of the theory and its use in legal education that I have published and was an elaboration of this earlier work in this regard. The only novelty in this respect was the use of the examples drawn from my experience as a law student and articled clerk.

In the contrasting of self-determination theory with behaviourist approaches to motivation the chapter breaks new ground in my work. There are two important insights. First, that motivational theories are components of learning theories. Second, that the motivational theories used (including common sense) are not simply a matter of preference because in practice manipulative theories interfere with the learner's educational experience and specifically the relationship of teacher and learner. This in turn links to chapter one and the values that should inform educational practice.

[165] In this the chapter followed Ruth W Grant, *Strings Attached: Untangling the ethics of incentives* (Princeton University Press 2012), chapter 4: 'Ethical and not So Ethical Incentives'.

[166] Rebecca Huxley-Binns and Graham Ferris, 'Putting Theory into Practice: Designing a Curriculum According to Self-Determination Theory' (2013) 19(3) The International Journal of Pedagogy and Curriculum. Graham Ferris and Rebecca Huxley-Binns, 'This is why I took a law degree in the first place. This is what I thought I would be doing. It is such hard work, but I am loving it' (Association of Law Teachers Annual Conference, Cardiff, April 2011); Graham Ferris and Rebecca Huxley-Binns, 'For Learning's Sake' (Association of Law Teachers Annual Conference, Oxford, April 2012).

Chapter four less obviously also develops the concern of 'Values ethics and legal ethics' with the student identity project. This is because the intrinsic of intrinsic motivation is built into the self-awareness and self-concept of the student. The intrinsically motivated student shares clear links to the wholehearted person in Frankfurt's work.[167] Identified regulation, as the term is used by self-determination theorists, on its face has a relation to the student's identity project.[168] Integrated regulation is in the fortunate position of not having (or not being aware of) any conflicting desires.[169]

This deep linkage is perhaps most easily noticed in the ethical conclusion of chapter four: that efforts to persuade a student to engage in a common endeavour are the ethically superior way to approach motivation. The challenge should not be for the student to get through the learning experience (pass and be accredited) but for the student to be strengthened or enriched in a way that student values. The educative process should be viewed by the student as serving the ends of the student. This may leave the student with a relatively external motivation, as the importance of the activity may lie in ends external to the sense of self. However, the more aligned with the self-concept of the student the activity is, then the stronger the motivation. For identified regulation the student has to value the learning experience as an opportunity of building up the self they desire. The teacher seeks to persuade the student that the purpose of the process is not to show competence in assessment but to build the capabilities of the student. The collaborative enterprise is the enrichment of the student through the acquisition of knowledge, skills, understanding, and self-knowledge in ways valued by the student whether for their own sake or instrumentally.

The links with chapter one are multiple. If the teaching is in the interests of the student then it should be possible to persuade the student of their value to herself without any sophistry.

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[167] Harry G Frankfurt, 'Identification and Wholeheartedness' in Harry G Frankfurt, *The Importance of What We Care About* (Cambridge University Press 1998).

[168] It also seems to share characteristics with a person who is resolved in their second order desire in Frankfurt's terms, see: Harry G Frankfurt, 'The Importance of What We Care About' in Harry G Frankfurt, *The Importance of What We Care About* (Cambridge University Press 1998).

[169] Pluralism tells us this is a fortunate and not necessarily possible state, see: Isaiah Berlin, 'The Pursuit of the Ideal' in Isaiah Berlin, *The Proper Study of Mankind: An Anthology of Essays* (Pimlico 1998), 10. As Sandel notes it can be the internal clashes of values that are most difficult to deal with under condition of modernity, see: Michael J Sandel, *Democracy's Discontent: America in search of a public philosophy* (Harvard University Press 1996), 350.

The attempt to find ways each student can gain from the process recognises value pluralism. The gaining of valued characteristics is the building of capabilities. Strengthening powers of reason and expression are aims that find ready endorsement amongst students. Inviting law students into the scholarly community is one powerful way to provide both relatedness and a new potential self-identity. The overarching idea of chapter one that education should be an ethically informed practice is naturally aligned with the emphasis on persuasion and collaboration in preference to coercion or manipulation.

5.3 Significance

Chapter four made new links between learning theory, psychological theory of motivation, economic theory and political theory that are original and valuable in themselves.

The chapter also generated new insight into how self-determination theory might be useful in reflection upon and delivery of legal education. It used both examples from the author's experience as a learner and as a teacher in designing Critical Legal Thinking to illustrate how the theory can be used in analysis and application. Of itself this has novelty and contributes to our understanding of the theory in practice.

The chapter also engaged in an analysis of problems with common sense behaviourism and its theoretical justifications that put together a new synthesis of congruent work from several discourses. At one level this was another example of my use of triangulation. However, viewed from the perspective of educational practice it constituted a strong argument for a major reconsideration of many of the under-theorised assumptions that inform teaching and curriculum in legal education.

The chapter thereby confirmed the importance in educational practice of taking a student-centred approach to legal education. This led to the identification of problems that are obscured if we restrict our view to the intentions of the educator. It also made power relations problematic in a healthy manner, as much educational discourse assumes power is unproblematic and benign.[170]

[170] Not all educational literature by any means for example: Ivor F Goodson, *Learning, Curriculum and Life Politics* (Routledge 2005); David F Labaree, *Education, Markets, and the Public Good* (Routledge 2007); Ted

The chapter is important in the response to the research question because it manages to make concrete an inquiry that can easily become very abstract. Chapter four is an elucidation of what concern with student life projects might mean in terms of teaching practice. The benefits sought are very practical and mainstream – strengthening student engagement is a well-recognised objective for modern mass higher education.[171] An understanding of how unarticulated and erroneous theories of learning can lead to self-defeating practice is important new knowledge. Knowledge and error are embedded in social and professional practices and chapter four is an example of how research can facilitate a renewal of practice informed by theoretical understanding of education from the perspective of the learner.

5.4 Reflections and Connections

Chapter four did not fully develop the ethical case against coercive or manipulative attempts to influence behaviour. The focus on the power of applied theory for educational practice marginalises the ethical issues. The topic was introduced but not explored. Presumably there are legitimate reasons to resort to coercion or manipulation in educational practice, and there is no examination in the chapter of when this might be the case – an issue of potentially great practical importance. This suggests that the topic deserves a more thorough treatment elsewhere. It would naturally fall into a treatment of the ethics of educational practice, a subject I have not researched at length.

Chapter four did not fully articulate the links between the psychological theory deployed, learning theory, Frankfurt's work, and the identity project of the learner. It suggested a valuable synthesis might exist but did not engage in the conceptual analysis that would be necessary to decide if the links were robust, whether it is possible to identify one or a few

Wragg, *The Art and Science of Teaching and Learning* (Routledge 2005). However particularly the more applied literature tends to adopt a technocratic pose that leaves issues of power unarticulated, for example: Stanley Fish, *Save the World on Your Own Time* (Oxford University Press 2012); Heather Fry, Steve Ketteridge and Stephanie Marshall (eds), *A Handbook of Teaching and Learning in Higher Education: Enhancing Academic Practice* (3rd edn, Routledge 2009); Ernest T Pascarella and Patrick T Terenzini, *How College Affects Students: A Third Decade of Research* (Jossey-Bass 2009).

[171] For example, there is a scholarly network: RAISE: Researching, Advancing & Inspiring Student Engagement that has its own journal: Student Engagement in Higher Education Journal.

underlying principles or concepts that could unify the convergent research conclusions it identified. To some extent this inquiry is taken forward by chapter eight.

Finally, chapter four did not lead the reader to a new professional praxis informed by the insights and arguments it contained. If inherited practices and conceptions of the learner and learning are inadequate then where might a reader concerned with her own professional practice go for help in re-imagining and re-enacting her practice? The works referred to in the chapter can be used, but they are directed more towards critique and establishing the need for a new approach than supporting development of new approaches to teaching.

At the most general level building into the curriculum and classroom or clinic interactions autonomy (permitting students to choose, within constraints), competence (setting tasks within the competence of students and developing from that starting point), and relatedness (establishing a sense of community in the student group and with wider communities such as academics or legal academics or lawyers or advisors) should enhance self-determination and support intrinsic motivation. But how to do this whilst continuing to support valid educational aims embedded in earlier teaching practice is not obvious.

Several literatures might be resorted to in order to support the legal educator. The self-determination literature furnishes a wealth of material rooted in the psychological and social-psychological approaches to motivation.[172] The literature is particularly rich in material focussed on the classroom interaction level of teaching and learning,[173] although it is predominantly concerned with the education of children in school not emerging adults in universities. A leading thinker who did try to apply his theories of education and student learning to legal education in the United States was Jerome Bruner.[174] Bruner's work started

[172] A recent authoritative book that would provide an excellent jumping -off point is Richard M Ryan and Edward L Deci, *Self-Determination Theory: Basic Psychological Needs in Motivation, Development, and Wellness* (Guilford Pres 2017). The application of SDT to education (with a focus on schools) is at Chapter 14, and the use of SDT in encouraging successful self-identity projects (with a focus on adolescents) is at Chapter 15.

[173] A useful review of the state of knowledge on the impact of different teaching styles in the early twenty-first century is given in Johnmarshall Reeve, 'Self-Determination Theory Applied to Educational Settings' in Edward L Deci and Richard M Ryan (eds) *Handbook of Self-Determination Research* (University of Rochester Press (2002).

[174] Anthony G Amsterdam and Jerome Bruner, *Minding the Law: How court rely upon storytelling, and how their stories change the ways we understand the law – and ourselves* (Harvard University Press 2000).

in cognitive psychology but took a distinctively cultural turn and may be more congenial to legal scholars who are uneasy in the literatures of experimental and theoretical psychology.[175] Literature on professional education can be helpful and in this connection it is worth mentioning *Educating Lawyers – Preparation for the Profession of Law* and *Teaching as Community Property* each of which make the identity projects of students a central concern, and the second also engages with the identity project of the teacher as well.[176] Finally, the work of theorists of learning may be helpful to those still working out their understanding of the learning process in legal education and what they hope to achieve.[177] Both Peter Jarvis and Knud Illeris provide helpful accounts of learning that encompass adult learning.[178]

[175] Jerome Bruner, *The Culture of Education* (Harvard University Press 1996) might be a good point of departure.
[176] William M Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond and Lee S Shulman, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007); Lee S Shulman, *Teaching as Community Property: Essays on higher education* (Jossey-Bass 2004)
[177] A good introduction to the field is either edition of Knud Illeris, *Contemporary Theories of Learning: Learning Theorists … In Their Own Words* (Routledge 2018) (Routledge 2009).
[178] Peter Jarvis, *Teaching, Learning and Education in Late Modernity: The Selected Works of Peter Jarvis* (Routledge 2012); Knud Illeris, *How We Learn: Learning and non-learning in school and beyond* (Routledge 2016).

6. Publication 5: *Uses of Values* Chapter 8

6.1 Thematic Summary

The chapter has two parts. The first part explored the relationship between moral motivation and identity, the second part was a series of illustrative examples of how one might teach to strengthen moral motivation. The first part recalled the specific issue that started this series of publications, an interest in what students care about. Thus, the chapter is concerned with the role of students' commitments as they inform student identity and influence the taking of ethical action. Thus, the chapter assumed identity is not fixed or given and argued that ethical action is linked to self-identity.[179] In the second part of the chapter the focus was upon the role of education in influencing what students care about. The extensive examples were useful because this is a subject that needs to be approached obliquely, because of concerns about the propriety of value indoctrination, respect for student autonomy, and recognition of pluralism of values.

Chapter eight picked up the unfinished task of chapter four of setting out a robust and articulated synthesis of Frankfurt and the student learner's identity project within a frame that emphasised the moral identity of the student. It was therefore creative of new insights and generated new knowledge so far as it was successful in its synthesis.

The chapter framed the discussion in terms of "moral motivation". This was because the chapter formed part of a series of four chapters (6, 7, 8, and 9) devoted to analysis, and elaboration and explication of how to teach in order to inculcate the four components of ethical action identified by Rest and Narvaez.[180] The four components are described by Rest and Narvaez as moral sensitivity, moral judgment, moral motivation and moral character and the language of chapter eight reflected this terminology. For successful moral action

[179] Personal moral development is a feature of many otherwise disparate approaches to ethical development and ethical education among the pioneers were: Jean Piaget, *The Moral Judgment Of The Child* (Routledge 2001); Erik H Erikson, *Identity and the Life Cycle* (WW Norton & Co 1994); Lawrence Kohlberg, *Child psychology and childhood education: a cognitive-developmental view* (Longman 1987).

[180] James R Rest, 'Chapter 1 Background: Theory and Research' in James R Rest, James R Rest and Darcia Narvaez (eds), *Moral Development in the Profession: Psychology and Applied Ethics* (Erlbaum Associates Inc 1994); *Uses of Values*, 157-8.

each of the four components must be present: the actor must realise there is an issue, understand what the right thing to do is, care about doing the right thing, and be able to act effectively.

Chapter eight is titled 'Ethical Identity' and it argued that moral motivation is another way to think about ethical identity, and that ethical identity is a part of a student's identity project. The problem was approached through an exposition of the research of the Oliners into those who did and those who did not assist Jewish people during the Nazi genocide.[181] This approach grounded the discussion in consideration of effective action, and posed the question in the first instance as an explanatory inquiry into what features of a person are associated with effective dangerous and altruistic ethical action.

The chapter explained that the four components are not an abstract schema of ethical action, and that moral motivation in particular needs to be in place prior to any event that requires ethical action. The chapter developed a metaphor of a spring-loaded trap: the motivational urge to act ethically must be a pre-disposition that will take effect when the agent is presented with some circumstance that is recognised as calling for ethical action - it has been perceived as such and is obviously, or is upon reflection, such a circumstance.

The chapter combined elements from the Oliners' work, Frankurt's work and Williams' work. Anthony Giddens' concept of the identity project in late modernity was used to situate the discussion in an account of the individual response to the social conditions of late modernity. However, Giddens did not populate his concept at the level of specificity needed for the analysis, so apart from situating the issues and supplying the idea of the identity project it played little further role in the discussion. The relevant parts of Frankfurt's work have been explained above when discussing 'What students care about'.

Williams emphasised four aspects of ethical conduct: the ethical demands of relationships,[182] the real risk of ethically motivated action misfiring,[183] the existence of

[181] Samuel P Oliner and Pearl M Oliner, *Altruistic Personality: Rescuers of Jews in Nazi Europe* (Free Press 1988).
[182] Bernard Williams, 'Persons, character and morality' in Bernard Williams, *Moral Luck: Philosophical Papers 1973-1980* (Cambridge University Press 1981), 18.
[183] Bernard Williams, 'Moral Luck' in Bernard Williams, *Moral Luck: Philosophical Papers 1973-1980* (Cambridge University Press 1981); see also Martha C Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (Cambridge University Press 2001).

ethical conflicts (ethical pluralism),[184] and the importance of people's life projects (whether ethical in focus or not) upon their ethical life.[185] Hence it may be seen he was opposed to the placing of ethics outside of the lived experience of people (i.e. against the Kantian noumenal self and area of activity outside the phenomenal world in ethical thought). Clearly, for Williams ethics were a part of life.

The chapter argued that the idea of the reflexive identity project, a feature of modernity driven by the loss of inter-generational social stability (sons not adopting the same roles as their fathers, daughters not adopting the same roles as their mothers), has an aspect concerned with commitment (what people care about). This way of presenting the issue best allowed me to synthesise the second order desire of Frankfurt, the ground projects of Williams,[186] and the "fundamental ethical principles" identified by the Oliners that had been internalised and acted upon by rescuers. Commitment does not need to be a self-conscious volitional act,[187] nor does it need to be ethical, although commitment that leads to ethical action will have at least an ethical component. Modernity has made conscious commitment more important but has not displaced socialisation as a source of ethical commitment.

Thus, Giddens' narrative of the self, Frankfurt's second order desire, Williams' ground projects and the Oliners' character or fundamental moral principle share a subject matter – the ethical identity of the agent (whether modern reflective agent, rescuer of Jewish people, or law student). The concepts are not identical, but they are all concerned with an aspect of the life project – the creation of a narrative of identity – under modern conditions. Therefore, the law students will also be engaged with a life politics and life planning that can and is likely to include ethical commitments that will inform their sense of self and guide their future actions.[188]

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[184] Bernard Williams, *Ethics and the Limits of Philosophy* (Fontana 2006), 174-196.
[185] Bernard Williams, 'Persons, character and morality' in Bernard Williams, *Moral Luck: Philosophical Papers 1973-1980* (Cambridge University Press 1981).
[186] Bernard Williams, 'Persons, character and morality' in Bernard Williams, *Moral Luck: Philosophical Papers 1973-1980* (Cambridge University Press 1981) 12-14. Ground projects are long term and important projects that give an individual's life purpose across time.
[187] In this respect the treatment is different from that associated with existentialism with its emphasis on personal conscious commitment.
[188] For narrative of the self, life politics and life planning see: Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Polity 1991) nn 120 and 154.

This final example of triangulation is strongly suggestive of something else. The convergence of the thinkers, whose starting points differ quite markedly,[189] suggests the ethical identity project is a feature of modernity for young people at least in the developed world. That the educational importance of the issue has increased over the last one hundred years or so. The two world wars, the collapse of the colonial project, genocide, and the crimes of communism have all made ethical complacency about modern society difficult to justify. The rise of new socially created risks has made ethics relevant to wider spheres of concern.[190] Economic change has undermined traditional understanding of work roles across the world. The identity project of late modernity is a product of modern liberties but also of modern insecurities.

Having made these links and argued that this area of the student's development was educationally appropriate, the chapter noted real problems in how an education effective for facilitating desirable moral motivation can be approached. Identity is a uniquely private matter and ground projects (or suitability of second order desires) are not subject to any disciplinary superior expertise in law (or elsewhere in the academy).[191] Here one must be wary of transgressing the proper boundaries of the teacher and student relationship.[192] Ethical identity should not be assessed, and in teaching terms is best approached obliquely.

The rest of the chapter gave a series of examples of how law teachers might approach such issues. This was primarily by making the issues of identity (ascribed and avowed)[193] salient

[189] The thinkers are drawn from philosophical and sociological backgrounds. The classic modern attempt to synthesise the insights of these disciplines is that of Jurgen Habermas. My work is not so ambitious, and Habermas has not engaged with the issues I am concerned with.
[190] Ulrich Beck, *Risk Society: Towards a New Modernity* (SAGE Publications Ltd 1992); Charles Perrow, *Normal Accidents: Living with High Risk Technologies* (Princeton University Press 1999).
[191] Contra: Anthony T Kronman, *Education's End: Why Our Colleges and Universities Have Given Up on the Meaning of Life* (Yale University Press 2007) who argues that the humanities do have useful knowledge and ways of framing the issues that are found in the traditions of the discipline and that can and should be taught.
[192] Kwame Anthony Appiah, *The Lies That Bind: Rethinking Identity* (Profile Books 2018), loc 76, makes the point well for the cognitive sphere: "not by telling you what to think but by providing an assortment of concepts and theories you can use to decide what to think for yourself." Here we are concerned with what people care about – what to feel - and should abjure the temptation of imposition of our beliefs even more seriously.
[193] The contrast between how one is seen or classified by others (ascribed identity) and how one's own commitments and self-identity (avowed) is familiar see e.g. The World Bank Group, Inter Cultural Communication. https://siteresources.worldbank.org/EXTGOVACC/Resources/InterculturalCommweb.pdf last accessed 11 January 2019. Sen makes a similar distinction in Amartya Sen, *Identity and Violence: The Illusion of Destiny* (Penguin 2007) when he contrasts ascribed with self-perceived identity. The important point is of course that the learner commitment is an aspect of avowed identity or self-perceived identity or the narrative of the self per Giddens.

and providing social space and conceptual language suitable to the project.[194] The examples were diverse and fairly well developed, because it is not easy to teach in the absence of relevant disciplinary knowledge. Asking people to use abstract and unapplied extra-disciplinary theory in their educational practice can undermine the feelings of competency of the teacher. When competency is threatened people often become defensive, which can undermine the educative project. Therefore, the chapter recognised the need for guidance and emphasised how difficult the task is, whilst providing methods for attempting it.

6.2 Relation to Earlier Publications

As noted above, chapter eight took up once again the question of what students care about. It also used Frankfurt's work as a key for understanding the nature of what people care about – the idea of the second order desire to distinguish the problem from other types of choice, and his elaboration of limits upon any such choice. The most distinctive development was that this choice was now situated within concerns with the learner's identity and moral action. The link with identity was made in 'Values ethics and legal ethics' which deployed the conceptual apparatus devised by Giddens to the learner and the interests of the learner. However, this article had little focus upon ethical efficacy (ethical action), an aspect that was to the fore of chapter eight. Thus, across the publications the task of synthesis was developed and became more ambitious.

Chapter four was concerned with the ethical quality of the learning environment and student motivation for learning. However, it accepted that greater student engagement was an appropriate evaluative measure in itself. The interest in student self-identity projects was therefore a rather instrumental approach to the issues of student values and student identities - justifying respectful persuasion over manipulation or coercion on efficiency grounds. The alignment with student interests was made in pursuance of the educative project.

In chapter eight this was no longer the case. The chapter showed concern with facilitating ethical action. It accepted that the values of students should be self-determined. Therefore,

[194] Kwame Anthony Appiah, *The Ethics of Identity* (Princeton University Press 2005), loc 1067.

it accepted that the nature of ethical action should not be determined by the teacher. The self-identity project of the student had become the focus of the educative process which should support and align itself with the self-identity project, which would thereby align with student interests. Thus, chapter eight made it clear that student interests are dynamic, not static, (as they shift with student commitments) and that education should serve the self-narrative identity process as a primary aim. In one sense this was a fancy way to express the well-recognised educational aspiration for self-development. It recognised the ambition of the liberal degree, which is concerned with the improvement of the student. In another sense it was rather more impressive as it re-vivified an area of discourse by placing it upon modern, secular and pluralist foundations. It thereby provided a conceptual language that can facilitate the planning and implementation of a legal education that takes seriously the self-development of the law student through legal education.

6.3 Significance

Chapter eight drew together several bodies of work and provides a synthesis of them that is persuasive and useful. A major problem of modern scholarship and research is the failure to recognise the significance of work done in one area of a discipline for work done in other areas of the same discipline and work done in different disciplines.[195] Educational research, as noted above, has tended to borrow methods of investigation from other disciplines. As such it has served as a potential site of inter-disciplinary synthesis. My practice of triangulation also generates an interdisciplinary dynamic. These two features of my work generate a pressure in my research for the identification of common concepts, or principles. Seeking underlying principles that explain disparate decisions is, as noted above, a feature of legal scholarship from its modern foundation in the twelfth century.[196] Thus, my research

[195] Joel Mokyr, *The Gifts of Athena: historical origins of the knowledge economy* (Princeton University Press 2002), chapter 2 'The Industrial Enlightenment'; Joel Mokyr, *The Enlightened Economy: Britain and the Industrial Revolution, 1700-1850* (Penguin 2011). Mokyr explores both relationships between propositional and prescriptive knowledge 9theoretical and applied) and social and economic receptiveness of new knowledge.

[196] Perhaps the most famous use of this lawyerly principle in the natural sciences was by Sir Charles Lyell, *Principles of Geology* (first published 1830-1833, Abridged edn, Penguin Classics 1997) and his principle of "uniformitarianism".

naturally brings together a problem of synthesis with a technique for synthesis. Chapter eight is an example of this process in powerful and effective motion.

In the first part of chapter eight a concern with the learner's experience of education generated a new understanding of the human experience of life under modern conditions. The problem of choice in the value sphere has generated much of post reformation philosophy. It lies behind the search for certainty not rooted in revelation that inspired Descartes, as well as the struggle with volition of the existentialists, and the post-modern attack upon grand narratives that require universal value validity. Giddens has examined how the ordinary individual responds to the problem in his work. Frankfurt has explored the nature of value choice in the life of an individual. Williams has wrestled with ethics in a world where there is no indisputable and clear difference between ethical and non-ethical values. The Oliners have tried to understand how and when ethical behaviour could and did survive the Nazi upsetting of values through its ideology of force, leadership and race. Chapter eight was able to synthesis these bodies of work because they are all concerned with the modern problem of pluralism of values, the lack of secure absolute knowledge of right and wrong or good and bad.

Chapter eight elaborated and developed understanding of the Rest and Narvaez four components model of ethical action. Specifically, it focused on moral motivation which has not received substantial attention. It dispelled a possible misconception about the model (that it is a schematic account of how ethical action arises) and brought into sharp focus the necessity for commitment prior to the events that require ethical action. Thus, it highlighted the importance of educational effort in the area of moral motivation.

The chapter utilised Frankfurt's work in its exploration of moral motivation, self-identity, and beliefs that are constitutive of the self. This was an extension of insights identified by Frankfurt in his own writings. Moral motivation is present when someone cares enough about something to act upon this concern. A second order desire is the desire to care about something, and it becomes constitutive of the volitional self. If one cares about something and one acts to further the interests of what one cares about then one is wholehearted in the action. One not only cares enough to act but acting in this manner is self-affirming. Having a second order desire to act ethically is to be motivated to act ethically. In these circumstances acting will affirm one's volitional identity, failure to so act will damage it.

Thus, I used Frankfurt to analyse moral motivation, extending his work to a new purpose and forging a new understanding of the nature of moral motivation.

Chapter eight identified common concerns amongst the authors it considered. It identified analogous categories and showed how each body of work can be used to inform and elaborate upon the others. By using different approaches to problems of individual commitments with ethical consequences it created a multi-faceted perspective on the issues it discussed. The resulting synthesis provided new understanding of the work synthesised and of the subject matter under investigation.

Finally, the chapter considered possible applications of the theoretical insights it provided. This concern with theory grounded in the demands of professional teaching practice produced valuable new knowledge at the applied level. In chapter eight it both illuminated the possible teaching value of the examples it explored and added to the professional knowledge of its academic readership.

6.4 Reflections and Connections

Chapter eight was effective in synthesising some of the major authors that have been used in my research. However, it did not enter into an account of the nature of identity and its possible influence, positive and negative, in legal education. If, as it is argued, the student identity project is a vital concept for student-centred education then it is a concept that should be explicated and explored. A similar point might be made about the concept of moral development. Whilst the idea of moral change over time is a common understanding, the constraints over that change and its possible termini are not a matter of consensus. Specifically, there is contention in the chapter over whether development is hierarchical and if so whether there is a single developmental apex.

Also, the chapter did not consider the interactions between extrinsic and intrinsic motivational factors. The chapter assumed it was intrinsic motivation that was of interest. The Oliners were concerned with a scenario in which power, the source of positive and negative sanctions, was opposed to moral action. In the context of legal professional ethics negative sanctions attach to breach of the ethical code – so external motivation is clearly

relevant. Motivation derived from moral feelings, motivation to act ethically because one feels it is the right thing to do, was effectively the subject matter of the chapter. However, motivation to act ethically may be non-ethical, or in the case of deceitful actions even unethical. This aspect of moral motivation derived from non-moral purposes was not clearly identified or explored in the chapter.

7. Conclusion

7.1 Development and Coherence of the Thesis

This thesis has been the first articulation of the research question: What is entailed by a student-centred approach to legal education? The writing of the PhD allowed me to identify the significance of the publications to this question and thereby develop new understanding of them. The opportunity to re-visit the original publications facilitated an exceptionally rigorous reflection upon the development of themes and integration of sources.

The "student" of student-centred was subjected to analytical division, in the search for that "student interest" that student-centred education demanded. Students became people divided between their past and future selves, and the significant linkage between these selves was not the body but the self-reflexive identity project, the attempts by the students through narratives of the self to find or impose meaning in their lives. 'What students care about' had left the students the subjects of an ahistorical and acontextual analysis. 'Values ethics and legal ethics' situated them in late modernity embarked upon a project of personal and professional identity.

Given reflexivity, the developing student understanding of what people (including themselves) are like and what is important to people that they obtain through their educational experience has an important impact upon their self-identity project. The values that inform educational practice impact upon the student through their motivating effects in the present and their influence upon character formation in the future.[197] Thus, it was necessary to try and move beyond concern with student values, whatever they may be – which was where 'What students care about' and 'Values, ethics and legal ethics' had left the issue - and consider what values it was in the interests of students as a body to be encouraged to adopt, and in *Uses of Values* chapters 1, 4 and 8 I set sail in these dangerous

[197] Character has been referred to above as "ethical character", "moral character", "professional character", and "Oliners' character or fundamental moral principle". It is of course another way of describing the purpose of the third apprenticeship in *Educating Lawyers* and is constituted in part by the ground projects of Williams.

waters.[198] The student is essentially dynamic, and developmental and social processes complicate the abstract simplicities of value choice. Legal education starts influencing what the student is, and therefore what is in her interest and this makes it imperative to articulate the duty of the legal educator, as attempted in chapter 1 of *Uses of Values*.

Thus, the nature of the student was elaborated upon across all of the publications. The understanding of the nature of the student informed how to identify the interest of the student that should lead educational practice. The application of this developing understanding of the student and student interest in pursuing an understanding of what was entailed by student-centred education upon the understanding of legal education was destabilising. As students, especially young or emerging adults, but all students are engaged in a vital ongoing project of self-identity construction and maintenance. Student-centred legal education should facilitate and support this process. The self-identity project can go well or badly, and it is in the students' interest that it goes well. What values a student commits to will influence whether the project goes well, and therefore, legal educators should concern themselves with the values offered to students in legal education for adoption.

In 'What students care about' the argument was that real educational benefits - in wellbeing, motivation and performance – could be derived by being attentive to what students cared about and how educational practices could engage with those concerns. Essentially, we assumed the practice could be value neutral, and did not impact on educational aims – it was concerned with how legal education was done not with what legal education should try to do. 'Values ethics and legal ethics' attacked this very assumption. I argued that a technocratic account of education obscured power relations and risked either marginalising the students' self-identity projects or even affecting them negatively. A student-centred account challenged assumptions about the limits of educational ambition to assessable outcomes. Education needed to respond to the whole person, because the whole person was learning, making sense of what was learned, and incorporating it into their self-narratives.

[198] The voyage was continued in chapter 3 but that falls outside the scope of this thesis.

In *Uses of Values* the instrumental use of values remained (as indicated by the title of the book) but engagement with value discourse had become an academic duty in chapter 1, and the vital role of ethical education in character formation was the focus on chapter 8. The aim of legal education had been transformed by the need to take seriously the interests of the student.

Thus, over the period of the research the central concepts under investigation developed, becoming more elaborate, and their interaction became a concern of the research. At the same time to support and articulate this elaboration new concepts were introduced and incorporated into the research synthesis. Some thinkers and theories were present from the start until the end: Frankfurt and self-determination theory. Others were introduced later as the research developed: Giddens and Rest and Narvaez in 'Values, ethics and legal ethics'; Williams, Nussbaum and the Oliners in *Uses of Values*.[199]

Therefore, one can clearly identify a process of conceptual development and elaboration over time and the publications evidence a coherent body of research over time (2011-2015).

7.2 The Research was Rigorous

It has been noted above that the research posed problems because of the need to draw upon resources from several disciplines in order to answer the research question. Law as an academic discipline does not so much generate data as try to harmonise and rationalise data in order to make the data coherent and useable.[200] Empirical educational research tends to adopt methods of investigation used in other disciplines, such as anthropology, history, politics, psychology, and sociology.[201] Legal and educational theory tend to use

[199] Frankfurt, Giddens, Williams and Rest and Narvaez are adequately referenced above. See for examples: Martha C Nussbaum, *Cultivating Humanity – Classical Defense of Reform in Liberal Education* (Harvard University Press 1997); Samuel P Oliner and Pearl M Oliner, *Altruistic Personality: Rescuers of Jews in Nazi Europe* (Free Press 1988).

[200] In the words of van Hoecke: "Legal scholars collect empirical data (statues, cases, etc) word hypotheses on their meaning and scope, which they test, using the classic canons of interpretation. In a next stage, they build theories (…) which they test and from which they derive new hypotheses (…)." Mark van Hoecke, 'Legal doctrine: Which Method(s) for What Kind of Discipline?' in Mark van Hoecke (ed), *Methodologies of Legal Research: which kind of method for what kind of discipline* (Hart Publishing 2011), 11.

[201] See n 24. Psychological researchers have authored much educational theory (e.g. Edward L Thorndyke, BF Skinner, Jerome Bruner, Howard Gardner), and the knowledge base they relied upon was derived from the discipline of psychology. Sociologists have been influential in research into the structural forces that have

methods informed by history, philosophy and social science including economics. Both legal practice and educational practice are sources of knowledge and understanding. In short, rigour becomes a contestable concept across disciplines and across disciplinary and practice-based inquiry.

At a methodological level I was aware, at times painfully aware, of the problem of rigour and the danger of confirmation bias. In the past I have taken an interest in the discourses about scientific method and I have read some of the methodological materials generated by social science as a result of my activities in the Graduate school (as it then was) at Nottingham Trent University.[202] I have also supervised research students who have used qualitative research methods which has required awareness of some of the problems of empirical research.[203] Finally, it is impossible to research across disciplines without becoming aware of concerns within disciplines around rigour, reliability, researcher bias, and value assumptions that may distort research questions. Ultimately there can be no universal response to these problems, but I did address the issues in four specific ways.

First, the practices and assumptions of doctrinal academic law were used. In effect legal techniques informed a meta-analysis. Legal reasoning interrogates texts and practices seeking generalisable principles, identifying contradictions, and rejecting logical or practical

impacted upon education (e.g. Emile Durkheim, Pierre Bordieu, AH Halsey, Martin Trow, Michael W Apple), and their knowledge base was taken from the discipline of sociology and its means of inquiry, reasoning and theory building. Anthropologists (e.g. Jean Lave) and Historians (e.g. Richard Aldrich) and political scientists (Robert D Putnam) have also had a significant impact on our understanding of education. Methods of inquiry have naturally been adopted from these and other sources into educational research, and methodological concerns have followed.

[202] Three presentations I gave between 2008-2010 were specifically concerned with these issues: Graham Ferris, 'The use of discipline specific theoretical materials and materials derived from educational theories in structuring curricula in law' (Research-informed Teaching Symposium, November 2008): the presentation was to a non-legal, mostly social science audience; Graham Ferris, 'How do judges and legal scholars make inferences about what parliament intended, about criminal intent and the intent of contracting parties?' (Graduate School NTU, Research Seminar on Researching Beliefs and Intentions, May 2010) presentation to a non-legal, mostly social science audience; Graham Ferris, 'How do judges and legal scholars make inferences about what parliament intended, about criminal intent and the intent of contracting parties?' (NTU Law School Research Away Day, May 2010) presentation to a legal audience. The events were interactive, and the discussions and other papers were as valuable as formulating my own ideas.

[203] Mohd Hwaidi, 'The Impact of the Uniform Customs and Practice for Documentary Credits 600 on Parties under Common Law and Jordanian Law' ((DPhil thesis Nottingham Trent University 2016); Sairah Al-Qasim, 'Legal Education In 'Islamic Law' For Legal Practice In England And Wales: An 'Islamic Law' Framework For Legal Professionals' (ProfDoc Legal Practice Nottingham Trent University thesis submitted 2019); Gabor Andrasi, 'An Overview of the Theoretical Background of Ethics Education in Central and Eastern European Countries' (DPhil Registered Nottingham Trent University 2016).

absurdities.[204] This deployment of practices honed in law provided two benefits. It enabled many sources weak in internal coherence or reasoning to be rejected – thus it gave a critical edge to the research process. It informed a search for underlying substantial similarities – thus it powered the process of synthesis that was a significant feature of the research.

Second, I used a triangulation technique. As detailed above I sought confirmation or disconfirmation from disparate sources. This naturally aligned with and informed the synthesis the research pursued. At a self-conscious level I tried to avoid confirmation bias in my use of triangulation, and I did seek to establish independence of the sources from each other.

Third, I applied in my teaching practice the findings of my research in design and delivery of my teaching especially in Critical Legal Thinking. This provided a practical testing of the theoretically informed features of the curriculum and delivery of the module – and the module was successful and exceptionally engaging for many students. Thus, my educational practice was not only a source of knowledge but enabled the testing of ideas generated from my research in practice.

Fourth, I read the disparate materials, including, where relevant, disputes around method and methodology. Hence, I spent considerable time engaged in investigating disputes around whether someone is able to cheat the Defining Issues Test,[205] and whether the construct of "intrinsic motivation" reflects a phenomenon in the world that is reduced

[204] Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983), 8-9 and at 253: "The analytical integration of canon law, that is its explicit logical systematization, proceeded from the belief that underlying multiplicity of legal rules and procedures was a set of basic legal principles, and that it was the task of jurists to identify those principles and to help shape the law so that it would inform them." Berman argues this impulse informs the Western legal tradition. In the common law tradition it is called" the declaratory theory of law". Mark van Hoecke, 'Legal doctrine: Which Method(s) for What Kind of Discipline?' in Mark van Hoecke (ed), *Methodologies of Legal Research: which kind of method for what kind of discipline* (Hart Publishing 2011), 14: "Explicit interpretation questions are not a marginal phenomenon in law. They arise when texts are unclear, but also when the result of a literal interpretation leads to unreasonable, inequitable or even absurd results. The confrontation of this result with the meaning given to the text, in a way, 'falsifies' the implicit, prima facie meaning of the text." Essentially the same point is made prescriptively by Dworkin: "The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of law, of justice and fairness." Ronald Dworkin, *Law's Empire* (Hart Publishing 2000), 225.

[205] The Defining Interests Test (DIT), was developed by Rest who developed the four component model of ethical action with Narvaez, and is a measure of ethical reasoning.

through the proffer of extrinsic rewards.[206] Obviously, my ability to judge these issues was relatively modest, but those critical reading skills developed in law were of real value for this enterprise.

Finally, all my research has been presented in public fora and published to enable people to comment and correct. This includes my educational practice which I have endeavoured to make common property. Ultimately public dissemination and critical review are the operational check on rigour in all disciplines.

7.3 Answering the research question – the contribution to human knowledge

The research produced novel understanding in four distinct ways: contributed to the literature on Frankfurt; added to the literature on legal education; it produced novel and valuable synthesis; and through use of the research it informed my educational practice and it generated new knowledge and tested theoretical insights through application. The short answer to the research question was that a student-centred approach to legal education entailed investigation of the individual student's situation in late modern society, a fundamental review of the purposes of legal education, and a novel approach to curriculum design and delivery. However, in arriving at this answer the work made several identifiable contributions to human knowledge.

[206] Re DIT: Colin McGeorge, 'Susceptibility to Faking the Defining Issues Test of Moral Development (1975) 11 Developmental Psychology 18; Nicholas Elmer, Stanley Renwick and Bernadette Malone, 'The Relationship between Moral Reasoning and Political Orientation' (1983) 45 Journal of Personality and Social Psychology 1073; Robert Barnett, Jean Evans and James Rest, 'Faking Moral Judgment on the Defining Issues Test' (1995) 34 British Journal of Social Psychology 267; Nicholas Elmer and E Palmer-Canton, 'Politics, Moral Reasoning and the Defining Issues Test: A reply to Barnett et al (1995)' (1998) 37 British Journal of Social Psychology.
Re intrinsic motivation: Edward L Deci, Richard Koestner and Richard M Ryan, A Meta-Analytic Review of Experiments Examining the effects of Extrinsic rewards on Intrinsic Motivation' (1999) 125 Psychological Bulletin 627; Robert Eisenberger, W David Pierce and Judy Cameron, 'Effects of reward on intrinsic motivation--negative, neutral and positive: comment on Deci, Koestner, and Ryan' (1999) 125 Psychological Bulletin 677; Mark Lepper, Jennifer Henderlong and Isabelle Gingras, 'Understanding the effects of Extrinsic Rewards on Intrinsic Motivation – Uses and Abuses of meta-Analysis; Comment on Deci, Koestner , and Ryan (1999)' (1999) 125 Psychological Bulletin 669; Edward L Deci, Richard Koestner and Richard M Ryan, 'The Undermining Effect is a Reality After All – Extrinsic Rewards, Task Interest and Self-Determination: Reply to Eisenberger, Pierce and Cameron (1999) and Lepper, Henderlong, and Gingras' (1999) 125 Psychological Bulletin 692.

7.3.A. Contribution to understanding of Frankfurt

From the first publication 'What students care about' it was clear that Frankfurt's theoretical account of second order desires was being used in my research in ways that both illuminated and supported his work and applied it in novel ways. The version of triangulation I developed was first used in connection with Frankfurt's theory. As noted above, empirical support was found for aspects of his exploration of volition in Damasio, work on law student wellbeing, and self-determination theory. The application of Frankfurt's theory to legal education was a novel application that demonstrated the usefulness of his theoretical work in a practical educational context.[207]

'Values ethics and legal ethics' took this contribution to our understanding of Frankfurt one step further. Frankfurt has never shown much interest in the social context of his theory in print. I placed his theory into a sociologically informed account of the individual in late modernity. This produced two new insights. First, Frankfurt's work became explicable in historical terms – he has been explicating the nature of the modern individual's reflexive self-identity project in his work. Second, this means we can use Frankfurt to illuminate the nature of this project, another application of his theory to a novel subject matter.[208]

Finally, chapter eight of *Uses of Values* applied Frankfurt's theory to the under-theorised nature of moral motivation in the four component model of ethical action. Frankfurt writes about "volitional continuity" as the necessary to our taking part in our own agency. This volitional agency is provided by our commitment to our second order desires. Thus, I argued, our second order desires are constitutive of who we are – they are an important part of our self-identity and are likely to inform our self-narratives. In chapter eight I extended this insight of Frankfurt to moral motivation – a restricted class of things we care about. I thereby made Frankfurt important for understanding the necessary conditions for ethical action.[209]

[207] Page 20 above for triangulation and pages 29-30 for the contribution to our understanding of Frankfurt made in 'What students care about'.
[208] Pages 42 above for the contribution of 'Values ethics and legal ethics' to our understanding of Frankfurt.
[209] Page 71 above.

My work has thereby shown how Frankfurt's theory can be supported by independent work he has not noted or connected his work to; how his work answers a historically felt need generated by late modernity; and how his work can be applied to advance educational theory and our understanding of ethical action. In these ways I have advanced our understanding of his work and its importance for legal education and higher education in general.

7.3.B. Contribution to the legal education literature

7.3.B.i. Practice of legal education research

Researchers into legal education who are motivated by their practice of legal education face difficulties in articulating their research aims, methods, and methodological orientation. The problem is most acute for those who come to legal education research from a legal practice background. My work articulates features of the legal academic discipline that can be utilised in research into legal education.[210] Furthermore, in this thesis I have articulated a type of triangulation that helps deal with the difficulties of using multi-disciplinary sources.[211]

7.3.B.ii. Identification of the student's interest

Student-centred educational theory has struggled with the problem of what is in the student learner's interest, and how this interest can be identified, ever since student-centred educational theory was given its classic formulation by Dewey. The centrality of the students' interest in student-centred educational theory has made this persistent lack of conceptual clarity an important weakness in such theories. I have made significant progress in providing a persuasive account of what is in the interest of the law student in this thesis. In 'What students care about' I first used Frankfurt to generate an abstract or formal

[210] Page 18-19 above.
[211] Pages 20 above.

response to the question of what is meant by the interest of the law student (the formulation and pursuit of wholehearted second order desires).[212]

In 'Values ethics and legal ethics' I partially populated the formal answer generated in 'What students care about' by analysing the 'third apprenticeship' idea developed in *Educating Lawyers*. This elucidated both the importance of the choice made by law students to study law for identifying their interests, and the important limits that should be respected in the undergraduate law degree in England and Wales at least. In brief the undergraduate law student should be offered the identity of lawyer for adoption but not forced to adopt this identity, and of course, it is not in the interests of a law student to be offered misleading or false visions of the lawyer.

The article also introduced the idea of the reflexive self-identity project. This idea means that contemporary law students have a concern with their self-narratives and life plans, and this is another point of contact with the third apprenticeship in legal education. However, it also means that the successful development of the self-identity project is in the interest of the law student, and therefore legal education that is student-centred should support students in this project. Although this element of the student's interest was first identified in 'Values ethics and legal ethics' it was further developed in chapters one and eight of *Uses of Values*. Chapter one explored the difficulties posed by disparate self-identities and different lifeworlds. It was argued that it is not in the interests of all students to be supported in developing one self-narrative – both disparate starting points and differing commitments meant this would be counter-productive. What is in the students' interest is being equipped to reason and make good choices in their 'life politics'. Legal education can support this process by recognising pluralism, validating the enterprise, supporting reasoning, providing useful vocabularies and potential role models. Chapter eight focussed on the importance of identity and commitment work before the student is put under ethical pressure. A good legal education should help students reflect upon their values and decide what values, and therefore what type of person, they want to endorse.

Thus, the insistence on the centrality of the student to the legal education project generated a significant elaboration of what is in the law student's interest. What my work makes very

[212] Pages 29 above.

clear is that modernity gives freedoms and choices that can be difficult to use well, helping our students to successfully construct self-identities that support their wellbeing in educational settings and beyond is in their interest and therefore should shape legal educational practice.

7.3.B.iii. Student engagement

In 'What students care about' I applied Frankfurt's theoretical insights to the problem of student wellbeing, engagement and academic motivation. This in itself was an important addition to the literature on student engagement. I also applied the insights of self-determination theory to the same issues, an early example in the UK setting. However, it was not until chapter four of *Uses of Values* that I fully explored this ground.

Chapter four broke new ground in the application of self-determination theory to educational practice in the law school. It is the most practice orientated section of this thesis and it explains and illustrates why it is important to work with truthful (accurate, evidence based, coherent) models of student motivation. It is not enough to have a theory, the theory must align with the reality it attempts to describe and explain. The chapter therefore evaluates competing theories of motivation and identifies self-determination theory as the strongest available theory for the legal educator.

This theoretical evaluation is important for practice for two reasons: first, incorrect theories can undermine practice; second, because the process identifies unexamined beliefs of the educator. Hence, this aspect of the chapter is not merely descriptive and evaluative, it is also an exemplary for those designing legal curricula and delivering legal education. The chapter interlaces theory and practical examples, because it seeks to bridge the world of practice-based knowledge and the world of theoretical knowledge. The contribution to human knowledge is not a new discovery or insight in either realm but the bringing together of the two realms in fruitful synthesis.

7.3.B.iv. Vision of the law degree

The purpose of legal education is raised in 'Values ethics and legal ethics' but is only fully surfaced in chapter one of *Uses of Values*. 'Values ethics and legal ethics' produced an account of what how one might approach legal education in general and ethics education in particular informed by novel theoretical insights derived from the synthesis of Frankfurt and Giddens noted above.[213] It also developed a critical account of the vision of ethical education suggested by the learning outcomes educational technology deployed by the LETR report and raised an alternative account rooted in student identity. The engagement with alternative visions at the level of what should be considered capable of assessment had an independent value for our understanding of legal education.

There is no reason to suppose that what is capable of assessment is what is most valuable in education. Whenever constructive alignment exceeds its role as a means to seek coherence in educational practice it starts to impose an unattractive unarticulated vision of education. The debates over the purpose of undergraduate legal education are present in the language and techniques of outcomes-based education. The technocratic frame smuggles in value positions that have not been subjected to scrutiny. The critical analysis in the article revealed problems hidden by the use of words and practices that were familiar in educational practice when the report was compiled. This revelation was itself of value and original.

However, the article was written primarily with another end in mind – to articulate a vision of legal education as a student-centred enterprise that could overcome the tired dichotomy of liberal education versus professional training. It did this by making the self-identity project of the student the unifying purpose, one which could easily accommodate both liberal and professional aspirations. From the perspective of the student self-identity project the third apprenticeship of *Educating Lawyers* was an example of the integrative power of available models for student identity. This approach was continued in chapter one of *Uses of Values*.

Chapter one made use of the synthesis of Frankfurt and Giddens on self-identity and the links with the third apprenticeship made in 'Values ethics and legal values'. The chapter

[213] Pages 42-43 above.

placed this synthesis into broader contexts – the self-identity project as an aspect of modernity and the debates over the purpose of legal education within the wider discourse on the purpose of university education. Once this was done it was possible to identify real problems posed to student-centred education by the diversity of the student body and contemporary values. No doubt one reason technocratic practice is permitted to smuggle value positions into educational practice is because widespread value difference makes open discussion of what values to inculcate potentially embarrassing.

The chapter accepted the need to address concerns over a lack of authoritative values directly by arguing for pluralism and the validity of truth as a concept. From this foundation the chapter put forward a series of value positions that could be justified in a plural educational environment that would support the self-identity projects of the students and thus serve as organising concepts for a student-centred legal education. This vision for legal education adds to the literature on legal education in an original, reasoned and valuable manner.

7.3.C. Novel synthesis

I have already noted the fruitful synthesis of Frankfurt, Giddens, and the concept of the third apprenticeship from *Educating Lawyers*, and Dewey. I have also noted the synthesis of theoretical knowledge and educational practice-based knowledge in connection with chapter four of *Uses of Values* in particular. Also, much of what I have described as triangulation could be viewed as synthesis – a successful triangulation identifies unperceived links between Frankfurt and Damasio and studies of law student wellbeing and self-determination theory. Therefore, I shall restrict the account of synthesis given here to the synthesis of Frankfurt, Williams and Giddens with the four component model of ethical action created by Rest and Narvaez.

This synthesis was undertaken in chapter eight of *Uses of Values*.[214] The literature on ethics education shows a tendency towards over-emphasis on ethical reasoning, and neglect of ethical efficacy and ethical motivation, ethical sensitivity receives a moderate amount of

[214] Pages 69-72 above.

attention. Recently ethical efficacy has been addressed by Mary Gentile and this area has taken off in terms of teaching.[215] Moral motivation remains neglected.

Moral motivation is concerned with the ethical commitments, intuitive responses, and feeling of right action of a person.[216] The synthesis was of Frankfurt whose work has proved so productive in my research, Giddens, Williams, the Oliners and Rest and Narvaez who set out the four component model of ethical action. From Frankfurt and Williams I took the related ideas of the ground project (Williams) and the second order desire, both of which I treated as fundamental commitments that partially constituted the person. This, as above, I then placed within the context of the reflexive self-identity project of Giddens, thereby both normalising the ideas and putting them into a historical context. These investigators and theorists all placed emphasis, not on reasoning, but on commitment and identity.

7.3.D. Practice

The question: What is entailed by a student-centred approach to legal education? was inspired by commitment to my educational practice. My legal education research has been in part an attempt to make my professional knowledge common and capable of being reviewed, adopted and adapted by my fellow legal educators.[217] It has also been an attempt to apply research productively to my practice.[218] Finally, my research led me to re-examine our understanding of the purposes and appropriate practice of higher education in general and legal education in particular.[219]

My research has repeatedly located the practice of legal education within broader concerns, with the individual seeking of a meaningful life, within the conditions of modernity, within a diverse society. This repeated re-positioning of legal education was driven by the problems

[215] Mary C Gentile, *Giving Voice to Values: How to Speak Your Mind When You Know What's Right* (Yale University Press 2012).
[216] By "feeling of right action" I am seek to capture the essence of the reports of people who have acted ethically, sometimes at great personal cost or risk, that they just did what anyone would do. Such responses are reported in Samuel P Oliner and Pearl M Oliner, *Altruistic Personality: Rescuers of Jews in Nazi Europe* (Free Press 1988) and Anne Colby and William Damon, *Some Do Care: Contemporary Lives of Moral Commitment* (Free Press 1994).
[217] Page 15 above.
[218] Pages 44-45, 60, 62-63, 72, and 83 above.
[219] Pages 4-45 above.

caused by insisting upon a student-centred approach, because being student-centred entails serious investigation and reflection upon what is in the students' interests. I have no reason to suppose the research presented in this thesis has exhausted this investigation. What I do argue is that it has made the radical nature of the question apparent.

My final contribution to human knowledge through this thesis is the identification of the power of the research question. A power this thesis illustrates but does not claim to have exhausted.

7.4 Final Reflections

This thesis explodes a set of common-sense beliefs about legal education in the UK.[220] In itself this conceptual and empirically informed work of destruction is not novel, as it draws upon earlier analyses and investigations. However, something is gained by bringing these critical accounts together and organising them around the research question: what is entailed by a student-centred approach to legal education? Because this makes it painfully clear that neglect of the problem of delivering a student-centred legal education is neglect of any truly educative purpose.

The research question pushed against commonly assumed boundaries delimiting legal education. Whilst legal education might start for a student in year one of an undergraduate degree and end in year three upon graduation this time slice of a student's life is obviously a prolonged event or process in the life of that student.[221] Viewing the degree as the subject of analysis delimits legal education in terms of institutional cycles, processes, and purposes rather than in terms of the meaning of the degree for the students. Students have a pre-degree past and a post-degree future and the degree is meaningful and important to them because of these facts.[222] This is not because how a student experiences being a law student is unimportant, those three years have substantial value in themselves, but because the

[220] For example: the "teaching and learning as parcel transfer" metaphor at 12-13 and 37; the effects on and utility of rewards for learning at 61-63; and the myth of positivist neutrality at 41 above; and publication 2 and publication 3, '1.1 Do No Harm' below.
[221] For the purposes of simplicity I am assuming a law student whose formal legal education ends upon graduation.
[222] As emphasised by John Dewey, see: n 4 above.

degree is part of an ever elaborating and developing narrative of the student. It plays an important part, but only a part, in the identity project of the student.[223]

Viewed from the perspective of someone hoping to become a law student legal education can serve innumerable purposes – vindication of intellectual capacity; adoption of a middle-class status; a necessary stage in being able to make provision for a family; escape from a village life that provided no endurable role; affirmation of British identity; need to understand how life can be so unfair. Viewed from the perspective of someone who has been a law student legal education is a source of innumerable aspects of the graduate: economic security; a desire to pursue justice; reluctance to rush to judgment; sensitivity to potential conflicts between values; social status; awareness of the contingency of life. [224] Even such a short and limited set of lists makes it clear student-centred legal education cannot prioritise all the disparate and potentially conflicting purposes and futures it serves.

Thus, the central dilemma of the research question is revealed: how can legal education serve the purposes and needs of law students given their diversity of origins, purposes, and futures? This question is considered above through consideration of what is in the interest of law students. Even if it were desirable one cannot rely upon the transmission of gentlemanly values through close social contact between students and academics.[225] We have a mass education system that serves a diverse student group.[226] Therefore, we need to identify common interests of most or preferably all students and devise methods of delivering legal education that permit students to tailor their own legal education.

In the late-modern world everyone is engaged in forging an identity for themselves because traditional identities are unstable or unavailable. This universal process is particularly salient in the period of transition from childhood to adulthood. All students have identity projects

[223] See: chapter 3 above.
[224] All of these examples in these two sentences are referable to students whom I have talked with about their education in my practice as a legal academic.
[225] John Henry Newman, *The Idea of a University* (first published 1852, Baronius Press 2006), 92-93: "when I speak of Knowledge which is its own end, when I call it liberal knowledges, or a gentleman's knowledge, when I educate for it, and make it the scope of a University.", 120: "if I had to choose between a so called University, which dispensed with residence and tutorial superintendence … and a University which had no professors or examinations at all, but merely brought a number of young men together for three or four years … I have no hesitation in giving preference to that University which did nothing …".
[226] See: 58-59 and 66 above.

and many undergraduates are engaged in the process of transition to adulthood.[227] Therefore, serving this enterprise manages to maintain a student-centred focus whilst avoiding becoming lost in the welter of different student expectations, hopes, and aspirations.

Given this insight it is possible to re-think what we are doing when we do legal education to make our practice student-centred. Students care about some things when they begin their legal education, and self-awareness of what they care about can inform self-knowledge. What one cares about changes in response to experiences including educational experiences. Educational experiences have two types of impact on this reflective process: they facilitate the assessment of substantive values; they provide conceptual tools for thinking about values.[228]

A student-centred legal education should support this process of student reflection on values (what the student cares about) in a positive manner in the various ways the thesis suggested, and in other ways that I have not had space to include or that I have not imagined. Role models should be presented;[229] the linguistic and conceptual tools for such a meta value discourse should be provided;[230] social space for respectful value discussion should be provided;[231] value conflicts should be explored.[232] Legal materials are a natural source for these types of discussion, and legal processes such as trial are an institutional attempt to fashion a process that permits value disputes to be resolved rationally and without violence.[233]

Of course, this insight applies to higher education generally and not only legal education. Thus, this thesis is a part of the discourse that exists around the purpose of higher education and the university. The problems of legal education are a sub-set of the problems of

[227] See: chapter 3 above.
[228] See: Appiah n 192, and Derek Bok, *Our Underachieving Collages: A candid look at how much students learn and why they should be learning more* (Princeton University Press 2009), 150: "It is not the place of faculty members to prescribe what undergraduates ought to consider virtuous. But surely faculties should do whatever they can to prepare their students to arrive at thoughtful judgments of their own" above; and publication 3 below.
[229] See: 45-47 and 65 above, and publication 5, sections 7 and 8 below.
[230] See: n 228.
[231] Discussed in publication 4 below at text around n 40.
[232] See: 40-41 above.
[233] See: Barbara J Shapiro, *Culture of Fact: England, 1550-1720* (Cornell University Press 2000) on the influence of legal rationality on early modern science.

education. Hence the use and relevance of works that explore modern higher education or the nature of university education to this thesis.[234]

As the thesis makes clear this support for the reflexive self-identity project should not be directive, in part because there is no reflective consensus on many of these value questions, in part because the diversity of the student body makes any such attempt pre-ordained to failure.[235] Furthermore, any such attempt would be a deviation from a student-centred legal education. It would be an attempt not to support the student identity project but to determine its outcome in an attempt to impose some value of the academic upon the student.[236] As argued above education should so far as possible eschew coercion and manipulation in favour of persuasion in its practices.[237]

Support for the student identity project, by giving conceptual tools, social space, authoritative recognition of the value of the process of reflection, and exemplars provides a powerful guide to addressing the interests of all of the students. However, it does not provide a solution to the problem of the diversity of student expectations, purposes, and aspirations. On its own it does not help students uninterested in academic directed self-reflection.

As the thesis explains people are generally happier, everything else being equal, if they feel they are doing what they decide to do. Self-determination theory tells us that the belief that one is choosing what to do, and that in doing so one is able to pursue one's curiosity and sense of delight has a strong impact on motivation and wellbeing. Furthermore, the theory tells us how to encourage that feeling, we do so by supporting peoples' feelings of competence, autonomy, and relatedness. Therefore, we should design and deliver legal

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[234] See: Derek Bok, *Our Underachieving Collages: A candid look at how much students learn and why they should be learning more* (Princeton University Press 2009); Derek Bok, *Universities in the Marketplace: The Commercialization of Higher Education* (Princeton University Press 2009); Anthony Bradney, *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century* (Bloomsbury Publishing 2003); John Brennan, Robert Edwards, Muir Houston, David Jary, Yann Lebeau, Michael Osborne and John T E Richardson, *Improving What is Learned in University: An Exploration of the Social and Organisational Diversity of University Education* (Routledge 2010); Stefan Collini, *What are Universities For?* (Penguin 2012); Stefan Collini, *Speaking of Universities* (Verso 2017); Stanley Fish, *Save the World in Your Own Time* (Oxford University Press 2012); John Henry Newman, *The Idea of a University* (first published 1852, Baronius Press 2006); Martha Nussbaum, *Cultivating Humanity – Classical Defense of Reform in Liberal Education* (Harvard University Press 1997).
[235] See: n 228.
[236] I have argued for a limited set of legal and educational values that can be justifiably advanced in legal education in publication 3 below.
[237] See: 64-65 above.

education with careful attention to supporting the human needs for autonomy, competence, and relatedness.[238]

Support for the student identity project calls for a social space in which reflection on values can take place, this process is likely to form bonds between participants. It is a way to build relatedness. Support for student reflection on values and life goals should build a sense of competence. One thing we all find ourselves doing is building self-narratives and working on our self-identity, in the context of late modernity it is something we do without external pressure. Engagement in one's self-identity project has an autonomous aspect. Thus, each aspect of the dilemma of student-centred legal education can be addressed by the same educational techniques and initiatives as has been demonstrated in the numerous examples contained in this thesis.[239]

Finally, I have argued that legal education can achieve this educative end by combining elements traditionally thought of as in irreconcilable tension, the liberal and the vocational models of a law degree.[240] In part this is because a student-centred perspective makes of the degree an event in a life and that life has needs of both lifelong learning for flourishing and for the adoption of economical roles in life. In part it is because identity has numerous aspects, and, if anything the different elements derived from the liberal and vocational models are too few to serve the self-identity project. Finally, it is because a student-centred approach to legal education permits the taking of the best from each model in the cause of best serving the interests of the students whose education we are entrusted with.

[238] See: chapter 5 above.
[239] See: publication 1, publication 4, and publication 5 below.
[240] See n 6 above.

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Chapter 9

What Students Care About and Why We Should Care

Graham Ferris and Rebecca Huxley-Binns

This chapter presents an account of the relationship between emotion, reason, law and ultimately legal education as complementary rather than antagonistic. We do not deny the potential for irrationality and destructive behaviour in our emotional lives. However, the familiar image of a dramatic clash between cognitive thought and feeling obscures the more normal, and in fact necessary, co-operation of reason and emotion in the human animal. It is our view that the co-operation of reason and emotion should be acknowledged as an intrinsic element of module design in legal education.

We argue here that education should be undertaken for some object of value to the learner. There is no need to suppose that one sole object must be universally adopted. We believe that an intuitive appreciation of the need to connect with something of importance in our students is very common among those working in higher education and has been articulated in literature (Dewey 1895; Rubin 1973; Biggs 2003; Gardner 2006). Any novelty in our position is derived from insisting that those delivering education should explicitly and deliberately consider the importance not solely of the cognitive outcomes desired (Ferris 2009), but the purposes of learners, meaning the things they do or might value, or care about, or strive for. Whilst the choice of purpose is that of the learner, we can use our experience and knowledge of teaching law in higher education to facilitate purpose, choice or value adoption or rejection. It is acknowledged that people care, and the fact that people care about things matters, in general and in the design of legal curricula.

Methodology

Our relevant expertise is practical and centred in legal education. Accordingly, our method has been to seek independent supports for tentatively articulated intuitive hypotheses to which our experience led us (Gardner 2006; Putnam 2000). Of course this method leads to a danger of self-fulfilling prophecy, selecting from the evidence only that which supports the hypothesis and rejecting that which is obstructive. In the words of Popper (2002: 124):

> if we are uncritical we shall always find what we want: we shall look for, and find, confirmations, and we shall look away from, and not see, whatever may be dangerous to our pet theories. In this way it is only too easy to obtain what appears to be overwhelming evidence in favour of a theory which, if approached critically, would have been refuted.

Another danger is that we may confuse repetition across sources with independent supporting evidence confirming our hypothesis. Given the restraints on space we can do little more here than introduce the disparate approaches that we have identified supporting the necessary linkage between what may be termed affect, or what we care about, and human action and specifically human learning. To summarise we would argue that: the philosophical work of Harry G. Frankfurt; the neurological work recorded by Antonio Damasio; the data on law student distress in law school in the USA; and the general body of work produced by self-determination theory researchers all provide evidence that is supportive of our main hypothesis that legal education is most effective and enjoyable when reason and emotion co-operate.

There remain problems of interpretation, reasoning and integration of the material selected here into an educational context. Synthesis of work produced in disparate fields is inherently hazardous. There are constant dangers of misapplication of ideas and terms outside the areas where they have been coined and refined. There is no way to avoid risks in such an enterprise, and our guide has been to try and follow the advice of Harry G. Frankfurt (1999: xi): 'Surely one need not have been trained in any very distinctive philosophical tradition or skill in order to be able to think clearly, to reason carefully, and to keep one's eye on the ball'. Where there is no scholarly discipline that can be adhered to, as material that spans disciplines is being brought together, there seems little option other than to fall back onto the general disciplines of rational discourse and reasoning (Ferris and Lunt 2010).

Why is What People Care about Important?

Harry G. Frankfurt has been writing about 'volition', or will, for many years. His aim is to establish a discourse of 'what to care about' to complement traditional accounts in philosophy of what to believe (epistemology) and what to do (ethics). A philosophy of volition raises issues of what it means to be a rational free agent. Such agency is characterised by self-reflection upon what desires are condoned and adopted, and what desires are resisted and rejected. Frankfurt talks of first-order and second-order desires, and it is second-order desires that distinguish rational free agents and other creatures. In short, a first-order desire is what is normally referred to as a desire: 'I want to eat the bun'. However, we also have a capacity for reflective self-evaluation that is manifested in second-order desires, so we might want to want to eat the bun, or we might not want to want to eat the

bun. Thus, second-order desires have first-order desires as their subject matter (Frankfurt 1998: 12): 'Someone has a desire of the second order either when he wants simply to have a desire or when he wants a certain desire to be his will'.

When we are content in what we want to want then we are 'wholehearted', and being wholehearted makes us feel free in acting upon our approved desires. What we want to want is in turn determined by what we care about, as what we care about is what we identify ourselves with, and that in turn gives a reason to want some desires and to reject others in order to be true to who we want to be. Thus, it is important to us what we care about.

If Frankfurt is correct then his analysis is potentially an important analytic tool for understanding, and facilitating, learning success. It provides an account of effective agency at the highest level of generality – and could thus be used to exploit for educational purposes any theoretical work that is concerned with agency. Essentially, Frankfurt claims that we can and do endorse or resist our own impulses; that we can act with or against the grain of our own willed character. One familiar phenomenon both authors have encountered in our educational practice can be illuminated by this insight – the very high motivation many students attracted to clinical models of legal education bring to their clinical studies. Students attracted to clinical courses typically want to be what they think a professional lawyer is. This is a second-order desire – they will and endorse all desires that serve this end. If a live client is involved there is an ordinary common first-order desire, to satisfy and please the person they interact with. This desire is endorsed by the desire to be a lawyer who serves clients and the student acts wholeheartedly, and with an efficacy and perseverance that wholeheartedness entails. The student feels this educational experience is useful and that doing the job well is worth the effort in its own right. Frankfurt gives us an analytical handle on this process, and therefore the possibility of reproducing its positive effects elsewhere in the curriculum.

If effective education is in part about the relationship between what students care about (second-order desires) and the curriculum then this has consequences for the design of an effective curriculum. For example, anecdotal evidence suggests that on entry to law school students care about myriad things: some care about righting wrongs in society, some want to serve by protecting the innocent or giving the downtrodden a voice. Others care about their earning potential by the age of 40. Motivation is harnessed by students doing what they perceive as being important to themselves. The things students feel are important are those that they care about. However, we cannot assume that all students know what they care about – as people are not inherently imbued with self-knowledge (Frankfurt 2004: 14):

> In designing and managing their lives, people need to confront a number of significant issues. They must make up their minds concerning what they want, which things they want more than others, what they consider to be intrinsically valuable and hence appropriate for pursuit not just as a means but as a final

> end, and what they themselves will in fact pursue as final ends. They have to determine what it is they care about.

Wanting a certain desire to be one's own is a second-order volition. Frankfurt contends that where a person is fulfilling a desire and the desire is one he embraces, then that person is truly free, or 'is enjoying as much freedom as it is possible for us to conceive' (Frankfurt 2004: 20). What we care about dictates our self-regard and our motivation for action, it colours all aspects of our inevitable and necessary involvement with our own emotions.

It is the very fact that our students do care about some things that makes a difference to the quality of their learning experience. Failure to address affect in curriculum design and teaching delivery is to divorce the purely cognitive elements of the taught course from the students' humanity. How often do students react to the outcome of a case with the exclamations, 'That's not fair'? It is the reflexive decision to care and to embrace congruent and resist incongruent desires that marks us as human (i.e., as rational free agents). If what we care about as teachers is that our students become autonomous learners, we must acknowledge and accept that the students' personhood, including their cognitive processes, abilities and perceptions, is driven by what they care about, and therefore not necessarily by what we care about. We should have regard to what our students care about when designing a curriculum and, if necessary, reduce the size of the syllabus to give a voice to the 'it's not fair' emotional response. We should plan with an eye to capturing student engagement. We tend to design in the light of what we regard as essential knowledge for understanding, but we cannot predetermine how our students will be able to respond to the curriculum in order to reach understanding. We must facilitate their journey, and their journey is laid out by what they care about, which may be different for each of them.

We can teach all of our students the same thing in the same way. However, they will not all learn the same thing in the same way. Frankfurt tells us that the student's sense of self is informed by what they care about, and that what they care about is not a given quality – he throws a new light on the old insight that people have to become. Education can ignore this process, can obstruct this process or can try to harness this process. However, if Frankfurt is right, what we cannot do is be immune from the influence of this process.

If we care about our effectiveness as educators we need to care about the fact that our students care about things. There are ways we can make space in a curriculum for whatever it is students do care about. Consider the way Michael Sandel makes use of the intuitive moral sense of his student audience in his justice lectures (Sandel 2006). He seeks out and asks about the students' response to ethical problems; he is inviting his students to think about what they care about and validating that reflective process in higher educational practice.

Frankfurt enjoins us to think about the will, volition, as an independent subject for enquiry. He argues that caring about things is contingent; as a matter of logic it is quite possible to conceive without contradiction of a person who cares about

nothing, not even themselves. However, this theoretical schema may not be a reliable reflection of the world. The major concepts fit together well enough: that what we care about guides our agency over time, that we engage in meta decisions about what we want to care about, that we may be bound involuntarily by our own caring about something, that questions of what we should care about are subject to rational discourse – although not necessarily to any transcendent solution (it is probably not possible to arrive at any universal answer, because what we care about is bound up with who we are). However, they raise two empirical questions. Is it possible for someone to not care about anything whilst still having cognitive functions and emotions: is this independence of reflective volition a reality? And if so, would it really matter if the ability to care were broken?

Men Who Could Not Care

Damasio has uncovered the neurological basis of the ability to care. He has confirmed empirically the intuition of Frankfurt that the ability to care about something is vital to a fully functioning human being – that it is not possible to be fully human with cognition alone, reason without purpose is not a viable proposition.

Pressure of space demands we deal with this issue briefly. However, mere familiarity with the neurological malfunctioning of Phineas Gage and the patient Damasio refers to as Elliot suffices for the purposes of this chapter (Damasio 2006). Damasio describes patients who do not care about anything, despite being cognitively functional in all respects and quite capable of understanding and moral reasoning. And these patients were severely compromised. Frankfurt's analysis suggested that volition organised around what we care about and the second-order desires that caring entailed was functionally independent of, although obviously linked to, cognition. That Damasio's work seems to identify a capacity to care that is both functionally and organically isolatable is a remarkable coincidence, and *prima facie* a powerful confirmation of the explanatory power of Frankfurt's analysis. It is not only language that Frankfurt has subjected to analysis – the language reflects a functional and organic reality.

Thus, Damasio confirms the existence of capacity for reflective volition as a separate organic entity in the individual organism. However, this may not render the issue of importance for legal education – it matters to individuals that they care about things, and that they can identify the things they care about, and that they care about the right things for themselves. However, this does not itself entail any imperative demand upon legal educators. What it does identify is a potential hazard for unselfconscious educational activity unaware of the importance of this process of maturation and acting in concordance with the will – a potential for institutional frustration of the process that mimics the effects of the organic damage Damasio was concerned with.

To be free rational agents, Frankfurt argues, we need to form second-order desires and to seek to act in accordance with those of our first-order desires that we endorse. Where we are able to act in concordance with our second-order desires we are wholehearted, which is a very positive outcome. Where we have formulated second-order desires but are beset with conflicting first-order desires that are contrary to our willed desires, we are conflicted and this is a less happy outcome. When we avoid such conflict by having only first-order desires we are less than fully human, merely 'wanton' (Frankfurt 1998: 16 and 176) and in empirical terms we are in the sad position of Phineas Gage, unable to live a meaningful life. Our colleague Julie Higginbottom has counselled hundreds of law students, and she assures us a significant number volunteer that they chose law because they wanted to make a difference. This strongly suggests these students felt legal study would be relevant to matters they cared about. However, our curriculum pays little regard to such inchoate and naïve desires. If the forming and holding of second-order desires is important then this institutional indifference might have a harmful effect.

Therefore, we turn to the effects legal education has been found to have upon students. The question is whether there is reason to worry that legal education might be hindering students' development of a useful and meaningful approach to what they care about – is there substantial reason to fear that neglect of students' values in law school might be having a deleterious effect on our students?

The Law School Experience in the USA: When Doing Nothing is to Tolerate Harm

We have located no parallel or even comparable research worth recounting in this regard for UK legal education. In the USA over the last 30 years there has been worryingly consistent evidence that law school undermines the well-being of students (Daicoff 1997, 2002). The seminal work in this area was two linked studies reported in two articles by Benjamin and Shanfield (Shanfield and Benjamin 1985; Benjamin et al. 1986). These studies established the problem as a feature of American law school – rather than American professional education (*cf* Enron and Redmount 1957; Solkoff 1968; Solkoff and Markowitz 1967; Heins et al. 1983) or the peculiar nature of an institution's intake (Hedegard 1979), or an artefact of poor empirical administration or analysis. The first study compared law students with medical students, and found unanticipated differences between them. In the second study, the researchers were able to make longitudinal comparison of cohorts of law students, and extend the study to one cohort before it entered the law school, and to one (different) cohort two years after graduation and entry into the profession. As the researchers used personality and diagnostic questionnaires that were well established and validated, they were able to compare law students with a normalised population, as well as with their medical comparators. The study was based in the University of Arizona and the numbers of students completing the questionnaires administered (320)

represented a return rate of over 70% (Benjamin et al. 1986). As the study took place over four years (1981–4), it was possible to compare a cohort's scores over time, so that the self-reported psychological health of a cohort in different years of study could be compared.

The studies found, in broad terms, that there was clear evidence that law school was damaging to law students' self-reported mental health. Thus, before going to law school students were healthier than after. In numerical terms the pre-law students were within the normal range for self-reported depression (around 3–9%) when first tested, but between 17% and 40% of students post-commencement at law school reported depression, and between 20% and 40% reported increased symptoms other than depression (Benjamin et al. 1986: 247). It was not that people prone to the psychiatric symptoms reported were attracted to law school and bringing their problems with them. The levels of reported symptoms shot up after entry into the first year. Nor was the problem caused by the difficulties and discipline demanded by all forms of professional education. The law students reported significantly higher levels of distress than the medical students on all the subscales, consistently across different types of distress and at statistically significant levels (Benjamin et al. 1986: 69). Unfortunately, the problem was not merely one of adjustment to the new law school regime; the higher scores for depression, obsessive-compulsion, anxiety and paranoid ideation remained high, and indeed tended to increase, over the course of the three years of study (Benjamin et al. 1986: 240). Finally, it would seem that the problems experienced in law school followed the students into the profession. Although self-reported symptoms tended to lessen a little upon entering the profession, the reduction was not statistically significant and the graduates of law school never recovered their pre-law school state of mental well-being.

We should note the inherent limitations of the study: it relied upon self-report; it concerned a single institution; the battery of tests was applied over a short period of time (15–20 minutes); the cohorts were not identical across time; not all cohorts were tested at each stage of the study. However, it is reasonable to regard the study as establishing a *prima facie* case for the harmful effects of American law school upon the mental well-being of law students. Furthermore, the study has not been out of line with other research, in the words of Daicoff (1997: 1407): 'At least since 1970, studies have found that law students report an unusually high level of stress, psychiatric symptoms, substance abuse, anxiety, depression, and internal conflict soon after beginning law school'. Therefore, we are looking at what appears to be a real problem.

Of course with complex social problems there is a country mile between identifying a problem and settling upon a causative analysis. There have been various attempts to account for the phenomenon of law student distress. The US relies heavily upon the Socratic or case book method of instruction and this has been identified as a stressful form of instruction (Shanfield and Benjamin 1985: 70). In more general terms the relatively heavy workloads, the highly competitive nature of law school, the relatively low contact time between students and staff due

to student numbers, and cost, create a learning environment that is less supportive than medical school. We cannot with confidence ascribe causation. However, the personal motivations of the law student as a learner have been identified as a possible cause of law student distress in several commentaries (Benjamin et al. 1986: 250), and have been tested for causative effects in studies by Sheldon and Krieger (2004, 2007) informed by self-determination theory. This research allows us to explore whether law student distress is linked to Frankfurt's concerns around the formation of second-order desires and the acting upon concordant first-order desires, which he described as being wholehearted.

Of course, it is possible to give an account of how a devalued study of law might undermine feelings of well-being, given that law is a source of normative meaning for many people. Schiltz has written with great force and power on the importance of values and personal motivation for the learning, teaching and practising of law (Schiltz 1999). Thus, Frankfurt must be taken as one voice in the contemporary discourse on the role of values in legal education and life. However, as noted above, his account is sufficiently generalised to serve as a bridging theory. It also avoids reliance upon any particular content. Frankfurt makes no attempt to prescribe what we should care about and does not rest his account on any account of development, thus avoiding suspicion of importing substantive values through the qualities inherent to a healthy developmental outcome. Two difficulties with accounts such as that of Schiltz have always been: to avoid the discussion getting bogged down in the nature of the values that should imbue legal education; and, to move from a hunch that subjective alienation is a factor towards a research model that allows the hunch to be formally stated and tested empirically. Frankfurt points us in the direction of second-order desires, things we identify ourselves with, and avoids the problem of what those values should be by working at a very high level of generality. He allows us to generalise. A group of humanistic psychologists have developed in self-determination theory a similar concern with the importance of how we regard the ends of our activity to Frankfurt's. What Frankfurt calls identification with second-order desires (in an account that is concerned with the arrival at a second-order desire, and the coherence of the idea of a second-order desire, and only then with the importance and effects of holding second-order desires) Sheldon and Krieger call autonomous motivations (those things one does because one wants to do them and not because someone else wants one to do them – the locus of perceived cause being the crucial issue). In effect Sheldon and Krieger transform the deeply felt hunch of Schiltz and the conceptual concerns of Frankfurt into a set of empirically testable hypotheses about law students.

Sheldon and Krieger replicated aspects of their study at two law schools, the Florida State University and an unnamed urban privately funded college in the mid-west. Several of the questionnaires were also administered once to psychology undergraduates at the University of Missouri, which gave a comparison group for the law students at the commencement of their legal studies. A comparison of the Floridian law students on the first day of term and the Missouri undergraduates showed the law students reporting slightly better subjective well-being and having

slightly more intrinsic values (2004). However, when the tests were repeated for the law students they had suffered statistically significant drops in subjective well-being, intrinsic values and autonomous motivation. The unnamed comparison law school also suffered a drop in subjective well-being and autonomous motivation that was statistically significant. Thus, the deleterious effects of the first year of legal studies upon students' well-being was confirmed. The prolongation of the research over the second and third years of study found no recovery in subjective well-being nor intrinsic values or autonomous motivation; there was, however, a slight numbing of all valuation by the second year.

Of course correlations do not show causation, but they can support or undermine theories about causative relationships. Two of the hypotheses that the Sheldon and Krieger research was designed to test were: (i) that autonomous motivation and intrinsic values would be positively correlated with subjective well-being; and (ii) that students with higher scores for autonomy and intrinsic values would have better academic performance holding other factors equal. Motivation was considered autonomous if the students reported acting for reasons they felt identified with, rather than acting in response to what were perceived as the demands of others. Intrinsic values are those that are considered to reflect the needs of the holder and valued in their own right; extrinsic values are those that are valued for the social rewards they are associated with, satisfying needs only indirectly (Kasser 2002: 128; Sheldon et al. 2004). Both hypotheses were supported by the findings. Thus, the study shows that student distress (as measured by subjective well-being) occurs at the same time as students feel less autonomous, and shift their values away from intrinsic and towards extrinsic values. Self-determination theory suggests that this coincidence of measurable changes is linked by a causative relationship, specifically that the loss of felt autonomy and shift in values is causative of some of the loss of subjective well-being. This loss of subjective well-being is in turn associated with earlier findings of mental health vulnerability (Sheldon and Krieger 2007).

The US research on student distress indicates the danger of ignoring the affective aspect of legal education. It seems clear that law school can be linked to unwanted changes in the emotional state of students. Also, the negative effects seem to be carried over into practice, undermining the American legal profession. It would be rash to generalise the research and assume similar problems in the UK and elsewhere. However, it would be just as rash to assume in the absence of careful investigation that no such problems exist elsewhere. Certainly at the anecdotal level several of the observed characteristics of the impact of legal education on the law student are familiar to us from our professional experience. The American experience gives the lie to the convenient assumption that if we neglect the emotional aspect of our students then we will do them no harm. However, the research goes further than that. The work by Sheldon and Krieger suggests that one cause of the problem law schools in the US have encountered is the loss of felt autonomy around values (and a shift from some values to others). This, of course, if correct, is a startling practical example of the importance of

what we care about, and fairly obviously there is overlap between Frankfurt's second-order desires with which we identify and the autonomous motivation that reflects the agent's sense of doing what the agent desires to do. However, to assess how much genuine support self-determination theory provides for Frankfurt's analysis we need to give consideration to the origins and conceptual structure of the self-determination theory that informed the research of Sheldon and Krieger.

Origins of Self-Determination Theory: How Rewards can Undermine Performance

In the early 1970s several researchers including Deci (1971), Kruglanski et al. (1971), and Lepper and Greene (1975) independently verified experimentally a phenomenon that ran against the grain of the dominant model of learning based on operant conditioning. The anomalous finding was that rewards could *reduce* subsequent engagement in an activity, rather than reinforcement (reward) leading to behaviour modification in the direction of the reinforced behaviour (motivating continued participation in an activity). Reward could lead to disengagement from an activity that had been initially intrinsically interesting and attractive. The studies gave experimental and empirical confirmation to the intuition that educational institutions with their structures of control and assessment could create boredom and imaginative disengagement. In the words of one of the early studies (Lepper and Greene 1975), the use of rewards risked turning play into work.

The origins of self-determination theory are located in the attempts by researchers to explain this demotivating effect of the giving of reward (summarised in Deci and Ryan 2002). Other studies showed the similar demotivating effects of deadlines, supervision and some forms of feedback, although the effect did not always follow verbal rewards in the form of positive feedback (Amabile, Dejong and Lepper 1976; Lepper and Greene 1975; Deci 1971; Deci, Koestner and Ryan 1999a, 1999b). It was hypothesised that the demotivation was caused by the way a learner perceived and understood the reward, hence cognitive evaluation theory. The theory proposed that the learner understood that the reward meant that the task was being undertaken to further the purposes of the reward-giver rather than being an activity chosen by the learner for the learner's own purposes. In the terms used by self-determination theorists the perceived locus of causation was shifted by the reward, from the learner to an external agent. The learner was no longer choosing but was being manipulated; hence the valued quality in an action known as 'autonomy' was being taken away. The result was the previously intrinsically desirable activity became less attractive, as it was associated with being controlled by an external agent.

Cognitive evaluative theory explained the loss of intrinsic motivation for interesting tasks – the experimental anomaly – and also why a reward that was unexpected, and therefore not perceived as intended to manipulate the learner's behaviour, did not undermine intrinsic motivation (Lepper and Greene 1973;

Amabile, Dejong and Lepper 1976); and why a reward that was perceived as an integral part of the activity, was not demotivating, as it also was not perceived as intended to control the learner's behaviour (Kruglanski et al. 1975). Finally, it explained why verbal feedback would be perceived as sometimes demotivating (when it was perceived as controlling) and sometimes as not demotivating (when it was perceived as supportive) (Deci 1971; Deci, Koestner and Ryan 1999). More interestingly, it suggested a mechanism that might have effects outside of the circumstances of the original experimental anomaly, and possibly provide a key to successful motivation.

Development of Self-determination Theory

Cognitive evaluation theory was merely a part of a developing model of human motivation, but it was foundational, and it identified autonomy as an important and valued feature of people's experience. When the model expanded its explanatory ambitions, autonomy was identified not simply as something valuable but as one of three psychological needs people have. The other two are a need to feel competent and a need for relatedness (Deci and Ryan 2002). Obviously many activities are not interesting for themselves but because of their role in some greater purpose. Thus, one might learn the legal citation system in order to find law reports, but few of us derived genuine pleasure from distinctions between square and round brackets that had to be learned. To broaden its usefulness and potential application, self-determination theory posits a continuum of autonomous motivation. On the self-caused (autonomy) side of the scale, in addition to intrinsic motivation, it includes 'identified' motivation, which exists whenever a person has made a purpose her own, so she has become identified with it. On the extrinsic or externally caused end of the scale are 'introjected' motivations, things done to please others, and because failure to do them brings shame or guilt, and finally externally imposed motivation, which responds to the rewards and punishments of others (bosses, teachers, or even the nebulous pressures of society or fashion, etc.). Identified motivation – the adoption as one's own of aims, values or things felt to be important – can be understood as a successful adoption of a second-order desire. Although, whether one might be said to have reached a second-order desire in some cases of introjected motives is more difficult to decide. For educational purposes the theory pushes us in two directions: towards trying to encourage student values that will make study purposeful (an aspect we will not pursue here); and trying to give room for student autonomy, as this will be responsive to student motivations and therefore responsive to what they care about.

Thus, with these ideas in mind we can understand what Sheldon and Krieger (2004) meant when they referred to the importance of *why* we care about things. If we care about a task because of its intrinsic attractiveness then motivation is not problematic. Koestner and Losier (2002: 102) suggest that if the attraction is partially due to novelty, or aspiration to mastery of an activity which requires

dull perseverance in practice, then we might require some help from identified purposes that can motivate us when an activity is not fun but is necessary to an important personal goal:

> The distinction between intrinsic motivation and internalization revolves around the way an individual becomes drawn to an activity. To the extent that an activity is inherently rewarding, such as recreational activities are for many people, it is likely that processes related to intrinsic motivation will energise and direct a person's involvement with the activity. However, to the extent that an activity lacks intrinsic appeal but is highly valued by one's social group, as may be the case with many school related tasks, it is likely that internalization will have to provide the basis for effective self-regulation. In this case it is the perception of the activity as valuable or meaningful that drives one to engage and persist in it.

Consider the possible ways in which these insights can be used to explain the high motivational responses we have observed in optional courses designed around mooting, that generates a spillover effect into performance in other courses. For some students there is an intrinsic attraction to the presentation of oral argument in a competitive setting – mooting has a performance joy and a game-like aspect – and this could explain initial high motivation. However, it is internalised motivation that can explain persistence in subordinate tasks and spillover effects. Mooting has ethics that may be internalised by students, and in turn motivate. A natural mooter may not enjoy close reading of cases, and yet the desire to win according to the rules of the game may motivate an interest in interpretative technique as an instrument to the desired outcome. Similarly, as mooting is concerned with persuasion, reasoning can become interesting, as logically compelling arguments have a persuasive quality. Here intrinsic satisfaction in one activity can through internalisation lead to motivation for what had before seemed dry and pointless tasks. Once alerted to the ambiguities of interpretation and the varieties of valid and invalid reasoning, the 'rightness' of careful reading and sound reasoning becomes apparent and themselves provide motivation that is likely to improve performance elsewhere. This is not to suggest that close reading and an attention to argumentative form suddenly become intrinsically motivating (activities undertaken for their own sake). It is to suggest that if the student has a reason for valuing the activities, if the student cares whether they have read carefully and reasoned soundly, the satisfaction of doing something the student considers valuable will provide a motivational force.

It is not the 'what' of values we are concerned with here (although self-determination theory does posit that some values are more desirable than others) but why we value things (Sheldon et al. 2004). If students feel that the activities they are engaged in further their own valued purposes then they can call upon the emotional and motivational resources needed to overcome difficulties. If they feel useless (an attack on competence) or socially isolated (an attack on relatedness) or if they feel they have to comply with the demands of the institution (an attack upon

autonomy), they risk becoming demotivated, alienated and unhappy. We have seen that in the United States this risk may have been realised, and there are worrying indications that in the United Kingdom, not just law school, but major features of our entire educational system are generating exactly the type of unintended consequences that self-determination theory warns us of.

Frankfurt insists upon the importance of what we care about, and identifies a sense of wholeheartedness that we feel when we are happy with our endorsed desires. Self-determination theorists started from an insight into the importance of why we feel we are doing things – for ourselves or for others. They too developed a concept of the person who is happy with what he desires, which they describe as self-concordance. Before we leave self-determination theory it is useful to reflect upon one more study in this tradition. Numerous studies have supported the proposition that teachers who provide support to their students' autonomy can have beneficial effects on the students (for example, see Reeve 2002). A recent study by Roth et al. (2007) investigated the relationship between the degree of autonomy felt by teachers in their work and the perceptions of the children they taught of how autonomy-supportive the teachers were. The research found that those teachers that felt more autonomous not only felt a greater sense of personal accomplishment and less exhaustion but were perceived by the children they taught as more supportive of the children's autonomy. Although it is but one study of 132 teachers in Israel, it confirms an intuitive feeling that the best teachers are those that enjoy the job, and self-determination theory tells us that we are likely to enjoy the job if we feel autonomous in our professional life.

Conclusion

Clearly good curriculum design cannot prevent depression. However, a well-designed curriculum enhances autonomy. A student (and also a teacher) who feels she is acting autonomously in her studies is likely to have higher subjective well-being and perform better academically. So if curricula are designed to enhance autonomy, we're all better off, and happier, and more productive.

Application of the insights to be gained from Frankfurt and the self-determination theorists does not demand a year zero approach to the curriculum. One final example of a small but significant change towards autonomous action was made in the coursework assessment for the final year option of the law of evidence. We started with a standard problem question concerning the cross-examination of a complainant in a rape case, where the facts were deliberately provocative, but the complainant's previous sexual history was borderline relevant. However, instead of asking for a traditional discussion of the question, students were asked to decide, as trial judge, on the admission of the evidence. Students repeatedly sought and received assurance that they could use the first person, and that provided the law relied on was stated clearly and accurately, there was no 'right' answer in respect of the decision to admit. More students got higher marks in that assessment than

ever before; and of the six that got firsts, three admitted the previous history and three did not! We have now adopted this 'role-play' aspect as part of our formative and summative assessment practice. Students take on the role of first instance or appellate judges and practise in seminars where other roles may be played by counsel for the Crown and defence. The point of this is to develop students' competence and confidence and improve their autonomy as learners. Improved performance came from a change in the student standpoint. By role-playing and deciding from the perspective of a judge rather as a discursive academic exercise, the students found meaning in the assessment and they performed better.

As curriculum designers and deliverers of legal education our role is not to provide mass counselling. However, we can provide mass choice or alternatively insist upon uniformity. We can make room for students to share what they value or dismiss such discourse as irrelevant, and we can leave room for explorations of the young person's relationships to his family, class, profession, society and world, or not. Attention to affect in legal education does not entail any need to talk mildly and avoid offence to imagined sensibilities. Whilst we should not attempt to impose our value systems upon the student body, we are more serviceable to them if what we care about is reflected in what and how we teach. If we feel autonomous we are likely to enhance student autonomy. In practical terms it is not difficult to enhance choice for students, nor is there any externally irresistible reason to abjure value discourse in law schools. However, we are still struggling with the simple truth that what we care about determines both what we do and how we feel about it.

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Values ethics and legal ethics: the QLD and LETR recommendations 6, 7, 10, and 11

Key Words: Ethics; QLD; identity; critical thinking; value; LETR Report

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Abstract

The LETR Report recommended increased attention to ethics and values and to critical thinking. These aims could be achieved jointly through teaching ethical thinking: not as theory but as part of developing the capacity for ethical conduct. Such a pedagogy has the potential to become a QLD signature pedagogy supporting "life-narratives" of students.

The LETR Report recommends a review of the QLD emphasising legal values and ethics. Concern with values and ethics is linked to concern with professional conduct. Maintaining the law degree as a general or liberal qualification is also strongly desired. These potentially conflicting drivers generate ambivalence towards legal ethics as a subject for study, especially if legal ethics is perceived as teaching the professional codes.

Resolution of this tension is achievable through recognising the potential role of ethical teaching as part of an identity apprenticeship. Developing ethical character is as much a liberal as a professional aim. Ethics teaching can play an integrative role in the QLD.

Formation of student identity is a central part of Higher Education taking colouration from being situated in legal education. In this context teaching legal ethics becomes the use of a salient example for carrying out the broader project of developing ethical capacity.

Teaching of professional ethics and values for integrity and quality

The importance of ethics and values within legal education and training is stressed by the final report of the Legal Education and Training Review independent research team (LETR Report). "Ethics" includes professional ethics and "values" those values specifically that underpin the rule of law: these two areas link up with a concern with professionalism. This emphasis on ethics and values is situated within a regulatory context. This means that ethics and values are important when they serve the broader objectives of supporting systemic integrity and service quality, rather than for their own sake. The perspective of the team was informed by the needs of the justice system and the legal services market: the general public, providers, and consumers, as well regulators.

As an educator committed to increasing the role and range of values based teaching and learning in legal education and working in academic higher education my perspective is different. My starting point is that value informed legal education and ethical education is

beneficial for my students, both those who go on to become legal service providers and those who do not. Even in the context of professional training and continuing professional development a concern with facilitating the growth of the capabilities of the learner to reason and act ethically is my focus.

The Foreword to the LETR Report identifies several "key messages", most of which seem to be broad objectives for legal education and training. Given first place is conservation of the existing strengths of legal education, training and professional practice. However, immediately after conservation is the need to encourage flexibility and responsiveness to changes originating from disparate causal agents. To conserve yet facilitate change: and not merely peripheral change but changes that are likely to touch all aspects of professional practice. At best this is dynamic tension that will give energy and direction to reform efforts, at worst it is contradictory.

The complexity of developments in the UK legal services market is striking. There have been unprecedented advances in information technology. The economic context of legal practice has changed. State subsidy of legal services has been under attack for many years. The conditional fee has generated problems and opportunities. Concurrently "globalisation" has given rise to international competition in legal services. The structure and identity of providers of legal services has also started to change. There is growing diversification of professional providers (the LETR Report was commissioned by ILEX Professional Standards as well as the Bar Standards Board and Solicitors' Regulation Authority) as well as greater specialisation within and between firms; and the possibilities for the structure of business organisations providing legal services has been revolutionised. This diversification, fragmentation, and reorganisation have been driven in part by statutory change and in part by technological and market forces. Finally, but most obviously pertinent to the commissioners of the LETR, changes in regulatory models and structures operating in the market require a response from regulators.

Another key message is a desire to increase diversity in the professions. It seems fair to portray conservation, flexibility, diversity, and regulatory challenges as problems that need addressing: tasks for the professional bodies, regulators, and service providers.

With some resemblance to hope at the bottom of the jar opened by Pandora is the key message of the importance of ethics, or professional ethics and values. Ethical education and training is more in the nature of a remedy for problems identified in other key messages. Although the Foreword identifies work based learning, including continuing professional development, as a possible source of solutions in the future it is as yet very problematic.[1]

[1] Although optimistic about work based learning the Report records evidence of substantial dissatisfaction with current Continuing Professional Development (CPD) provision and practice: see LETR Report [2.147] – [2.163]. There are also concerns about the coherence, consistency and effectiveness of traditional work place training, see: [6.61] and [6.63] the crucial factor is the quality of supervision. This means solutions of the problems identified at [6.62] are essential. Supervision is a candidate for prescribed CPD [5.96] – [5.97]. So, if reform of

Also, wider use of outcomes based regulation with alignment of learning and teaching, and assessment, with appropriate outcomes is put forward as a powerful tool for coordination and the achievement of consistency and regulatory purposes.[2] However, an outcomes defined approach is largely undeveloped outside of the academy, although ILEX has already implemented a learning outcomes approach.

Thus, although the potential importance of new approaches to education and training is recognised these must be considered to be areas that are as yet under development. For example more variety in, more extensive use of, and better focussing of work place learning is potentially important: for facilitating diversity, ensuring competence, and providing a powerful experiential pedagogy.

The use of professional ethics to constrain professional action, to empower the professional in resisting improper pressure, and as a well established feature of professional education and training, marks ethics out. It is familiar and we have experience in its use in educational practice. It is familiar as an aspect of professional practice that is important, useful, and valued. An ethically informed legal education and training can hope to both conserve professional standards and at the same time facilitate beneficial change: for the nature of ethical principles is that they are capable of application in new circumstances. And this should make those committed to teaching in a value informed way that encourages ethical growth a little wary. There is a lot that can be accomplished through the inculcation of values and the facilitation of ethical behaviour – but it cannot be a panacea. Furthermore, there is a tension between ethical education that attempts more than teaching the code and assessment of outcomes based educational practices that must be negotiated very carefully.[3]

Two cheers for the research team

CPD succeeds then it might remedy some problems of supervision in work based learning. Obviously this will need a new and far more rigorous audit process of work based learning [6.71]. All of these integrated parallel reforms are to be co-ordinated through standards expressed as outcomes, and standardised assessment: except for CPD which needs to give more recognition to informal but structured (therefore, not standardised) learning practices [6.95] and [7.27] – [7.28]. Each proposed reform is problematic and integration across the reforms is even more problematic. The current state of work based learning is clearly one the research team feels is in need of reform rather than available as a source of solutions. As well as providing assurances of competence at the beginning and during a professional career, and developing professional attributes, work based learning is hopefully going to alleviate the problems of social mobility posed by problems of access to the profession [6.51] – [6.54].The Report recognises the infeasibility of a grand reform in such complex matters and recommends setting up a Legal Education Council to try and inform continuous regulatory reforms at recommendation 25.

[2]LETR Report p. ix: "enhance consistency of education and training through a more robust system of learning outcomes and standards, and increased standardisation of assessment", [4.106], [4.122], and Recommendations 1 – 5.

[3] See: LETR Report [4.94] [4.110], [4.134], and [4.139] which identify problems with outcomes in this area; but these problems seem to be forgotten at [4.140]. Also, see below in particular the text between notes 11 and 16 for an exploration of this problem.

The support found by the research team for a greater emphasis on values and ethics is impressive and welcome. To summarise:

> "Ethics, values and professionalism … was rated the most important knowledge area in the LETR online survey, a result which echoed the demand for a greater emphasis on professional ethics and conduct across the qualitative data and stakeholder responses to Discussion papers … A majority of respondents took the view that ethics and professionalism need to be developed throughout the continuum of education and training." [4]

In short, although there already exists some ethical and value informed education and training it is felt more would be a good thing. At undergraduate level (and GDL) expanding the foundation subjects would cut into time available and limit academic freedom. Although there was some support for professionalism or ethics as a foundation subject it was a minority who favoured this.[5] The proposal for the undergraduate stage of legal education was:

> "Hence, it is proposed that the QLD/GDL should include outcomes that advance an awareness and understanding of the values embedded in law, legal processes and solutions, and the role of lawyers in advancing those values. Further … that some understanding of underlying legal values should be incorporated in the education and training of any authorised person." [6]

To sum up:

> "The perceived centrality of professionalism and ethics to practice across the regulated workforce is one of clearest conclusions to be drawn from the LETR research." [7]

A lot of people see the teaching of ethics as a known and potentially effective solution to a lot of problems. The research team agrees and recommends, *inter alia*, that the undergraduate stage of legal education should direct some resources in this direction. However, there are no recommendations as to content, or delivery, and expressly no recommendation for "professional conduct" to become a foundation subject.[8]

The final recommendations on ethics and values are 6 and 7:

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[4] LETR Report [4.65] – [4.67]

[5] Indeed, there is some evidence that teaching ethics as a discrete subject can be ineffective, see: Ernest T. Pascarella and Patrick T. Terenzini, *How College Affects Students: A Third Decade of Research: 2* (2005) John Wiley & Sons Inc, San Francisco, Ca, at p. 355: "*Ethics courses*. Another purposeful intervention designed to facilitate growth in principled moral reasoning is a course focussed on ethics. This approach has been particularly visible in undergraduate business curricula … The weight of evidence from these studies is somewhat equivocal …. We suspect that the mixed findings for this body of evidence reflect to some extent the fact that ethics interventions in the various studies differed substantially in their content, emphasis, and implementation. On balance, across all studies the effect on principled moral reasoning of exposure to either ethics courses or interventions is probably positive, though quite modest in magnitude."

[6] LETR Report [4.104].

[7] LETR Report [7.10].

[8] LETR Report [7.89].

> "Recommendation 6
>
> LSET [Legal Services Education and Training] schemes should include appropriate learning outcomes in respect of professional ethics, legal research and the demonstration of written and oral communication skills.
>
> Recommendation 7
>
> The learning outcomes at initial stages of LSET should include reference (as appropriate to the individual practitioner's role) to an understanding of the relationship between morality and law, the values underpinning the legal system, and the role of lawyers in relation to those values."

Both the revelation of the degree of support for greater emphasis on values and ethics in legal education and training, and the clear indication that it is a matter for all stages of legal education, are to be welcomed. However, a full set of three cheers must be denied, because of the understandable but potentially treacherous issue of perspective. The viewpoint of the research team was not the same as the viewpoint of the academic institution considering what might be appropriate undergraduate learning outcomes.

How the perspective of the research team obscures educational implications

This LETR Report is welcome to those who wish to see more attention given to values and ethics in legal education generally and the academic stage in particular. Less welcome are two features of the treatment of ethics and values in the Report.

First, ethics teaching risks becoming a vehicle for social engineering - it risks being put forward as an instrument for regulatory aims. It cannot be a vehicle for delivering the full commitment to client of the traditional professional for the price of the lowest cost competitive supplier whilst maintaining the values of justice and delivering to the financial investor the required 15% return on capital. In the words of Kurt Lewin:

> "It seems to be easier for society to change education than for education to change society." [9]

There is a tendency for utopian hopes to be pinned upon educational initiatives, but neither education nor regulation can square the circle of inconsistent policy imperatives.[10] Educators must be careful not to impose unrealistic demands upon our students, and our

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[9] Kurt Lewin, *Some Social-Psychological Differences Between the United States and Germany* (1936) in *Resolving Social Conflicts and Field Theory in Social Science* (1997) Washington, DC: American Psychological Association, (2010) electronic edition.

[10] The problem is not unique to legal services or the UK, see: David F. Labaree, *Someone Has to Fail: The zero-sum game of public schooling* (2010) Harvard University Press, Cambridge, Mass at loc 10: "We Americans have long pinned our hopes on education. It's the main way we try to express our ideals and solve our problems. … So we assign these social missions to schools, and educators gamely agree to carry them out. When the school system inevitably fails to produce the desired results, we ask reformers to fix it. … The system never seems to work the way we want it to, but we never give up hope … just keep tinkering."

educational institutions. Alignment of the educational experience with the best interests of the learner and not the perceived needs of the legal services market is crucial. We can help the profession and the regulators, but we cannot do it by subsuming the interests of the students to the market. That would be unethical for educators and a very unstable foundation for the teaching and learning of ethics and professional values.

Second, the Report notes[11] but loses sight of the peculiar nature of ethics education as being more than cognitive or skills based. Ethics is primarily about behaviour rather than argumentation. The theory of ethics is not ethics. Indeed there is a risk that teaching theory of ethics enables the unethical learner to develop powers of rationalisation that facilitate unethical behaviour:

> "I remember one CEO who told me that while interviewing a recent MBA graduate for a job, he asked the man whether he had taken a course in business ethics. When the interviewee answered yes, the CEO asked him what he had learned. The job candidate explained that he had learned about all the models of ethical analysis – deontology, virtue ethics, consequentialism, and so on – and that whenever he encountered a conflict, he could decide what he wanted to do and then select the model of ethical reasoning that would best support his choice." [12]

If one reviews the recommendations and proposal quoted above the LETR Report seems to have reverted to a cognitive approach to ethics demanding: "outcomes that advance an awareness and understanding". This is in part because the Report deals with "integration" as a separate aspect of educational endeavour to ethics and values.[13] However, the best contender for an educational intervention that is *integrative* in the required sense is an ethical or moral one concerned with both the values of the individual and those of the system. Indeed, this integrative role of ethics and considerations of values in legal education was emphasised by the recent Carnegie Report which developed the idea of three apprenticeships reflecting three dimensions of professional work: the intellectual or cognitive (thinking); expert practice (performing); identity (behaving). The Report expanded upon the general nature and content of the third apprenticeship:

> "The third apprenticeship, which we call the apprenticeship of identity and purpose, introduces students to the purposes and attitudes that are guided by the values for which the professional community is responsible … it also shares aspects of liberal education in attempting to provide a wide, ethically sensitive perspective … the essential goal … is to teach the skills and inclinations, along with the ethical standards,

[11] LETR Report at: [4.65], [4.83] – [4.86],

[12] Mary Gentile, *Giving Voice to Values: How to speak your mind when you know what's right* (2010) Yale University Press, New Haven, electronic edition, at loc. 103.

[13] LETR Report [4.76], Table 4.3 – five of the six classes of "competencies" have ethical components or would potentially be developed through ethical education, context is the odd one out.

> social roles, and responsibilities … it is the ethical-social apprenticeship through which the student's professional self can be … explored and developed." [14]

One purpose of this third apprenticeship is to carry out the integration of the intellectual and practical and identity aspects of legal education:

> "Because it directly addresses professional life in all its dimensions, the apprenticeship of identity and purpose is the natural site for integration." [15]

In short one of the most exciting aspects of teaching ethics or making values central in legal education is the impact it can have upon the identity and sense of self being developed by the student learner. But in this the cognitive aspect of ethical teaching is not primary, it serves the greater purpose. It is from such an understanding of ethics as being about *behaviour* not words that the legal educator can most effectively serve the felt needs of the legal practitioners and the legal regulators. This aspect of ethical education causes one point of friction with outcomes based assessment practice: the possibility of an authentic metric seems deeply problematic.

The issue is whether future behaviour will be affected by ethical education and training. The answer is unknowable until the circumstances that test the question arise. In this area therefore, the better approach is sometimes to demand experience with the processes involved in ethical education: such as dilemma argument; or exposure to powerful role models; or opportunities to engage in service activities; or exposure to material on diversity that counteracts common negative stereo-types. One can assess for engagement (presence and completion of tasks), and understanding (explaining the theory or substantive content of taught materials and application of the same), and even perceptual sensitivity (can students see issues raised by representing a buyer and seller in the same transaction). In an experiential setting, such as a clinic, the reflective practice method of teaching and assessment offers scope for a somewhat more realistic assessment of such qualities. But even this is a poor proxy for the real issue – how the student will act in the future in an unsupervised environment under the pressures of life. Essentially a key aim of ethical education that cannot be assessed is the internalisation of ethical standards into the self-identity of the student, and it is not only futile to try and assess this outcome directly but also intrusive. Educationally it fails to respect student autonomy sufficiently, and professionally it substitutes a passive compliance for a critical and sincere internalisation of professional ethics and identity.

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[14] William M, Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, Lee S. Shulman *Educating Lawyers: Preparation for the Profession of Law* (2007) Jossey-Bass: San Francisco, CA, at p. 28, loc. 430-439.

[15] Ibid. at p. 196, loc. 2773. See also at p. 14, loc. 263 : "The third element of the framework – professional identity – joins the first two elements and is, we believe, the catalyst of an integrated legal education. The third element of our framework for legal education, which is sometimes described as professionalism, social responsibility, or ethics, draws to the foreground the purposes of the profession and formation of the identity of lawyers guided by those purposes."

Undergraduate students value highly the personal development they experience at University. The SOMUL project termed this the "identity-projects" of the students.[16] This usage echoes the terminology of Giddens who argued that modernity imposes a project on individuals, because ascribed roles and identities are inadequate outside of traditional social orders, modern life does not produce unchanging cycles of life and ascribed role identity. Who we are becomes a problem we have to deal with, self-awareness and social instability means that:

> "Self-identity today is a reflexive achievement. The narrative of self-identity has to be shaped, altered and reflexively sustained in relation to rapidly changing circumstance of social life." [17]

Identity is not singular, we can have numerous identities that play a role in our life narrative.[18] One potentially important identity is professional, and as Peter Birks remarked:

> "A law school fails in its teaching if it does not give its graduates the opportunity to make a moral commitment to their subject and through their subject to the public good." [19]

In other words undergraduate students need to decide who they are, they are aware of this process of becoming, and consider University to be valuable *because* it is a time and place they can use to pursue this need. In the words of the report on the SOMUL project:

> "not everyone experiences major personal change as a result of going to university. But most do." [20]

This need generates a duty in legal educators to try and support the students in this process of constructing identities for themselves. To be clear: the students will act in any event, and we have no warrant to try to impose an identity upon the students; hence, the great care needed to identify the correct perspective of the educator as opposed to the regulator. However, we can facilitate without imposing, and to do nothing in the name of neutrality is actually a failure on our part:

> "to give people a conceptual vocabulary is to influence them; but to deprive them of it is to cripple them, not to empower them." [21]

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[16] John Brennan, Robert Edmunds, Muir Houston, David Jary, Yann Lebeau, Michael Osborne and John T.E. Richardson, *Improving What is Learned at University: An exploration of the social and organisational diversity of university education* (2010) Abingdon: Routledge

[17] Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (1991) Polity, Cambridge, at p. 215.

[18] Amartya Sen, *Identity & Violence: The Illusion of Destiny* (2006) Penguin, London.

[19] Peter Birks in Peter Birks (ed) (1996) *What Are Law Schools For?* Oxford University Press, Oxford at xiv:

[20] Op. Cit n. 13 at pp.155-156.

[21] Kwame Anthony Appiah (2005) *The Ethics of Identity*, Princeton University Press, Princeton, NJ at loc. 1067.

One identity we should offer is surely that of a legal professional, we should facilitate and make meaningful the possibility of law students making "a moral commitment to their subject". We can do this through giving the students a conceptual vocabulary, and it is a conceptual vocabulary drawn from ethics and value discourse. However, a conceptual vocabulary is not enough, and it would be better if we *also* helped them develop awareness, the ability to reason critically and validly, courage, and effective strategies for action in accordance with their beliefs. Such learning opportunities can help them to integrate their experiences, and to make a moral commitment, and to forge an integrated professional identity, if they so choose.

A very summary account of ethical education and another caution around assessment

There is more than one model of the causative factors that underlie ethical action,[22] but one that has proved robust and been influential in professional education was developed by Rest. In his own words:

> "My view of the major determinants of moral behaviour (the Four Component Model) came to be formulated while I was doing a general review of the morality literature … the Four Component Model starts with the question, 'What must we suppose happens psychologically in order for moral behaviour to take place?' We wind up with at least four distinct processes." [23]

The components are: sensitivity – awareness of an ethical issue raised by a situation; judgment – the ability to reason correctly about the nature of the ethical issues and to identify what an ethical response would be; motivation – wanting to act ethically having decided what that would entail; character – the ability to act ethically. The first is about perception, which may require sensitivity or empathy, it often requires emotional or social intelligence. The second is about cognition and reasoning, there is an influential theory, associated with Kohlberg, that moral reasoning is developmental in nature, and that undeveloped people simply cannot understand certain types of ethical argument. The third is about what one cares about, what one values, which may involve an internalisation of values undertaken as part of an identity project. The final component is about courage in the face of possible disapproval or opposition and feelings of efficacy. All four of these components need to be present for effective ethical action.

The four component model is useful for educators because it identifies attributes of the individual learner that might benefit from informed educational practice. It breaks down the otherwise intractable problem of inculcating ethical character into tractable steps. It also brings home the other reason why outcome based educational practice can be dangerous in

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[22] For a model that seeks to explore situational rather than only individualistic factors see: Richard Moorhead, Victoria Hinchly, Christine Parker, David Kershaw, and Soren Holm, *Designing Ethics Indicators for Legal Services Provision* (2012).

[23] James R. Rest and Darcia Narvaez, *Moral Development in the Profession: Psychology and Applied Ethics* (1994) Laurence Erlbaum Associates Inc, Hillsdale, NJ at p. 22.

ethical education. As well as the artificiality of proxies for ethical character the nature of the values adopted (component two and three) is subject to legitimate and radical difference of opinion. To try and assess in this sphere (with allowance for less freedom of legitimate opinion in the sphere of ethical conduct governed by professional codes) becomes a politically divisive conformity test.

It has been shown that one can cheat the Defining Issues Test for moral reasoning,[24] and use of the test in education and training would have little effect other than destroying the usefulness of the test. However, even if such a form of assessment were practicable the Kohlberg stages have been criticised because they allegedly reflect political preferences.[25] Unquestionably at the undergraduate stage of legal education any assessment regime must respect value differences expressed by students. We must facilitate the identity projects of students rather than trying to co-opt them for the purposes of the profession, or regulators, or even the legal system. We must put our confidence in the inherent persuasiveness of the values we espouse and resist the temptation to try and impose them through assessment. In the words of Derek Bok:

> "It is not the place of faculty members to prescribe what undergraduates ought to consider virtuous. But surely faculties should do whatever they can to prepare their students to arrive at thoughtful judgments of their own" [26]

Although we might also hope to help our students to become sensitive to ethical issues in daily life, and effective moral actors, the emphasis Bok places on student autonomy seems correct. In the undergraduate context the ethics of professional service are ones we should offer up for consideration, critical reflection, and adoption.

Conclusions

Recommendation 10 of the LETR Report calls for a review of the undergraduate qualifying law degree and Graduate Diploma in Law and Recommendation 11 states:

> "There should be a distinct assessment of legal research, writing and critical thinking skills at level 5 or above in the Qualifying Law Degree and in the Graduate Diploma in Law ..."

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[24] See: Nicholas Emler and Bernadette Malone, *The Relationship Between Moral Reasoning and Political Orientation* (1983) 45 Journal of Personality and Social Psychology 1073; Nicholas Emler and Emma Palmer-Canton, *Politics, moral reasoning and the Defining Interest Test: A reply to Barnett* et al *(1995)* (1998) 37 British Journal of Social Psychology 457. These studies suggest that even a conscientious annual redrafting of the actual questions asked in the DIT would not be effective. The problem is the student is undertaking the test with a purpose (passing well) that is not conducive to the test functioning properly.

[25] See in addition to the articles cited above: Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1990) Harvard University Press; Steven Hartwell, *Promoting Moral Development Through Experiential Teaching* (1995) 1 Clinical Law Review 505.

[26] Derek C. Bok (2006) *Our Underachieving Colleges: A Candid Look at How Much Students Learn and Why they Should be Learning More*, Princeton University Press, at p. 150.

This recommendation can be met thorough ethically informed teaching. At Nottingham Law School our final year Critical Legal Thinking module combines an ethical and value informed curriculum with assessment of the rigour and soundness of students' critical thinking, research skills, and writing skills.[27] One way of generating an appropriate set of learning outcomes can be through such courses. More generally there is a need to identify what a review of the QLD informed by the LETR Report offers, and to chart some predictable hazards to the successful navigation of any such review.

The emphasis on values and ethics and professionalism is an opportunity. As already noted recommendations 6 and 7 call for learning outcomes that encompass ethics and values and professionalism. Ethical reasoning is pre-eminently critical thinking, and links to recommendation 11. Academic providers should regard these recommendations in a positive light because they can be used to help students in their identity projects. Thus, the argument is that there is a concurrent interest in academic ethics and professional ethics in facilitating and supporting the identity-project of each of our students.

At the same time there is a clear risk or hazard in giving greater emphasis to values and taking an interest in the identity-projects of students. We must be careful of what we attempt to assess, and accept non-assessable outcomes probably best prescribed (if at all) by the observable levels of provision and engagement; and to deny ourselves the power to determine which internalised values are the right ones for students to adopt.

Ethics and values can be taught anywhere in a curriculum: in jurisprudence; or in clinical legal education; or in traditional foundation subjects; or optional modules; or specialist ethics modules; or in keystone research dissertations. Moral reasoning seems to be enhanced by discussion of dilemmas and elaboration of the circumstances of particular cases. These features of casuistic reasoning are familiar from case law. Indeed value discourse is naturally adaptable to signature pedagogies of legal education. It would seem that a values approach would be welcome to legal academics, as it offers a way to enrich the very pedagogies we have developed in practice over time. Peter Birks identified one source of hesitation:

> "This is difficult because of the proximity of propaganda and indoctrination."[28]

This concern has been addressed above. A concern that ethical education will be no more than teaching the codes of professional conduct has also been implicitly rejected above.[29] In short that would not be appropriate at undergraduate levels.

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[27] This potential for combining value discourse with jurisprudence was also noted in : Seow Hon Tan, *Teaching Legal Ideals Through Jurisprudence* (2009) 43 The Law Teacher 14.

[28] Peter Birks in Peter Birks (ed) (1996) *What Are Law Schools For?* Oxford University Press, Oxford at xiv.

[29] For an incisive critical account of such a model see: William H. Simon, *The Trouble With Legal Ethics* (1991) 41 Journal of Legal Education 65.

There seems to be another cause for concern: that values or ethics are soft and not capable of rigorous analytical treatment. Possibly some legal academics believe that the law has to be freed from the subjective and contested field of values in order to be teachable as law. Philippa Foot said:

> *"[Q] But people think that sometimes there is a difficulty reconciling morality with rationality.*
>
> [PF]They do, but I believe it is a mistake to think you've got an independent idea of rationality; that there is one idea of rationality and one idea of morality and somehow you have to reconcile them. They're not separate. From the beginning, if you like, morality leads rationality and not the other way round." [30]

Reflection and teaching about values and ethics and professional practice are not a distraction from the business of legal education: rather, they are its most effective vehicle. In the words of the Carnegie Report:

> "A more effective way to teach is to keep the analytical and the moral, the procedural and the substantive in dialogue throughout the process of learning the law." [31]

Hopefully the forthcoming review of the law degree will enable this potential to be realised and put into practice across the higher education sector.

[30] Philippa Foot interview in 2001 published in 2013 Sept/Oct issue of *Philosophy Now.*
[31] Op. Cit n. 11 at p. 142 Loc. 2021

CHAPTER 1
THE VALUES OF LEGAL EDUCATORS

This book is a book about the uses of values in legal education. The primary concern is with legal education as an educative enterprise. This leads to a focus upon the development of the student of law. The first value articulated, and indeed endorsed, is that educational practice should be aligned with the interests of the law student first and foremost. Therefore, the focus of this book is the impact of legal education upon the law student.

An alternative approach to legal education is to make alignment with the demands of the profession or society the primary task of legal education:[1]

> 'American society has become more dependent on the legal profession for its functioning than ever before. Americans, therefore, have ever more reason to take an interest in the legal profession and, we believe, in how lawyers are prepared for their important public responsibilities.'
>
> 'What sets these courses apart from the art-and-sciences experience is precisely their context: law school as apprenticeship to the profession of law.'
>
> '… the common aim of all professional education: specialised knowledge and professional identity.'

We will return to competing ideals for legal education below. For now it is sufficient to note that this view comes from North America where law school delivers a three-year full-time post-graduate programme, and there is no further professional stage (such as the Legal Practice Course or the Bar Professional Training Course) nor any compulsory work based apprenticeship stage (such as the Training Contract or Pupillage).

Although this book has wider concerns than just the undergraduate law degree (the LLB) in the UK, and freely uses evidence from other sources, the undergraduate degree is the institutional background to the book. This is because it is the area where the author has most experience. Therefore, the default law student is an undergraduate at a British university reading for a degree in law.

The value of alignment advanced here is not empty, and could be contested, as indeed it is by some concerned with professional education specifically. We know that not all educational systems have had the best interests of the students in mind. The segregated system of education provided for African-Americans and castigated by Carter G Woodson was one notorious example of such misalignment.[2] Some critics of contemporary legal education in the common law world make a similar damning accusation of misalignment with reference to the structure and practice of legal education.[3] Therefore, it is quite important to start out in a book about values in legal education with the identification and assertion of this value for academic and educational practice.

Assertion of this value does not entail the denial of other important interests that need to be considered in the context of legal education. We have noticed already that the public importance of professional education leads some to make a concern with professional apprenticeship the primary value for legal education.[4] Obviously, legal education is a commercial enterprise, as is higher education in general.[5] Obviously, legal education plays a role in the reproduction of social hierarchies and what has been termed the 'legitimation of domination',[6] or a related idea, or perhaps the same idea more prosaically expressed: 'individual status attainment'.[7] Obviously, legal

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[1] W.M. SULLIVAN, A. COLBY, J.W. WEGNER, L. BOND and L.S. SHULMAN, *Educating Lawyers - Preparation for the Profession of Law* Jossey-Bass, San Francisco CA 2007, loc. 81, loc. 109, and loc. 111

[2] C.G. WOODSON, *The Mis-Education of the Negro*, Wilder Publications, Blacksburg VA 2008, p. 8: 'The thought of the inferiority of the Negro is drilled into him in almost every class he enters and in almost every book he studies.'

[3] B.Z. TAMANAHA, *Failing Law Schools* University of Chicago Press, Chicago IL 2012, at locs. 3253-54 and 3295-97 calls for reform in order to align the interests of Law Schools as educational providers with the interests of law students.

[4] W.M. SULLIVAN, A. COLBY, J.W. WEGNER, L. BOND and L.S. SHULMAN, above n. 1.

[5] D.C. BOK, *Universities in the Market Place - The Commercialization of Higher Education*, Princeton University Press, Princeton NJ 2003.

[6] P. BOURDIEU, *The State Nobility – Elite Schools in the Field of Power*, L.C. CLOUGH (tr.), Polity Press, Cambridge 1996, p. 5

[7] D.F. LABAREE, 'The American Struggle Over Educational Goals' in D.F. LABAREE, *Education, Markets, and the Public Good*, Routledge, Abingdon 2007, p. 98

education has to be aware of the legal profession.[8] Obviously, the state of legal education will have an impact upon the state of the legal system.[9] Obviously, the understandings of lawyers, academics, and others who have had contact with legal education will impact upon the quality of our legal culture.[10] Obviously, legal education will have an impact upon lay understanding of the law.[11] Obviously, legal research may be useful for the legal system, the political system, the ethical culture of society, the economic system, our understanding of co-ordination problems, our understanding of language games and human culture.[12] Legal education does not take place in a vacuum and it is not a simple enterprise. Any account that is blind to the myriad influences upon legal education risks becoming a caricature of the reality of practice.

Therefore, a second value position is necessary for this book to take, a view of this cacophony of voices demanding attention. The viewpoint adopted is one of value pluralism, and thus, there will be no claim to identification of a principle that can impose a stable hierarchy upon these potentially conflicting demands upon legal education. Rather, it is argued that discourse about values is undermined by assertion of a single value as the ultimate, or true, or unifying, or overarching, or best value. The alignment of educational practice with the interests of the student cannot be the sole value that is given regard when thinking about legal education. However, what is asserted is that it is the right value to start with when considering what legal education should be, and a necessary value to use when evaluating educational practice. We will return to pluralism below. It is first necessary to more fully articulate, and defend the importance and coherence of, a value of alignment of educational practice with the interests of the law student.

It is necessary to be careful and modest when thinking about alignment of educational practice with the interests of students. Modest because it must be recognised that educational practice cannot be relied upon to transform social practice. Careful, as the assertion of this value hides the problem of knowing what the interests of students might be. Thus, we can only try to align our practice to what we have reason to think is in the interests of students. It is due to this fact that it is sensible to try and shift as much power to innovate and direct the educational process to students as is proper. Nor can we realistically expect to make larger changes in social practice, even if convinced that such change would be in the interests of our students. Indeed, often we may find we are fighting a rearguard action to defend what we can of their interests from pressures from the multifarious social forces that impact upon legal education. However, there is an ubiquitous perspective on these issues that must be noticed: that we should allow consumer choice to determine what students interests are thus acting in a way consonant with the contemporary zeitgeist. This topic demands a fuller treatment than can be accommodated in this chapter. The impossibility and undesirability of shifting the task of identifying student interests onto the market is demonstrated in chapter 2.

The critical account of consumerism here, and later, is deliberately restricted in scope because of the need for realism in establishing aims and ambitions for educational reform. There is no implicit programme for the overthrow of the ideology of the market embedded in this work. Legal education cannot cure the ills of the legal services market, or of the growing problems around access to justice generated by austerity politics, or the ethical

[8] Although details differ across jurisdictions it seems there are always both cultural and institutional links. In the UK the Bar and the Law Society have prescribed certain content for a Qualifying Law Degree.

[9] There is a reasonable, if usually unexamined, assumption that legal education will have an effect upon those who go on into legal practice. An example: 'LETR is required to ensure that the future system of *legal education and training will be effective and efficient in preparing legal service providers* to meet the needs of consumers.' <letr.org.uk> accessed 16.04.2013.

[10] The importance of legal education for general legal culture is oddly underemphasised in academic and regulatory commentary. However, it was given attention by Blackstone in his landmark work see: W. BLACKSTONE, 'On The Study of The Law' in *Commentaries on the Laws of England*, vol. 1, Oxford 1765-9, <www.lonang.com/exlibris/blackstone> accessed 16.04.2013. A contemporary awareness of the importance of the issue is shown in C.A. MACKINNON, 'Mainstreaming Feminism in Legal Education' (2003) 53 *Journal of Legal Education* 199.

[11] I am unaware of any study of the portrayal of legal education in the mass media, or of public perceptions of legal education, rather than of legal practice. A fascinating indication of what such studies might reveal is provided by A. SARAT and S. SCHEINGOLD, *The Cultural Lives of Cause Lawyers*, Cambridge University Press, Cambridge 2008.

[12] Law is still a site of dispute over the nature of its research mission: see M. VAN HOEKE, 'Preface' in M. VAN HOEKE (ed.), *Methodologies of Legal Research - Which Kind of Method for What Kind of Discipline*, Hart, Oxford 2011, loc. 113: 'Legal scholarship is torn between grasping as much as possible the expanding reality of law and its context, on the one hand, and reducing this complex whole to manageable proportions, on the other. In the latter case …, law is largely cut loose from its context, and societal problems are exclusively worded as "legal problems" … As a reaction, many attempts have been made, from the nineteenth century onwards, to broaden legal doctrine, or to conceive it differently. Adding a social science dimension or a comparative dimension … the question then becomes one of demarcating the borders of legal science …': Contrast the self-assurance of P. BIRKS in P. BIRKS (ed.), *What Are Law Schools For*?, Oxford University Press, Oxford 1996, p. viii: 'For the law schools are discharging a public function essential to a modern democracy. It is a law making function, continually directed to the improvement of the law and to the underpinning of its authority or, perhaps the more suitable word in a modern society, its legitimacy. The law schools are the guardians of the law in the interests of the public.'

challenges facing our students whether they go into the legal profession or not. Kurt Lewin caught the point with his gift for pithy statement:[13]

> 'It seems to be easier for society to change education than for education to change society.'

Legal education is a part of the educational system and the entire system is subject to forces quite beyond it to resist. Lewin had in mind the radical and traumatic impact of the Nazification of Germany including education. Lewin wrote of an 'authoritarian style' of social life as typified by Germany in the 1930s. He contrasted this with a 'democratic style' as typified by the United States to which he had emigrated. These contrasting models were far more clearly demarcated than those facing higher education today. Even so the increasing influence of market models for collective action, including for the design and provision of higher education, raises real and increasing concerns about the respect given to educational values within educational institutions. To quote Derek Bok:[14]

> 'By trying so hard to acquire more money for their work, universities may compromise values that are essential to the continued confidence and loyalty of faculty, students, alumni, and even the general public.'

And that is the view from Harvard University.

In short we cannot hope to be socially transformative agents in our educational practice. The rejection of consumerism as a panacea for the problems of legal education is not a battle cry against the modern zeitgeist. Nor is it a call for an insulated or inward looking model of legal education. What is important is to understand what market forces can, and what they cannot, achieve. All institutions of higher education face external demands, and we will find Lewin's observation as true today as in the 1930s. However, that academics and institutions of higher education are ships upon a great ocean does not mean they cannot steer, nor that they cannot have a mission of real significance to perform. We are subject to forces outside our control but we are not out of control unless we relinquish those means of navigation available to us.

To quote Lewin once again, in the same article:[15]

> 'Education tends to develop certain types of behaviour, certain types of attitudes in the children or other persons with whom it deals. The kind of behaviour and the attitude it tries to develop, and the means it uses, are not merely determined by abstract philosophy or scientifically developed methods, but are essentially a result of the sociological properties of the group in which this education occurs. In considering the effect of the social group on the educational system, one generally thinks of the ideals, principles, and attitudes which are common within this group. Indeed, ideals and principles play an important part in education. But one will have to distinguish the ideals and principles which are officially recognized from those rules which in reality determine the events in this social group. Education depends on the real state of the social group in which it occurs.'

In our contemporary setting Lewin forces us to consider how much responsibility should be given to consumer choice, or market demand, in reforming legal education. The idea of consumer choice is a powerful ideal or attitude at work in modern society. If this ideology is not reflected upon it becomes a default position. It influences formal reform proposals, and those relying upon it have a rhetorical vocabulary of liberation from conservatism, paternalism, and outworn educational traditions they can deploy. When we consider 'the rules which in reality determine' conduct it also plays a role, that the student chose to purchase something is a readymade justification for a practice. Finally, it removes the need to engage in protracted discourse about values because it substitutes the values of the student for those of the educator. And in the ideology of consumerism the customer is always right.

Consumer choice is a powerful value in modern thinking. It serves as a means to give people what they want. If students can be given choice, it might be argued, then they will demand through market processes the legal education that they want, and what they want is the best measure of what they need. There are a host of objections that could be made to this approach that are informed by the interests, perspectives, and associated values that Bok identified in the quotation above. Further, there are practical and theoretical objections to attempts to establish a

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[13] K. LEWIN, 'Some Social-Psychological Differences Between the United States and Germany' (1936) in *Resolving Social Conflicts and Field Theory in Social Science*, American Psychological Association, Washington DC 1997.
[14] D.C. BOK, above n. 5.
[15] K. LEWIN, above n. 13.

consumer market in legal educational services. Finally, there are questions of principle and policy around the finance of legal education. However, all of these more general questions and arguments are not the subject matter of this book. The primary relevance of consumerism for this book is whether the achievement of alignment being advanced as a primary value for educational practice can be met through consumer choice. The illusory and self-defeating nature of attempts to identify the best interests of students through consumer choice is explored in chapter 2. The chapter focuses narrowly on why consumer choice cannot play the required roles of identification and alignment of student interests with legal education.

1. ALIGNING WITH THE INTERESTS OF LAW STUDENTS

If we reject a consumerist ideology then we have to try to bring into alignment educational practice and student interests through other means. To some extent the remainder of this book is an extended essay on how this might be accomplished. Chapter 3 examines what values students should be encouraged to endorse and internalise. It is argued that the proposed practice is aligned with the interests of students. However, there are some general values that should inform the practice of legal educators, and the remainder of this chapter is devoted to a consideration of these values. Specifically, the chapter argues that legal educators: should try to do no harm to the welfare of law students; should supports student autonomy by taking a pluralist stance towards value conflicts; should encourage law students to reflect upon what they care about, and to spend some time thinking about their own values, and offer support for this process; should try to enhance the capabilities of law students; should promote sound reasoning and clear expression; should try and promote an interest in the seeking of the truth in students; and should include students into the community of scholarship to the fullest extent practicable. There is reason to suppose that each of these educational aims is in the interest of law students. However, the general approach is not an attempt to enumerate what is in the best interests of students, but to try and discover what is in the interests of students through educational practice.

There is an emphasis on the importance of the first value: that we should seek to do no harm. This is in part because it was the realisation that the risk of harm was real that led to the author's engagement with the problems of legal education as a topic of research. Therefore, it was a crucial stage in the process that led to this book. This is in part because it is research into legal education and student well-being that firmly closes the door to any argument that paternalism offers an alternative to consumerism as a source of the knowledge necessary to align students' interests with legal education. The evidence that demands a rejection of a paternalism based on academic expertise is reviewed in chapter 2, following the explanation of why consumerism must be rejected as a source of the same knowledge. In effect chapter 2 is the chapter of shadow values, those values or approaches to legal education that are rejected by adoption of the values and vision of legal education that this book advocates. Putting these shadow values in a separate chapter allows for an account of the positive values that inform the book and the academic practice it advocates.

1.1. DO NO HARM

There is evidence to suggest that legal education can have a harmful effect upon the self-reported welfare and mental health of law students. To be clear there is evidence that legal education is harmful to some law students. We delay a review of the research evidence until chapter 2, but the anecdotal evidence that inspired the author to focus upon the problems of legal education is recounted here.

The author first became interested in the possible importance of values in legal education after noticing the high levels of personal distress being shown by law students in his law school. The pastoral advisor employed by the law school indicated that she saw almost one in four of our very substantial intake of students over the three years of study. Given the reluctance many people feel about admitting the need for help and support, and alternative sources of support both official and unofficial, this suggested that even higher levels of difficulty or distress existed in the student body. It suggested that some need for support was more or less normal for our students. As these are law students they are among the most academically successful young people admitted to our institution.

This appeared paradoxical, and was a genuine surprise. I felt my relationships with the students were good, and friendly, and that I was generally trying to be supportive. Student feedback, both formal and informal, suggested I was well liked and that the students felt my teaching was interesting. At this time in my career I was lecturing to a whole year group of first years in the second term and a whole year group of third- or final-year students in the first term. It was hard to believe that I could be missing the indications of such widespread distress. Note that those most alienated were not attending classes at the institution, and were seeing neither the pastoral advisor nor myself. These students would form the bulk of the depressing first year tail of fails, some of whom would never progress into the second year.

Reflection confirmed some indications were present that all was not well. I would attend the induction week activities and meet enthusiastic and excited young people thrilled to be studying law. By week three, when small group teaching begun, these same first-year students had changed in demeanour, and were hesitant, anxious, and socially lacking in confidence. I had joked about 'what we do to them' to quench that enthusiasm so quickly at the start of their legal education, but had not seriously thought we might be harming them.

My personal tutees started telling me about humiliating interactions and difficulties in communicating with some of my colleagues, especially during small group teaching. I had not realised that I had managed to stop them doing so in the past. I simply started asking in personal appointments with personal tutees: 'How are your small groups going - are you finding them useful?'

I began to notice and worry about inconsequential remarks between colleagues about how hopeless students were nowadays. I noticed how often colleagues took what I call a schoolmarm attitude to students, not unkind, but not respectful. It could be termed a paternalistic attitude, but it seemed to me to verge on a patronising attitude.

I asked the pastoral advisor why the students she was seeing had wanted to study law. I thought their sense of alienation may be due to their misplaced and unrealistic expectations about law and legal education. She told me they had wanted to be able to earn a living, but mostly that they had wanted to do good in their work life.[16] They wanted to help people. Shameful to admit, I was stunned by this revelation. I had shared in the common belief amongst legal academics that modern students are driven by instrumental concerns towards study and the law, motivated by the promise of money and the need to get through the assessment with as little trouble as necessary.[17]

I asked some colleagues what they remembered about their days as law students. The clearest answer was: 'being told what I thought did not matter, and might be tolerated, but was not important for legal education'. I asked the pastoral advisor what she thought was at the root of the unhappiness she was dealing with. She thought the students felt that they had little to offer. They were trying but not sure why they were doing what they were doing, and they were feeling very insecure. They generally assumed any fault was their own, and not that of the institution.

Perhaps the students had entered into a course of study which they thought was informed by the importance of right and wrong. Once committed to this study they were told that their views of what was right and what was wrong were irrelevant to their study. They were told to identify why the judge had decided the case the way he had (almost invariably it was a he), to identify the legal issue. Suddenly all those jokes I used, to illustrate why law was not for the faint-hearted and that it was not justice but the letter of the law that we were concerned with, felt misplaced. Perhaps I had been interpreted as displaying a cynicism towards right and wrong that had left my

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[16] The danger of assuming students are motivated by a desire to achieve material success seems to be widespread. From the USA: 'As one student said, "I wish the faculty had a more diverse idea about what success in the law is. There seems to be one version of success in the law where you go to this big firm and the firm owns your soul for the rest of your life and that's success. It is unlike other professions where you are shown the alternatives." This comment was echoed by students on virtually all the campuses we visited, and many expressed their sense of vulnerability to the pressure.' W.M. SULLIVAN, A. COLBY, J.W. WEGNER, L. BOND and L.S. SHULMAN, above n. 1, p. 150, loc. 2130. For an awareness of the importance of giving space in legal education for students to commit to idealistic ends in the UK see: P. BIRKS in P. BIRKS (ed), above n. 12, xiv: 'The next matter which takes time is idealism. … A law school fails in its teaching if it does not give its graduates the opportunity to make a moral commitment to their subject and through their subject to the public good.'

[17] My assumption, that students were more interested in getting qualified and into well-paid work than in getting educated and helping clients, was probably symptomatic of my unreflective beliefs around motivation; for my informed position see chapter 4 below. The mis-ascription of material motivations to others by those in authority seems to be common: A. KOHN, *Punished by Rewards - The Trouble with Gold Stars, Incentive Plans, A's, Praise, and Other Bribes*, Houghton Mifflin Company, New York NY 2000, p. 130: 'Several studies over the last few decades have found that when people are asked to guess what matters to their co-workers – or in the case of managers, to their subordinates – they assume money is at the top of the list. But put the question directly – "What do you care about?" – and the results look very different, To wit: When samples of industrial employees in 1946 and 1986 were asked what they looked for in a job, they ranked "good wages" fifth out of ten possible factors. In the more recent survey, "interesting work" was number one. Supervisors, however, assumed workers cared most about money'.

students emotionally bruised and confused.[18] Perhaps my well-meant, worldly-wise advice[19] - to attend to the text of the law, to authority, to the detail, to the procedure, my attempt to help them identify the elements of the legal craft - was making my students fall into confusion.[20]

If we take alignment of educational practice with the best interests of students as the primary value for legal academics at undergraduate level then the possibility of harming students through our educational practice raises two issues. First, the presence of such harm in practice wholly undermines any claim to an expertise capable of informing a valid paternalistic identification of the best interests of students. Doing no harm is a minimal ethical requirement for an ethic of alignment with the best interests of students. The relevant evidence is considered below (in chapter 2) in an exploration of why we cannot rely upon academic expertise to identify the best interests of students under a paternalistic model of educational practice. Second, it makes reflection upon whether we can avoid student harm, or the avoidable risk of harm, an ethical priority. It makes further reflection on the nature, purpose, and practice of legal education an ethical priority for legal academics. It is this concern that informs the rest of this chapter. The issues are important because the positions arrived at directly affect the experience of students in legal education.

1.2. PLURALISM AND AUTONOMY

It seems clear that the studies on student distress and legal education rule out any comfortable assumption that educational institutions and academics know best, and that students should put their trust in their law schools. If we seek a source of knowledge about what is in students' best interests we must reject consumerism, and, the evidence demands, we also reject paternalism, at least in legal education. Legal educators have not known what is in the best interests of law students, or knowing the same have not acted upon the knowledge. If the consumerism or paternalism choice were a true dilemma we would be in trouble. However, it is not a true dilemma and we have a clear third option: the support of student autonomy in the context of an expressly pluralist understanding of human values.

In the context of considering what values should inform academic and institutional practice, pluralism and the encouragement of student autonomy are closely linked concepts. Pluralism as a working belief rejects any notion that academics have access to the truth about what constitutes the good. This is because pluralism insists that there are different goods that are incommensurable and inconsistent. There are only goods and not any one Good.[21] In light of this the educationally crucial task for the student is to think about, reflect upon, and choose what goods she should seek. This is effectively a description of acting autonomously.[22] In the words of Derek Bok:[23]

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[18] There is *some* evidence, beyond the professional experience of myself, my colleagues, and our pastoral advisor, that law students feel they are being taught it is wrong to have ethical responses, to feel involved with the law, and legal process, and social justice, from the investigation of US Law Schools. 'Many in our focus groups expressed this sort of confusion about what they feared were the implications of this dispassionate perspective for the nature of their roles as lawyers, diminishing their hopes that they might serve substantive goods in their careers.' W.M. SULLIVAN, A. COLBY, J.W. WEGNER, L. BOND and L.S. SHULMAN, above n. 1, p. 141, loc. 2006.

[19] Well meant but not thought through. There is a need to distance oneself from the facts and establish legal criteria of relevance and importance. However, merely establishing distance is not enough: 'They are warned not to let their moral concerns or compassion for the people in the cases they discuss cloud their legal analysis. This warning does help students escape the grip of misconceptions about how the law works in order to hone their analytical skills. But when the misconceptions are not addressed directly, students have no way of learning when and how their moral concerns may be relevant to their work as lawyers and when these concerns could throw them off track.' W.M. SULLIVAN, A. COLBY, J.W. WEGNER, L. BOND and L.S. SHULMAN, above n. 1, p. 187, loc. 2657.

[20] I fear I was trying to induce 'ethical anaesthesia' or even 'moral lobotomy', terms coined to describe the general effects of the infamous first year of Law School in the USA. K.N. LLEWELLYN, *The Bramble Bush* (1951), Oceana Publications Inc., New York NY 1996, p. 116: 'The hardest job of the first year is to lop off your common sense, knock your ethics into temporary anesthesia.' W.M. SULLIVAN, A. COLBY, J.W. WEGNER, L. BOND and L.S. SHULMAN, above n. 1, loc. 1116: 'We certainly discovered that the same process is very much at work in today's law schools. Faculty, like students, vary considerably as to how worrisome they find this "lopping" and "knocking," this temporary moral lobotomy. However, virtually everyone with whom we spoke was aware that this process was a major facet of the case-dialogue pedagogy of the first year.'

[21] I. BERLIN, 'The Pursuit of the Ideal' in H. HARDY and R. HAUSHEER (eds.), I. BERLIN, *The Crooked Timber of Humanity – An Anthology of Essays*, Pimlico, London 2003, pp. 1-19.

[22] K.A. APPIAH, *The Ethics of Identity*, Princeton University Press, Princeton NJ 2005.

[23] D.C. BOK, *Our Underachieving Colleges – A Candid Look at How Much Students Learn and Why They Should Be Learning More*, Princeton University Press, Princeton NJ 2006, p. 150.

> 'It is not the place of faculty members to prescribe what undergraduates ought to consider virtuous. But surely faculties should do whatever they can to prepare their students to arrive at thoughtful judgments of their own.'

The suggestion is not to assume that students already know how they desire to live their lives (consumer choice) nor to assume that academics know how their students should live their lives (paternalism) but that the task of higher education is to support the students in making the best choices for themselves.

Pluralism and autonomy as values for students will receive more attention in chapters 3, 8 and 9. Suffice it to say that they are being put forward as shared values for academics and educators as well as for students.

2. TAKING OURSELVES SERIOUSLY: THE IMPORTANCE OF WHAT WE CARE ABOUT

Harry Frankfurt has written extensively on the rationality and importance of considering what is important to each of us – he argues that what we want to want is an important question for each individual.[24] Such reflection is an important part of any fully autonomous life. It is a question that informs what Bernard Williams called 'ground projects'.[25] It informs what Giddens called 'life politics'.[26] The question of what one cares about does not have to be difficult or abstruse or intellectual. However, the question is difficult to talk about. What legal education can do is validate the desire to talk about the question, and provide a model discourse and vocabulary to help a student to articulate and reason about the question successfully.

We can offer aid to the student who is trying to decide what he cares about. Such does not need to be directive. However, the classic legal educational response of inducing moral anaesthesia or even moral lobotomy is deeply unhelpful.[27] What would be more helpful is a way to talk about the question. In the words of Appiah:[28]

> '[T]o give people a conceptual vocabulary is to influence them; but to deprive them of it is to cripple them, not to empower them.'

If we accept that education is transformative, as is argued in this book, then it must impact upon the future self-identity of the student. If we accept, as has been argued above, that we should strive to enhance student autonomy, then we are under a duty to try and help our students deal with this autonomy and this necessity to construct a meaningful self-identity. The alternative is to accept avoidable risk of student harm. A man without a ground project was for Williams a man with no reason to live. If pluralism means we cannot give students an account of the Good, then we must try and equip them with the means to think about what goods it is that they desire to desire. Therefore, one value that should inform our practice is the value of taking our values and our students' values seriously.

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[24] H.G. FRANKFURT, *The Importance of What We Care About - Philosophical Essays*, Cambridge University Press, Cambridge 1988; H.G. FRANKFURT, *Necessity, Volition, and Love*, Cambridge University Press, Cambridge 1999; H.G. FRANKFURT, D. SATZ, C. KORSGAARD, M. BRATMAN and M. DAN-COHEN, *Taking Ourselves Seriously and Getting It Right*, Stanford University Press, Stanford CA 2006.

[25] B. WILLIAMS, (1981) 'Persons, Character, and Morality' in *Moral Luck –Philosophical Papers 1973-1980*, Cambridge University Press, Cambridge 1981, pp. 12-13: 'A man may have, for a lot of his life or even for just part of it, a ground project or set of projects which are closely related to his existence and which to a significant degree give a meaning to life … Of course in general a man does not have one separable project which plays this role: rather, there is a nexus of projects … and it would be the loss of all or most of them that would remove meaning.'

[26] A. GIDDENS, *Modernity and Self-Identity: Self and Society in the Late Modern Age*, Polity, Cambridge 1991, p. 215: 'Life politics, to repeat, is a politics of life decisions. What are these decisions and how should we seek to conceptualise them? First and foremost, there are those affecting self-identity itself. As this study has sought to show self-identity is a reflexive achievement. The narrative of self-identity has to be shaped.'

[27] K.N LLEWELLYN, above n. 20, p. 116: 'The hardest job of the first year is to … knock your ethics into temporary anesthesia.' W.M. SULLIVAN, A. COLBY, J.W. WEGNER, L. BOND and L.S. SHULMAN, above n. 1, loc. 1116: 'We certainly discovered that the same process is very much at work in today's law schools … this temporary moral lobotomy.'

[28] K.A. APPIAH, above n. 22, loc. 1067.

2.1. BUILD CAPABILITIES

A discourse and vocabulary for reflection upon values builds a capacity for ethical reflection and life planning. It gives clues as to potential integrating ground projects, and coherent narratives of the self. This is a capability building because it enables a choice to be made that was not previously available. Amartya Sen and Martha Nussbaum have argued that the purpose of economic development should be to increase and improve the life choices available to people,[29] and the end of educative practice should be to enhance and inform the available possible choices for the educated.[30] At least in the version developed by Sen this approach informs a profoundly practical and situated approach to justice.[31]

One can easily adapt the work of Nussbaum and Sen to legal education. It suits educational practice because it starts from the qualities and needs and abilities of the learner. The aim is to enhance the situation of each learner by creating new capabilities or enhancing existing ones. What the learner does with these capabilities is not the business of the educator. However, the approach is informed by an empirically grounded optimism about how people will use their new opportunities and powers.

As the capability approach starts with paying attention to the current capabilities of the learner, and then seeks the most efficient means to enhance that learner's choices, it can serve as a method for alignment of educative practice with student need. It seeks to increase total welfare, as does classic utilitarianism; but it does so with two crucial differences. First, it is far richer in the amount and type of information it considers important. Who is benefited is relevant, how a benefit comes about is relevant, the quality or nature of a benefit is relevant, and who chooses the benefit is relevant. Second, what is sought to be increased is not pleasure, or goods and services as a proxy for pleasure. The key measure of success is greater effective and meaningful choice for people, in the words of Sen:[32]

> 'Expansion of freedom is viewed in this approach, both as the primary end and as the principal means of development. Development consists of the removal of substantial unfreedoms that leave people with little choice and little opportunity of exercising their reasoned agency.'

In the words of Nussbaum:[33]

> 'The Capabilities Approach … holds that the key question to ask, when comparing societies and assessing them for their basic decency or justice, is, "What is each person able to do and to be?" In other words, the approach takes *each person as an end* … it is *focussed on choice or freedom* … It thus commits itself to respect for people's powers of self-definition. The approach is resolutely *pluralist about value*'.

Adaption of this approach to a value-informed legal education seems entirely apposite because the principles that inform the capability approach or human development approach are consonant with the modern mission of higher education already sketched out above: an educational practice that endeavours to serve the student, and aims at the welfare of the student, and to do so by supporting autonomy, and building the student's capacity for effective self authorship. Building capability gives choices to learners, not imposes them upon learners.

To avoid ambiguity, what is proposed here is not proselytising for the human development approach as a substantive set of values in public policy. What is being argued for is the adaptation of the human development approach to higher education in general and legal education in particular. It is an attempt to make the task of aligning the best interests of the students with the curriculum and practice of legal education operationally doable. It is an attempt to make a fruitful borrowing from the development discourse into the educational discourse.

The proposed role of the capability approach in this book is an attempt to find a means to overcome the old, tired, and unproductive contrast between the liberal and the professional in legal education; or more polemically between

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[29] A. SEN, *Development as Freedom*, Oxford University Press, Oxford 1999. See: A. BONI and M. WALKER (eds.), *Human Development and Capabilities: Re-imagining the university of the twenty-first century*, Routledge, Abingdon 2013.

[30] M.C. NUSSBAUM, *Cultivating Humanity - Classical Defense of Reform in Liberal Education*, Harvard University Press, Cambridge MA 1997; M.C. NUSSBAUM, *Creating Capabilities - The Human Development Approach*, Belknap Press of Harvard University, Cambridge MA 2011.

[31] A. SEN, *The Idea of Justice*, Allen Lane, London 2009.

[32] A. SEN, above n. 29, p. xii.

[33] M.C. NUSSBAUM, *Creating Capabilities - The Human Development Approach*, Belknap Press of Harvard University, Cambridge MA 2011, p. 18.

education and training as a model for the law school.[34] The educational or liberal ideal pulls law and legal education towards the general development of character and intellect in the student, and the professional or training ideal pulls towards adequate preparation for a professional practice through attention to a traditional corpus of subjects, the development of analytical and practical skills, and the inculcation of professional ethical concerns. This contrast is of course one aspect of the larger contrast described by Stefan Collini as the historical repetitive argument over the teaching of useful or useless knowledge as the legitimate purpose of the university.[35]

The debate takes place in the shadow of the social role of the university, and especially elite institutions of higher education, as grantors of legitimacy for social privilege, and as the preeminent source for the acquisition of cultural capital.[36] The demand for access to ever higher levels of educational qualification has been driven by a consumer demand for social, economic and professional advancement.[37] There is a tendency for the liberal or useless ideal to be tied to elite and prestige education,[38] and the professional or useful ideal to be associated with wider access, diversity, democratic and meritocratic values.[39]

Defenders of the liberal ideal of a university reject assertions that the liberal ideal should be understood as tied to the social prejudices and reactionary temperament of its most famous exponent:[40]

> 'The cumulative changes of recent decades are commonly talked about in terms of the transition from an "elite" to a "mass" system of higher education, and there is a tendency, which I think we should resist, to identify "useless" subjects with the former and "useful" subjects with the latter. Those who wish, nostalgically or defiantly, to cling to what they believe to be the values of the good old days tend to turn to their Newman for support and comfort. I should make clear, once again, that I do not intend to encourage or endorse that reaction: a properly democratic system of higher education is surely something we should welcome, and anyway it is here to stay.'

What Collini argues is essential to a university education is not any exclusivity, nor any pattern of life (such as provided by campus universities that encourage student residence),[41] nor any subject matter of study (useful or useless); rather it is the freedom to seek to explore the assumptions that underlie the subject matter of study:[42]

> 'One rough and ready distinction between university education and professional training is that education relativizes and constantly calls into question the information which training simply transmits. In this sense,

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[34] There is an extensive literature that touches upon this contrast, for the UK see: P. BIRKS (ed), above n. 12; B. HEPPLE, 'The Renewal of the Liberal Law Degree' (1996) 55 *Cambridge Law Journal* 470; A. BRADNEY, *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century*, Hart, Oxford 2003: for the USA see: W.M. SULLIVAN, A. COLBY, J.W. WEGNER, L. BOND and L.S. SHULMAN, above n. 1.

[35] S. COLLINI, *What Are Universities For?*, Penguin, London 2012, chapter 3.

[36] P. BOURDIEU, above n. 6.

[37] D.F. LABAREE, *Someone Has to Fail - The Zero-Sum Game of Public Schooling*, Harvard University Press, Cambridge MA 2010, and the discussion below in chapter 2.

[38] To give evidence from the most influential articulation of the liberal educational ideal that the imputation is not mere prejudice: 'when I speak of a knowledge which is its own end, when I call it liberal knowledge, or a gentleman's knowledge, when I educate for it, and make it the scope of a University.' Cardinal J.H. NEWMAN, *The Idea of A University*, Baronius Press, London 2006, pp. 92-93.

[39] Newman held up the practice and institutions of Oxford University in the early decades of the nineteenth century as the epitome of a liberal university: J.H. NEWMAN, above n. 38, 'Discourse VII, Knowledge and Professional Skills', pp. 125-147. It was in reaction against the socially exclusive nature and obscurantist curricula of the old Oxford and Cambridge establishments that University College London was established in 1826. <http://www.ucl.ac.uk/UCL-Info/AboutUCL/History.html> accessed 6.08.2013: 'The University of London (now UCL) was formally founded on 11th February. A fundamental principle was that not only would students of all beliefs be allowed entry, but that no religious subjects would be taught. The established interests of Oxbridge and the Church prevented the University of London receiving a royal charter, so it was set up as a joint stock company. The new University was vilified by the Church as "The Godless Institution of Gower Street", and by the Tory press as "The Cockney College", because of its aim to extend access to university education from the very rich to the growing new middle class.'

[40] S. COLLINI, above n. 35, p. 41.

[41] Newman asserted otherwise: 'if I had to choose between a so called University, which dispensed with residence and tutorial superintendence and gave its degrees to any person who passed an examination in a wide range of subjects, and a University which had no professors or examinations at all, but merely brought a number of young men together for three or four years, and then sent them away again … I have no hesitation in giving preference to that University that did nothing'. J.H. NEWMAN, above n. 38, p. 120. The centrality of the social connections made at university is reflects the feelings of many students about the value of university - especially students who attend and reside at campus universities, see: J. BRENNAN, R. EDMUNDS, M. HOUSTON, D. JARY, Y. LEBEAU, M. OSBORNE and J.T.E. RICHARDSON, *Improving What is Learned at University - An Exploration of the Social and Organisational Diversity of University Education*, Routledge, Abingdon 2010.

[42] J. BRENNAN, R. EDMUNDS, M. HOUSTON, D. JARY, Y. LEBEAU, M. OSBORNE and J.T.E. RICHARDSON, above n. 41, p. 56.

> education encourages the student to recognise the ways in which particular bits of knowledge are not fixed or eternal or universal or self sufficient.'

Thus, Collini is clearly claiming the role of the heterodox voice for the university. Liberal education is essentially about academic freedom to question.

Elsewhere I have suggested that the most attractive aspects of the liberal educational ideal are:[43]

> 'most important is probably the individualistic focus of education implied by liberal education … Liberal education is concerned with the development of the individual student … second … an open-minded education, as opposed to a dogmatic education … that includes the possibility that the student will ultimately reject the underlying ethical approach of the teacher … Third … a liberal education implies a generous spirit towards the task of education …'

At that time my hope was to try and identify features of the liberal ideal around which legal academics could find consensus and build a collegial identity. The proposed use of a capability approach marks a turning away from this hope, and an attempt to forge an approach that avoids falling back into arguments that pit the useful or professional or training against the useless or liberal or educational. One reason to think that this may be fruitful are the principled positions argued for and held by Martha Nussbaum, as both capability advocate and defender of the humanities in American liberal college degrees.[44]

A capabilities approach captures many of the features that made a liberal ideal attractive. It is concerned with the enhancement of individual students, and avoids elitism in this task. Indeed the logic of human development prioritises not the most accomplished of the population but those who have least freedoms. The approach is open-minded about the nature of the good, explicitly pluralistic, and optimistic about the consequences of giving people effective power to make choices. For Sen freedom is both the measure of development,[45] and the means of development:[46] 'achievement of development is thoroughly dependant on the free agency of people'. Finally, the capabilities approach is essentially generous. It is based on a concern with the welfare of people, and a concern to generate more freedom, because greater freedom enables people to live better lives. It makes the realised benefits to people the measure of success, and it does not suffer from the parsimonious attitude towards benefits associated, fairly or unfairly, with utilitarian ideals.

As well as capturing valuable aspects of the liberal tradition it captures goods sought by the professional tradition. There is no contradiction from the human development point of view between enhancing choice and making students more employable. Being able to obtain employment enhances choice. There is no contradiction between the recognition of the need for reasonable arrangements for students subject to disabilities and human development. The principle of justice it advances means disabled people have a claim to extra resources to raise or enhance their capabilities, to enable them to exercise freedom:[47]

> 'An understanding of the moral and political demands of disability is important not only because it is such a widespread and impairing feature of humanity, but also because of the tragic consequences of disability can actually be substantially overcome with determined societal help and imaginative intervention.'

There is no tension between widening access and the capabilities approach to education as freedom for all people, the enhancement and building of capability for all members of society, is both the measure of and means for achieving success.

Given the transformative nature of education it is important that we have some conception of what it is we are trying to achieve. What it is that higher education, the university, is trying to achieve, must be envisioned at a very abstract level of generality. Higher education is very disparate. What the law school is trying to achieve still needs

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[43] G. FERRIS, 'Aspirations for Law in the University' (2004) 13 *Nottingham Law Journal* 67, pp. 70-71.
[44] M.C. NUSSBAUM, *Cultivating Humanity - Classical Defense of Reform in Liberal Education* Harvard University Press, Cambridge, MA 1997; M.C. NUSSBAUM, above n. 33; M.C. NUSSBAUM, *Not For Profit: Why Democracy Needs the Humanities,* Princeton University Press, Princeton NJ 2010.
[45] A. SEN, above n. 29, p. 4: 'assessment of progress has to be done primarily in terms of whether the freedoms that people have are enhanced'.
[46] Ibid.
[47] A SEN, above n. 31, p. 259.

to be envisioned abstractly; the student body and the legal services market, and the life circumstances of graduates of the law school are very disparate, and becoming more so. The liberal ideal offered a rather contemplative and intellectual ideal type:[48]

> 'He apprehends the great outlines of knowledge … A habit of mind is formed which lasts through life, of which the attributes are, freedom, equitableness, calmness, moderation and wisdom … a philosophical habit. This then I would assign as the special fruit of the education furnished at a University … the main purpose of a University in its treatment of its students.'

The alternative approach, the professional or training or useful approach, does not choose to define the educative task primarily in terms of the development of the student as an individual. It seeks to advance socially useful aims through education. The professional ideal offers as an ideal type one who has internalised as a ground plan, or identified as something that is cared about, the ethical position of the professional practitioner, in the words of the recent Carnegie Foundation report into legal education in the USA:[49]

> 'the common aim of all professional education: specialised knowledge and professional identity.'

If left without explanation and elaboration this statement is an impoverished overview of the professional ideal as it severely underestimates the creative and transformative ambitions for institutions of professional education. It does not articulate clearly the self-reflective and critical parts that the US law school has to play in creating professional identity:[50]

> 'Professional schools are not only where expert knowledge and judgment are communicated from advanced practitioner to beginner; they are also the place where the profession puts its defining values and exemplars on display, where future practitioners can begin both to assume and critically examine their future identities.'

It does not bring into focus the important emphasis placed on the active role of the learner in choosing to become a professional. Professional identity cannot be imposed, nor is it forced upon unwilling candidates. There needs to be a willing seeking for professional identity that explains application and entry into law school, and that law school can support and ideally enable:[51]

> 'Ultimately, the goal of formative education must be more than socialization seen as molding human clay from without. Rather, formative education must enable students to become self-reflective about and self-directing in their own development. Seen from a formative perspective, law school ought to provide the richest context possible for students to explore and make their own the profession's possibilities for a useful and fulfilling life.'

It also begs misunderstanding, because of assumptions about available standpoint built into the liberal ideal. Rather than detached and contemplative the professional ideal is engaged and active, the student is seeking to understand the very practice of the student:[52]

> 'The mark of professional expertise is the ability to both act and think well in uncertain situations. The task of professional education is to facilitate novices' growth into similar capacities to act with competence, moving toward expertise, In order to do this, students need access to forms of social interaction that embody the basic understanding, skill, and meaning that, together, make up professional activity.'

The primacy the professional ideal places in the value of preparation for the profession must be rejected if the primacy of the development of the student is to be defended. Also, such an alignment violates the commitment to belief in pluralism of the good, and the associated value of student autonomy in choosing goods. Therefore, the professional ideal cannot be wholly absorbed into the capability approach to educative aims that this book tries to advance. However, the commitment to practice skills is clearly capability enhancing. Furthermore, the support for

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[48] J.H. NEWMAN, above n. 38, p. 85.
[49] W.M. SULLIVAN, A. COLBY, J.W. WEGNER, L. BOND and L.S. SHULMAN, above n. 1, loc. 111.
[50] W.M. SULLIVAN, A. COLBY, J.W. WEGNER, L. BOND and L.S. SHULMAN, above n. 1, loc. 114
[51] Ibid. locs. 1225-1228.
[52] Ibid. locs. 184-186 and locs. 188-190.

a commitment by students to a professional identity is in itself capability enhancing. Freedom to choose is a freedom to commit, although of course commitment must restrict subsequent choice. The point is structurally similar to the point made by Appiah about supplying a conceptual vocabulary quoted above.[53] If we support students in the development of the qualities necessary to found a competent professional practice, and hold out as desirable to students the values of professional practice, then we influence them. But to refuse to do so is not enabling. It does not empower students to be radically unprepared for practice. It leaves them, and their future clients, vulnerable and anxious. Fundamentally, freedom is valuable because it can be exercised.

Across all three approaches (liberal, professional and capability) is recognition of the central importance of the personal development of individual students, what the report of the SOMUL project called 'identity projects'. Indeed, it is this feature of undergraduate education that UK students themselves single out as being the most important value of university education:[54]

> 'However, some students point to their academic experiences as a major source of personal change whereas others point to the more general experiences of life at university and of leaving home for the first time as the major source of change. … [T]hey were more about "confidence" than about "competence". They were more about the acquisition of "social and cultural capital" than the "human capital" associated with knowledge and skills. More generally "reflexive" changes in student identities … are evident but so too is the weight of previous more ascribed identities. Also, as noted in other surveys of university learning … there is also the issue of whether changes in student identity are the outcome of university experience or simply of "growing up". Plainly both are involved. … the "affirmation" of both "imported" and "new" identities occurs within higher education as part of what can be termed "identity projects" … And not everyone experiences major personal change as a result of going to university. But most do.'

The vital difference in the approaches we have been considering is that the capability ideal for higher education,[55] as well as the liberal ideal for undergraduate education, each view identity as a field of student discovery, choice, and largely undetermined development. The professional ideal sees the choice of identity project as being taken prior to study, and the realm of discovery and choice as more circumscribed, because the range of acceptable termini of development are pre-determined. However, even this distinction should not be overdrawn, as the formation of 'subject identity' is both a desired product of undergraduate education in the UK, and there is empirical evidence that undergraduate education is effective at forming subject identities in graduates.[56] There is a real and important difference between the ideals, but there are elements of choice and elements of prior desired outcome in them all.

There is another educationally important differentiation between the ideals, in terms of what they value educationally. The liberal ideal values primarily the cognitive, or linguistic and logical-mathematical intelligences. The professional and capabilities ideals each allow for a broader valuation of intelligences, valuing not only the linguistic and logical-mathematical but also, in particular, the personal intelligences, and, to a lesser extent, the bodily-kinaesthetic intelligence.[57] In legal education this is sometimes described in terms of opposition between

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[53] K.W. APPIAH, n. 23, loc. 1067: 'to give people a conceptual vocabulary is to influence them; but to deprive them of it is to cripple them, not to empower them.' See also, Peter Birks, quoted at n. 17 above: 'A law school fails in its teaching if it does not give its graduates the opportunity to make a moral commitment to their subject'.

[54] J. BRENNAN, R. EDMUNDS, M. HOUSTON, D. JARY, Y. LEBEAU, M. OSBORNE and J.T.E. RICHARDSON, above n. 41, pp. 155-156, references omitted. The Social and Organisational Mediation of University Learning (SOMUL), was a four-year research project. The researchers administered questionnaires and conducted interviews with students across 15 institutions of higher education and three disciplines (sociology, bioscience, and business studies). The institutions were varied, including campus universities and post-1992 universities, teaching and research institutions.

[55] Although not directed at the role of higher education in 'identity projects' the short book A. SEN, *Identity & Violence - The Illusion of Destiny*, Penguin Books, London 2007 gives a very voluntaristic account of identity, as would be expected in the light of the heavy emphasis on voluntary action in the human development or capability literature.

[56] J. BRENNAN, R. EDMUNDS, M. HOUSTON, D. JARY, Y. LEBEAU, M. OSBORNE and J.T.E. RICHARDSON, above n. 41, p. 142: 'there are important commonalities in the reported effects of the student experience, irrespective of type of setting. Thus, looking at "what was most important" for each type … A continuing commitment to the subjects studied in higher education – and by implication the acquisition of a "subject-identity" – was important to fewer than half the students sampled.' Not the only thing valued, nor most commonly, but still a significant feature across different types of undergraduate degree in the UK.
One would expect subject identity to become more important in post-graduate education. The PhD serves to 'sustain the supply of researchers' in disciplines, as well as providing 'a labour market qualification' for academic and other employment, an account of current debates on the PhD and Professional Doctorates see: C. PARK, *Redefining the Doctorate*, Higher Education Authority, 2007, available at: <www.heacademy.ac.uk/assets/documents/research/redefining_the_doctorate.pdf> accessed 8.08. 2013.

[57] The idea of different intelligences is taken from H. GARDNER, *Frames of Mind - The Theory of Multiple Intelligences*, 2nd ed., Fontana, London 1993; H. GARDNER, *Intelligence Reframed - Multiple Intelligences for the 21st Century*, Basic Books, New York NY 1999.

doctrine (liberal, linguistic and logical-mathematical intelligences) and skills (professional, personal and bodily-kinaesthetic intelligences). The Carnegie report adopted a division of legal professional education into three apprenticeships, reflecting three dimensions of professional work: the intellectual or cognitive (thinking); expert practice (performing); and identity (behaving). The report argued that US law school education was unbalanced, giving too much emphasis to the cognitive apprenticeship at the expense of neglecting the practice and identity apprenticeships. It is suggested that a human development approach has no inherent tendency towards over-emphasis on developing linguistic and logical-mathematical capabilities. Rather, it has an inherent bias towards usefulness that makes it consonant with attempts in legal education to shift the centre towards practice expertise as a model,[58]or clinical education, or practical reason or nous.[59] However, as with the distinction between prescribed and open choice in identity formation the distinction is not categorical, and liberal education in the arts is often centred on intelligences other than the linguistic and mathematical.

Of course it is important to remember when reflecting on the North American literature that the UK law school is not directly comparable to the US law school. As an undergraduate stage in higher education, and the first of three stages in the path to professional qualification, it is less closely tied to preparation for professional practice. However, nor is the UK law school called upon to instil 'a philosophical habit', as opposed to an active or engaged habit, into its students, as the liberal tradition favours. It is argued here that what legal education in the UK, and in particular the undergraduate degree, is called upon to do is to enhance the capabilities of its students, and to thereby increase the effective freedom of choice open to them. In this it can take lessons from both the ideal of a liberal education and the ideal of professional education.

2.2. PROMOTE SOUND REASONING AND CLEAR EXPRESSION

Law is of course about power.

However, and educationally vitally, it is about language and reason. The ability to locate weakness or error in an argument is a safeguard against being manipulated, overawed, misdirected, mistaken or confused. The abilities to construct, and recognise the need to be constrained by, valid arguments are fundamental to theoretical and practical reasoning. Legal academics are appointed and promoted, in part, because of their facility in reasoning. This is an area of expertise where we do generally know better.

Expression is far from inconsequential for the success of reasoning. It is not merely logical competence - the manipulation of premises and conclusions - that is needed. One must find the right expression for the thought, or proposal, or issue. It is almost impossible to hold in practice to the analytical distinctions between substance and form, or expression and concept. In the words of Montaigne:[60]

> 'I sometimes hear people who apologise for not being able to say what they mean, maintaining that their heads are so full of fine things that they cannot deliver them for want of eloquence. That is moonshine. Do you know what I think? It is a matter of shadowy notions coming to them from some unformed concepts which they are unable to untangle and to clarify in their minds: consequently they cannot deliver them externally. They do not yet know what they mean. Just watch them giving a little stammer as they are about to deliver their brain-child: you can tell that they have labouring-pains not at childbirth but during conception!'

The use of language and reason to ask questions, think about problems, and decide what to do is of immense importance in the law and in life. One can use numbers in a similarly life enhancing way, or one can be functionally

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[58] The 'epistemology of practice' noted in the quotation above from: W.M. SULLIVAN, A. COLBY, J.W. WEGNER, L. BOND and L.S. SHULMAN, above n. 1, pp. 188-190.

[59] The author has tried elsewhere to formulate a more practice centred aim for legal education: G. FERRIS and N. JOHNSON, 'Practical Nous as the Aim of Legal Education' (2013) 19 *International Journal of Clinical Legal Education* 271. There is a real problem in articulating a vision of educational ambition and practice that eschews academic traditions, as was noted by W.M. SULLIVAN, A. COLBY, J.W. WEGNER, L. BOND and L.S. SHULMAN, above n. 1, locs. 1334-35: 'skills training will continue to face an uphill battle unless it is linked with an accepted theory of lawyering that could provide a bridge between theory and practice and perhaps establish a rationale for more systematic continuing education beyond law school'.

[60] M. DE MONTAIGNE, 'On Educating Children' in M. DE MONTAIGNE, *Michel De Montaigne The Complete Essays*, M.A. SCREECH (tr.), Penguin Classics, London 1991, pp. 189-190.

innumerate and baffled by numerical reasoning. There is a real value in being able to think and talk and write and figure and in being able to combine the two primary symbolic systems we have developed for reasoning.

Legal reason is not 'natural reason' but an 'artificial reason' according to Coke.[61] However, it is still reasoning, albeit - to borrow some powerful analogies and images from Ronald Dworkin - a reasoning that has the structural peculiarities of the chain novel or comic book title. Each link in the chain of reason is constrained by links forged in the past, and it would take a Hercules of the intellect to forge all the disparate elements together and shape new links correctly and elegantly time after time.[62] The corpus of law reports is the collective articulation by the judges of their reasoning and decisions; of their attempts to reason within the confines of the law and hopefully towards justice. These judges were helped and hindered in their endeavour by lawyers who were reasoning not merely artificially but to a very definite and pre-set purpose: the advancement of their clients' cause. All of this reasoning was constrained not only by legal categories, the very stuff of artificial reason, but by legal process, which provides the matrix of artificial reason.

The law, as it is taught in law schools, includes words and arguments about words, or 'doctrine'. This is valuable, and of value to students beyond its inherent value as constituting the investigation of the law. Expression and reasoning can be practiced and improved, and legal education should be about practice and improvement in these areas.

We should value good reasoning, both linguistic and numerical. We should value clear and effective expression. We should seek to improve the abilities of students in these areas. We should use teaching techniques to do so, such as: modelling; and provision of timely and useful feedback; and giving time for reflection; and scaffolding; and the introduction of useful vocabulary and conceptual structures; and breaking down the complex end operations into simpler sub-operations that students can master; and use of narratives to illustrate the importance of success and failure in reasoning and expression; and through question and answer; and student presentation; and through assessment tasks, and so it goes on.

Hopefully this value is not contentious.

2.3. PROMOTE THE SEEKING OF TRUTH BY STUDENTS

Valuing the seeking of truth may be contentious. It may be thought that a commitment to pluralism precludes commitment to seeking a truth about any significant question. It may be thought that the central importance of falsification or scientific revolution in the theory of science precludes us from speaking and writing about knowledge of any truth, as all knowledge is potentially subject to revision.[63] However, such views are far too absolutist. In fact people and communities of practice can and do use intelligibly and usefully various effective standards of truth. What probably is futile is to seek for The Truth, the search epitomised by Descartes for certainty in knowledge.

If we abandon the search for truths then we undermine the value of reason and clear expression. It is important for legal educators to value the seeking after truth, provided there is sufficient reason to suppose such a seeking is rational. Certainly in law more than in some areas of activity the idea of there being a value in truth is important. Sincerity or authenticity may be an alternative value in some areas of human activity, perhaps in some artistic enterprises, or in love, even for some thinkers in the field of morals or ethics.[64] However, much legal communication is not sincere or authentic. A representative may speak as instructed by her client; a negotiating position may be taken in order to influence the other party, not because it expresses the true position of the speaker;

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[61] E. COKE, *Prohibitions del Roy* (1607) in *The Reports of Sir Edward Coke, in Thirteen Parts*, J. Moore, Dublin 1793, 12th Report 63, p. 65.
[62] R. DWORKIN, *Law's Empire*, Fontana, London 1986.
[63] The idea of the centrality of falsification we owe to Karl Popper, see: K. POPPER, *The Logic of Scientific Discovery*, Routledge Classics, London 2002; and the concept of the scientific revolution to Thomas Kuhn, see T. KUHN, *The Structure of Scientific Revolutions*, 3rd ed., University of Chicago Press, Chicago IL 1996. What they share is a view of scientific knowledge as provisional.
[64] Habermas makes sincerity a condition for moral communicative action, the origins of this position seems to lie in the 1970s, see: J. HABERMAS, 'What is Universal Pragmatics?' (1976) in J. HABERMAS, *On the Pragmatics of Communication*, M. COOKE (ed.), Polity, Cambridge 1998.

professional practice and expertise requires some distance or objectivity. The professional restraints upon telling lies rest upon a belief in the existence and importance of truth, not of sincerity.

It would be a distraction to try and wrestle with the problems of truth. I will simply report on three approaches to truth, from the works of Howard Gardner, Simon Blackburn, and Harry Frankfurt.

Howard Gardner notes that the concept of truth, or untruth or mistake, is a very early feature of human cognitive development:[65]

> 'Truth has its natural home in human language, but the possibility for ascertaining the true state of affairs extends to the prelinguistic infant. From the opening days of life, our five senses tell us what the world is like and, by implication what it is *not* like. A baby reaches for a cup and grabs it confidently – there really is a cup there. A baby reaches for a virtual cup, puts her fingers around it, discovers a simulacrum instead, and whimpers, acts frustrated, or even wails.'

Gardner gives central importance to human senses and human communication in the developing concept of truth. However, each can deceive, and mere impression or report becomes inadequate. However, the possibility of mistake or delusion produces a positive truth-seeking response; this leads to social institutions for truth seeking:[66]

> 'In the search for truth, our greatest allies are the scholarly disciplines and the professional crafts – in short, areas of expertise that have developed and deepened over the centuries.'

From reflection upon academic disciplines and crafts he generates an idea of multiple truths in place of a naïve idea of truth:[67]

> 'Just as scholarly disciplines have their respective truths, professions and crafts have *theirs*, and these truths need to be honed.'

From this he moves on to consider multiple criteria and methods of truth seeking: [68]

> 'Whether one considers a scholarly discipline, like history, or a craft like the fashioning of a violin, or a profession like journalism, it remains appropriate to speak about the pursuit of truth, Each of these spheres has its own methods and criteria; each has evolved over time; each must take into account new discoveries, fresh opportunities, unanticipated obstacles … From a distance, then, we can observe a continuum of truth-seeking, ranging from systematic and self-conscious methods of academic scholars (such as scientists) to the less formal approaches of professionals (such as journalists) to the targeted variations of craftspeople (such as jewellers).'

Gardner considers whether truth is applicable to art, but rejects the suggestion, and reviews his argument:[69]

> 'The notion of a single truth or a single standard of truth now seems hopelessly simpleminded. So, too, the notion that truth can be established simply by relying on one's senses, or by polling the neighbours ... Rather, over epochs, and with plenty of twists, turns, and setbacks, human beings have established expertise. Both scholarly disciplines and professional crafts allow the determination of truths – truths about how the world is and truths about how to act in the world in order to tackle challenges that are often quite complex.'

In summary, the idea of what is so, or 'truth', is very fundamental to people. We get upset when we find we are wrong, but we seek ways to avoid errors and refine our understanding. However, we have come to realise that the task is not unitary but various, and informed by why and how we are seeking truth. However, our collective experience is that we have got better at discerning reality from illusion over time. Indeed, we have developed collective ways to refine and improve our understanding that we constantly deploy. Gardner endorses truth seeking,

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[65] H. GARDNER, *Truth, Beauty, and Goodness Reframed - Educating for the Virtues in the Age of Truthiness and Twitter*, Basic Books, New York, NY 2012, loc. 446
[66] H. GARDNER, above n. 65, loc. 483.
[67] Ibid. loc. 605.
[68] Ibid. locs. 639- 644.
[69] Ibid. locs. 664-670

but not as a single activity, and not as a naïve activity; it requires self awareness and collective action over time. Gardner's basic idea seems to be that people have encounters with the world informed by beliefs about the world, and those beliefs are validated or invalidated by the state of the world. The schematic shape of his reasoning is developmental, at both the individual and collective level.

Simon Blackburn has written an illuminating short book on the philosophical treatment of truth.[70] His discussion locates the range of sensible opinion in a middle ground between two modern extremes of an absolutist search for The Truth, and a relativism that embraces aspects of irrationalism and voluntarism. His account shows how both extremes actually share a common assumption: that truth is an abstract quality of a statement that is independent of people and time and domain. He uses a contrast between traditional and modern scepticism to illustrate this shared assumption of the warring modern factions. Traditional sceptical thinking was not a substantive position held as a world view. As such it was not capable of being refuted as a world view, as modern absolutists assume and seek to do with sceptical arguments, whether through scientific method or philosophical refutation of scepticism; this of course was the philosophical project of Descartes. Neither did traditional scepticism claim to render reason broken-backed; leaving will and personal preference as the sole remaining justifications for beliefs, as some modern relativists argue. Blackburn argues that Nietzsche was the most important source for these aspects of modern relativism. Scepticism was traditionally understood as a means to test our beliefs, and reason's warning against dogmatic certainty:[71]

> 'The sceptic, having recognised all that is to be said on both sides of any question, found that they balanced evenly, and therefore suspended belief, resigning himself to a state of *epoche* or lack of opinion … Today's relativist, persuading themselves that all opinions enjoy the same standing in the light of reason, take it as a green light to believe what they like with as much conviction and force as they like. So while ancient scepticism was the sworn opponent of dogmatism, today dogmatists feed and flourish on the desecrated corpse of reason.'

Blackburn counters both absolutists and relativists by situating truth in multiple ways.[72] Truth is not something added to a true statement: 'I am Graham Ferris' means *the same* as: 'It is true that I am Graham Ferris'.[73] The evidence necessary to support the claim depends on the issue – Am I who I claim to be? Is it raining? Does following the map get you where you want to go? All statements of truths are informed by, and confined by, what we are doing when we express them – they form part of some language game.[74] This approach confounds the absolutist, as we cannot escape uncertainty through any special authority, in 'sense data' or in the 'empirical' or 'reason', because truth seeking and stating is a social activity. This confounds the relativist, as although we do view things through theory, and our perspectives are partial, these facts do not stop our theories and perspectives from being truth seeking and truth establishing. These familiar facts about our human activity when seeking truth do not disturb our understanding of truth as a reality, and as something valuable, although they deny truth the status of a transcendent value:[75]

> 'We found that once we have an issue to decide, it comes with its own norms. Once the issue is the issue, relativism becomes a distraction. In natural science we have found no reason to qualify Clifford's optimism about the method of harnessing observation to theory … In the human sciences we have learned to respect difference of perspective without identifying it with illusion and error … we never found … an underlying foundational story telling us, from somewhere outside our own world view, just why that world view is the right one. But perhaps we have learned to do without that … we can take the postmodern inverted commas off things that ought to matter to us: truth, reason, objectivity and confidence. They are no less, if no more, that the virtues that we should all cherish as we try to understand the bewildering world about us.'

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[70] S. BLACKBURN, *Truth: A Guide for the Perplexed*, Penguin Books, London 2006.

[71] S. BLACKBURN, above n. 70, p. xiv.

[72] Ibid. p. 71: 'Perhaps we do not need a conception of truth, but only a conception of the particular truths in the plural, the ones that make issues for us from time to time.'

[73] Ibid. pp. 59-61: 'Both the relativist and the absolutist are impressed by Pilate's notorious question "What is Truth?" … The minimalist can be thought of turning his back on this abstraction … notice the *transparency* property of truth … it makes no difference whether you say it is raining, or it is true that it is raining, or true that it is true that it is raining, and so on for ever … the phenomenon of transparency means that there is no new topic introduced by talk of truth.'

[74] Ibid. pp. 129-130: 'Wittgenstein telling us that we cannot step outside our own skins, cannot survey our own practices on the one hand and the world on the other, and get a view of how they are related … We just immerse ourselves in our different language games … In *every* area that Wittgenstein considers in detail his weapon of choice is to look carefully at what we are *doing* with language'.

[75] Ibid. pp. 220-221.

In short he concludes that what has driven the philosophical debates has been at least in part a shared assumption by both sides of the debate about what a truth has to be in order to be a truth. If we give up the grandiose theoretical project we can regain scepticism as a valuable tool for testing our thought and beliefs rather than viewing it as a philosophical doomsday weapon.

Finally, Harry G. Frankfurt does not focus on where our idea of truth comes from, nor on how robust our concept of truth and practices of truth seeking are; rather he has considered why truth is important to us.[76] He starts by noticing how useful truth is in familiar practical concerns; for example how essential some objectivity and factual truth is to such a task as building a bridge:[77] 'No one in his right mind would rely on a builder … who does not care about the truth'. He acknowledges that in the evaluative sphere truth is less straightforward. However, we rely upon reasons for valuing what we value, and for making evaluative judgments. These reasons depend upon the reality of truth:[78] 'Unless we know whether we are justified in regarding various factual judgments as true, we cannot know whether there is really any sense in feeling and in choosing as we do'. This applies to both societies and individuals. From considerations of utility he turns to consideration of *why* truth is useful, and suggests it is because truth corresponds to reality, and we need to plan on the basis of reality. It is possible to live in denial but:[79]

> 'it is nearly always more advantageous to face the facts with which we must deal than to remain ignorant of them. After all, hiding our eyes from reality will not cause any reduction of its dangers and threats.'

Of course, these truths, pleasant and unpleasant, include truths about ourselves. Without truth rationality itself teeters on the brink of pointlessness, and on a more everyday level our personal relationships are impoverished. Intimacy depends upon truth, the successful liar cannot be known, and when someone we love betrays us it so threatens our sense of reality that we feel a little crazy.[80] A world of lies that we believe told by other people is a world of delusion. A world of lies told by ourselves to ourselves is a world of self-delusion and is another sort of crazy as it leads to practical irrationality.[81] Finally, we should value truth because it is the means by which we can know ourselves, it is essential for our sense of personal identity:[82]

> 'We learn we are separate beings in the world, distinct from what is other than ourselves, by coming up against obstacles to the fulfilment of our intentions … When certain aspects of our experience fail to submit to our wishes … it becomes apparent to us that they are independent of us. That is the origin of our concept of reality …. To the extent that we learn in greater detail how we are limited, and what the limits of our limitation are, we come thereby to delineate our own boundaries and thus to discern our own shape … This not only provides us with an even more emphatic sense of our separateness. It defines for us the specific sort of being that we are. Thus, our recognition and understanding of our own identity arises out of, and depends integrally on, our appreciation of a reality that is definitely independent of ourselves. In other words, it arises out of and depends on our recognition that there are facts and truths over which we cannot hope to exercise control.'

Thus, Frankfurt links the need for truth to our ability to function in the world, our ability to know and be known by others, and even our ability to know ourselves.

Legal academics should value and seek truths within their own domain; indeed this is one aspect of research and scholarship. One major purpose of teaching law is to teach students how to respect legal truth, and how to establish legal truth, and recognise legal falsehood. However, it goes further than this concern with subject matter. As educators we should be aware of the need for students to recognise the importance of truth for their choices of values, and in their plans for life, both professional and more generally. This is not a permission to engage in dogmatic assertion of beliefs held to be truths by academics that their students must accept as true. Our modern understanding of the nature of truths does not legitimate such activity. But neither does it justify the abandonment of truth seeking, nor the intellectually flimsy cynical relativism that exists in the popular culture of the modern world. Finally, truth should be valued in education because without a respect for truth it is impossible for students to construct a realistic self-identity. Truth should be a vital value for legal academics, as researchers and scholars,

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[76] H.G. FRANKFURT, *On Truth*, Pimlico, London 2007.
[77] H.G. FRANKFURT, above n. 76, p. 23.
[78] Ibid. p. 31.
[79] Ibid. p. 57. See: E. WIESEL, *Night*, M. WIESEL (tr.), Penguin Classics, London 2006, for a seminal work on the consequences of denying unbearable truths.
[80] H.G. FRANKFURT, above n. 76, pp. 79-82.
[81] Ibid. pp. 83-84.
[82] Ibid. p. 98.

and as educators, and in higher education as educators of young people who are coming into adulthood and trying to form a sense of self-identity and a life plan.

2.4. INCLUDE STUDENTS IN A SCHOLARLY COMMUNITY

Expertise, knowledge, power of expression, and cognitive ability are central to the status hierarchies of both the academic and legal professions. Students are not expected to start their programmes of study with these qualities. Education should entail growth and development of the student in the direction of these esteemed qualities. Recognition of this merited status amongst academics and its absence amongst the student body, and the hierarchy this disparity implies in the educational process, is necessary and familiar. It partially explains why students are willing to pay people like me to teach them. Inequality is at the foundation of educational practice – the less able, less knowledgeable, less practiced become enabled, more knowledgeable and effective actors. It has been argued that the human proclivity for teaching is the key distinction between humanity and the rest of the animal kingdom.[83] So, given this structural distinction between the expert and the neophyte, what does the urging of a co-operative asymmetrical community, made up of students and academics and administrators, in a 'scholarly community' demand?

There seem to be three discrete legitimate reasons for valuing the induction of students into a scholarly community, and the character of that community will depend in part upon the relative importance given to these three motivational forces. Whilst each will undoubtedly co-exist with the others in the educational practice of any individual or any institution it is useful for analytical purposes to describe them separately. First is the perpetuation of the field or discipline. Second is the development of student identification with the discipline or profession. Third is support for the autonomy of the student as a learner.

Inculcation of students into a scholarly community is not an act of generosity. The discipline can only subsist if it is renewed. The power and influence and status of the legal academy depend upon its students internalising aspects of the discipline. However, even more vital to the discipline is the induction of the neophyte into the mysteries of the practice – legal research and legal understanding as well as legal practice are all dependent upon the success of legal education in serving as an apprenticeship. This may seem counter-intuitive, or naively unrealistic, in the face of complaints in university staff rooms that teaching duties owed to students act as a distraction from intrinsically rewarding research activity. However, there is no solid evidential basis to doubt that teaching is felt to be important by legal academics.[84] To be clear, it is argued here that one reason that teaching is valued by legal academics is because it serves the needs of the discipline. This is an independent source of valuation of teaching to its being valued because of the benefits it brings to the students.

It is important to recall the nature of a discipline as a group activity over time that generates group understanding. It is not multiple individuals who each have internalised the corpus and methodologies that serve as separate repositories of the discipline. The discipline is the group of researchers practicing the discipline. It is this distributed intelligence that constitutes the knowledge and practice of the discipline.

Jerome Brunner identified the vital links between disciplinary practice and the generation of knowledge and understanding:[85]

> 'The gist of the idea is that it is a grave error to locate intelligence in a single head. It exists as well not only in your particular environment of books, dictionaries, and notes, but also in the heads and habits of the friends with whom you interact, even in what socially you have come to take as given … It has to do also with your having entered a community in whose extended intelligence you share. It is that subtle "sharing" that constitutes distributed intelligence. By entering such a community, you have entered not only upon a set of conventions of praxis but upon a way of exercising intelligence.'

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[83] J. BRUNNER, *The Culture of Education*, Harvard University Press, Cambridge MA 1996, p. xi: 'We are the only species that *teaches* in any significant way.'

[84] F. COWNIE, *Legal Academics – Cultures and Identities*, Hart Publishing, Oxford 2004. The centrality of reproduction of the community of practice for understanding what is happening was emphasised in J. LAVE and E. WENGER, *Situated Learning: Legitimate peripheral participation*, Cambridge University Press, Cambridge 1991.

[85] J. BRUNNER, 'Knowing as Doing' in *The Culture of Education*, Harvard University Press, Cambridge MA 1996, p. 154.

It is prudent in this context to reiterate that the legal academy is a profession. The legal discipline based in universities is 'an area of more or less systematic inquiries' and shows the 'effects of professionalization of the field' in short that it is an academic discipline.[86] Thus, in attending to this collective aspect of the academic discipline we have an articulation of an idea that was applied in relation to legal education and professional practice in the Carnegie report:[87]

> 'Formal knowledge is not the source of expert practice. The reverse is true: expert practice is the source of formal knowledge about practice. Once enacted, skilled performance can be turned into a set of rules and procedures for pedagogical use … But the opposite is not possible … holism is real and prior to analysis. Theory can - and must - learn from practice.'

The assertion that the students of a discipline are also the future of the discipline is most familiar when contemplating the advanced student and the traditional the role of the PhD as a qualification for research and academic professions.[88] The same cultural link, if not the same labour market link, is present between the undergraduate or professional students and the legal academy.

In more prosaic terms the vital role of students for the scholarly community is recognised in the strength of the links between research and teaching. Research seems to be dependent upon teaching in law to a large degree:[89]

> 'The other two functions, research and teaching, are closely linked together. If university lawyers were asked which of the two mattered more they would almost all object to the decoupling.'

> '[E]ven research-based institutions find it difficult to prosecute research in fields that are never taught … in general teaching and research have to go together.'

Thus, the very process of disciplinary activity seems to rest upon the inculcation of the students into the discipline. The group is in part made up of neophytes, the activity of the group that generates its understanding is coupled up with the practice of teaching and learning, and the new leaders of the discipline must be recruited from the student body. The intellectual inquiry is in a symbiotic relationship with the educational practice.

Thus, the first reason for the inclusion of students into the scholarly community is the continued existence of the scholarly community or discipline. The dependence of the discipline on the educational practice is not always fully appreciated. This reason for inclusion does not demand the recognition of the whole student body as full members of the community, as only a few are going to go on to enter the academic profession.[90] It is compatible with a relatively passive and reactive student role as it is the teaching, rather than the learning, that is the most obvious site of the generation of the gains to the discipline of the educative enterprise.

The second aspect of the scholarly community is the law student rite of passage into the community of those that 'think like a lawyer' - the lawyerly articulation of the adoption of a 'subject identity' by students. In the USA the Carnegie report has criticised an over-emphasis on the cognitive aspect of *thinking* like a lawyer, arguing that this 'cognitive apprenticeship' is only one of three necessary apprenticeships that should be present in professional legal education.[91] The technique for inculcating this lawyerly thought process in the US law school is the 'signature pedagogue' of the law school, the so called Socratic or case dialogue method:[92]

> 'Students in these classes know they will have to present more than memorized formulas … Along with the pressure to keep up or excel, there is often excitement, as students put aside their laypersons' reasoning

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[86] The expressions are taken from G.E.R. LLOYD, *Disciplines in the Making - Cross Cultural Perspectives on Elites, Learning, and Innovation*, Oxford University Press, Oxford 2009, p. 3.

[87] W.M. SULLIVAN, A. COLBY, J.W. WEGNER, L. BOND and L.S. SHULMAN, above n. 1, p. 118, locs. 1674-77.

[88] C. PARK, above n. 56.

[89] P. BIRKS, above n. 12, p. vi and p. xi.

[90] This may explain the behaviour observed in many US Law Schools by W.M. SULLIVAN, A. COLBY, J.W. WEGNER, L. BOND and L.S. SHULMAN, above n. 1, pp. 97-98, locs. 1383-1386 (emphasis added by the author): 'Traditional apprenticeship emphasizes the informal transmission of expert knowledge thorough face-to-face contact. As we have noted, law schools provide this kind of experience *for the very few law students* who find themselves *on the track for* the bench and *legal scholarship*. The experience of most law students, however, includes little of this highly particularistic kind of training or assessment of competence … students typically have little close contact with faculty.'

[91] Ibid. p. 27, loc. 418: the three being described pp. 27-28, locs. 420-438: cognitive or intellectual (thinking); expert practice (performing); identity and purpose or ethical-social (behaving).

[92] W.M. SULLIVAN, A. COLBY, J.W. WEGNER, L. BOND and L.S. SHULMAN, above n. 1, p. 225, locs. 93-96.

about cases, to try in earnest to "think like a lawyer." … [T]hese practices carry a profound mystique. They also produce lasting results.'

Thus, a declared aim of legal education is to bring about this transformative change in the student, and it is defined as joining the community of 'lawyers' so far as typical reasoning processes go. However, there has been criticism of the narrowness of the passage, directed to only one aspect of the legal personality, the intellectual.

It seems likely that this production of a subject identity is linked to the first reason for promoting a scholarly community, the health of the discipline as a discipline. It is here that the approach of the Carnegie report is both most antagonistic and most sympathetic to the core arguments of this book. Most antagonistic because the creation of a professional identity is too closed an educational end for the approach advocated here. It infringes upon the value given here to value pluralism and student autonomy. It may be appropriate for those students who wish to make a moral commitment to the legal profession, but it would be obstructive to those as yet undecided, or those who have rejected the profession as a career. Most sympathetic because of the emphasis the report gives to the non-cognitive apprenticeships, and especially the emphasis on the apprenticeship of identity or purpose. Also, the critical account in the report of visions of legal education that avoid issues of values through the adoption of an 'objective' and 'neutral' posture is wholly congruent with the approach advocated here. There is a shared concern that moral anaesthesia is a debilitating condition rather than a useful professional shell. Finally, the strong emphasis on the apprenticeship as a transformative process and the importance of identity to adult education is wholly consonant across the report and this book.

The natures of the scholarly communities that this reason for acting might generate are disparate. It is useful to think back to the authoritarian and the democratic educational styles discussed by Lewin.[93] An authoritarian style would be consonant with the views that law requires submission to authority as a discipline and that students grow in response to the challenges of a robust teaching and learning environment. The first is a view that could be honestly held, and indeed seems to be persuasive to many lawyers to some extent. However, it is very rare to find a legal academic who does not endorse and encourage critical thinking about law in his or her educational practice. The evidence against the safety and truth of the second view is reviewed in chapter 2. Most legal academics are probably not attracted to an authoritarian style. However, a style that emphasises intellectual excellence as demonstrated through competitive enterprises is probably more attractive. A democratic style suffers from the weaknesses of all democratic process. It relies upon a principle of equality that is antithetical to the educational institutional status structure of deserved merit and authority noted above. It places reliance upon the students to co-operate and engage in the process. It imposes heavy procedural burdens on the administration of consultation and facilitation of public discourse through some viable communicative channel. These features make it difficult to implement changes quickly in the face of perceived institutional need. Certainly at the level of academic self-governance the consistent pressure of the last twenty years has been away from democratic governance of institutions and towards managerial or authoritarian models of governance.[94]

There is some empirical data available on the formation of subject identity in UK universities from the SOMUL project:[95]

> '[T]here are important commonalities in the reported effects of the student experience irrespective of setting … A continuing commitment to the subjects studied in higher education – and by implication the acquisition of a "subject identity" – was important to fewer than half the students sampled. There were significant differences between students according to the subjects studied. Perhaps most noticeable … is the much lower commitment to their subject by business studies students … Sociology students were more likely to emphasise a changed world view.'

The relevant survey responses were:[96]

Students' perceptions on how they have changed	Business studies	Biosciences	Sociology
I am very committed to the subjects I've studied here and would like to continue to read/study them in the future	32	62	54

[93] Text at nn. 14-16 above.
[94] See e.g. S. COLLINI, above n. 36; and A. BRADNEY, above n. 34.
[95] J. BRENNAN, R. EDMUNDS, M. HOUSTON, D. JARY, Y. LEBEAU, M. OSBORNE and J.T.E. RICHARDSON, above n. 41, pp. 142–143, locs. 387-3931.
[96] Ibid.

My time at university has really changed the way I see the world	48	52	58

Thus, our first two reasons for acting demand some sort of scholarly community, but do not necessitate any particular style of community. It may be authoritarian, and dogmatic. Alternatively it may favour competition and elitism. Or it may favour a democratic or critical style. Or they may allow any combination of the above styles. There is strong evidence, both of the anecdotal or narrative type and of the orthodox social science type, to indicate that students are affected by the style of the educational social group or community.

The indeterminacy in operational realisation of the first two reasons for encouraging a scholarly community that includes at least some of the students means that the importance accorded to the third reason for acting may determine the style of the community. The third reason for facilitating a community is to support the autonomy of the student as a learner. This makes it qualitatively different in emphasis to the first two concerns. Both the survival of the discipline and the inculcation of a subject identity are motivations informed by the imperatives of the educators. They are concerned with what the teaching aims to do for the field of inquiry and to the identity of the students. In the first the subject of concern is primarily the field and not the students. In the second it is an effect upon the student that is defined by someone other than the student (by the academic community) that is aimed at. Only in the final reason for acting is the learning and self-direction of the student the primary concern.

Communities marked by inequalities of capacity can be characterised by dominance and submission, or by support and care. The justification of slavery by Aristotle is the classic justification of dominance because of the submissive nature of the dominated – the slave.[97] Thus, inequality can support privilege for the stronger; but inequality can also found duties to the weaker:[98]

> 'The perspective of obligations of power was presented powerfully by Gautama Buddha in *Sutta-Nipata*. Buddha argues there that we have responsibility to animals precisely because of the asymmetry between us … since we are enormously more powerful than other species, we have some responsibility towards other species that connects exactly with this asymmetry of power. Buddha goes on to illustrate the point by an analogy with the responsibility of the mother towards her child … because she can do things to influence the child's life that the child itself cannot do.'

The importance of asymmetry within a relationship – whether temporary or permanent – is central to an ethic of care:[99]

> 'In equal relations, we do expect that, under appropriate conditions, the parties will exchange places as carer and cared for … However, many relations are not equal or symmetric, and it is analyzing unequal relations that we see the special contribution of the cared-for. By recognizing the carer's efforts, by responding in some positive way, the cared-for makes a distinctive contribution to the relation and establishes it as caring. In this way, infants contribute to the parent-child relation, patients to the physician-patient relation, and students to the teacher-student relation … [T]he ethic of care is not about moral credit. It is about moral life and what makes it possible. The contributions of the cared-for sustain us in our attempt to care.'

Educational communities are paradigm examples of communities that recognise the obligations of power and experience to care and act in the interests of those who are unable to act for themselves. This aspect of the scholarly community is the one that pushes practice towards an alignment with the interests of the student. The ethic of care is founded on 'receptiveness' in the carer for the state and needs and desires of the cared for. It is the seeking by the carer in actual social interaction of what the cared for wants or needs and the subsequent endeavour to meet those desires and needs.[100] It is also the aspect that pushes practice towards encouragement of student independence and a democratic style of social interaction.

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[97] ARISTOTLE, *The Politics*, T.A. SINCLAIR (tr.), T.J. SAUNDERS (revsd.), Penguin Books, London 1992, pp. 56-75; 1252a24-1255b30.
[98] A. SEN, *The Idea of Justice*, above n 31, p. 205.
[99] N. NODDINGS, *Caring - A Feminine Approach to Ethics & Moral Education*, 2nd ed., University of California Press, Berkeley CA 2003, p. xiv, loc. 46.
[100] N. NODDINGS, above n. 99, p. 19, loc. 360. See also: p. 15, loc. 310, receptiveness leads to: 'apprehending the other's reality, feeling what he feels as nearly as possible, is the essential part of caring from the view of the one-caring.'

It is necessary to emphasise the importance of the professional identity of legal scholars as educators at this point. This is because the relationship between academic and student and lawyer and client is different in crucial respects, both in theory and as lived practice. At this point, in constituting the scholarly community that includes the student, the legal academic must *not* think like a lawyer.

As a matter of principle a lawyer has a restraining role vis-à-vis the client: the relationship is situated within the context of loyalties to the system of law and justice that can irritate the alignment of lawyer and client interest.[101] Further, clients are usually adult, and often extremely capable and powerful. The superiority of the lawyer may well be limited to the area of professional expertise alone. The status and power relationship may otherwise be in favour of the client. Thus, the relationship whilst being one of service lacks asymmetrical features typical of caring relationships. Furthermore, there is some evidence that this potentially conflicting relationship is lived as such by lawyers.

As part of the GoodWork project Carrie James investigated whether interviews with professionals revealed gender differences in how the relationship between self and other was understood.[102] She carried out quantitative analysis over many professional domains, and qualitative analysis over three professional domains: law, journalism and theatre. It was this qualitative analysis that gives us reason to believe that significant numbers of successful lawyers feel that their relationship to clients is a site of conflict rather than primarily a caring relationship. James defined a conflict approach to relationships: [103]

> 'The conflict approach is consistent with the familiar idea that self and others are dichotomous and competing constituencies. In narratives representing this stance, tensions or explicit conflict between meeting obligations to self and to others are highly salient. In the terminology favoured by the GoodWork team, a misalignment exists between the needs of self and others.'

Of the three professional domains subjected to qualitative analysis: [104]

> 'Lawyers were more likely than actors or journalists to mention conflict: 38 percent of the lawyers in the sample exhibited this stance compared with 22 percent of actors, and no journalists discussed self–other responsibilities as central conflicts for them … The fact that a majority of subjects who demonstrated the conflict approach were lawyers suggests that the nature of the domain may encourage this mind-set, or that the very least convey an understanding of certain responsibilities – to client, for example – as probable sources of conflict.'

The clearest expression of this conflict was encapsulated in the phrase used by one lawyer that 'the client is always an enemy', a view that leads to a keen concern with self-protection in the lawyer–client relationship: [105]

> 'According to this lawyer [who worked in criminal courts], maintaining strict roles or boundaries between self and other is necessary to do good work in the law and to protect his integrity as a professional. Furthermore, he explicitly suggested the mind-set of the "client as enemy" is normative in the law.'

This defensive approach is of course inimical to a caring relationship. The effects of fear of client betrayal confirms Noddings' insight that the cared-for has an essential role in maintain a caring relationship. It seems that this aspect of thinking like a lawyer involves a very guarded approach to clients (and other lawyers). As a community of practice the demands of the role of the lawyer makes such an embattled perspective more common than in other

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[101] For England & Wales see e.g. Bar Counsel Code of Practice, 8th edition, at paragraph 301. The Australian statement of the principle is direct and concise, see: the 2011 Barristers' Rule at paragraph 5 a: 'Barristers owe their paramount duty to the administration of justice'.

[102] C. JAMES, 'Beyond the Gender Stereotype: Responsibilities to Self and Others' in H. GARDNER (ed.), *Responsibility at Work - How Leading Professional Act (Or Don't Act) Responsibly*, Jossey-Bass, San Francisco CA 2007. At locs. 2651-2653: 'I found that gender does not independently affect how individuals understand self and other, while professional domain emerges as a significant influence.'

[103] Ibid. locs. 2702-2704

[104] Ibid. locs. 2730–2733. At 2892–2895: 'After theatre subjects, lawyers are the next most likely group to discuss congruence between obligations to self and others. Interestingly, lawyers are nearly equally likely to exhibit congruence and conflict stances, the two distinct poles of the self-other continuum. This finding suggests that a discourse of conflict exists in law but may be counterbalanced by other discourses or actively rejected by our (admittedly unrepresentative) sample of lawyers.'

[105] Ibid. loc. 2742.

professional practices. However, we must not forget that James also found there are alternative responses to the pressures of legal practice:[106]

> '[I]t is important to note significant variation in self-other approaches within our sample of lawyers. In fact, a slightly greater percentage of lawyers described self-other responsibilities as congruent.'

In this regard legal academics must 'think like an educator' even though they are trying to lead their students to 'think like a lawyer'. This produces a very difficult tension in legal education as it generates an inconsistency in the shared educational endeavour. Thinking like an educator entails a caring response towards the students, and ideally leads a joint and co-operative endeavour. In the words of John Williams:[107]

> '[I]t was a successful seminar, one of the best classes Stoner had ever taught. Almost from the first, the implications of the subject caught the students, and they all had that sense of discovery that comes when one feels that the subject at hand lies at the center of a much larger subject, and when one feels intensely that a pursuit of the subject is likely to lead – where, one does not know. The seminar organised itself, and the students so involved themselves that Stoner himself became simply one of them, searching as diligently as they.'

The novelist is describing the same elusive and unstable reciprocal and shared experience that Nel Noddings describes:[108]

> 'In the event that inclusion [of the teacher by the student] becomes actual, the relation is converted, as we have noted, from that of teacher-student to one of friendship. This may of course, happen, but even if it does, when the teacher assumes her function as teacher, the relation becomes again, temporarily, unequal.'

As Williams, who taught in higher education for many years, understood, the feeling of comradeship with the students is very rewarding for the teacher – we struggle to help our students to be able to do that which we can do, and join us in common endeavour as scholars. We share our passion for our subject.

However, this model of a shared endeavour is dangerous in legal education – because self-protection of the students who enter into professional practice demands that they be helped to think like a lawyer, and that includes being able to act in a manner that is self-protective. In effect the incongruence between thinking like an educator and thinking like a lawyer generates an imperative to teach 'do as I say' (protect yourself from client betrayal) not 'do as I do' (enter into a caring relationship with you that leaves me vulnerable).

Despite these troublesome problems for legal education the first principle should be that the relationship between academic and student is a relationship founded on an asymmetrical caring. The scholarly community can be a community of shared endeavour, as sketched in the quotation from Williams. This scholarly community in its activities should aspire to an equality of collaborative effort between teacher and learners. However, it is imperative that legal education makes the conflicted nature of aspects of legal practice apparent. It seems likely that the felt necessity to prepare law students for the harsh realities of legal practice has informed educational practice and led to much-criticised tropes, such as the 'bad man' approach to the law.[109] The evidence reviewed in chapter 2 confirms that this is the wrong approach to the educational relationship, because absent a caring relationship students come to harm. If this is accepted then one role of values in legal education is to warn students of the risk of client betrayal in practice. Students need to become aware of the lived reality of conflicting values in society, the law, and legal practice. They can then seek to develop strategies to counter the risks they will face if they enter practice: whether through a conflict view of the lawyer–client relationship; or through aligning the client group served with the values of the student; or through developing an alternative model of the legal system that encourages the seeking of 'win-win' outcomes rather than 'zero-sum' outcomes, as seems to be a feature of lawyers who hold a congruent view of the lawyer–client relationship.[110]

A caring community takes interest in and is concerned with the best interests of the cared-for. Thus, this community ideal returns us to our first principle of alignment. However, we have moved forward, because a collaborative

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[106] Ibid. loc. 2775.
[107] J. WILLIAMS, *Stoner*, Vintage Books, London 2012, p. 141.
[108] N. NODDINGS, above n. 99, p. 71, loc. 1115.
[109] O.W. HOLMES, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457.
[110] C. JAMES, above n. 102, loc. 2902.

community is one in which the cared-for can influence the activities of the community. It is through interactions between the academics and administrative staff of the University and the students that the best interests of the students can be discovered. Thus, reflection upon this aspect of the scholarly community is the key to educational practice. What we need to beware of is the complicating and difficult problems posed by the central place in legal practice held by conflicting interests. This conflicting interests mind-set familiar to lawyerly thinking is out of place in academic legal practice.

A scholarly community of adult learners is not one of structurally permanent inequality. Education is a process in which the learners should become ever more capable - it has features of a rite of passage. It remains difficult to realise all the potential gains from this developmental aspect of higher education. The shared experience of legal education has helped inform academic practice, as academics in particular reflect upon their experiences and use them to guide practice. However, there remains much to be done in educational practice to unlock the potential insights of our students as partners in the educational process. The ideal scholarly community would not only try to reproduce itself through its teaching practice but to renew and reinvigorate itself as well. The secret to moving towards this ideal lies in realising the essentially caring nature of the educative relationship, and giving full effect to both sides of that relationship: both the caring party and cared-for have important roles to play, and ultimately the asymmetrical relationship should become one of equality, and the cared-for can offer reciprocal care when circumstances change. Such a community reproduces itself and evolves culturally through time. It is towards such a community ideal that a values-oriented approach to legal education pushes us.

CHAPTER 4
STUDENT MOTIVATION

1. INTRODUCTION: THE IDEA OF INTRINSIC MOTIVATION

Concerns with student well-being and student engagement in their studies led to the research activity and exploratory changes in teaching practice that inform this book. One obvious place to seek guidance on issues of well-being and motivation was psychological theories. Essentially, such studies pointed towards the central importance of student identity and student values for educational practice. This chapter traces the conceptual and practice process that led to this understanding.

If one acts for the enjoyment or sense of achievement derived from the action then the action is 'intrinsically' motivated. What is 'intrinsic' about the motivation may be the reason for acting. It is important to note what types of reason are considered intrinsically motivating: curiosity, exploration, feelings of competence or power; and what types of reason would not be so considered: it would please my mother or my son; it is necessary if I am to achieve my goals; one needs to take care when marking essays because it is a serious professional responsibility. Alternatively, what is 'intrinsic' about the motivation may be the lived experience of acting. Some activities simply feel good, draw the eye, and are tempting. Thus, most people like to chat and laugh together, to play sports, to listen to music and move to the beat. Of course not all social groups are attractive, we rarely enjoy sports we are unusually poor at playing, and someone else's music can be the very opposite of attractive. In short it cannot be merely the activity itself that makes it intrinsically motivating, it must be the interaction between the act and the actor. Apart from any other factors, what used to be intrinsically attractive can become dull with familiarity and repetition: novelty is often a part of what makes something intrinsically motivating. Finally, it is clearly not the case that these two aspects are mutually exclusive or contradictory. Often an activity may be intrinsically motivating because it shows both aspects.[1]

Thus, there seem to be at least two aspects of 'intrinsic' motivation identifiable. The first aspect is termed intrinsic because the actor acts for her own reasons. Deploying a spatial metaphor we can say that the locus of control comes from inside the actor. The second aspect is termed intrinsic because of the feelings associated with the activity: one acts because doing so is satisfying and rewarding; motivation is derived from the activity itself. Such activity is sometimes called 'autotelic'.

Intrinsic motivation has been the subject matter of two influential psychological models devoted to its theoretical exploration reflecting this dichotomy of aspect. 'Self-determination theory' started from a concern with the perceived locus of control, as internal or external to the self.[2] The approach associated with the work of Mihaly Csikszentmihalyi, which will be referred to as the 'flow' approach, started from an interest in the feelings

[1] Vallerand and Ratelle note that some researchers have adopted a three-part taxonomy for intrinsic motivation: intrinsically motivated by a desire to know, or to accomplish things, or for the sensation of the activity. The proposed differentiation would differentiate knowledge or accomplishment together as 'reasons' from the sensation or experience. The aim in the text is not to propose any new technical concept, but to capture the different aspects of what makes an activity intrinsically motivating. R.J. VALLERAND and C.F. RATELLE, 'Intrinsic and Extrinsic Motivation: A Hierarchical Model' in E.L. DECI and R.M. RYAN (eds.), *Handbook of Self-Determination Research*, University of Rochester Press, Rochester NY 2002, p. 42.

[2] Hence 'self-determination' the starting point for this approach is the idea of a locus of control as developed by deCharms. The early theoretical construct was 'cognitive evaluation theory'. The foundational studies were: E.L. DECI, 'Effects of Externally Mediated Rewards on Intrinsic Motivation' (1971) 18 *Journal of Personality and Social Psychology* 105; A.W. KRUGLANSKI, I. FRIEDMAN and G. ZEEVI, 'The Effects of Extrinsic Incentive on Some Qualitative Aspects of Task Performance' (1971) 39 *Journal of Personality* 606; M.R. LEPPER and D. GREENE, 'Turning Play Into Work: Effects of Adult Surveillance and Extrinsic Rewards on Children's Intrinsic Motivation' (1975) 31 *Journal of Personality and Social Research* 479; T. AMABILE and W. DEJONG and M.R. LEPPER, 'Effects of Externally Imposed Deadlines on Subsequent Intrinsic Motivation' (1976) 34 *Journal of Personality and Social Psychology* 92. There is a summary of the development of self-determination theory in E.L. DECI and R.M. RYAN , above n. 270; and the literature was subjected to meta-analysis in E.L. DECI, R. KOESTNER and R.M. RYAN, 'A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivation' (1999) 125 *Psychological Bulletin* 627. Finally, the meta-analysis and the fundamental phenomenon are defended against critics in E.L. DECI, R. KOESTNER and R.M. RYAN, 'The Undermining Effect is a Reality After All – Extrinsic Rewards, Task Interest, and Self Determination: Reply to Eisenberger, Pierce, and Cameron (1999) and Lepper, Henderlong, and Gingras (1999)' (1999) 125 *Psychological Bulletin* 692.

associated with the activity.[3] These two theoretical approaches are not exhaustive of the field, but they have been the most thoroughly elaborated and influential.

There does not seem to be any necessary contradiction between these two theoretical approaches to the subject of intrinsic motivation. Each of the two theoretical approaches tends to emphasise one aspect of intrinsic motivation in explanation and theoretical elaboration. The crucial difference seems to be in the questions asked rather than in the explanations given. Moreover, the two approaches share several important features. Each approach is interested in well-being and performance. Each tends towards a humanistic approach to psychology: positing inherent human psychological 'needs', and a tendency towards self-actualisation.[4]

The emphasis here will be on self-determination theory, as the theoretical structure is more conducive to being deployed in an educational setting. However, this should not be understood to imply a rejection of flow theory as an explanatory model.[5]

2. THE ORIGINS OF SELF-DETERMINATION THEORY

The story of self-determination theory starts with the hypothesis of intrinsic motivation by experimental psychologists in an attempt to explain how rewards that were intended to reinforce behaviours could actually have the opposite effect. In the early seventies several researchers independently verified experimentally a phenomenon that ran against the grain of the dominant model of learning based on operant conditioning.[6] The anomalous finding was that rewards could reduce subsequent engagement in an activity, rather than act as a reinforcement that led to behaviour modification in the direction of the reinforced behaviour. Rewards generated less not more of the rewarded behaviour. The hypothetical explanation put forward was that reward could lead to disengagement from an activity that had been initially intrinsically interesting and attractive. The studies gave experimental and empirical confirmation to the intuition that had informed several progressive educational reform movements: that educational institutions, with their structures of control and assessment, could create boredom and imaginative disengagement.[7] In the words of one of the early studies the use of rewards risked turning play into work.[8]

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[3] The subject matter of flow theory is the 'optimal experience'. It is the experience of action, the feelings that accompany the action, that are given centre stage, Csikszentmihalyi explains how autotelic captures this aspect of action, M. CSIKSZENTMIHALYI, *Flow – The Classic Work on How to Achieve Happiness*, Rider, London 2002, p. 67: 'The key element of an optimal experience is that it is an end in itself. Even if initially undertaken for other reasons, the activity that consumes us becomes intrinsically rewarding. … The term "*autotelic*" derives from two Greek words, *auto* meaning self, and *telos* meaning goal. It refers to a self contained activity, one that is done not with the expectation of some future benefit, but simply because the doing itself is the reward.'

[4] Thus, each starts from three implicit rejections: a rejection of a Locke's *tabula rasa*; a rejection of a pure behavioural approach; a rejection of Hobbes' assertion that that human nature is naturally malign and in need of subjection. These rejections are common to an earlier tradition in humanistic psychology in the USA, personified by such writers as Abraham H. Maslow and Carl R. Rogers.

[5] Especially in the areas of expertise and the development of mastery flow theory seems likely to be a valuable perspective.

[6] See E.L. DECI, above n. 271; A.W. KRUGLANSKI, I. FRIEDMAN and G. ZEEVI, above n. 271; M.R. LEPPER, D. GREENE and R.E. NISBETT, 'Undermining Children's Intrinsic Interest With Extrinsic Reward: A Test of the "Overjustification" Hypothesis' (1973) 28 *Journal of Personality and Social Psychology* 129.

[7] A risk John Dewey was well aware of. He was critical of both traditional school discipline that held the child to a task to inculcate a habit of effort, and edutainment that pampered the love of novelty in the child, and sought to stimulate it by any means. Dewey reasoned that these two approaches were both mistaken about the nature of a learner's *interest*, and that interest was the key to learning and development of moral character. For Dewey interest was an aspect of the expression of the self, and where it was present effort would follow. Dewey thought discipline encouraged dissolution behind a façade of compliance. J. DEWEY, 'Interest in Relation to Training of the Will' in J.J. MCDERMOTT, *The Philosophy of John Dewey – Two Volumes in One*, University of Chicago Press, Chicago IL 1981, p. 427: 'The spontaneous power of the child, his demand for self-expression, can not by any possibility be suppressed. If the external conditions are such that the child cannot put his spontaneous activity into the work to be done, he finds that he cannot express himself in that, he learns in a most miraculous way the exact amount of attention that has to be given to this external material to satisfy the requirements of the teacher, while saving up the rest of his mental powers for following out lines of imagery that appeal to him … the deeper intellectual and moral nature of the child has secured absolutely no discipline at all, but has been left to follow its own caprices, the disordered suggestions of the moment, or past experience.' In other words children daydream through the school day.
Dewey expounded on self-expression and gave an account of interest that is similar to the later accounts of intrinsic and extrinsic motivations. Where there is self-expression there is interest, and where there is interest there is intrinsic motivation; where there is not self-expression there is no interest, and where there is no interest extrinsic motivations are deployed as a substitute. Both fear of sanctions (discipline) and promise of the pleasures of reward (edutainment) are attempts at external motivation. Dewey discussed two types of self-expression: direct and immediate and mediate, which is an interest in an activity because it is a direct means to a desired end. Activities that allow immediate interest are similar to activities that are intrinsically motivating, and his account of activities of mediate interest is similar accounts of the flow experience. Ibid. pp. 432-434.

[8] M.R. LEPPER and D. GREENE, above n. 271.

Thus, researchers devised self-determination theory through attempts to explain the occurrence of a de-motivating effect from the giving of reward,[9] and as later studies showed the similar de-motivating effects of deadlines, supervision, and some forms of feedback.[10] The effect could be subtle, and it did not always follow verbal rewards in the form of positive feedback. The effect seemed to violate a fundamental principle of operative conditioning theory: that learning was adequately conceived of as a response to environmental stimuli, that organisms learnt from the reward or (less effectively) punishment of expressed behaviour. It was hypothesised that the de-motivation was caused by the way a learner perceived and understood the reward.

Hence, the first theoretical construct was called 'cognitive evaluation theory'. The theory made the perception and understanding of the learner the crucial explanatory factor. If the learner understood that the reward indicated the task was being undertaken to further the purposes of the reward-giver, this could de-motivate the learner. It was de-motivating when, in the absence of reward, the learner felt the activity was either chosen by the learner, or for purposes serving the learner. In the terms used by self-determination theorists the perceived locus of causation was shifted by the reward, from the learner to an external agent. The learner was no longer choosing but was being manipulated. Rather than exercising autonomy in trying to carry out the task the rewarded learner felt she was being used to further some plan of the experimenter. Hence the valued quality in an action known as 'autonomy' was lost. The result was the previously intrinsically desirable activity became less attractive, as it was associated with being controlled by an external agent.

Cognitive evaluation theory accounted for the developing experimental evidence. It explained the loss of intrinsic motivation for interesting tasks – the experimental anomaly – and also why a reward that was unexpected, and therefore not perceived as intended to manipulate the learner's behaviour, did not undermine intrinsic motivation.[11] It could also explain why a reward that was perceived as an integral part of the activity was not de-motivating, as it also was not perceived as intended to control the learner's behaviour.[12] Finally, it explained why verbal feedback would be perceived as sometimes de-motivating (when it was perceived as controlling) and sometimes as not de-motivating (when it was perceived as supportive).[13]

Cognitive evaluation theory became part of a developing model of human motivation. It was foundational for self-determination theory and it identified a sense of autonomy as an important and valued feature of people's experience. By putting the understanding and action of the learner in the centre of the analysis, rather than having a focus on the encroaching environmental stimuli, the self-action of the learner became a central concern for any resulting model of learning. The intrinsically motivated, or desirable, activity was what the learner wanted to do. The activities in the experiments were not typically based on consumption, eating or drinking, the archetypical reinforcements in operative conditioning with animals. They involved effort and were directed to an end. They included examples of activities learners might engage in for the purpose of getting better at them. Such concerns were obviously consonant with theories of learning that took a developmental approach to learning,[14] that saw the learner as reliably self-directed developmentally,[15] and that deployed such concepts as human needs for activities.[16] If we start our investigations from observations of desirable or enjoyable activities then it soon becomes necessary to identify why learners find some activities desirable.

Edward Deci and Richard Ryan in particular were responsible for expanding the explanatory ambitions of cognitive evaluation theory into self-determination theory, a more ambitious account of human motivation and well-being. In the course of this development, autonomy was identified as one of three psychological needs that people have: the other two human needs being a need to feel competent, and a need for relatedness.[17] People naturally desire to engage in activities that they feel support or strengthen autonomy, feelings of competence, or relatedness. The motivation for engaging in such activities is intrinsic. Activities that threaten the satisfaction of these needs are felt to be undesirable. Such activities are not intrinsically motivated, and if such activities are valuable then some extrinsic 'regulation' of the learner is needed. To maintain the activity, and any learning that

[9] R.M. RYAN and E.L. DECI, 'Introduction' in E.L. DECI and R.M. RYAN (eds.), above n. 270.
[10] T. AMABILE, W. DEJONG and M.R. LEPPER, above n. 271; M.R. LEPPER and D. GREENE, above n. 271; E.L. DECI, above n. 271; E.L. DECI, R. KOESTNER and R.M. RYAN, 'A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivation' (1999) 125 *Psychological Bulletin* 627, pp. 652-653.
[11] M.R. LEPPER and D. GREENE, above n. 275 and T. AMABILE, W. DEJONG and M.R. LEPPER, above n. 271.
[12] A.W. KRUGLANSKI, A. RITER, A. AMITAI, B.S. MARGOLIN, L. SHABTAI, and D. ZAKSH, 'Can Money Enhance Intrinsic Motivation?: A Test of the Content-Consequence Hypothesis' (1975) 31 *Journal of Personality and Social Psychology* 744.
[13] E.L. DECI, above n. 271; and E.L. DECI, R. KOESTNER and R.M. RYAN, above n. 279, p. 652.
[14] J. PIAGET, *Origins of Intelligence in the Child*, M. COOK (tr.), Routledge and Kegan Paul, London 1953.
[15] C.R. ROGERS, *On Becoming A Person – A Therapist's View of Psychotherapy*, Constable, London 2004.
[16] A.H. MASLOW, *Motivation and Personality*, R. FRAGER (ed.), Harper & Row, London 1987.
[17] R.M. RYAN and E.L. DECI, above n. 278.

is associated with it, the learner needs some motivational impetus beyond the attraction of the activity itself. The more an activity responds to these needs, the more self-determined the activity is. Thus, from identification of intrinsic motivation, revealed by rewards interfering with it, the theory has developed to put forward an account of a very few basic human needs that explain why some activities are intrinsically motivated.

Obviously, in legal education many activities are not going to be intrinsically motivating for learners. However, they may be very important because of their educational purpose. Thus, one might learn the legal citation system in order to find law reports, but few of us derived genuine pleasure from distinctions between square and round brackets that had to be learned. To broaden its usefulness and potential application cognitive evaluation theory had to develop into self-determination theory. Self-determination theory posits a continuum of autonomous motivation. It also recognises non-autonomous motivations, the rewards and punishments of operative conditioning theory. A concern with intrinsic motivation led to the need to identify, elaborate, and try to understand extrinsic motivation.

3. EXTRINSIC MOTIVATION

The conceptual corollary of intrinsic motivation is 'extrinsic' motivation. Extrinsic motivation originates from outside the self, or derives not from the activity itself but from some consequence of carrying out the activity. The dominant model of 'motivation' in the middle of the twentieth century was the one implicit in operant conditioning theory or behaviourism. Strictly speaking behaviourism tried to avoid positing such 'mental' states as 'motivation' and to restrict the subject matter of psychological science to observable behaviour.[18] Thus, it had no concept of extrinsic motivation; rather it had the concept of 'reinforcement'.[19] As we know it was the failure of desirable stimuli, the failure of rewards, to reinforce that led to the formulation of cognitive evaluation theory. Thus, the formulation of a concept of extrinsic motivation was originally parasitic upon intrinsic motivation; it was the other type of motivation. However, this crude dichotomy was soon rejected as inadequate.

Self-determination theorists have developed a more complex account of motivation than a simple dualism of intrinsic versus extrinsic motivation. To offer an adequate account of human motivation it is necessary to make a broader and more elaborate set of distinctions.[20] An important feature of this account is a total rejection of any dichotomy between intrinsic and extrinsic motivation. The opposite of intrinsic motivation is not extrinsic motivation, as extrinsic motivation is still motivation. The opposite is 'amotivation', no motivation, and therefore no relevant activity.[21] In higher education this is the student who 'drops out', who fails to attend, who does not submit assessments. It is important to remember the possibility as extrinsic motivation is important in practical life, and one important feature of extrinsic motivation is that it is motivation.[22]

Probably of least importance for improving educational practice is intrinsic motivation. Pure intrinsic motivation, joy in activity, is fairly unusual in the student body in higher education. No activity by teaching staff or institutions is likely to induce universal intrinsic motivation. Where some students are intrinsically motivated, their self-regulation is precious: both because it will hold up the performance of those students, and because intrinsically motivated students may serve as role models for others – the presence of intrinsic motivation may be socially salient to the culture of an institution. Therefore, where intrinsic motivation exists the key educational imperative is to not disrupt the student's motivation. It was the realisation that 'rewards' or 'incentives', attempts to encourage activity and improve performance, could actually reduce commitment and degrade performance that led to the

[18] See n. 273. Thus three implicit assumptions: (1) *tabula rasa* - given the needs of an organism for physical survival the behaviour of the organism was the result of environmental variables; (2) mental states or processes are not salient - only the externally observable can be the subject matter of science; and (3) there is no essential human nature – the most central characteristic of humanity is its malleability.
Behaviourism was congruent with logical positivism, and scientific optimism, and naïve empiricism. As such it has parallels with the tendencies of legal positivism, to see law as an instrumental system which is justified by its efficiency of operation, that treats law as a technology of social control. It was a psychology of causal explanation that rejected attempts to interpret behaviour as a meaning generating activity.
These links between law as a means to control behaviour and behaviourism are visible in the work of B.F. Skinner, B.F. SKINNER, *Beyond Freedom and Dignity*, Hackett Publishing, Indianapolis IN 2002, p. 5: 'What we need is a technology of behaviour … But a behavioural technology comparable in power and precision to physical and biological technology is lacking, and those who do not find the very possibility ridiculous are more likely to be frightened by it than reassured. That is how far we are from "understanding human issues" in the sense in which physics and biology understand their fields, and how far we are from preventing the catastrophe toward which the world seems to be inexorably moving.'

[19] The relationship between theories and technologies of extrinsic motivation and approaches based on intrinsic motivation is considered below, see section 5.

[20] R.J. VALLERAND and C.F. RATELLE, above n. 270.

[21] E.L. DECI and R.M. RYAN, *Intrinsic Motivation and Self-Determination in Human Behaviour*, Plenum, New York NY 1985.

[22] R. HUXLEY-BINNS and G. FERRIS, 'Putting Theory into Practice: Designing a Curriculum According to Self-Determination Theory' (2013) 19 (3) *The International Journal of Pedagogy and Curriculum*.

conceptualisation of 'intrinsic motivation'.[23] We will return to the problems of interference between intrinsic and extrinsic motivational features of an institution below.

Extrinsic motivation requires an extended and differentiated account.[24] Self-determination theory has developed a typology for external motivation that is both differentiated and dynamic.[25] The expression 'regulation' is used to describe the manner in which different types of extrinsic motivation operate.[26] The different types can be described as running along a scale from motivation that is most externally located and least self-directed towards more self-directed whilst still extrinsic motivation. Before giving a short account of these various forms of regulation of behaviour it is important to reiterate that the description is of a dynamic not a static system. Obviously the attitudes of a student to aspects of study are not fixed. An ill-considered interference with an intrinsically motivated student can damage or even destroy intrinsic motivation. A well-considered intervention can lead to a student becoming more self-determined or even intrinsically motivated. Thus, the usefulness of self-determination theory in this area is in helping us to structure a teaching curriculum, a teaching methodology, and an institutional structure that supports students in developing a more intrinsic motivation for academic study.

Extrinsic motivation has been conceptualised as a continuum with four identifiable regulatory types by Deci and Ryan.[27] Each of the four requires our attention.[28]

External regulation is regulation of behaviour perceived by the learner as coming from outside the self altogether. Thus, it is how self-determination theory describes the reward or punishment model of common sense psychology and behaviourism. The action is not undertaken for any reason that is relevant to the action – the action itself is at best neutral as a motivational force. The reason the action is undertaken is some non-essential or contingent consequence of the action (promised reward or threatened punishment). Obviously it is the consequence which is motivationally active in this model. If obtaining the reward is contingent upon undertaking the action then the actor will undertake the action. Whether the action is pleasant, indifferent, or obnoxious to the actor is not salient.

When the author began his post-graduate legal education, what was then called Law Society Finals Part 2, this approach to motivation was almost reverentially demonstrated to his cohort. The entire student group was addressed in a lecture. It was obviously a lecture that was relished by the lecturer. We were instructed:

> 'Look to your left. [Dramatic pause, to allow the turning of heads] Look to your right. [Pause] One of you three *will* fail this course.'

The idea, it seemed, was to motivate us to study hard by making clear to us that failure was a real possibility. The one in three statistic did indeed reflect national fail rates for the course. This practice continued at the relevant institution for many years after my attendance. It relied entirely upon external regulation and focused upon a relatively distant punishment for its motivating effects. As such it was justifiable under no psychologically respectable model of student motivation. It was very controlling; and denied the existence of any hope in the collective psyche of the staff that the course might be intrinsically interesting; and it suggested the lack of competence in a large and undetermined part of the student cohort; and the particular dramatic technique (one of you three will fail) invited competition rather than relatedness and cooperation between the students. For all these reasons the technique could have been designed to frustrate rather than facilitate self-determination. The focus upon punishment distant in time, and, contingent upon students being able to produce complex and ill-defined behaviour, also failed to satisfy the basic requirements for operant conditioning.

Introjected regulation is like an internalised version of external regulation. Just as the institution of censorship can lead to self-censorship, to forestall unwanted official attention, so the perceived goals and values of others can

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[23] E.L. DECI, above n. 271; A.W. KRUGLANSKI, I. FRIEDMAN and G. ZEEVI, above n. 271; M.R. LEPPER, D. GREENE and R.E. NISBETT, above n. 275.

[24] E.L. DECI and R.M. RYAN, above n. 290; E.L. DECI and R.M. RYAN (eds.), *Handbook of Self-Determination Research*, University of Rochester Press, Rochester NY 2002.

[25] C.S. RIGBY, E.L. DECI, B.C. PATRICK and R.M. RYAN, 'Beyond the Intrinsic-Extrinsic Dichotomy: Self-Determination in Motivation and Learning' (1992) 16 *Motivation and Emotion* 165. E.L. DECI, H. EGHRARI, B.C. PATRICK and D.R. LEONE, 'Facilitating Internalization: The Self-Determination Theory Perspective' (1994) 62 *Journal of Personality* 119. Development of the dynamic element was influenced by the analysis of: H.C. KELMAN, 'Compliance, Identification, and Internalization: Three Processes of Attitude Change' (1958) 2 *The Journal of Conflict Resolution* 51.

[26] C.S. RIGBY, E.L. DECI, B.C. PATRICK and R.M. RYAN, above n. 294.

[27] E.L. DECI and R.M. RYAN, above n. 290.

[28] This account follows C.S. RIGBY, E.L. DECI, B.C. PATRICK and R.M. RYAN, above n. 294.

determine the choices of someone. In effect the self chooses what it thinks someone else would want it to do, in order to avoid offending or disappointing that imagined other. The imagined other may not be a person. If a person feels they should want to do something, or to be something, and therefore they are motivated to engage in some activity, then the regulatory style is introjected. The demand is for compliance to some demand that feels external to the self, although there may be a desire to be what one should be. One suggestive description of what leads to introjected regulation is that it is what happens when people 'swallow whole and do not digest' aspects of the environment.[29]

Introjected regulation is associated with powerful negative feelings if the actor does not perform as he should: guilt, shame and loss of self-esteem. It is as if values have been accepted but not endorsed by the actor. The tension between the purposes of the other, who offers rewards and punishments to induce behaviour, and the self's own goals has become internalised. The self does not want the things it is striving to obtain, yet it accepts that it should want them and act in ways that advance their achievement. Perhaps there is lack of reflection upon what it means to value something, the undigested value; perhaps the value has been adopted not for itself but to do what it is thought will please another. Regardless of the reasons for its existence introjected regulation is the least self-determined form of internalised motivation.

Identified regulation is in effect, to use the metaphor of undigested values leading to introjections, a digested internalisation of a goal or value. If the self adopts a value or goal then activity that expresses or develops that value, or that makes progress towards the goal, is undertaken because that value or goal is important to the actor. If students identify with values or goals, and they can see the links between the values or goals that they have identified with and their study tasks, then they are likely to be well motivated, and therefore more successful. This is self-determined regulation of behaviour because it proceeds from and advances the desires of the self.

The difference between introjected and identified, and the transition between them, is difficult to grasp in abstract terms. An experience of the author in the course of his legal education and training might help to clarify.

I had completed the academic stages of legal education and entered into the work-based apprenticeship period of two years of 'articles' as it was then known. In this period I was employed by a firm of solicitors and working for clients, but under the close supervision of senior solicitors in the firm. One 'seat' was in the criminal department of the firm, advising suspects being interviewed by the police, and working in teams defending those facing criminal charges or criminal trial.

I had to defend a man who was accused of a sexual crime against a minor. The defendant had previous convictions for sexual abuse of minors, and it seemed likely that he had committed the offence charged. However, his instructions were clear: he had not committed the offence, and the alleged events did not take place. I found acting for him conscientiously difficult. The duty to represent a client in a professional manner was one I was aware of, and the thought that I was not able to act professionally in this case made me feel inadequate and confused.

I raised the problem with my supervisor and he gave me a typed excerpt from the address to the jury of Erskine in the trial of Tom Paine for seditious libel in 1792.[30] The publication that led to the prosecution, Tom Paine's *Rights of Man*, was probably the most notorious (or famous) book of its day. Only the beginning of the address had been reproduced, the remaining text, which was concerned with the freedom of the press, was not typed up.

My supervising solicitor invited me to read the excerpt, and when I had, we had a conversation about its contents and the defence of the client.

For those unfamiliar with the address to the jury, Erskine first dealt with prejudicial evidence led by the prosecution, and allowed in by the judge, at a time of high political excitement. Erskine tried to counteract the effects of this prosecution misconduct. The Attorney General had also made a distinct point of stating that he was personally committed to the prosecution. Erskine had been defamed and criticised for agreeing to represent Paine, and he did suffer professionally as a result of doing so.[31] Erskine rejected the idea that he had to believe what the

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[29] F.S. PERLS, *The Gestalt Approach and Eyewitness to Therapy*, Science and Behaviour Books, Ben Lomand CA 1973 cited E.L. DECI, H. EGHRARI, B.C. PATRICK and D.R. LEONE, above n. 294.

[30] I have found the source (after twenty odd years! It really did make an impression on me) he had arranged for the typing up of pp. 105-108 of *The whole proceedings on the trial of an information Exhibited by the King's Attorney-General Against Thomas Paine*, taken in shorthand by Joseph Gurney (1793) London: Martha Gurney. He had the manuscript ready to hand and had clearly used it before. J. GURNEY, *The whole proceedings on the trial of an information Exhibited by the King's Attorney-General Against Thomas Paine*, London 1793.

[31] He lost the office of Attorney-General (legal advisor) to the Prince of Wales.

defendant believed in order to defend him, that an advocate endorsed the views of his client by representing him. He rejected the idea that the lawyer should decide for himself whether an accused deserved to be found guilty, to in effect pre-try the defendant, and only defend those he thought to be innocent. He asserted the importance of counsel being available to any defendant if justice was to be done. The words in which he did so are still sometimes quoted as a classic statement of an important ethical principle for advocates:[32]

> 'For, from the moment that any advocate can be permitted to say, that he will or will not stand between the crown and a subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end.'

The effects upon me of this reading, and subsequent conversation, and reflection upon the role of defence advocate, was to change my feelings about the value of the advocate's role, and my own participation in the defence of a man I thought was probably guilty. I had already accepted, without any deep consideration, the ethics of my profession, and was aware of the ethical rules around representation of defendants to criminal charges. However, I had not digested the material. The professional ethics were just another type of rule I had to be aware of and avoid breaching. Following the intervention of my supervising solicitor I identified with the values protected by the rule. I now wanted to abide by the rule because it enabled me to be the lawyer I wanted to be; it enabled me to serve a value in my work that I had become personally committed to.

This shift from introjected to identified regulation was brought about by appealing to my reason. There was no attempt to deal with my concern through the assertion of authority. Implicit in this was choice, although it was not suggested that I stop working on the case if I did not resolve my conflicting feelings. I suspect if I had earnestly requested the same I would have been allowed to do so; however, the thought of 'giving up' did not even occur to me at the time. In any event I felt that my autonomy was being respected, I was being offered help to resolve a problem, rather than being told to toughen up and get on with it. But the manner in which the help was offered was supportive in other ways also.

My concern was taken seriously, and indeed it had been anticipated that a decent man might feel conflicting impulses: between professional loyalty to the client and feeling the vulnerable should be protected from predators.

My competence was assumed, and called upon, when the eighteenth century address was handed over for me to read. Not a summary nor an updated version, nor a version with the relevant passages highlighted. I had undergone an academic education and the reading of difficult texts was a central part of that education; this was an area where I had skills, and they were recognised.

The document with Erskine's address to the jury embodied tradition and offered membership in three different communities. First, it was the classic statement of an important professional ethical principle, that lawyers must stand ready to represent the unpopular, and if necessary suffer the contamination of their social stigma in so doing, in order to make the rule of law real. It also gave sage guidance on why we cannot concern ourselves with our own opinions of our clients' guilt, and thus gave reasons to adopt what is a difficult perspective to adopt. These substantive aspects of the text linked me to the community of legal representatives (not barristers as I am a solicitor). Second, it linked me to all those other articled clerks who had been through this process. The document was clearly well thumbed. I was part of a community connected by a relationship with my supervising solicitor. I was a member of a community of decent young people who had needed to think and feel their way through this issue to become professionally fit lawyers. Finally, I was through the discussion of the document part of the team in the firm who had to deal with these conflicts. The strain does not go away, and it is important for all those involved to recognise the strain, and talk about it, and deal with it ethically and properly.

Hopefully this rather long account demonstrates the meaning and importance of the shift from introjected to identified regulation. It also illustrates the intimate links between this transition and the values held by the student (in this case apprentice). It also illustrates how this transition can be facilitated by teaching practice, allowing and helping the learner to do what only the learner can do, by supporting the process. It seems likely that the key division between regulatory styles is between the externally regulated and the introjected on the one side and

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[32] Ibid. p. 108. An example is available at: <http://www.middletemple.org.uk/Downloads/9A%20-%20Ruth%20Deech%20-%20THE%20INDEPENDENCE%20OF%20THE%20BAR.pdf>accessed 10.04.2013, *per* Baroness Deech, Chairman, Bar Standards Board, August 2010. The quotation, as is often the case, is not referenced to any text.

identification on the other side. However, there is one more step towards a fully self-determined regulation that still stops just short of intrinsic motivation, and that was not achieved in the example above.

Integrated regulation is not merely the adoption of individual values or goals but the integration of the adopted values and goals with each other and with the self that has adopted them. Thus, each value with which the self has become identified is aligned with the other values and desires of the self. This might be described as knowing who you are and feeling happy about who that person is. It has clear similarities to the state of being Frankfurt has termed 'wholehearted'. Anyone who has been able to resolve the inherent tensions in being a spouse, and parent, and son or daughter, and sister or brother, and lawyer, and teacher, and researcher, and friend, and looking after themselves in being all these things, would be integrated. It may be a state more often aspired to than achieved, but one can become more or less integrated.

Thus, self-determination theory has identified a range of extrinsic regulation of behaviour, ways that an activity that is not intrinsically enjoyable or attractive can be kept up. The range runs from least self-determined: external motivation and introjected regulation; to most self-determined with identified and integrated regulation. The more self-determined a regulatory style is the better in terms of motivational persistence and feelings of well-being. The range is not a description of the motivational character of individuals, thus a person might become more or less self-determined in their regulatory style. Nor is it a developmental range: an individual does not need to pass from external, to introjected, to reach identified regulation. It is possible to start from identified regulation, or of course intrinsic motivation, towards an activity. The concepts are descriptive of a learning process, and thus are inherently dynamic, and internalisation is the dynamic process.

It is through the development of an elaborated conceptualisation of extrinsic motivation that self-determination theory becomes a powerful aid in teaching and learning. It helps us to identify what should be effective in trying to enhance student motivation, and as will be seen below warns us against mistakes in this area. Although the theory started with cognitive evaluation theory and a focus upon intrinsic motivation, a single-minded focus on this educationally exceptional state was found to be inadequate because:[33]

> 'Throughout life, people face the challenge of developing self-regulation of activities that are useful for effective functioning in the social world but are not inherently interesting and thus not intrinsically motivated.'

4. HELPING STUDENTS BECOME MORE SELF-DETERMINED

It is obviously self defeating to try and force people to be self-determined. Yet the more self-determined students are, the greater their well-being, and the stronger and more effective their motivation. Therefore, it would be desirable to make students more self-determined. We have seen above that identification with values can encourage self-determination, as identification involves a person taking the value as their own. A person wants to pursue activities which are aligned with a value her self has identified with, which advance that value, which develop capacities to act effectively in relation to that value. In these circumstances she is capable of self-determined regulation; her motivation is internally located. So, the problem is helping people become more self-determined.

Self-determination theory views the person as an organism that seeks what it needs.[34] The human needs that self-determination theory posits are for autonomy, competence, and relatedness. Needs should enhance well-being, so if one feels autonomous, competent and part of a group then one should feel well and happy or fulfilled.[35] Needs

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[33] E.L. DECI, H. EGHRARI, B.C. PATRICK and D.R. LEONE, above n. 294. 120. See R. HUXLEY-BINNS and G. FERRIS, above n. 291.

[34] Obviously this idea can be question begging, after all to know what one needs one must first know oneself, and that quest has occupied many a lifetime. One promising approach to this area of difficulty is described in K.M. SHELDON, 'The Self-Concordance Model of Healthy Goal Striving: When Personal Goals Correctly Represent the Person' in E.L. DECI and R.M. RYAN (eds.), above n. 293, p. 65. For evidence that intrinsic values rather than extrinsic values are associated with self-reported subjective well-being: K.M. SHELDON, R.M. RYAN, E.L. DECI and T. KASSER, 'The Independent Effects of Goal Contents and Motives on Well-Being: It's Both What You Pursue and Why You Pursue It' (2004) 30 *Personality and Social Psychology Bulletin* 475; for evidence to similar effect in relation to law student well-being: K.M. SHELDON and L.S. KRIEGER, 'Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being' (2004) 22 *Behavioural Sciences and the Law* 26.

[35] Well-being and happiness are generally measured through questionnaires, although other methods, such as the experience sampling method have also been deployed: M. CSIKSZENTMIHALYI and R. LARSON, 'Validity and Reliability of the Experience-Sampling Method' (1987) 175 *Journal of Nervous and Mental Disease* 526. Numerous approaches and works are concerned with attempts to measure either happiness

should be universal, so men and women, and people from different cultures, and people of different ages should share needs, that is all feel better if their autonomy, competence and feelings of relatedness are enhanced.[36] Of course what activities allow people to feel competent, for example, will vary very widely across groups and individuals.

SOME EXPERIENTIAL SUPPORT FOR THE THEORY

Taking this account of human needs, and the idea of the learner as someone who would naturally be attracted to and find satisfaction in activity that satisfied these needs, the author and his colleagues used these three needs as guides for designing a curriculum for a module and teaching the module. The idea was that if the module respected autonomy; recognised, rewarded and developed competence; and was delivered within a social environment that was supportive, and had features of a community to create relatedness; then it would enhance feelings of well-
4.1. being, and encourage internalisation of the ethos of the module and its aims, because it would be meeting the needs of the students. We hoped to encourage self-determined regulation of activity in the students through a design and practice that was supportive of the needs of the students. The module was Critical Legal Thinking, a final-year undergraduate jurisprudence module, the student group was around 120 students, and the module team were the author, Rebecca Huxley-Binns, and Andrea Nicholson. The module was very successful, student results were very strong, and student questionnaire feedback indicted high levels of engagement with the module. There were a lot of students who reported that the module was hard and that they enjoyed it. The module continues to run and is still successful; student feedback continues to be enthusiastic. We think that we had some success in facilitating self-determined regulation through giving attention to the needs of the students in our approach to design and delivery.

Autonomy support was provided in several ways. We gave attention to assessment in particular. Final-year assessment is important to our students because it will determine the classification of their undergraduate degree. We felt providing for some autonomous choice around assessment would be symbolically very important. Institutionally we were limited in the form of the assessment (it had to be a 6,000 word essay and an oral presentation of ten minutes with ten minutes of questions). We had considerably more freedom around what the subject matter of the assessment would be, so we used this to maximise student autonomy. We provided three set titles, with student choice over which they attempted. We also provided for a fourth title drafted by the student, subject to approval and drafting help from the academic staff. This possibility was received enthusiastically; although only around twenty students actually drafted their own question, all the students had enhanced feelings of choice around the assessment. Given the controlling nature of assessment we felt this openness to negotiate how a learner wanted to be assessed was valuable.

In an effort to support autonomy we also resisted any attempt to force an answer, or set of answers, upon students in class or in assessment. The module had an express and implicit emphasis on pluralism.[37] One dramatic way of emphasising this was organising the lecture programme as a series of guest lectures by members of staff not on the module team. We refused to have a few authoritative voices that lectured, led seminar discussion, and assessed. By displaying diversity of opinion amongst staff we tried to legitimate variation of opinion. This also enabled us to emphasise the autonomy of staff, and thus was a cultural endorsement of autonomy. Finally, in our group sessions we emphasised the possible validity of different questions and different answers, but this aspect of our practice will be picked up below.

We felt competence was a very important area to give attention to. There is a tendency for legal education to emphasise not being wrong, and to take little interest in the opinions of the students. As has been noticed elsewhere, learners often find legal education in the common law tradition debilitating.[38] As justice is a virtue and easily approached through ethics, we decided to make this our approach because it allowed us to seek information from the students. This is because the intuitive response of people to ethical problems are various and important for ethical reasoning. All of our students could bring something of value to the early seminar discussions, because

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or eudemonia e.g. B.M.S. VAN PRAAG and A. FERRER-I-CARBONELL, *Happiness Quantified – A Satisfaction Calculus Approach*, Oxford University Press, Oxford 2008; and P.R.G. LAYARD, *Happiness - Lessons From a New Science*, Penguin, London 2011.

[36] This account is adapted from E.L. DECI and R.M. RYAN (eds.), above n. 270, p. 22.

[37] Express though study of the work of Isaiah Berlin and Amartya Sen, see: I. BERLIN, 'The Pursuit of the Ideal' in H. HARDY and R. HAUSHEER (eds.), I. BERLIN, *The Crooked Timber of Humanity – An Anthology of Essays*, Pimlico, London 2003; I. BERLIN, 'My Intellectual Path' in H. HARDY (ed.), *The Power of Ideas*, Princeton University Press, Princeton NJ 2000; and A. SEN, *The Idea of Justice*, Allen Lane, London 2009. Implicit through a refusal to organise the materials in any progressive array, the jurists were grouped by question rather than chronologically or in terms of a single debate culminating in some selected modern jurists, the broad questions were: what is justice; what is law; what is legal realism?

[38] G. FERRIS and R. HUXLEY-BINNS, 'What Students Care About and Why We Should Care' in P. MAHARG and C. MAUGHAN (eds.), *Affect and Legal Education - Emotion in learning and Teaching the Law*, Ashgate, Farnham 2011.

their individual intuitive reaction to dilemmas was the subject matter of the sessions. Everyone could start from some base of competence. We could then develop in class the ability to reason about these intuitions and how juristic theories were either concordant or antagonistic to these intuitive feelings. We also tried to utilise media that our students were competent with. Text, especially extended text, is not the preferred medium for communication for many of our students. We located and obtained permission to use the lectures on justice by Michael Sandel originally delivered to students at Harvard.[39] Almost all students are skilled at watching and following this type of material. Also, his approach modelled our seminar discussions and commitment to pluralism.

Relatedness was the final human need we tried to meet. There were two major aspects to this. First, the small groups sessions, and the discussion of intuitive ethical responses. This material is quite personal in nature. It reveals information about what people value. If we are asking students to share such information then several things follow. First, staff must be open to share also, and avoid judgmental responses to the intuitive reactions of students at both the verbal and body language level. Second, students must respect the views of their peers and not deride or mock them. Third, the atmosphere needs to be relaxed and not earnestly charged. Although sharing such information makes one vulnerable, the process is in fact a natural social one that people will do without prompting if allowed to do so. Fourth, it must be possible to discuss, and even critically consider, the different intuitive reactions but avoiding *ad hominem* arguments. Therefore, the sessions become devoted to the subject matter of intuitive reactions to ethical problems but the process the sessions are devoted to is one of developing respectful discussion of ethical problems by the group. A group that shares such information and develops a respectful and relaxed style of discourse is a group that builds social capital.[40] It is a group that provides and supports relatedness. Thus, the seminar sessions were used to build relatedness taking advantage of natural social processes and the nature of the subject matter. Relatedness was also built in a less immediate way. The attitude towards the jurists and other thinkers, and to the members of the academic staff, and to student peers was one of shared endeavour. Although it was perfectly proper to disagree with jurists or each other, the central task was one of trying to understand the hopes and work of the jurists. Pluralism accepts that no one has the answer to any important question. Several defensible answers exist to such questions, and usually several indefensible ones also. The students were invited to join a continuing quest for meaning and solutions to real problems of meaning and social co-ordination - they were invited to be scholars. This also gave a sense of relatedness through shared endeavour across time, status, and culture.

Critical Legal Thinking was an example of a real-life attempt to use the insights of self-determination theory to enhance student well-being and motivation. It was an enterprise compromised by the demands of the institution and the experience of the students and the demands of other social forces; it was very far from a laboratory experiment. The students and staff all enjoyed the module, results were very good, students worked hard and achieved well, above the average for taught courses on the degree programme. It is worth reporting upon because it reflects a successful experience for those involved. It was not intended to be, and was not, a test of self-determination theory in legal education. It was the *use* of self-determination theory in legal education.

4.2. SOME EXPERIMENTAL SUPPORT FOR THE THEORY

An attempt to test the use of the differentiation of regulatory styles in extrinsic motivation and to test the efficacy of attempts to facilitate and encourage self-determined regulation was an experiment carried out by Deci, Eghari, Patrick and Leone.[41] The experiment was designed to answer two questions. First, if there really was a difference between introjected regulation on one hand and identified or integrated on the other hand. Second, whether presence of one, two or three 'supportive conditions' would encourage the more self-determined form of regulation. They set up a dull task, to avoid the risk of intrinsic motivation interfering with the experiment, pressing a space-bar when a dot of light appeared on a monitor screen. The three supportive conditions were: providing a reason for the activity; acknowledging that the task was dull; instructions were given in a way that suggested the subject had choices. The non-supportive conditions were: no reason for the activity was given; no acknowledgement that the task was dull or irksome was given; instructions were relayed in a controlling fashion using such expressions as you should, must, and have to. There were 192 'subjects' who took part in the experiment, all of whom were psychology students at a North American College whom were offered credit for taking part. The group of subjects included both men and women but no significant sex differences were identified in the results.

[39] M. SANDEL, Harvard University's Justice with Michael Sandel, available at: <http://www.justiceharvard.org/> accessed 15.08.2014.
[40] R.D. PUTNAM, *Bowling Alone – The Collapse and Revival of American Community*, Simon & Schuster Paperbacks, New York NY 2000.
[41] E.L. DECI, H. EGHRARI, B.C. PATRICK and D.R. LEONE, above n. 294.

The experimenters measured motivation in two ways. First, by measuring continuance at the task after the experimenter had declared the experiment finished: subjects were invited to carry on if they wished to do so while the experimenter fetched a questionnaire. Second, through a questionnaire that asked about the subjects' attitudes to the task. From analysis of the questionnaire responses, statistically significant support was found for the conception of difference in motivational regulation between the groups who experienced self-determination supporting conditions and the groups that did not. Essentially, the group given supportive conditions found meaning in the activity. From analysis of persistence in the activity measure, statistically significant evidence was found for effects upon persistence of the different experimental conditions. Essentially, when two or three supportive conditions were present there was more persistence, but when one or none were present there was less. Oddly, in the light of the theory, no supportive conditions led to greater levels of persistence than the presence of one supportive condition.

The experiment has been described at length for four reasons. First, it illustrates how artificial the experimental technique is when contrasted with something as important to the learner and complex and prolonged as legal education.

Second, it illustrates how sensitive people are to minor changes in the social situation. Essentially, the self-determination supportive conditions amounted to treating the subjects with the respect due to rational people. They were given reasons for acting in a certain way, shown consideration with regard to their feelings, and asked to do things and given some choice over how the task was undertaken. These subtle and undemanding social conditions were enough to change how willing people were to do something, how they felt about what they were doing, and what sense they made of the activity. By artificially stripping away complexity the experimental method allows us to observe and confirm the presence of such delicate social and psychological processes.

Third, the experiment allows us to reflect back upon the learning experience of the author when he found himself representing a man accused of sexual offences against a minor. Self-determination theory, as illustrated by this experiment, gives an explanatory model for why the intervention by the supervising solicitor was so effective. His actions assumed that I deserved and needed a good reason for doing what the job demanded. His response fully acknowledged the reasonableness and appropriateness of my feelings about the task. His response did not use the very real authority he had over me. Furthermore, as noted above he encouraged me to recognise and develop my competence and enhanced my feelings of relatedness. However, he did not do this to fulfil the requirements of self-determination theory. He did this because he recognised me as a decent human being and fellow professional in the making. What this experiment makes very plain is that one reason self-determination theory works is because it recognises the learner as a fully human being whose co-operation needs to be sought and not something that needs to be manipulated into acting as desired.

Fourth, the experiment found that the condition that led to the least persistence was the presence of only one of the three supportive conditions. Where there was no encouragement for self-determination there was relatively significant persistence in a dull and intrinsically unrewarding task. This was despite not valuing that task as shown by the questionnaire responses. It seems possible that the extrinsic motivational range of regulation may have a discontinuous aspect to it. Sometimes the movement from interjected to identification or integration may be a natural enough progression, as was illustrated by the experience of the author faced with representing the defendant. However, sometimes the two approaches to regulation may be conflicting or contradictory; more of one may require less of the other. The experiment raises the possibility that there may not be merely one risk of de-motivation through rewarding or punishing behaviour. One familiar risk is of external interference in the presence of intrinsic motivation, the phenomenon that first inspired cognitive evaluation theory. This experiment suggests what may be a far more common risk, the risk of substituting introjected regulation where in its absence identified or integrated regulation could have been established.

In teaching terms we may be faced with two potentially effective but contradictory approaches to student motivation. We may strive to establish *either* introjected regulation, *or* to establish identification or integration. However, it is worth quoting from the conclusions of the experimenters, who in somewhat more rarefied terms seem to be identifying the possibility that we are faced with a choice of aim in legal education, and indeed in education generally:[42]

> 'Perhaps the most important finding of the present research was that the type of internalization – namely, integration versus introjections – appears to have been dichotomously dependant on whether the context

[42] Ibid. p. 138.

> tended to be supportive of self-determination promoted integration (as represented by positive correlations between behaviour and self-reports), whereas those that were nonsupportive of self-determination promoted introjections (as represented by negative correlations).
>
> These results are consistent with a kind of threshold (rather than incremental) model of promoting integration … Integration seems to require a general ambience of support for self-determination, whereas introjections results when there is a general ambience of non-support.'

We have already established that the 'ambience of support' amounted to treating people as responsible agents whose co-operation was sought. We have seen how in the world outside the laboratory this approach is concerned with the values held, and sense of self of the individual, and the sense they have of belonging and wanting to belong to a community. We have argued that the intrinsically motivated individual should be treasured, and we should try not to interfere with her activity. This experiment suggests that there are good reasons, in terms of teaching efficacy, to abjure the attempt to motivate through both external and introjected regulation. This is not because such regulation is altogether ineffective, but because it is less effective and results in lower well-being for the learner than identified or integrated regulation, and we cannot act to encourage both at the same time. It seems we must consider the theoretical contradictions between different models of learning, because the consequences of facilitating both are not harmonious, the relevant facilitative conditions cannot be combined. Rather the learning environments required are discordant and we must choose one or another. What the researchers termed 'ambience' is not an accretion of separate social conditions that can be added regardless of what other conditions are present, it is the holistic character of a situation.

5. INCENTIVES AND UNINTENDED CONSEQUENCES

As has been noted cognitive-evaluation theory and flow theory, and other theories that posit concepts of intrinsic motivation as causative or explanatory factors in their models of learning, were reactions to the dominance in Anglo-American academic psychology of operant conditioning learning theory, otherwise known as behaviourism.[43] Explanations favoured by behavioural theory did not require any internal process by learners, or organisms to use the favoured term. This physical reductionism, which was tied to such influential movements as logical and legal positivism, was rejected as a workable scientific paradigm in the third quarter of the twentieth century. Thus, it was not only in the field of motivation and learning that this restrictive approach to the subject matter of psychology was rejected, and the consequences of this rejection are sometimes referred to as part of 'the cognitive revolution'.[44] However, the basic model of learning described by the theory of operant conditioning has not dropped out of use at all. The psychological theory was part of a wider interest in 'incentives' and we will return to this wider context below.[45]

Classic formulations of the theory of learning through operative conditioning do not use the term 'motivation' as that would involve the ascription of importance to a non-observable phenomenon. The key concept is 'reinforcement'. Positive reinforcement is provision of a 'stimulus' of which an organism seeks repetition.[46] In operative conditioning procedures animals would typically be kept hungry, and provision of food would be the reinforcing stimulus. However, experiments sometimes explored alternative sources of reinforcement. There is no need for a concept of motivation in this model, because it is absorbed into the concepts of behaviour (act), stimulus (environmental event; it seems 'stimulus' incorporates some idea of perception; if unperceived an event would not be a stimulus), and reinforcement (stimulus that increases the probability of the action being repeated). The pigeon pecks at a defined area (act), a pellet of food is delivered (stimulus), and the pigeon repeats the act (reinforcement).

It will be apparent that positive reinforcement is not a discrete fact or event (eating the food pellet is not reinforcement) but a relationship between an earlier event (pecking), a present event (the 'stimulus' of getting and eating the food), and later events (the repeated behaviour). A stimulus reinforces if the act by the organism which immediately preceded the stimulus is more likely to be repeated after the stimulus than chance would bring about. Motivation would be an internal characteristic of the organism. Behaviourism avoids the need to acknowledge any such characteristic. There are only facts or events that occur in sequential order. It is an effect of an event –

[43] Obviously psychology was never univocal, and many non-behaviourist psychologists were active throughout the twentieth century.
[44] H. GARDNER, *The Mind's New Science - A History of the Cognitive Revolution*, Basic Books, New York NY 1987.
[45] R.W. GRANT, 'The Ethics of Incentives: historical origins and contemporary understandings' (2002) 18 *Economics and Philosophy* 111.
[46] Strictly speaking this is 'positive reinforcement', there is also a concept of 'negative reinforcement' that exists when a stimulus makes repetition less likely. Examples would be painful stimuli, such as electric shocks.

reinforcement – that leads to behaviour change (or learning) that has efficacy. The aim is to explain what happens to the organism to alter its behaviour without imputing any internal, and therefore unobservable, events.

It will be noted that motivation can be described as observable behaviour: it is the tendency to persist in action or efforts to effect an action (or obtain a goal). The difference between a motivational and a behaviouristic explanation is not primarily about what is observable and what is internal, and thus not observable. The difference is what factors are given causal effect. In behaviourism the description of events in the external environment is sufficient for a complete explanation of behaviour change. Therefore, there is no temptation to explore perspectives internal to the organism; *ex hypothesi* they are excluded from causal efficacy.

Thus, reinforcement-based explanations are inherently committed to a view of motivation as something that operates outside the organism. The behaviourist is committed to external motivational efficacy because internal motivation is not expressible by the concepts available to the theorist. It is theoretically inconceivable. It is ineffable. The problem for behaviourism was that in order to render the internal state of the organism unnecessary for causal explanation the concept of 'reinforcement' was put under considerable pressure.

'Reinforcement' was generally used in two different, but usually overlapping, senses. This ambiguity supported the theory in two ways. It aligned the theory with a version of folk psychology, and it made it seem that the theory was independent of any unobservable element. It achieved both of these ends by eliding 'positive reinforcement' with 'reward'. When the rat pressed the bar and then received the food it was rewarded for pressing the bar – it obtained food and assuaged its hunger by eating it; and it was reinforced – it was more likely to press the bar again. Folk psychology explains the reinforcement by the reward, as we assume the rat associated the bar pressing with the reward. The desirability of the reinforcement, its reward character, is independent of the observation of repeated behaviour that follows its receipt. This is contingent. Food is desirable to a hungry rat. There is no conceptual link between desirability and positive reinforcement in behaviourist theory, that which is observed to be associated with increased frequency of a behaviour is reinforcement. The hunger of the rat is not a part of this explanation.

We can trace the beginnings of the transformation from reward to reinforcement in the writings of behaviourists in the 1930s and 1940s. Ruth Grant notes a variety of usage to describe the external stimulus that would become the reinforcement. She notes such terms as 'environmental stimulus', goal stimulus' and 'goal object' and quotes Hull:[47]

> 'The concept of incentive in behaviour theory corresponds roughly to the common-sense notion of reward. More technically, the incentive is that substance or commodity in the environment which satisfies a need, i.e. which reduces a drive.'

Here the reliance of behaviourism upon folk psychology of reward, and its concept of behaviour as being a disturbance or imbalance in the organism, are both on display.

The ambiguity might seem unlikely to ever lead to confusion: as that which reinforces is likely to be desirable. Certainly, when dealing with hungry animals in tightly controlled laboratory conditions the two can be aligned. The ambiguity became visible, and the embarrassment caused by the impossibility of even articulating a contrast between internal and external motivations acute, when more complex and less tightly controllable conditions generated unexpected results. If provision of something that was desired (food for the hungry rat) made behaviour less likely (acted as a negative reinforcement) and doing nothing resulted in more of the behaviour (acted as a positive reinforcement) then reinforcement may be an absence of response by the environment. Thus, the psychological experiments in the 1970s that identified an inhibiting effect from reward made the ambiguity visible and created a significant problem for behaviourism.

The paradigm experimental situation of the hungry animal and the food stimulus obscured the tension within the concept of reinforcement, because it was designed by people who understood that hungry animals will be motivated to do whatever produces food. The folk-psychology insight, that food rewards hungry animals and can be used to mould animal behaviour, informs the experimental paradigm. The technical description of reinforcement as any stimulus that is 'observed to precede a greater probability of repetition of behaviour' does not expressly or

[47] C. HULL, *Principles of Behaviour, An Introduction to Behaviour Theory*, D. Appleton Century Company Inc., New York NY 1943, quoted in R.W. GRANT, above n. 314, p. 123.

conceptually *require* the 'stimulus as reward' mechanism. Animals manipulated in highly restricted environments will never expose the ambiguity.

In the 1970s it was experiments involving human subjects that generated unexpected results. The provision of desired stimuli did not reinforce behaviour. The behaviour was being carried out, and behaviour was being persisted in, without any external reinforcement; furthermore, the introduction of stimuli intended to reinforce - the introduction of rewards - decreased the behaviour. Conceptually, behaviourism had very limited options for explanation. The behaviour could be explained as self-reinforcing behaviour. The persistence of the behaviour is explained by the behaviour being reinforcing of the behaviour. Here the key concept of reinforcement seems quite circular and non-explanatory. It is hard to avoid this circularity, whilst remaining inside the conceptual structure.

The alternatively was to go outside the behaviourist theoretical constraint. A natural way to explain behaviour that required no external reinforcing stimulus was to say it was intrinsically motivated, the behaviour itself was desirable, or enjoyable, or valuable to the organism. The articulation of intrinsic motivation almost automatically carries with it its corollary of extrinsic motivation, and that fits behaviour that requires an external reinforcing stimulus quite naturally.

It has been necessary to develop this account because the difference between the two models of learning is fundamental in two ways.

Behaviourism deals with behaviour as something that is caused: it is the result of something originating in the environment impacting upon the agent - an essentially mechanistic explanation. The initial behaviour that will be shaped by operant conditioning is treated as random; it has no meaning. Motivational theories deal with behaviour as initiated by the agent in interacting with the environment, as such the purpose or perception of the agent must be considered as a causative feature of the description – an explanation essentially concerned with what things mean to the agent. The assumption is that behaviour will not be random, but directed by internal features of the agent.

Behaviourist explanations do not recognise the agent as a moral being; it is a thing to be acted upon. Motivational theories can, and with human subjects in order to encourage self-determination must, treat the agent as a moral being.

These structural differences mean that reliance upon either model is liable to generate interference effects upon attempts to use the other model. Actions designed to shape behaviour using operative conditioning will interfere with attempts to recognise and support self-determination. Actions taken to support self-determination will corrupt or even remove linkages between the desired behaviour and the rewarding or punishing institutional response. Thus, from the perspective of either explanatory model the actions taken under the presumptions of the other are senseless; they seem irrational and counterproductive.

This basic conflict of conceptual description affects the relationship between motivationally informed theories such as self-determination theory and the folk psychology of reward and punishment. Alfie Kohn describes the synthesis of folk psychology with the learning model of behaviourism as 'pop behaviourism'. Pop behaviourism has certainly not been swept aside by any cognitive revolution. It is often described by those who use its conceptual structure as the use of 'incentives' to influence behaviour. Psychological research into the motivational impact of rewards has been gathered and put to polemical use by Kohn.[48] His work identifies the synergistic links between the conceptual structure of behaviourism and the folk psychology of reward and punishment in a persuasive extended argument.

Kohn deploys research by self-determination theorists and by flow theorists amongst others. His central argument is that extrinsic motivational interventions are counter-productive and morally unsound. He argues that promising rewards to encourage behaviour that is capable of intrinsic motivation is actually de-motivating.[49] Further, rewarding does not work in the way those deploying rewards want it to work. It influences behaviour as agents seek the reward, but they do this rather than trying to improve performance in the behaviour desired by the person rewarding; it is a classic system productive of unintended consequences. Rewards denied can quickly become seen by those denied them as punishing, and behaviourist models identified negative reinforcement as a poor substitute

[48] A. KOHN, *Punished by Rewards - The Trouble with Gold Stars, Incentive Plans, A's, Praise, and Other Bribes*, Houghton Mifflin Company, New York NY 2000.
[49] Ibid. Chapter 5.

for positive reinforcement. Agents focussed on rewards tend to eschew experimentation and risk taking in the activity rewarded, as it is a less effective means to obtain the reward, another systemic unintended consequence of using pop reward and punishment as behaviour modifiers. Rewards or punishments are often ineffective if they are used to alleviate a pressing institutional problem, because they do not seek to address the underlying cause of the problem. Finally, rewards corrupt relationships as they seek to manipulate rather than persuade.[50]

It is important to realise how important this attack upon behaviour modification through incentive is for educational practice, because it undermines and casts doubt upon very common and well-meant educational practice and reform proposals. However, the conceptual resort to an intrinsic versus extrinsic dichotomy means we must treat Kohn's synthesis with caution.

Kohn does lead us to wider perspectives on motivation. Obviously, many practically and theoretically inclined people outside of academic psychology have been interested in motivation. The author's supervising solicitor had a keen practitioner's eye to effective motivational intervention as illustrated above. Management theory and practice, educational theory and practice, economic theory and practice, political theory and practice are all fields in which how behaviour may be influenced, and what people will learn from an experience or communication, are vital questions. In his synthesis Kohn addresses organisational theory and practice, educational theory and practice, and the raising of children in theory and practice. One factor that he emphasises and that we need to be aware of is the importance of power relations in the context of affecting the behaviour of others. This in turn reminds us of the importance of our values as legal educators when we contemplate how we should approach questions of student motivation.

If, as the analysis above indicates, motivationally informed theories and incentive based theories interfere with each other, then one would expect to find some awareness of this problem in the literatures. Indeed this is the case. Bruno Frey, an economist, talks about the crowding out of choices informed by a concern with the public interest by the offer of monetary reward; and the loss of employee motivation following 'incentivising' reform of emolument. He expressed the basic insight as a formal proposition:[51]

> 'The (relative) Price Effect which captures the price system's essential mechanism is fully accepted. The Crowding-Out Effect introduced here is an additional force working in exactly the opposite direction: a higher monetary reward offered may reduce an activity rather than increasing it.'

Ruth Grant, a political scientist, highlights the need to view incentives as a means of exercising power, and to recognise the ethical consequences of that insight:[52]

> 'Persuasion, along with coercion and incentives, must be included among the alternative means of exerting power. Incentives attempt to circumvent the need for persuasion by giving people extrinsic reasons to make the choices that the person or institution offering the incentive wishes them to make. When incentives are employed, there is no need to convince people that collective goals are good or to motivate them to pursue those goals by appeals to rational argument or personal convictions.'

Obviously, therefore, an institutional emphasis on the deployment of incentives will tend to exclude the concern with student values that is central to the argument of this book. Incentives avoid the need to be concerned with what the people incentivised value or care about. This is because they are informed by a theory of causality that places the effective cause outside the learner; the concept of the incentive externalises motivation in the same way reinforcement does.

In the educational field a widespread ineffectiveness of financial incentive schemes to improve educational performance was reported by Roland Fryer Jr:[53]

> 'In the 2007–2008 and 2008–2009 school years, we conducted incentive experiments in public schools in Chicago, Dallas, and New York City – three prototypically low-performing urban school districts – distributing a total of $9.4 million to roughly 27,000 students in 203 schools (figures include treatment and

[50] Ibid. Chapter 4.
[51] B.S. FREY, *Not Just For the Money - An Economic Theory of Personal Motivation*, Edward Elgar, Cheltenham 1997, p. x.
[52] R.W. GRANT, above n. 314, p. 30.
[53] R.G. FRYER, Financial Incentives and Student Achievement: Evidence From Randomised Trials (2011) 126 *The Quarterly Journal of Economics* 1755, 1756-1757.

> control). All treatments were school-based randomized trials, which varied from city to city on several dimensions: what was rewarded, how often students were given incentives, the grade levels that participated, and the magnitude of the rewards. The key features of each experiment consisted of monetary payments to students (directly deposited into bank accounts opened for each student or paid by check to the student) for performance in school according to a simple incentive scheme … The results from our incentive experiments are surprising. The impact of financial incentives on student achievement is statistically 0 in each city.'

In an educational setting this actually represents a negative outcome, because of the demonstration effect. As Derek Bok reminds us, students are keen observers of the practice of educational institutions, especially if that practice is contrary to professed institutional values:[54]

> 'Another educational cost that commercialisation can incur has to do with the moral example such behaviour gives to students and others in the academic community.'

It will be recalled that the use of incentives is an attempt to manipulate rather than to persuade students. It is based upon a model of a passive agent who is affected by reinforcement. It is not an attempt at cooperation, and it lacks those features of an intervention supportive of self-determination that we discussed above. Although ineffective in changing behaviour in the way the incentive was designed to operate, the attempt to incentivise, or buy, student performance was still an attempt to exercise power manipulatively. This runs counter to concerns with working together, mutual respect, and educational practice being for the sake of the educated, for one would not need to manipulate someone else into acting in their own interests. If we think of analogues with legal ethics, such an approach would run counter to respect for client autonomy at the very least. In Bok's words:[55]

> 'In colleges and professional schools alike, courses on practical ethics are now a common feature of the curriculum. Although classes of this kind can serve a valuable purpose, students will surely be less inclined to take them seriously if they perceive that the institution offering the courses compromises its own moral principles … In deciding how to lead their lives, undergraduates often learn more from the example of authority than they do from lectures in a classroom.'

The brute fact is that behaviourism, pop behaviourism, financial incentives, or rewards and punishment as a means to try and 'motivate' students are all varieties of a single model of learning, one that denies the need to concern oneself with the values or autonomy of the learner. Such attempts can have bad effects whether we describe those bad effects as: undermining intrinsic motivation; or creating an ambience suitable for and supportive of introjected regulation of behaviour; or of crowding out intrinsic motivation; or being ethically questionable attempts to exert power; or bad moral examples.

Interventions that are not based upon the behaviourist paradigm include: showing concern with the values of students; engagement with students as autonomous individuals; support for and creation of groups or social spaces or communities in which feel students feel connected; and respect for students as people who have valuable skills and competences to deploy. The evidence in this chapter suggests that this approach is the practical and effective means to facilitate student motivation. That student self-determination and student choice of values and goals are essential parts of facilitating effective student motivation. In the context of legal education, where many of our students will go on to practice law professionally, these factors extend beyond the student experience to the issue of an education that can serve as a preparation for an ethical professional life.

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[54] D.C. BOK, *Universities in the Market Place - The Commercialization of Higher Education*, Princeton University Press, Princeton NJ 2003, p. 109.

[55] Ibid. Bok was not describing the use of incentives to motivate students. He was describing the effect of institutions compromising educational values for commercial reasons: 'the institution compromises its own moral principles in order to win at football, sign a lucrative research contract, or earn a profit from Internet courses'.

CHAPTER 8
ETHICAL IDENTITY

It has been recognised that teaching legal ethics should not be restricted to teaching legal professional codes of conduct, but that it often is so treated when legal ethics form part of a compulsory curriculum. As Deborah L. Rhode writes:[1]

> 'Although ABA accreditation standards require schools to offer instruction in professional responsibility, the vast majority satisfy their obligation with a single mandatory course that focuses on bar disciplinary codes. Too often, the result is "legal ethics without the ethics". Students learn what the codes require but lack foundations for critical analysis.'

However, this emphasis on the cognitive and theoretical itself has been criticised as too narrow.

In this chapter and the next the broader aspects of ethics are the focus of attention - those components of effective moral action characterised as moral motivation and moral character by Rest. It is probably in this area of ethics, the area that impinges most upon the personal morality and identity of students, that anxiety about the proper limits of academic action is most acute. It is also in this area that detailed knowledge of professional codes is irrelevant except as illustrative material. It is in this area that an undergraduate degree designed to support the personal identity development of students is most clearly justified in educational terms. Finally, the systemic impacts of legal education are likely to be important in this area, as a failure to support students in developing an ethical set of priorities invites the adoption of unethical values by young people.

1. TEACHING MORAL MOTIVATION

To be morally motivated is to care about some moral or ethical value more than other values that are present in some situation.[2] In this context 'values' mean anything that someone treats as having value.[3]

It is important to remember that the four-component schema for ethical action is an analytical construct. It may not reflect psychological causality, nor a sequence of events in practice. A particular risk of distortion comes from our cultural narratives of moral heroism. In the words of Samuel and Pearl Oliner:[4]

> 'The emphasis on autonomous thought as the only real basis for morality continues to enjoy widespread acceptance. The lonely rugged individualist, forsaking home and comfort and charting new paths in pursuit of a personal vision, is our heroic fantasy – perhaps more embraced by men than women but nonetheless a cultural ideal. His spiritual equivalent is the moral hero, arriving at his own conclusions regarding right and wrong after internal struggle, guided primarily by intellect and rationality. It is this vision that underlies much of Western philosophy and psychology. In a culture that values individualism and rational thought most highly, a morality rooted in autonomy is

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[1] D.L. RHODE, 'Ethics in Practice' in D.L. RHODE (ed.), *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation*, Oxford University Press, Oxford 2000, p. 21.

[2] It is better to avoid a 'moral' versus 'non-moral' categorisation into mutually exclusive sets of values: 'The use of two categories, "moral" and "non-moral" suggests to numerous writers on the topic that the cases to be investigated fall into two neatly demarcated and opposed categories … in everyday life we find, instead, a complex spectrum of cases, interrelated and overlapping in ways not captured by any dichotomous taxonomy.' M.C. NUSSBAUM, *The Fragility of Goodness: Luck and ethics in Greek tragedy and philosophy*, Cambridge University Press, Cambridge 1986, p. 29.

[3] H.G. FRANKFURT, 'The Importance of What We Care About, Identification and Wholeheartedness' in *The Importance of What We Care About*, Cambridge University Press, Cambridge 1998; H.G. FRANKFURT, 'On The Usefulness of Final Ends' and 'On Caring' in *Necessity, Volition, and Love*, Cambridge University Press, Cambridge 1999; and H.G. FRANKFURT, *The Reasons of Love*, Princeton University Press, Princeton NJ 2004; B. WILLIAMS, 'Persons, Character and Morality' in *Moral Luck: Philosophical Papers 1973-1980*, Cambridge University Press, Cambridge 1981.

[4] S.P. OLINER and P.M. OLINER, *Altruistic Personality: Rescuers of Jews in Nazi Europe*, Free Press, New York NY 1988, p. 257. The reference to Adorno is to T.W. ADORNO et al., *The Authoritarian Personality*, WW Norton, New York NY 1950.

> considered most praiseworthy. Those who behave correctly – ethically in fact – but do so in compliance with social norms or standards set by individuals or groups close to them or because of empathic arousal are presumed to be in some way morally deficient. That few individuals behave virtuously because of autonomous contemplation of abstract principles – a finding that has been reiterated in numerous studies including Adorno's and our own – has not deterred advocates of independent moral reasoning from advancing it as the most morally admirable style. In some sense, rarity may even confirm its virtue, since it conforms to our cultural notion of the hero as a rather lonely person.

An individual who notices a problem, reflects upon it, decides that it is right to act, and then acts (the four-component model in sequence and ascribed to a single agent) matches this cultural hero type. However, moral motivation is not likely to be derived from contemplation of abstract principles as applied to the exigencies of the moment. There is a danger that the components are treated as a narrative explanatory structure. If this is done we will be misled.

Therefore, it is necessary to reflect upon what might generate moral motivation. It will be argued that the sources for moral motivation are likely to be close to features that are not purely cognitive, not entirely volitional, and that are important as part of an individual's identity. Therefore, it is inappropriate to grade students for factors that indicate moral motivation of the type desired by the institution. Any assessment should be directed to either: self-knowledge (of the student); or assessment of the success of the educational practice (assessment of the institution).

2. WHY DO PEOPLE ACT MORALLY?

Samuel Oliner has spent many years trying to figure out what inclines people to act altruistically, rather than to remain passive bystanders, or to act wickedly. His research interests have been influenced by his own experiences as a Jewish boy in occupied Poland during World War II.[5] He was helped by non-Jewish Poles. One woman in particular put her life, and the lives of her family, in jeopardy to assist Oliner when he came to her for help. He wanted to know why some people behaved in such an altruistic manner. There is no purchase here for assumptions of rational self-interest as a universal key to unlocking the secrets of human motivation.

To try and understand the motives of those who had helped Jewish people living under the Nazi regimes in Europe, Samuel and Pearl Oliner identified people who had offered such aid, at a significant personal risk, without demanding payment or personal advantage in return. These people, rescuers, were interviewed and questionnaires were completed from their answers to questions. In each case the claim of a rescuer to have helped Jews was substantiated by third-party testimony. Some people who had not given aid were also interviewed as a control, and the questionnaires were also completed for them. These nonrescuers were not perpetrators of atrocity, but they had not been identified as having been moved to offer aid to Jewish people. The full process was administered to 231 rescuers,[6] and a control sample of 126. However, it was discovered that this control sample was not uniform: 53 claimed to have been part of resistance groups, or to have helped Jews, or both. Therefore, the control group was sub-divided into two: actives (53) and bystanders (73). The actives claimed to have acted against the Nazi authorities; the bystanders made no such claims. Finally, 150 Jews who had been helped were interviewed. This group provided a third-party view of the apparent motivations of rescuers.[7]

The questionnaire examined not just the attitudes of the interviewees. There were sections devoted to: birth-family background and upbringing; occupation, education, religious views, values, and disciplinary practices of parents (or significant others); youth and education, and beliefs and self-perceptions of the interviewee; life in the years before the war, including whether the interviewee was married, their occupation, education, political beliefs, and religious or community life; the events of the time immediately leading up to the war, and during the war; and post-war life – a section that included personality tests. Thus the questionnaire collected many types of information, and a lot of information beyond the fact of the rescue

[5] S.P. OLINER, *Narrow Escapes: A boy's holocaust memories and their legacy*, Paragon House Publishers, St. Paul MN 2001.
[6] A further 175 were interviewed, but not used in statistical analysis because they did not complete the full protocol. However, the data from their interviews was used as a source of information informing the study and its conclusions.
[7] S.P. OLINER and P.M. OLINER, above n. 460, Appendix A.

itself. Particular attention was paid to any knowledge of, or links with, Jewish people in the life of the interviewee.

Thus, the research allowed extensive qualitative material to be reviewed in the light provided by statistical comparison for the groups (rescuers versus nonrescuers and rescuers versus bystanders were the most revealing). The accounts of the rescuers were checkable against the accounts of those they had rescued (the third-party confirmations) and against the perceptions of those who had been rescued (the 150 Jewish interviewees).

The Oliners concluded:[8]

> 'Rescuers, like nonrescuers, worried both before and during the war about feeding, sheltering, and protecting themselves and their families. What distinguished rescuers was not their lack of concern with self, external approval, or achievement, but rather their capacity for extensive relationships – their stronger sense of attachment to others and their feeling of responsibility for the welfare of others, including those outside their immediate familial or communal circles. While some tried to resist the burdens imposed by such attachments, their sense of personal obligation did not allow them to do so. The help they extended to Jews was rarely the result of a perception of Jews as particularly worthy, but was rather a reflection of their characteristic ways of determining moral values and actions. For some rescuers, helping Jews was a matter of heightened empathy for people in pain. For others, it was due to internalized norms of social groups to whom they were strongly attached. And for a small minority, it was a question of loyalty to overriding, autonomous principles rooted in justice or caring.'

The most infrequent type of rescuer was the person who owed personal allegiance to abstract principles: whether justice principles or principles of care. The felt sense of obligation was more often fuelled by discomfort and distress at the idea of the pain being suffered by others; or, by shared ideas about what was right or wrong. Principles are important for explaining the behaviour of rescuers, but they are not driving, they are not the primary motivational force. They might be said to articulate why it is right to act, but the call to action is more usually rooted in human empathy or group standards of conduct.

This is not to downplay the importance of felt ethical beliefs. The point is that they are felt. The logic of the rescuers' reaction seems to be something like what follows. Some principles are so important that their violation is an outrage to me as a person who holds them to be true. It is wrong to treat people in a way that violates those humane principles, any people. It is not that some people deserve decent treatment, but that all people deserve decent treatment. To single out any group as undeserving is wrong. People who are threatened with being mistreated in such a way deserve our help. By helping we express our selves as these principles are fundamental to us. I think the Oliners make a similar argument:[9]

> 'For most rescuers, then, helping Jews was an expression of ethical principles that extended to all of humanity and, while reflecting concern with equity and justice, was predominantly rooted in care. While other feelings – such as hatred of Nazis, religion, and patriotism, or even deference to an accepted authority whose values the rescuer shared – influenced them, most rescuers explain their actions as responses to a challenge to their fundamental ethical principles. This sense that ethical principles were at stake distinguished rescuers from their compatriots who participated in resistance activities only. For these resisters, hatred of Nazis and patriotism were most often considered sufficient reasons for their behaviours; for rescuers, however, such reasons were rarely sufficient.'

What the research question and methodology made very clear is that the motivation, the feeling that some principles were fundamentally important and a compassionate response to distress, predated the occasion for moral action.

If we return to the four components for moral action we find that establishment of moral motivation must precede perception and reasoning for effective action to occur. Moral motivation is more like a spring-loaded trap than a stage in a sequential process. If the trap is loaded, and the principles are felt to be fundamental, then perception of what reasoning tells the agent is wrong will spring the trap. It will be too

[8] Ibid. p. 249.
[9] Ibid. p. 170.

late at the time of reflection in practice to start working on motivation. Thus, the importance of the character of the person facing a moral challenge is confirmed by the Oliners' results. Character, predisposition to act when faced with cruelty or injustice, needs to be developed before the need to respond arises. One cannot expect people to develop motivation when faced with threats to their safety. As the Oliners' noted we all, rescuers and bystanders alike, fear for the wellbeing of ourselves and our loved ones. The difference is that rescuers cannot remain impassive in the face of cruelty.

The formation of character is not just a matter for higher education or legal education. The Oliners' called for greater attention to be given to moral motivations in schools. Workplaces and professions have a role to play. All social institutions are implicated in the success or failure of society to inculcate altruistic values. Families are important in this process:[10]

> 'Because of their solid family relationships, such children tend to internalize their parents' values, increasingly incorporating standards for personal integrity and care within their own value systems. While they may articulate such standards as cognitive principles, they experience them viscerally. They provide an organizing framework for their life activities and assessments of right and wrong. Even minor infractions distress them, and fundamental violations threaten them with a sense of chaos.'

This alerts us to two important consequences of the results of the Oliners' research. First, it may be unfair to blame those who lack moral motivation, sometimes called moral courage in terms resonant with our starting point of moral heroism, for their lack of motivation. If one has no familial model for strong moral motivation then it is far more difficult to achieve moral courage. Second, it is who we are that is at issue. This is not a matter of being persuaded by an arithmetical demonstration. This is not a matter of knowledge transmission. This is about who we are. It is the close links between who we are, issues of identity, and what we care about, that which guides our lives, that is considered next.

In a later study Samuel Oliner interviewed Carnegie heroes (people who have risked their own life to save the life of another), and Hospice Volunteers. He combined this data with his research into rescuers of Jews in Nazi Europe. He also considered studies of military heroes, moral leaders, and philanthropists. He used these data sets to inform reflection upon the nature of altruistic action, both life-threatening or 'heroic' and prosaic or 'conventional'. One important conclusion he reached was the need for an internalisation of principles if they are to be realised in practice:[11]

> 'What is the implication of these helper/rescuers, and what can we learn from their rich narratives? Looking at the group of individuals we interviewed, I can say, first, that ordinary people are capable of both heroic and conventional altruism and that they are ordinary members of a moral community who have internalized the ethics of caring, virtue, and social responsibility form their loved ones, as well as being in contact with other moral leaders in a certain period of their life. They have internalized the notion that persecution, oppression, and the lack of helping others in not an acceptable part of their moral universe.'

The impact upon life and identity of such acts of internalisation is our next topic.

3. WHAT DOES IT MEAN FOR A PERSON TO HAVE A FUNDAMENTAL PRINCIPLE?

Some things we value, such as self-protection, personal aggrandisement, sexual satisfaction, are not generally considered ethical values.[12] Other values, such as loyalty to one's friends and family, protection of one's projects, or keeping a promise are considered ethical in nature, but not perhaps altruistic. Some values, such as trying to protect vulnerable strangers, or seeking to advance social justice, are considered fully ethical. These fully ethical or altruistic values are generally linked to religious values, and the golden

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[10] Ibid. p. 250.

[11] S.P. OLINER, *Do Unto Others: extraordinary acts of ordinary people*, Westview Press, Cambridge MA 2003, p. 210.

[12] Bentham by treating all acts as valuable because they give pain or pleasure renders all values ethical as sources of utility. Frankfurt argues that self-love: 'coming to love oneself is the deepest and most essential – and by no means the most readily attainable – achievement of a serious and successful life.' H.G. FRANKFURT, *The Reasons of Love*, Princeton University Press, Princeton NJ 2004, p. 68.

rule is a strong unifying principle linking discrete valued acts: when acting ethically one is often trying to treat others as one would wish to be treated.[13]

One can treat the care given to family, friends, community as ethical in nature.[14] Oliner assumes care is an ethical response, and identifies it as a very important source of altruistic behaviour. One can treat caring for individuals as an essentially non-ethical felt necessity.[15] It is assumed here that what we decide to label 'ethical' or 'moral' is less important than the fact that we recognise that restricted accounts of morality are insufficient to our end of encouraging actual ethical behaviour. There are values that people hold, whether classified as ethical or not, that are imperative in their demands upon the agent holding them, and potentially in conflict with each other. Declaring a value ethical is not a means of resolving such conflicts.

Values are tied up with identity.[16] What one values and who one is are not wholly distinct questions. One has some choice over who one decides to identify with, and exercise of this choice will be influenced by what one values. Although ascribed identity might operate independently of individual valuations assumed identity is tied to such valuation.

What one values is not a matter of indifference. In his context to value something is not to be indifferent. Individuals who lose the capacity to value anything, to whom all choices seem indifferent, are unable to live full lives.[17] It seems they are prone to risky behaviour, and find it very difficult to sustain plans or relationships. Practical rationality assumes that there is a goal or aim that means can be directed towards achieving. If there is no goal, if nothing is valued, then rationality has no traction.

Bernard Williams wrote of 'ground projects':[18]

> 'A man may have, for a lot of his life or even just for some part of it, a ground project or set of projects which are closely related to his existence and which to a significant degree give meaning to his life.'

Ground projects for Williams were matters of such importance for an individual that their frustration might lead the person to contemplate suicide, although they might be saved from despair by other things or hopes. Ground projects could be selfish, or not:[19]

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[13] Essentially there is a division between values capable of being universal values and those only capable of being particular values. K. ARMSTRONG, *The Great Transformation: the world in the time of Buddha, Socrates, Confucius and Jeremiah*, Atlantic Books, London 2006 gives an account of the propagation of the golden rule across cultures. Utilitarian and Kantian ethics are universalistic without being deistic.

[14] N. NODDINGS, *Caring: A Feminine Approach to Ethics & Moral Education*, 2nd ed., University of California Press, Berkeley CA 2003 considered above in chapter 1.

[15] H.G. FRANKFURT, above n. 468, considered below.

[16] B. WILLIAMS, above n. 459, pp. 14-15: 'All this argument depends on the idea of one person's having a character, in the sense of having projects and categorical desires with which that person is identified … The give him, distinctively, a reason for living this life, in the sense that he has no desire to give up and make room for others … Difference in character give substance to the idea that individuals are not inter-substitutable.' H.G. FRANKFURT, 'The Importance of What We Care About' in *The Importance of What We Care About*, Cambridge University Press, Cambridge 1998, p. 83: 'A person who cares about something is, as it were, invested in it. He *identifies* himself with what he cares about … Insofar as the person's life is in whole or part *devoted* to anything, rather than being merely a sequence of events whose themes and structures he makes no effort to fashion, it is devoted to this.' H.G. FRANKFURT, above n. 468, p. 17: 'But the very fact that there *are* things that we care about – that we do care about something – is even more fundamentally significant. The reason is this fact bears not just upon the individual specificity of a person's life, but upon its basic structure. Caring is indispensably foundational as an activity that connects and binds us to ourselves. It is through caring that we provide ourselves with volitional continuity, in that way constitute and participate in our own agency.'

[17] A. DAMASIO, *Descartes' Error*, Vintage, London 2006.

[18] B. WILLIAMS, above n. 459, p. 12. Compare A. COLBY and W. DAMON, *Some Do Care: Contemporary lives of moral commitment*, Free Press, New York, NY 1994, p. 86: 'We have discussed the steadfast dedication to moral principles that guides the exemplars' choices – and indeed often makes them feel that they have little latitude of choice. Such a spirit of dedication is often found in the moral realm of human affairs but not in moral matters alone. In fact, people can feel this kind of dedication to any number of causes that they are committed to, once they are so committed. The key is the volitional act of commitment.'

[19] B. WILLIAMS, above n. 459, p 13. There is some empirical evidence for this conceptual analysis, A. COLBY and W. DAMON, above n. 474, p. 64: 'In Suzie Valadez, as in the other exemplars, this implies a fundamental identification of the self with the values and beliefs that are at the heart of the work. She has become consumed by the work, fully and completely engaged. For Suzie, her work is her life. It makes her more alive, yet it doesn't distract her from other things that she is trying to do … This kind of wholehearted desire to pursue one's moral goals is what we mean by unity of self and morality. In Suzie, this unity is the key to her stamina, her certainty, and her joy.'

> ‘Ground projects do not need to be selfish, in the sense that they are just concerned with things for the agent … They may certainly be altruistic, and in a very evident sense moral, projects; thus he may be working for reform, or justice, or general improvement.’

However, they are important because they constitute the character of a person, not because they are moral.

Harry Frankfurt wrote of first order desires and second order desires. It is second order desires that are characteristic of persons. Animals have first order desires, they want things. To have a second order desire involves having a reflective attitude to one’s first order desires. One may want to want something, or one may not want to want something. It is an act of volition, deciding to want one thing rather than another, that constitutes an agent. To merely respond to desires as they manifest is to be a wanton. To want to want something, and to seek to realise that desire, and to set about doing so, is to act wholeheartedly. What one wants to want is what one cares about:[20]

> ‘It is my view that one essential difference between persons and other creatures is to be found in the structure of a person’s will … Besides wanting and choosing and being moved to do this or that, men may also want to have (or not to have) certain desires and motives. They are capable of wanting to be different, in their preferences and purposes, from what they are.’

At first Frankfurt wrote in terms of decisions and reasoning, but eventually he emphasised caring, in other words holding something to be important, as ultimately constitutive of people. It was what one loved that was the starting point for reflection on life, not reflection on life that led one to care.

There were two fundamental problems with viewing the issue as one of decision making, of volition constrained by reason. The first problem was that the evaluative criteria to judge whether one thing to care about was better than another thing to care about were hopelessly circular. In order to know what is better one must first know what is important, and what is important is what one should care about.[21] The second problem was that the reasoning process was impossible to set up without some view of what matters to the thinker:[22]

> ‘This means that someone who is interested in making a reasonable decision concerning how to live cannot propose to start out by refusing to take any determination of the will for granted. If he insists upon being entirely impartial, and upon evaluating the available options unguided by any volitional predisposition, his inquiry is hopeless. The pan-rationalist demand for selfless objectivity is in this context not a reasonable one. It makes no sense to attempt an impersonal approach, from no evaluative point of view, to the problem of how one should live.’

The emphasis here is on the need to start from a settled or real volitional position: that is it cannot merely be some arbitrary position subject to change at will. If one merely asserts some opinion then there is still no traction for reasoning to start from; because one might as well start from some other place.[23] For Frankfurt this makes a familiar quality of love important – one cannot just chose what or who to love. Love is not merely a matter of decision or will.

Frankfurt needed a starting place and he sought it in the idea of confidence of belief.[24] Frankfurt appealed to love as the source for such confident belief – love not founded upon reasons. We care about and value

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[20] H.G. FRANKFURT, ‘Freedom of the Will and the Concept of a Person’ in *The Importance of What We Care About*, Cambridge University Press, Cambridge 1998, p. 12.

[21] Ibid. pp. 92-93.

[22] H.G. FRANKFURT, ‘On the Usefulness of Final Ends’ in *Necessity, Volition, and Love*, Cambridge University Press, Cambridge 1999, p. 93.

[23] The problem resembles that noted by Bernard Williams, that we have to live during reflection – there is no out of life place from which to reflect upon our values: B. WILLIAMS, *Ethics and the Limits of Philosophy*, Routledge, Abingdon 2006, p. 117. Frankfurt noted specifically that confidence is not equivalent to being fanatical or having a closed mind, H.G. FRANKFURT, above n. 468, p. 28 n. 9.

[24] H.G. FRANKFURT, above n. 468, pp. 26-31. On the importance of certainty of belief, but not a certainty based primarily upon prudential reasoning, A. COLBY and W. DAMON, above n. 474, p. 70: ‘Because the exemplars do not weigh the pros and cons of their decisions, they usually do not experience their moral actions as a matter of choice. They are not tormented by fear or paralyzed by the agonies of indecision: There is nothing Hamlet-like about this group. They are people who translate their principles into action directly, with little indecision or hesitation. There is a sense of great certainty, and a conspicuous absence of doubt, in their moral conduct.’

what we love and it gives meaning to our lives. Self-love, the preference for life over death,[25] and our love for our infant children were his paradigm cases:[26]

> 'Perhaps there are such arguments, but that is not to the point. The fact that people ordinarily do not hesitate in their commitments to the continuation of their lives, and to the well-being of their children, does not derive from any actual consideration by them of reasons; nor does it depend even upon an assumption that good reasons could be found. Those commitments are innate in us. They are not based upon deliberation. They are not responses to any commands of rationality.'

Thus, when one places an ethical concern over other values one may be deciding who one is, who one loves, and what is important in one's life. Furthermore, these questions of values so important they constitute the self are not questions that can be resolved through reasoned demonstration.

The objects of one's love must be determined by each individual for herself. Indeed, they are not matters that an individual can determine in any straightforward manner. To ask someone to just 'be different' in this respect is as cruel as to ask someone to simply change who they are sexually attracted to. The matter is not one of mere will. Volition has its own necessities as reason has its necessities. In each case the necessity is not felt as an external act of power – one is not forced by another to accept the necessity; rather one adopts and internalises the necessity.[27]

The necessities of reason are more familiar to us. Consider this passage from George Orwell's *Nineteen Eighty-Four*. The rebellious hero Winston Smith has been caught and is being questioned by a party official called O'Brien. The process is designed to break Smith, and render him willingly compliant to the demands of the party. He is being electrocuted during the dialogue that follows:[28]

> '"Do you remember," he went on. "writing in your diary, 'Freedom is the freedom to say that two plus two make four'?"
>
> "Yes," said Winston.
>
> O'Brien held up his left hand, its back towards Winston, with the thumb hidden and the four fingers extended.
>
> "How many fingers am I holding up, Winston?"
>
> "Four."
>
> "And if the Party says that it is not four but five – then how many?"
>
> "Four."
>
> The word ended in a gasp of pain. The needle of the dial had shot up to fifty-five.
>
> …
>
> The fingers stood up before his eyes like pillars, enormous, blurry and seeming to vibrate, but unmistakeably four.

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[25] T. NAGEL, 'Death' in *Mortal Questions*, Canto, Cambridge 1979, argues that our own death should not be feared or seen as a necessary evil when evaluated rationally.

[26] H.G. FRANKFURT, above n. 468, p. 29. Interestingly Colby and Damon found the sole area of regret common to their moral exemplars was around the sacrifices their children had to make, or the decision not to have children in order to pursue their moral commitment, A. COLBY and W. DAMON, above n. 474, p. 68: 'In the end we found that there was one and only one central area of our exemplars' lives about which they commonly expressed regret: their relations with their children.'

[27] A. COLBY and W. DAMON, above n. 474, p. 78: 'Once achieved this recognition carried with it the full force of logical necessity. It became an evident truth not subject to denial or compromise.'

[28] G. ORWELL, *Nineteen Eighty-Four*, Penguin, London 1989, pp. 261-262.

> "How many fingers, Winston?"
>
> "Four! Stop it, stop it! How can you go on? Four! Four!"
>
> "How many fingers, Winston?"
>
> "Five! Five! Five!"
>
> "No, Winston, that is no use. You are lying. You still think there are four. How many fingers, please?"
>
> "Four! Five! Four! Anything you like. Only stop it, stop the pain!"'

Orwell is demonstrating the violence inherent in trying to force someone to deny what they know, as a matter of reason, to be true. Two plus two makes four, whatever the head of the institution claims. It is a necessity of reason to acknowledge the fact. But it is not an alien will that forces acknowledgment – it is one's own understanding. To deny the truth is to do violence to the self.

For Frankfurt what one loves, what one cares about, is a necessity of volition. Although one can work towards not loving that which one loves it is a labour that must be undertaken by indirect routes. One cannot successfully will oneself not to love what one loves, no more than one can will to believe that two plus two makes five:[29]

> 'To the extent that a person is constrained by volitional necessities, there are certain things that he cannot help willing or that he cannot bring himself to do. These necessities substantially affect the actual course and character of his life. But they affect not only what he does: they limit the possibilities that are open to his will, that is, they determine what he cannot will and what he cannot help willing.'

Unlike the truths of arithmetic what one cares about is constitutive of who one is:[30]

> Now the character of a person's will constitutes what he most centrally is. Accordingly, the volitional necessities that bind a person identify what he cannot help being … the essential nature of a person consists in what he must will. The boundaries of his will define his shape as a person.'

This analysis of how we construct ourselves from what we love is a way to understand the metaphor of internalisation.

When we internalises a principle we make it a guide for feeling and action. We want to advance the principle; it is what we care about and how each one of us judges our self. It is likely the internalisation was associated with individuals we loved or cared about. However, that is not the central issue. It is our relationship with the internalised principle, not how it came to be internalised, that we need to focus upon. To betray the internalised principle is to betray ourselves:[31]

> 'Caring about his beloved is tantamount, then, to caring about himself. In being devoted to the well-being of his beloved as an ideal goal, the lover is thereby devoted to an effort to realize a corresponding ideal in himself – namely, the ideal of living a life that is devoted to the interests and ends of his beloved. Someone who loves justice, for instance, necessarily wants to be a person who serves the interests of justice. He necessarily regards serving its interests not only as contributing to

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[29] H.G. FRANKFURT, 'On the Necessity of Ideals' in *Necessity, Volition, and Love*, Cambridge University Press, Cambridge 1999, p. 114. There is some empirical evidence that supports this conceptual analysis, A. COLBY and W. DAMON, above n. 474, p. 75: 'It [the moral certainty of the moral exemplars in the study] is the certainty of one who has little patience with compromise or half-truth, and it evokes a quality similar to numerical necessity, as when one realizes that two plus two must equal four and therefore simply cannot be convinced to say that it equals something else.'

[30] H.G. FRANKFURT, above n. 485, p. 114.

[31] H.G. FRANKFURT, 'Autonomy, Necessity, and Love' in *Necessity, Volition, and Love*, Cambridge University Press, Cambridge 1999, p 139.

> the realization of a desirable social condition, but also as integral to the realization of his ideal for himself. His love defines for him, at least in part, the motives and preferences of his ideal self.
>
> A person who fails to act in the ways that caring about his beloved requires necessarily fails to live in accordance with his ideal for himself. In betraying the object of his love, he therefore betrays himself as well. Now the fact that a person betrays himself entails, of course, a rupture in his inner cohesion or unity; it means that there is a division in his will. There is, I believe, a quite primitive human need to establish and to maintain volitional unity. Any threat to this unity – that is, any threat to the cohesion of the self – tends to alarm a person and to mobilize him for an attempt at "self-preservation."'

It is clearly true that to pretend to have no ethical perspective in legal education is to teach unarticulated ethics by stealth. It produces an unsophisticated naturalistic defence of the *status quo* in curriculum terms. The attempt to do so may not be in bad faith. Fear of encroaching upon parts of the students' selves that are not decently encroached upon may lie behind such attempts.

It is here, in the field of moral motivation, that the fears of value informed teaching being oppressive and tending towards attempts at mind control are most alive. It is a sense of how intimately these questions relate to the self that makes people of good faith wary of exploring them. What is not justified by the academic role is the assumption of the rule of spiritual teacher or guru to the student. In this field respect for the self-determination of the student is of primary and overwhelming importance. This means, *inter alia*, that summative assessment in this area – testing and grading for righteousness – is not justifiable on any grounds.[32]

It is here that the voluntary nature of student choice is paramount. Paternalism is dangerous here. Critical thought is threatened by the imposition of any values here – even those justifiably taught on a law degree as constitutive of law as a discipline, or as a system, or as a profession. Hypocrisy and self-blindness on the part of academics are a particular danger here. What we care about is not a proper standard for what our students should care about. Even the moral has and should have its limits, morality that tries to determine all of our important acts:[33]

> 'is a genuine pathology of the moral life, the limitations of the moral is itself something morally important.'

And it must be for individuals to determine those limits in the light of what they care about as individuals, not as abstract moral agents.

Moral motivation is however a necessary subject to teach upon - although the better verb might be 'facilitate' rather than 'teach' in this context. Self-reflection upon values is a vital aspect of the forming of identity. As noted above it is constitutive of the self. Supporting students in this enterprise is vital to effective ethical education and to supporting the student in their identity formation. What is not acceptable is correct moral character as an assessed learning outcome.

4. TEACHING MORAL MOTIVATION IS VALUE-INFORMED LEGAL EDUCATION

Moral motivation, it is argued above, is a matter that requires attention before a person is placed in a position of making a difficult choice. A predisposition for giving priority to ethical concerns needs to be established in advance. It may be already present in students: as a result of family background; or educational experiences prior to higher education; or from association with social groups that hold principles of ethical conduct dear. Legal education might endorse and maintain already existing values that could motivate ethical action in the future. Or it might actually dampen down and stifle principled reactions in students

[32] A. EVANS, *Assessing Lawyer's Ethics: A practitioners' guide*, Cambridge University Press, Cambridge 2010, p. 6: 'the proposals here are very cautious for precisely this reason; they do not advocate assessment of attitudes, that is, of a person's ethics *per se*, but rather of their awareness of the varying options'.

[33] B. WILLIAMS, 'Moral Luck' in *Moral Luck: Philosophical Paper 1973-1980* (1981) Cambridge University Press, Cambridge 1981, p. 38.

who arrive with internalised principles of care. Or it might establish such principles where they are lacking, and maintain them in students who already have them.

Oliner tries to inculcate altruistic principles by modelling them in his practice and talking about them in his teaching:[34]

> 'In my own teaching I try to share with students ample evidence that helping others and putting the welfare of others alongside their own is psychologically and physically healthy for them and that there are negative consequences of indifference to other people's plights.'

He also asserts that our institutional practices need to reflect respect for altruistic principles if we wish to teach by example:[35]

> 'I can only hope that people who share my vision for a more caring world will take this research and move it forward by designing caring curriculums, workplace procedures, and ways to invest their daily lives with good works.'

In this he reminds us that what has already been argued for in this book is the starting point for teaching moral motivation. Oliner aligns his preferred values with the welfare of the student. He tells us that in his teaching he emphasises the advantages to the students personally of adopting the values he cherishes. One suspects, from reading him, that he also models his values through his teaching persona. He argues for a value sensitive curriculum, and awareness of the importance of values in procedures, and encourages his readers to make doing good part of their lives.

A value-informed legal education is one that makes values, principles, caring, and student reflection upon who one wants to be, salient in the educational process. To some extent any and all of the proposals for teaching practice in this book are relevant to moral motivation. If moral motivation is something that is learnt from people who the learner cares about, then the quality of student relationships with staff and other students is important.[36]

Moral motivation is learnt, but not necessarily in classrooms as a subject. The process is natural in the context of a community, internalisation of standards of conduct it is an essentially social activity: whether that community be a family, or a university, or a network of scholars, or a profession. The studies of Oliner have reaffirmed the essential insight of Aristotle on the importance of 'character' and its essentially social nature:[37]

> 'An Aristotelian approach considers human beings to be inherently social, and treats moral character as a social construct. To this extent it starts by acknowledging that we are members of a community with some common *locus* and culture. The idea of community emphasizes that our individual interests and mutual interests are situated or embedded within the institutions and social groups to which we belong. Both the law school and (as Durkheim noted long ago) the professions clearly constitute moral communities and serve as guardians and transmitters of cultural capital and values; the implications of this – both positive and negative – warrant consideration in the curriculum. At the same time, we cannot forget, either individually or collectively, that we are simultaneously members of wider communities (defined by cultural ties, ethnicity, and so on), so that we need to be sensitive to the priorities that might be assigned to our obligations to these different communities.'

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[34] S.P. OLINER, above n. 467, p. 212. Notice how pervasive the appeal to self-interest is: Oliner expresses an argument for altruistic behaviour as justified by self-interest. In the light of his core exemplars – those helping Jewish people in Nazi Europe – this is a remarkable way to phrase his case.

[35] Ibid. p. 212.

[36] For the importance for students of such matters see: J. BRENNAN, R. EDMUNDS, M. HOUSTON, D. JARY, Y. LEBEAU, M. OSBORNE and J.T.E. RICHARDSON, *Improving What is Learned at University – An Exploration of the Social and Organisational Diversity of University Education*, Routledge, Abingdon 2010, and discussion in chapter 1.

[37] J. WEBB, 'Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education' (1998) 25 *Journal of Law and Society* 134, 142.

Thus, once again pluralism is a necessary pose because the communities we live in are diverse, because modern society is diverse, and ethical thought should seek areas of agreement that can bridge moral communities.

The use of dilemmas, as advocated as a means for teaching moral reasoning above, can lead to the development of moral motivation. This is for three reasons. First, the appeal to intuitive responses as a starting point for discussion brings home moral diversity in the student group. It allows students to become aware of the possibility that people they like might disagree about matters of importance, and to view such disagreement as something for discursive reflection rather than conflict. Second, it allows students to take their values and their selves seriously.[38] It makes reflection on values possible without embarrassment or threat of humiliation. Finally, it operates as an opportunity for imaginative rehearsal. Many of the teaching techniques that are used in this area rely upon forms of imaginative rehearsal. The metaphor of the spring trap helps us to see why. To be effective, moral motivation must be in place before the possibility of ethical action arises. Unless the situation is highly repetitive and has been institutionally reduced to routine then real life experience may well not be available. Therefore, the human capacity to imagine and plan for the future must be called upon, we do this through imaginative rehearsal: in other words we practice.

Thus, it is important to recall that facilitating ethical conduct is not teaching a series of separate tasks to be mastered by the student. To deliver legal education it is necessary to focus upon some delimited knowledge, or process of reasoning, or skill, or exercise. One cannot teach everything at once. The modern jargon is to talk of learning outcomes from some teaching process. These are attempts to describe the immediate purpose of the session or module or programme. However, the aims of higher education generally and legal education specifically transcend the outcomes. We hope to enable people develop capacities that they will use and elaborate upon through their life. We hope to facilitate people acting ethically, rather than being too surprised, or too frightened, or too abashed to do so. These aims are supported by many learning outcomes, in different ways for different learners. The specific examples considered below are just that, examples. They make sense in the broader context of a value-informed educational practice, rather than as free-standing solutions.

5. ALLOWING STUDENTS TO ENVISAGE THEMSELVES MORE OBJECTIVELY

It is not always natural for students to 'imaginatively rehearse' possible futures. One problem is that the exercise only works if the imagined future is that of the student herself. The student needs to see herself as subject to forces and possibilities that are common to humanity rather than as the unique entity she surely is. Seeing the self 'objectively' – as others see one, in terms of characteristics one shares with others – is not straightforward.[39] This difficulty is compounded by a narcissistic tint to our social life: there is reason to fear that concern with how others see us is becoming threatening to personal development.[40] What we risk in attempting to encourage objectivity is inflaming pre-existing anxieties around appearance and peer perception. We need an impersonal and non-threatening method to allow personal imaginative rehearsal of the future.[41]

In this endeavour the language and production of drama are potentially very useful. Dramatic productions are familiar to students and the language of drama has been assimilated by social scientists who were trying to obtain a similar objectifying effect.

The metaphor of the theatre has been powerful in sociology. People have roles, such as mother, or Protestant Irish (Orangeman), or child, or barrister, or German, or school child, or blind person, or garage mechanic, or gang member, or city counsellor, or retired person, or sister, or bird watcher, or Conservative, or mental health nurse, or goth. Viewed from the perspective of the social institutions we inhabit our personal identify

[38] H.G. FRANKFURT, D. SATZ, C. KORSGAARD, M. BRATMAN and M. DAN-COHEN, *Taking Ourselves Seriously and Getting It Right*, Stanford University Press, Stanford CA 2006.
[39] T. NAGEL, *The View From Nowhere*, Oxford University Press, Oxford 1986.
[40] J.M. TWENGE, *Generation Me: Why today's young American's are more confident, assertive, entitled – and more miserable than ever before*, Free Press, New York NY 2007.
[41] What follows draws heavily from the Stan Marsh prize winning paper given by G. FERRIS and R. GEE, *Adoption of professional identity as playing a role and entering a group* (2014) Association of Law Teachers 49th Annual Conference, Leeds, 13-15 April 2014.

is largely a function of our roles. Some roles are more important than others, and we occupy many roles at the same point in our lives and across different points in our lives.

Different roles are played out before different audiences and in different physical locations. One problem with the concept of the role is that it is static. Life is lived over time and the person who lives it changes. Learning is probably continuous over life, and experiences shape perception and decisions. The role is not endlessly repeated as in the real theatre, it is constantly under revision. One way to express this aspect of life is to talk of careers. Goffman coined the expression 'moral career' in connection with the role of the mental patient at an asylum,[42] and used it again to refer to the stigmatised and those who manage characters (public perceptions) that are subject to being discredited.[43] Goffman did not give any definitive definition of the moral career but Rom Harre gave the concept a definition that is adopted here:[44]

> 'It is the social history of a person with respect to the attitudes of respect and contempt that others have to them and of their understandings of these attitudes.'

We can return to Goffman for an explanation for why the idea of 'the career' is helpful in trying to construct and understand biographies and autobiographies:[45]

> 'One value of the concept of the career is its two-sidedness. One side is linked to internal matters held dearly and closely, such as image of self and felt identity; the other side concerns official position, jural relations, and style of life, and is part of publicly accessible institutional complex. The concept of career, then, allows one to move back and forth between the personal and the public, between the self and its significant society, without having to rely overly for data upon what the person says he thinks he imagines himself to be.'

For the educational project it is not the freedom from reliance on self-report that is significant: it is the ability to move back and forth between private and public; between identity and group membership and status. The idea of the moral career is also useful because education is, of course, an institution that spends a lot of time on shame and honour formally through 'assessment' and informally in countless classroom interactions.[46] Every student has experience of successful and unsuccessful 'hazard' – the taking of a risk to hopefully gain honour and prestige but which risks failure and humiliation. Engagement in social interaction always involves hazard, and intuitively one knows that fear of failure and humiliation is stronger than the hope of approval and success in many student groups. Although the official and instrumental activity is study and refinement of understanding, the seminar or tutorial is a social space easily used for expressive action – the bestowing of honour or contempt.[47]

In developing the idea of the moral career in the context of teaching there is then a potentially painful self-awareness on the part of the academic.[48] One reason many institutions do not explore this area is that it might expose the institutionally powerful to moral hazard and reveal the tenuous link between overt aims and actual practices.

The ideas of the role, and of the role through time as the career, and of the moral career as a particularly important and familiar career, are still not enough to deal with the task at hand. There remain two more complicating factors. One is life span. The other is multiple roles carried out in different theatres. At this point we can call upon the work of Donald Super who devised a diagrammatic means to express these ideas. He incorporates life span, and multiple roles, and the interaction between roles into a single image.[49]

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[42] E. GOFFMAN, 'The Moral Career of the Mental Patient' in *Asylums: Essays on the social situation of mental patients and other inmates*, Penguin, London 1968.
[43] E. GOFFMAN, *Stigma: Notes on the management of spoiled identity*, Penguin, London 1990.
[44] R. HARRE, *Social Being*, 2nd ed., Blackwell, Oxford 1993, p. 205.
[45] E. GOFFMAN, above n. 498, p. 119; Giddens terms such reflexive autobiographical accounts 'narratives of the self' in A. GIDDENS, *Modernity and Self-Identity: Self and society in the later modern age*, Polity, Cambridge 1991.
[46] E.C. WRAGG, *The Art and Science of Teaching and Learning: The selected works of Ted Wragg*, Routledge, Abingdon 2005.
[47] R. HARRE, above n. 500, p. 208.
[48] R. COLES, *William Carlos Williams: The knack for survival in America*, Rutgers University Press, New Brunswick NJ 1986, makes it clear that this critical self-awareness was a central feature of William Carlos Williams, in both his medical and writing careers.
[49] D.E. SUPER, 'Life-Space Approach to Career Development' (1980) 16 *Journal of Vocational Behaviour* 282; D.E. SUPER, 'Life Career Roles: Self-Realization in Work and Leisure' in D.T. HALL and Associates, *Career Development in Organizations*, Jossey-Bass, San Francisco CA 1986.

Furthermore, he can incorporate decision making into the overall picture enabling a single life decision to be thought about as a part of the complex situation that it takes place within.

Super's diagram is a 'rainbow' – the arch shape tracks life span from vulnerability as a baby to vulnerability as an old person: the assumption is a process of birth, growth, exploration, establishment, maintenance, decline, and death. At first roles are limited in number (child – the mother-baby dyad; sibling); but they increase in number (one does not stop being a child or sibling when one goes to school – a new role as student is added); and then tend to decrease (as parents die, schooling comes to an end, retirement removes the professional career). At different times different roles are primary. The diagram manages to show the potential for conflict as the time available for different simultaneous roles generates zero-sum choices (whenever time spent on one activity or in one 'theatre' is lost to another).

In practical terms one can start with the rainbow and the idea of multiple careers over a life-span. Students can be invited to sketch out the careers they feel will be desirable, or important, in the form of a career rainbow. Interesting variation or novelty can be looked at, and the idea of a career can be articulated. Elaboration of the diagram leads naturally to the setting out of the concepts. At this point the idea of career contingencies and decisions can be introduced (and noted on the diagram). These can then be fleshed out into decision problems drawn from real life or fiction or created for the educational setting.

The rainbow has already proved to be useful with several categories of students:[50] from A Level students to undergraduate students in social sciences. It encourages debate and the imagining of the self as an individual with multiple and potentially conflicting sources of identity from different theatres and roles played within them. Students are encouraged and enabled to view themselves as engaged in a life that is individual and contingent yet typical and predictable; that is constrained by necessity yet determined by personal decisions; that is lived and yet described by theory. The experience is apparently enjoyed and productive of insight rather than being dry and of no relevance.

Participants in the Super's rainbow exercise seem to enjoy the novelty of viewing their life from an unusual perspective. The theatres and roles are sometimes subjected to critical comment, but that can inform discussion and is not problematic. Multiplicity of roles and theatres brings into focus issues around conflicting demands on actors.[51] Synchronous roles in different theatres invite reflection on whether some aspects of the actor should remain stable across roles, an issue of the proper place for integrity in the face of incompatible pressures for compliance.[52] The waxing and waning of careers suggests the importance of time in decision making about life projects. The schematic manages to give an impersonal means to reflect upon what one thinks is important in a life.[53]

6. DIVERSITY: AWARENESS OF DIFFERENCE

Robert Putnam describes two types of social capital.[54] There is social capital that has a bonding effect: it reinforces the ties of an exclusive community. There is social capital that is bridging: it operates across social groups, hence bridges gaps. If we are to advance the values of the political solution of difference then we require a system that is characterised by bridging social capital. It is through the recognition and valuing of diversity that political rule operates. However, totalitarian and authoritarian rule tends towards the rule of an exclusive sub-group: racial groups in Nazi Germany, and Apartheid South Africa, and the British Raj; class or party in the USSR; religious groups in early modern Europe. Bonding social capital is still valuable social capital, but it can encourage intolerance and petty mindedness. Bridging social capital is the source of tolerance and cosmopolitan views.[55]

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[50] The personal experience of Ricky Gee informs this paragraph.

[51] Explored in A. BRADNEY, 'Instead of a Career: Work, Art and Love in University Law Schools' in P. MAHARG and C. MAUGHAM (eds.), *Affect and Legal Education: Emotion in learning and teaching law,* Ashgate, Farnham 2011; and B. WILLIAMS, above n. 489.

[52] Explored in S.A. SCHEINGOLD and A. SARAT, *Something to Believe In: Politics, Professionalism, and Cause Lawyering*, Stanford University Press, Stanford CA 200.

[53] It can be a means to engage in 'life-planning' by means of 'narrative of the self' to use the terms Giddens coined in A. GIDDENS, above n. 501.

[54] R.D. PUTNAM, *Bowling Alone – The Collapse and Revival of American Community*, Simon & Schuster Paperbacks, New York NY 2000.

[55] K.A. APPIAH, *Cosmopolitanism: Ethics in a world of strangers*, Penguin Books, London 2006.

When in using the dilemma to make students aware of difference of opinion amongst the students then one is facilitating the production of bridging social capital. People naturally seem to enjoy the types of interactions that generate social capital.[56] Exercises that highlight how different groups experience social interactions can be powerful learning opportunities. However, care needs to be taken to avoid embarrassment and reinforcement of bonding social capital alone.

Russell Pearce has reported on an exercise designed to open up discourse on how people feel they are perceived.[57] In a group large enough to generate feasible sub-groups the class is asked to divide into four sub-groups on the basis of race and gender (women of colour, men of colour, white women and white men). This grouping is based on the assumption that these ascribed groups will have salience in social interactions. The sub-groups are invited to sub-divide: on any criteria the groups feel salient, e.g. class, English as a first language, sexuality. With a small group it is often better to allow the group to remain undivided, but seek a collective account reflecting the diversity within the group. The groups are, or the group is, asked to describe how their identity group (or the diverse members of a small group) experiences being a law student.

The sub-group or group must give their account through a drawing. Imposing the need to draw and represent graphically might generate some dissent; however, it is an important element of the exercise. There seem to be several reasons for this.[58] First, it tends to neutralise the too-ready language skills of law students. These skills can be used to distance the students from their feelings. Second, it encourages a freer expression because the participants struggle to express anything: the drawing tends to produce images that require interpretation, they tend towards the inchoate. This allows for some humour around the drawings which can diffuse tensions.[59] Finally, it encourages cooperation within the group directed towards producing some sort of picture.

When the groups (or group) have produced their pictures they are shared and discussed.

Pearce takes aim at the assumption of normality that is English as a first language white male. As Goffman pointed out the norm (normal) is in fact abnormal.[60] There is an unmistakable tendency to regard middle class white male as neutral, despite it obviously being a very specific set of social roles. In the words of Pearce:[61]

> 'To be a responsible and constructive member of legal organizations, a white lawyer must therefore acknowledge that whiteness is a racial identity and not a background norm.'

The aim here is not quite the same.

The aim here is to raise awareness of both difference and commonality of experiences. The ideal of equality of opportunity is widespread. The assumption that the ideal is realised in practice in the UK is widespread, at least amongst my students.[62] The belief in colour- and gender-neutral rule of law is strong, reflecting the universalising norm expressed and given social reality in the ideal of a rule of law, justice being depicted as blind as to status or power. The aim is not necessarily to attack this conception: rather the aim is the preliminary one of establishing the salience of identity for lived experience. This process of discovery of difference is at the root of bridging social capital.

Bridging social capital is at the root of perceiving the other as a person deserving of care, or respect, or recognition. Awareness of experiences of others allows a universalism to develop from awareness of

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[56] R. DUNBAR, *Grooming, Gossip and the Evolution of Language*, Faber & Faber, London 1996, suggests that language originates from the need to create and maintain social capital.

[57] R.G. PEARCE, 'White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law' (2005) 73 *Fordham Law Review* 2081. The teaching exercise was created by Pearce, David Thomas, Robin J. Ely, and Elaine Yakura.

[58] What follows is informed in part by my experience of being part of a demonstration of the technique run by Russ Pearce at the National Institute for Teaching Ethics and Professionalism Summer 2014 workshop in London.

[59] R.G. PEARCE, above n. 513, n. 33: 'These classes are both pedagogically valuable and emotionally difficult'.

[60] E. GOFFMAN, above n. 499, p. 128.

[61] R.G. PEARCE, above n. 513, 2099.

[62] H. SOMMERLAD, '"What are you doing here? You should be working in a hair salon or something": outsider status and professional socialization in the solicitors' profession' [2008] 2 *Web Journal of Current Legal Issues*; J. TOMLINSON, D. MUZIO, H. SOMMERLAD, L. WEBLEY and L. DUFF, 'Structure, Agency and Career Strategies of White Women and Black and Minority Ethnic Individuals in the Legal Profession' (2013) 66 *Human Relations* 245.

diversity. This can generate academic benefits for all students.[63] However, again the focus here is not on that aspect of diversity, but on the need to explore difference in order to understand what is common. In the words of Martha Nussbaum:[64]

> 'People from diverse backgrounds sometimes have difficulty recognizing one another as fellow citizens in the community of reason. This is so, frequently, because actions and motive require, and do not always receive, a patient effort of interpretation.'

In effect it is seeking to build from the specific to the universal by extending the range of the familiar. If most people do not apply universal principles to specific situations in ethical practice then we must seek to build outwards from specific and familiar groups to those less familiar.

The power of the exercise described by Pearce is that it makes one's own identity group unfamiliar through the drawing exercise. It then brings out the similarities and differences through the sharing of interpretations of the drawings. It enables articulation of the ordinary and commonplace realities of identity perspectives through a common awkwardness in graphic expression. It makes the giving of some explanations of actions and motives natural: because everybody has to explain, there is no normal group whose experience is taken as the common standard for each group.

The power of the exercise is difficult to explain. The whole process requires careful administration, and significant time. This means it will need to be embedded in a relevant substantive subject matter. Obvious possibilities are: the relationship between the client and lawyer; equality in employment law; equality in sports law; reflections on employment careers; social justice; civil rights; social work and the law; medical law; research ethics; and legal theory. One benefit of incorporating the exercise into teaching practice is that it sensitises the academics involved to the issues of diversity in their own practice.

Exercises developed in the field of diversity training are often adaptable for the purpose of developing appreciation of difference and common humanity. Test of unconscious bias are a fun way to introduce the idea that we incorporate stereotypes into our perceptions of the world.[65] As always in this area of practice sensitivity needs to be shown and exclusion of any individuals or sub-groups should be assiduously avoided. A lightness of touch is usually better than earnest seriousness in terms of tone.

7. PUBLIC ROLE MODELS

Anne Colby and William Damn interviewed 23 people they identified as moral exemplars in American life. The aim was to identify what made and motivated people who were recognised as moral exemplars. The people interviewed were diverse in terms of ethnicity, gender, class, and religious identities. One reason to carry out the study was to use the results to inspire other people to be motivated towards a life of moral commitment:[66]

> 'In the course of human events, moral values have been most convincingly demonstrated and communicated through the personification of good in individual lives. Moral behaviour and moral influence of every kind rely heavily on such personification. This may be inevitable, because moral choices are constructed in relationships with real people, and moral ideas have behavioural meaning only as they are actively interpreted in human relationships. Moral personification is a ready-made means of creating such interpretations, since it brings with it direct illustrations of human action as well as an inspirational example of virtue embraced.'

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[63] M.J. CHANG, N. DENSON, V. SAENZ and K. MISA, 'The Educational Benefits of Sustaining Cross-Racial Interaction among Undergraduates' (2006) 77 *The Journal of Higher Education* 430.

[64] M.C. NUSSBAUM, *Cultivating Humanity - Classical Defense of Reform in Liberal Education*, Harvard University Press, Cambridge MA 1997, p 63.

[65] A technique discussed by Lisa Webley in a Panel session on *Responding to the Ethics and Values Recommendation of the Legal Education and Training Review: What and Why?* at International Legal Ethics Conference VI 10–12 July 2014 in London. Such tests are available at: <https://implicit.harvard.edu/implicit/> accessed 28.07.2014.

[66] A. COLBY and W. DAMON, n. 474, p. 22.

The other aim was to try to understand what led to people living remarkable and morally exemplary lives:[67]

> 'Human goodness, in fact, is both persistent and fragile. It appears when we least expect it, under condition that are little understood and difficult to create.'

In legal education one means to try and support students in developing moral motivations is to expose them to role models, and to reflect upon those people's choices and lives. In doing this we must be aware of the linked dangers of hagiography and an unrealistic emphasis on individuals. The Oliners' warning of the beguiling attraction of the hero narrative is apposite here.[68] Colby and Damon are at pains to emphasise the importance of social support for their moral exemplars:[69]

> 'The relations between the exemplar and the group are reciprocal in their influence and are mutually transformative. Initially, there is a partial match of goals between the two. Then there is a communication of new information and concerns, followed by an engagement in new activities, followed finally by the adoption of broader moral goals.'

The life stories of the moral exemplars were not marked by isolated struggle but by an invigorating social dynamic. Although some exemplars faced periods of social ostracism as a result of their activities, it was one they shared with others who were significant others. Support, challenge, and creative discourse marked the developmental process of the exceptional individual far more than any isolated and tortured wrestling with conscience.[70]

In educational terms the danger of presenting an unrealistic portrayal of the heroic individual is best countered by placing the individuals whose experiences are being considered into a social context that gives real emphasis to other people active at the time. The better vehicle is not the biography in isolation but the story of the times, or events, or groups, or movements, that the life story formed a part of. There are three challenges to adopting a contextual account. First, there is a risk that the story of the individual is lost, and the educational advantage of a close consideration of an individual's formation and struggle and achievement becomes obscured by the clutter of contextual information. Second, that the contextual material makes the quantity of subject matter that has to be covered overwhelming in terms of curriculum space. Third, the difficulty of identifying adequate teaching resources to support the teaching and learning aims. Each of these problems can be dealt with.

To use a single example of how the three problems can be dealt with I will briefly discuss the possible use of the life stories of Clifford and Virginia Durr as individuals whose moral commitments and active life can be presented as role models for law students to consider. Clifford and Virginia were married and lived a long life together. Clifford was a lawyer. Virginia was a mother, legal secretary, volunteer worker, and activist. Each was born to an upper class Alabama family and had a privileged upbringing. Their lives were caught up in the struggle against poll taxes in the Southern States, the impact of the Great Depression, the administration of New Deal reforms, the un-American activities witch hunts, and desegregation.

Virginia spent three decades in political activity directed against poll taxes. Poll taxes were charged upon the casting of a vote. They were high enough to be a real economic disincentive to vote for poor white men, women of all classes without independent economic resources, and black people. In effect the poll tax made the grant of the vote to women in 1920 nugatory for most women in the Southern States of America. It was this injustice that moved Virginia to enter political work, together with a desire to mix with the politically active women of Washington DC where she was living. Her experiences with this group of politically active women sensitised her to the justice behind calls for union recognition and racial equality, and ultimately to the need to end segregation in the South. She refused to support attacks on communists or communist sympathisers, and was subpoenaed by the Senate Internal Security Committee to give evidence. She refused to answer any questions, and although she was threatened with imprisonment for contempt she suffered no formal sanction. She was active in the civil rights movement in the 1950s and 1960s.

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[67] Ibid. p. 2.
[68] S.P. OLINER and P.M. OLINER, above n. 460, p. 257.
[69] A. COLBY and W. DAMON, n. 474, p. 14.
[70] Ibid. p. 70.

Clifford Durr started out as a lawyer in a practice giving advice to the local business community in Alabama. However, during the Depression he suggested that the partners could take a drop in their pay rather than laying off vulnerable workers. This led him to become vulnerable to being laid off, and he sought work in Washington DC where he worked for the Reconstruction Finance Corporation – a New Deal body where he worked on a programme to re-capitalise the banks. In 1941 he was appointed head of the Federal Communications Commission. However, he was opposed to administering loyalty oaths, and refused to do so, and when his period in office came to an end in 1948 he resigned in order to avoid being involved in the mounting anti-communist persecutions. He stared a law firm in Washington, but an early client was a victim of the anti-communist persecutions, and he became associated with such clients. One characteristic of those facing persecution was they had no funds, and the firm was soon not viable due to its reputation of being willing to act for suspected or even actual communists. He obtained a post working for a corporation in Denver. However, before he had even started, the corporation insisted Virginia retract a political statement she had made, and as he refused to put pressure on her to do so he lost the position. The couple moved back to Alabama where he practiced law with a client base that included poor Afro-Americans. When Virginia became a notorious figure in conservative Southern circles by refusing to answer questions in the Senate, Clifford's white client base almost entirely disappeared. He would later support civil rights activists through his legal practice.

The couple make a valuable case history because they each supported the other. They changed from being principled but essentially privileged and conservative young people to becoming radicals who put principles before economic and career advantage. The interactions the couple had with each other, and that each of them had with those social groups she and he chose to associate with in Washington DC, were crucial to their developing awareness of injustice and devotion to opposing it. The geographical changes make it easy to keep the focus upon the couple sharp. Their arenas of struggle change as they move around the country for work reasons. Thus, the first challenge of keeping the individuals in focus whilst giving emphasis to the social influences upon them is simplified by them being a couple that had to move around and that did different things in different places.

The second challenge (that the quantity of material is too much in terms of curriculum space) is more difficult. In the UK at least, the American Civil War, segregation, the impact of the Great Depression, the New Deal, the anti-communist persecution of the Cold War, and the civil rights movement are not very well understood. There is some background awareness of them in popular culture but it must be assumed that it will be necessary to teach the background history. In the UK even *Brown v Board of Education of Topeka* is an unfamiliar reference.[71] Also, the constitutional role of the Supreme Court is unfamiliar to UK law students. However, these problems are not significantly aggravated by the American origin of Virginia and Clifford Durr. Students are more likely to have heard of Abraham Lincoln than William Gladstone; almost certain to have the most patchy knowledge of the Empire and decolonisation; to have very little understanding of the Irish Troubles as they are quaintly known; and little appreciation of the impact of the Great Depression in the UK. It may be useful to explain the differences between the jurisdiction and role of the Supreme Court in the UK and Supreme Court in the USA.

The problem is how to incorporate the quite extensive contextual material into a curriculum context where it becomes independently worthwhile to teach it. If one is teaching a comparative law course that has the USA as a comparator jurisdiction then the material easily lends itself to such an enterprise. If teaching about democracy and the rule of law then the material lends itself to use as an excellent example of deficiencies in nominally democratic regimes, and the struggle for reform in the twentieth century. If teaching about the relationship between law and social change the material is seminal. If teaching comparative legal history the material is wonderfully engaging. However, all of these subjects are marginal in contemporary undergraduate legal education. If this couple are to be used as role models of a lifetime of moral engagement then it cannot be sufficient to rely upon any such vehicle being available. The issue becomes whether the development of the story of the couple is worth telling for its own sake.

It is argued above that political rule - rule through sectional assertion of interest - is a value that legal education should try to advance. In part this reflects the truth expressed by Jhering when he wrote:[72]

> 'I now turn to the real subject of my essay – the struggle for law. This struggle is provoked by the violation or the withholding of legal rights. Since no legal right, be it the right of an individual or of

[71] 347 US 483 (1954).
[72] R. VON JHERING, *The Struggle for Law*, Callaghan & Co, Chicago IL 1915, p. 21.

> a nation, is guarded against this danger, it follows that this struggle may be repeated in every sphere of law – in the valleys of private law, as well as on the heights of public and international law.'

The life stories of Virginia and Clifford Durr are all about the struggle for rights, for concrete law: the struggle to make rights real and effective in practice, in the face of prejudice, tradition, and public fear whipped up by political actors for sectional advantage. Their stories show that it is possible to live a life devoted to this struggle and find it fulfilling. If not their story, then some other life story or life stories with this content deserve some space in the legal curriculum.

The third difficulty (identifying adequate teaching resources) is not a problem. There is the work of Colby and Damon on Virginia, which also touches on Clifford.[73] This work also places her life story into an analytical frame that helps to articulate those features of her story of general ethical importance. There is Virginia's autobiography.[74] There is a scholarly biography of Clifford.[75] Once one expands the focus beyond the couple, the literature is vast.

An alternative to using historical figures is to use people who have been involved in more recent principled action. Nick Johnson and I used the example of Susan Murray and Beth Robinson as exemplars of good legal practice.[76] Their commitment to equal rights for gay and lesbian couples could equally be used in to inform instructional use of their practice as exemplars of ethical legal practice.[77] David Luban has used the example of Yvonne Bradley as exemplary ethical legal practice.[78] It is possible the more contemporary context that such people act within can reduce the strain of necessary supporting material. However, there is some loss of perspective, and the supporting literatures are less deep.

8. FICTIONAL CHARACTERS

Role models combine two means of influence: they have narrative interest – the biography is a form of narrative people find interesting; and they have an impact on what people view as feasible in a life – the biography informs readers of what is possible in the real world. It is the second feature that makes biographical accounts potentially uniquely powerful as an inspirational form. What has been lived must have been possible. Obviously, the honesty of the biographical narrative is crucial to this impact. If a reader feels the account is not true, that the narrative is more hagiography than biography, then the reader feels that it is not a realistic inspirational model.

The fictional account of a life, or of a working life, or of an event in a life, can also influence in these two ways. The short story, the novel, the play, the film, the poem, and the essay can all capture interest and be 'true to life' in literal or symbolic ways. Fiction is largely, although not entirely, judged by its ability to engage, to entertain, and to inform the audience. Literary or commercial success does not indicate a work will be useful in encouraging ethical self-reflection or the development of a moral character. However, it is a good indicator that the work can engage and form a way to focus ethical reflection for some students.

There are fictional accounts of legal education and legal practice that can be used in legal education.[79] These often engage with ethical problems of law, the legal system, and legal practice. There seems no

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[73] A. COLBY and W. DAMON, n. 474.

[74] V.F. DURR, *Outside the Magic Circle: The autobiography of Virginia Foster Durr*, University of Alabama Press, Tuscaloosa AL 1990.

[75] J.A. SALMOND, *The Conscience of a Lawyer: Clifford J Durr and American civil liberties, 1899-1975*, University of Alabama Press, Tuscaloosa AL 1990. He also features in: S.H. BROWN, *Standing Against Dragons: Three Southern Lawyers in an Era of Fear*, Louisiana State University Press, Baton Rouge LA 1998.

[76] G. FERRIS and N. JOHNSON, 'Practical Nous as the Aim of Legal Education' (2013) 19 *International Journal of Clinical Legal Education* 271.

[77] B. ROBINSON, 'The Road to Inclusion for Same Sex Couples: The Lessons From Vermont' (2001) 11 *Sefton Hall Constitutional Law Journal* 237; S. BARCLAY and A-M. MARSHALL, 'Supporting a Cause, Developing a Movement, and Consolidating a Practice: Cause Lawyers and Sexual Orientation Litigation in Vermont' in A. SARAT and S. SCHEINGOLD (eds.), *The Worlds Cause Lawyers Make: Structure and agency in legal practice*, Stanford University Press, Stanford CA 2005; W.N. ESKRIDGE Jr, *Equality Practice: Civil unions and the future of gay rights*, Routledge, Abingdon 2002, pp. 43-82.

[78] D. LUBAN, 'Lawfare and Legal Ethics in Guantanamo' (2008) 60 *Stanford Law Review* 1981. See also C.S. SMITH, *Bad Men: Guantanamo Bay and the secret prisons*, Phoenix, London 2008, pp. 81-127.

[79] H. LEE, *To Kill A Mocking Bird*, Arrow, London 1997; J.J. OSBORNE, *The Paper Chase*, Peninsular Road Press, 2011; R. ROSE, *Twelve Angry Men*, Penguin Books, London 2006, to give three famous examples that gave rise to equally famous cinematic adaptations.

reason not to make use of these resources in legal education, although they are actually little used in my experience. The problem is presumably once again the problem of space on the curriculum.

There are fictional accounts of the importance of values in living a life worth living.[80] Such accounts are likely to feature on courses concerned with law and literature, or law and the humanities, or law and media studies. If well chosen and well taught I have no doubt these can be extremely valuable in developing ethical awareness and sophistication in law students.

Here I intend to focus on one example of a powerful short story that can be used to illuminate problems of ethical professional practice. It is about ethical conduct in the practice of the medicine. One advantage of taking a story from non-legal professional practice is that it raises issues of ethical professional practice rather than ethical legal professional practice. It makes the generalisation of the ethical issues easier because the issues are abstracted from medical practice and are abstract enough to apply to legal practice. The ethics are general not related to knowledge of any code or rule of practice, but clearly related to the duty to put the interests of the patient first.

The story was written by William Carlos Williams and is called *The Use of Force*.[81] Williams practiced as a doctor in first half of the twentieth century in New Jersey. The story tells of a house call by a doctor on a sick child. The story is not very long and can be read in about ten minutes. It is short enough, if desired, to be read within a seminar of one hour and still leave time for group analysis and discussion.

Students need to be told that diphtheria used to be a dangerous disease in the USA and UK that was often fatal to children. Mortality rates in the absence of effective treatment were up to 20% of cases in children under five and 5-10% in older patients. President Cleveland's daughter died of diphtheria, as did one of Queen Victoria's adult daughters and her infant granddaughter. An effective treatment was developed in the early years of the twentieth century, but early treatment was important for success. The most telling diagnostic sign of diphtheria is a peculiar membrane on the tonsils which looks a bit like a patch of grey leather in the back of the mouth. In the UK diphtheria is controlled by vaccination, as indeed it is in most of the developed world.

The story starts by giving a very brief account of the situation. The parents are both at home and clearly worried; implicitly this child is their first and only child. The doctor is aware of the business nature of the relationship as well as the medical relationship of care; the fee of three dollars is mentioned in establishing the scene. All of the adults are worried that the child, a young girl, might have diphtheria. The child is described as:[82]

> 'an unusually attractive little thing … She had magnificent blonde hair, in profusion. One of those picture children often reproduced in advertising leaflets …'

The child is attractive and seems strong constitutionally; however, she is feverish and uncooperative. She claims not to have a sore throat, but will not let her mother look. The doctor tries to coax her into opening her mouth. He uses her name 'Mathilda' in an attempt to establish her trust. All attempts are futile, and the parents' attempts to help hinder his conciliatory approach. The parents irritate the doctor who speaks the dread word 'diphtheria' and frightens the parents, and no doubt thereby the little girl, by doing so. He will need to force the child's mouth open.

It is in the best interests of the child to have the diagnostic check. The child was clearly going to struggle, and the doctor had to enlist the aid of the parents, and the father in particular to help hold her still. Fear of diphtheria, and distress at the fight, and hesitance over hurting the child in restraining her, all take their toll on the father:[83]

> 'The father tried his best, and he was a big man … he himself was almost fainting, while the mother moved back and forth behind us raising and lowering her hands in an agony of apprehension.'

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[80] L. TOLSTOY, *The Death of Ivan Ilyich and Confession*, P. CARSON (tr.), Liveright, New York NY 2013.
[81] W.C. WILLIAMS, 'The Use of Force' in *The Doctor Stories*, New Directions, New York NY 2012.
[82] Ibid. loc. 1046.
[83] Ibid. loc. 1079.

Thus the characters in the drama have been sketched out with brilliant economy of description. The parents almost overcome by fear that their loved and cherished baby might die; at the same time swamped by embarrassment before the doctor, and feelings of helplessness in the face of their Mathilda's refusal to cooperate, Mathilda who is stubborn, scared, and furious. The doctor who is spending a lot of time on a three dollar fee; who is irritated by the parents and their inability to control the child and thereby facilitate his task; and who is now engaged in a struggle against the child he likes but who he must distress in order to protect her.

The doctor should look at the back of the child's throat. There is no doubt about what should be done here. The problem is how it should be done. It is hard to hurt a child in order to examine it. It is hard to do so calmly. It might make sense to let everyone calm down and come back later. However, any delay might raise the risks to the child, and of course it would mean more time spent on this patient, and the dreadful thought of the unpleasant task put off through the rest of the doctor's day. The doctor presses ahead:[84]

> 'Then I grasped the child's head with my left hand and tried to get the wooden tongue depressor between her teeth. She fought, with clenched teeth, desperately! But now I also had grown furious – at a child. I tried to hold her down but I couldn't. I know how to expose a throat for inspection. And I did my best. When finally I got the wooden spatula behind the last teeth and just the point of it into the mouth cavity, she opened up for an instant but before I could see anything she came down again and gripping the wooden blade between her molars she reduced it to splinters before I could get it out again.'

The doctor presses on, using a spoon in the place of his shattered medical implement:[85]

> 'Get me a smooth-handled spoon of some sort, I told the mother. We're going through with this. The child's mouth was already bleeding. Her tongue was cut and she was screaming in wild hysterical shrieks. Perhaps I should have desisted and come back in an hour or more. No doubt it would have been better. But I have seen at least two children lying dead in bed of neglect in such cases, and feeling that I must get a diagnosis now or never I went at it again. But the worst of it was that I too had got beyond reason. I could have torn the child apart in my own fury and enjoyed it. It was a pleasure to attack her. My face was burning with it.'

This is the dramatic highpoint of the story. The diagnosis is made: the child did have diphtheria, and presumably will receive treatment and recover. But the story does not end with this victory for medical care. It ends with a description of the little girl:[86]

> 'Now truly she was furious. She had been on the defensive before but now she attacked. Tried to get off her father's lap and fly at me while tears of defeat blinded her eyes.'

The child has been humiliated.

This story is about a professional who has to do something unpleasant but very important. It is about someone who is aware of the importance of money to himself and to his clients, and who is aware of the importance of his services to these parents. It is about someone who in the embodied reality of the task struggles to cope. He does the right thing, but he does it in an emotional state that is wrong. He tends to the child but he also fights and defeats the child. He is irritated by the parents because they are clumsy and too aware of him as the doctor, but he is clumsy and too aware of them as people in the midst of distress that he is causing. He does his professional duty, but he does it by behaving unprofessionally. He has done his duty but comes away knowing he has failed in some way to be who he aspires to be.

In terms of issues for discussion raised by the story it is useful to explore at least eight with law students. First, did the doctor do right? Second, could the situation have been resolved properly with less distress – and if so, how? Third, is the emotional state of the parents a proper matter for the doctor to consider? Fourth, is the emotional state of the child relevant to the duty of the doctor beyond issues of avoiding physical harm if possible? Fifth, what values are at play in this story? Such as: duty to give proper medical care to the

[84] Ibid. loc. 1088.
[85] Ibid. loc. 1093.
[86] Ibid. loc. 1104.

child; care for her feelings; care for the feelings of the parents; care for the feelings of the doctor, who is clearly upset; amount of the fee charged in light of the difficulty and time taken; self-control; professionalism. Sixth, is the description of raising tension and heightened emotions familiar from any prior experience of the students? If so, how did they cope? Seventh, how might such feelings arise in legal work? In this regard there is beating the witness in cross-examination; or the other side in negotiation; or informing the unpleasant client that the scheme is illegal, appeal is hopeless, or the tax cannot be avoided. Eighth, how might we prepare ourselves to deal with the emotions that can be associated with acting rightly?

Hopefully, it is clear that the power of the writing makes it worth the time spent in reading and providing the contextual information required for classroom use of the story. Fiction can get the student as close to an imaginative embodiment of the situation as is possible. Honest fiction that concerns itself with the difficulties of professional practice can raise issues of conduct that would be difficult to raise in a clinical or work situation.

Fiction can help students in reflecting upon their values and what they want them to be. In its ability to put the reader in the story it can approach simulation as a methodology for learning. Engaging fiction draws readers into the narrative and allows them to care about the characters and their difficulties. Fiction informed by an honest and thoughtful intelligence portrays situations and events in ways that illuminate issues that are difficult to bring into focus using other methods.

9. CLINICAL LEGAL EDUCATION

There are several ways in which clinical legal education might be important for inculcating values or for leading to student reflection upon values. Real client clinics in particular encourage students to adopt client service as an aim, as discussed above in chapter 3. Furthermore, many law clinic clients are from social groups that face difficulties in accessing adequate legal services. Awareness of the difficulties faced by underprivileged groups or individuals can have transformative effects upon students. There is some fairly robust evidence that clinical experience in law school can lead to ethical development in practice: that clinic might in fact prepare some students to be ethically aware when they leave education and start practicing.[87] These possibilities for use of clinical methods in legal education have been explored above.

Here concern will be focussed upon those clinics that adopt an expressly value-oriented perspective, clinics that are directed towards social justice, or community service, or service to some specific community.[88] These clinics direct students to have regard to certain values, such as: access to justice, or equality of treatment for different groups in law and elsewhere, or alleviation of poverty, or liberty, fraternity and equality as social values. Some social justice-orientated clinics have played an important role under oppressive regimes and might be considered a form of oppositional non-governmental organisation.[89] In sponsoring a social justice law clinic, a law school might be pursuing what has been treated as an important, indeed definitive, characteristic of a university: 'a role as critic and conscience of society'.[90]

Some models of social justice clinic violate the imperative to align higher education with the interest of the student as set out in chapter 1.[91] The primacy of alleviating deficiencies in access to justice is not an educational aim. It does fit into the broader role of the university, and especially as an extra-curricular activity it is an area of voluntary activity that might be encouraged as a form of community service. However, it is not appropriate to place community justice above the educational interests of the students,

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[87] J. PALERMO and A. EVANS, 'Almost There: Empirical Insights into Clinical Method and Ethics Courses In Climbing the Hill Towards Lawyers' Professionalism' (2008) 17 *Griffith Law Review* 252.

[88] T. EZER, L. DESHKO, N.G. CLARK, E. KAMENI and B.A. LASKY, 'Promoting Public Health through Clinical Legal Education: Initiatives in South Africa, Thailand and Ukraine' (2010) 17 *Human Rights Brief* 27; M.A. DU PLESSIS, 'University Law Clinics Meeting Particular Student and Community Needs: A South African Perspective' (2008) 17 *Griffith Law Review* 121.

[89] Address by President Nelson Mandela at the official opening of the Bram Fischer library at the legal resources centre Johannesburg, 27 September 1996, available at: <http://www.lrc.org.za/publications/papers> accessed 05.08. 2014. The Report of the Legal Resources Trust for the period ended 31 March 1980, available at: <http://www.lrc.org.za/publications/annual-reports/3> accessed 05.08.2014.

[90] New Zealand, Education Act 1989 section 162(4)(a)(v). See: J. KELSEY, 'Privatizing the Universities' (1998) 25 *Journal of Law and Society* 51 for context and discussion.

[91] D. NICOLSON, 'Legal Education or Community Service? The Extra-Curricular Student Law Clinic' [2006] 3 *Web Journal of Current Legal Issues*; and D. NICOLSON, 'Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice' (2013) 16 *Legal Ethics* 36.

and whilst a commitment to some form of social altruism might inform an academic in her life and practice this is not a legitimate reason to impose this value choice upon students.[92] Such an academic might act as an inspirational role model for students. However, the commitments central to the identity of the academic are not commitments of the academy.

Thus, the political commitment to serving underprivileged groups in society is not a value that can be allowed to supplant either the educational values of higher education, or the specific values of legal education. This does not mean there can be no place for them in legal education. Indeed, some of these personal commitments can be brought within the ambit of specifically legal values: restrictions on access to justice can distort the truth-finding function of legal process; denial of voice to underprivileged groups can undermine the practice of political government. Some others can be offered as inspirational goals that can be endorsed by students: an internalised ethic of altruistic action on behalf of the poor or weak can serve as a valuable model for students.[93] Certainly those models that do not assess for compliance with the political aims of the social justice clinic avoid the danger of becoming oppressive.[94]

There are various models of social justice clinic.[95] Some are concerned with the delivery of legal services.[96] Some are concerned with policy.[97] Similar, in being concerned with live clients and social justice concerns, are the innocence projects,[98] and placements with legal advice providers such as the Citizens Advice Bureau.[99]

Fran Quigley argues that clinical education should be used to teach about social justice. Quigley rejects the idea that not talking about social justice is neutral, and arguing that such neglect has an ethical content. Quigley argues that legal education should aim to inculcate values of opposition to social injustice in students:[100]

> '[A] complete legal education and, in particular, a complete clinical educational experience, should include lessons of social justice. Clinical teachers should accept as part of their role the exposure of clinical students to experiences and reflective opportunities that will lead to social justice learning. To perform adequately this role, clinical teachers must understand the dynamic that causes the students' justice perspective to be transformed by their clinical experiences, and then design a methodology inspired by adult learning theory that will nurture the social justice learning opportunities a clinical course uniquely provides.'

Thus, Quigley argues for self-conscious efforts in the design and delivery of clinical legal education with the aim of facilitating students' re-evaluation of their own values in the light of social injustice.

The argument identifies clinical legal education as particularly powerful as a 'transformative' method of teaching and learning. The transformation in question is one of ethical beliefs, or moral motivation. The

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[92] Not all cause lawyers share a common view of justice, some support left wing views of the social justice and fight against poverty persuasion but some are conservative in orientation: A. SOUTHWORTH, 'Professional Identity and Political Commitment among Lawyers for Conservative Causes' in A. SARAT and S. SCHEINGOLD (eds.) *The Worlds Cause Lawyers Make: Structure and agency in legal practice*, Stanford University Press, Stanford CA 2005, p. 83; K.R. DEN DULK, 'In Legal Culture but Not of It: The Role of Cause Lawyers in Evangelical Legal Mobilization' in A. SARAT and S. SCHEINGOLD (eds.), *Cause Lawyers and Social Movements*, Stanford University Press, Stanford CA 2006, p. 197. Opposition to poverty may be informed by conservative or religious values as well as more liberal, or radical values A. COLBY and W. DAMON, above n. 474.

[93] C. MENKEL-MEADOW, 'The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers' in A. SARAT and S. SCHEINGOLD (eds.), *Cause Lawyering: Political commitments and professional responsibilities*, Oxford University Press, Oxford 1999, p. 31.

[94] Donald Nicolson has championed extra-curricular - therefore, voluntary and non-assessed - social justice clinics, associated with the law school but not part of its curriculum.

[95] F.S. BLOCH, *The global clinical movement: educating lawyers for social justice*, Oxford University Press, Oxford 2011.

[96] F. QUIGLEY, 'Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics' (1995) 2 *Clinical Law Review* 37; J.H. AIKEN , 'Provocateurs for Justice' (2001) 7 *Clinical Law Review* 287; S. WIZNER, 'Teaching And Doing: The Role of Law School Clinics In Enhancing Access To Justice' (2004) 73 *Fordham Law Review* 997.

[97] W.W. PATTON, 'Getting Back to the Sandbox: Designing a legal policy clinic' (2011) 16 *International Journal of Clinical Legal Education* 96.

[98] C. MCCARTNEY, 'Liberating Legal Education? Innocence Projects in the US and Australia' [2006] 3 *Web Journal of Current Legal Issues*.

[99] Or 'blended' clinical education in collaboratively with outside organisations: A.E. LOWE, 'Community Collaboration: A blended domestic violence clinic' (2008) 10 *Thomas M Cooley Journal of Practical and Clinical Law* 375.

[100] F. QUIGLEY, above n. 552, p. 38.

power of clinical education rests upon its nature as experiential learning, and learning theories of experiential learning.

Although there are various formulations of the dynamics of experiential learning they tend to agree that learning is a reflective process: something is noticed in the world that requires explanation; it is reflected upon; the reflection leads to the construction of a new view of the world.[101] Fran Quigley uses such a model, taken from Jack Mezirow, of learning through reaction to a 'disorienting moment'.[102] The learner struggles to place a disorienting event or experience in existing schemes of meaning; this awareness of the unexplained results in either reflection and work on the problem posed, or in the dismissal of the incongruity; if the experience is reflected upon then learning can take place, as the learner re-orders prior understanding to make sense of the disorienting event. This learning, because it involves changes in the way the world is perceived and understood, can be transformative in effect.[103]

Quigley identifies the social context of live client clinic providing legal services to disadvantaged individuals or groups as key, because this generates experiences that are likely to be disorienting moments for relatively privileged law students:[104]

> 'The experiential basis of live-client clinical settings is ideal for the provision of disorienting experiences for the learner. Most clinical courses involve the learners' direct representation of clients who, due to poverty, disability, discrimination or the like, are the victims of systemic injustice. Most law students come to the course without significant exposure to the victims of injustice and almost none come to the course with experience representing a person trying to wring a just result from an often unresponsive legal system. When the learners are confronted with their clients' very real suffering and frustration, the learners' necessarily abstract understanding of social justice often prevents assimilation of the experience. Hence, disorientation occurs.'

In support of this plausible claim paraphrases of student remarks are produced at the head of the article:[105]

> 'I couldn't believe what I saw in court yesterday. While we were waiting for our trial to start, dozens of people were getting evicted by the judge without even having a real chance to defend themselves. A lot of these tenants seemed to have good cases, but just because they were poor and didn't know the system the landlords' lawyers were getting anything they wanted from the judge. I just never realized how poor people get railroaded in what I thought was a fair system.'

The brute facts of the lived experiences of the clients undermined comfortable assumptions about the legal system.[106]

In order to make best use of such disorientating moments a clinic needs to be structured so that: firstly, it facilitates the occurrence of disorientating moments for the students; secondly, that it facilitates the work on making sense of the experience, through reflection and discussion; and thirdly, that it allows the students to give effect to their value reorientation.[107] The first necessity is embedded in clinical education with live

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[101] P. JARVIS, 'Learning to be a Person in Society: Learning to be Me' in P. JARVIS, *Teaching Learning and Education in Late Modernity: The selected works of Peter Jarvis*, Routledge, Abingdon 2012. An excellent selection of readings is: K. ILLERIS (ed.), *Contemporary Theories of Learning: Learning theorists … In their own words*, Routledge, Abingdon 2009.

[102] J. MEZIROW, *Transformative Dimensions of Adult Learning*, John Wiley & Sons, San Francisco CA 1991.

[103] Jarvis distinguishes between events (which seem to be equivalent to disorienting moments) and episodes. The episode is either an event that is prolonged over time or a series of events. This conceptual division helps to highlight the key role paid by the learner in defining the significant events (what is perceived as connected); and it allows the idea of the episode enables the analysis to span time, as learners do. In effect it is the self that is the subject matter not things happening: "it is important to recognise that awareness spans time and that we learn to live within the flow of time but learning occurs as joined up series of events upon which we concentrate.' P. JARVIS, 'Experience' in P. JARVIS, *Teaching Learning and Education in Late Modernity: The selected works of Peter Jarvis*, Routledge, Abingdon 2012, pp. 37-38.

[104] F. QUIGLEY, above n. 552, p. 53.

[105] Ibid. p. 37.

[106] N. MARTIN, 'Poverty, Culture and the Bankruptcy Code: Narratives from the money law clinic' (2005) 12 *Clinical Law Review* 203, 239-240 supplies evidence to this effect of disorienting moments, reflection, and re-evaluation for the academic as well as the students: 'Practicing law in the clinic is hard work, much harder than I anticipated given that we were not dealing with domestic violence or other life-threatening situations. As we saw it, it was *just money*. We were simply using business law and business law students, to serve the needs of indigent clients. This, however, created a clash of two worlds. We were attempting to use legal tools to help clients that arise from a system that clients see as oppressive. At times, the clients felt that this was the very system that kept them oppressed and poor. Given the use of this system and its tools, it was natural for clients to mistrust the process. It would have been surprising, in retrospect, if this did not happen.'

[107] F. QUIGLEY, above n. 552, pp. 52–56.

clients. The second is typically already supported in clinical legal education by supervision, team working, group discussion, and reflective journals. Making sure the social justice reflection is productive requires attention. It is useful to provide an adequate terminology and structural analysis to be used in making sense of the moments. Finally, in providing legal services, in helping the clients, the student is able to give effect to the new understanding of the world and the place of social injustice in that world.

Thus, the clinic can be viewed as a teaching methodology that is naturally well suited to encouraging the type of value reorientation that Quigley argues should be part of the teaching mission of the law school. This model, of using clinical education to facilitate the re-evaluation by the student of previous uninformed values positions is not objectionable. The learning model places agency in the student. The method is one that is fully open, and that relies for effectiveness upon the heightened consciousness and awareness of the student to the values being re-evaluated. This use of clinic must be considered a valid and appropriate one in trying to facilitate the development of salience for moral motivations in law students.

Openness to reassessment of values has been identified as a characteristic of moral exemplars. The process was observed and described happening naturally by Colby and Damon:[108]

> 'As Brand became more aware of the reality of American poverty, he also became more sensitive to poverty abroad. He had enjoyed travel even before he joined the war on poverty. But after he established TAP [Total Action Against Poverty], he travelled with eyes newly opened to the extent and nature of global poverty. Thus, his travel time began to put the local conditions into a global perspective, to understand the relation between poverty and environmental issues, and to begin to act on the international as well as the local level. Thus, the changes in his goals changed his perception of the world, which in turn broadened his understanding and ultimately changed his goals again.'

Not all of us are open, and not all of us agree about how to make sense of disturbing experiences. The aim of legal education should be to support students in their own personal struggles with the world of experience and to help them find positive ways to make sense of the ugliness of that world. This is the task of teaching directed towards the moral motivations and personal identity of students.

[108] A. COLBY and W. DAMON, above n. 474, p. 144.