

# Forming lawyers for justice : The role of clinical legal education in developing reflective lawyers

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**Forming lawyers for justice:**  
**The role of clinical legal education in developing reflective lawyers**

**Anna Frances Cody**

A thesis in fulfilment of the requirements for the degree of Doctor of Philosophy

Faculty of Law

UNSW

August 2020



**Thesis Title**

Forming Lawyers for Justice: The role of clinical legal education in developing reflective lawyers

**Thesis Abstract**

This thesis explores the role of clinical legal education as a methodology for teaching law students to become reflective, justice-focused lawyers. Specifically, it questions the significance of reflective skills in enabling law students to achieve their ethical duty to contribute to justice. The thesis finds that developing a reflective lawyer means teaching a lawyer the importance of thinking about how to be a lawyer. It includes an analysis of both self in lawyering and the ability to think analytically about the law and the legal system and their role in creating social justice. Reflection is the key to students learning and understanding concepts of justice and injustice in a broad sense.

The thesis includes an analysis of empirical research which measures the impact of a clinical component within an applied legal ethics course on students' understandings of ethical issues. This empirical evidence reveals the ways in which a clinical component, where students interview real clients, can enrich students' understandings of what constitutes ethical issues. It emphasises the importance of caring for clients as a facet of achieving justice. A clinical component changes students' understandings of what constitutes ethical issues, from narrower ideas of 'conflict of interest' to broader understandings of the limitations of the legal system to provide solutions for people and the limitations of free legal services. The thesis discusses the ways in which including a clinical component can also provide a means to build students' confidence in their ability to complete their law studies, and also reinforce their commitment to using law as a tool to achieve justice.

The thesis finds, furthermore, that reflection is central as a means to interrogate identity and privilege in students. Identity in the form of ability/disability is one aspect of identity. The thesis finds specific means to teach this through a clinical methodology. It finds that teaching students about the medical versus the social model of understanding disability, and the centrality of people with disability in teaching students about disability, are fundamental to effective teaching of these issues. Through the lens of ability/disability, a range of facets of identity is examined. Within methods of legal education, clinical legal education is a particularly effective way of teaching students how to be reflective and justice-focused. It provides a path to transform legal education.

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**Publication Details #1**

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<b>Authors:</b>	Anna Cody
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<b>Authors:</b>	Anna Cody
<b>Journal or Book Name:</b>	Journal of Law and Medicine
<b>Volume/Page Numbers:</b>	(2018) 25(4) Journal of Law and Medicine 1056.
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## Abstract

This thesis explores the role of clinical legal education as a methodology for teaching law students to become more reflective, justice-focused lawyers. Specifically, it questions the significance of reflective skills in enabling law students to achieve their ethical duty to contribute to justice. The thesis includes an analysis of empirical research which measures the impact of a clinical component within an applied legal ethics course on students' understandings of ethical issues. This empirical evidence reveals the ways in which a clinical component, where students interview real clients, can enrich students' understandings of what constitutes ethical issues. It emphasises the importance of caring for clients as a facet of achieving justice. A clinical component changes students' understandings of what constitutes ethical issues, from narrower ideas of 'conflict of interest' to broader understandings of the limitations of the legal system to provide solutions for people and the limitations of free legal services.

The thesis finds that developing a reflective lawyer means teaching a lawyer the importance of thinking about what they do, how they do it, and whether there are other ways of doing the work of a lawyer. It includes an analysis of both self in lawyering and the ability to think analytically about the law and the legal system and their role in creating social justice. Reflection is the key to students learning and understanding concepts of justice and injustice in a broad sense.

Having examined the central role of reflective skills in forming reflective and justice-focused lawyers, the thesis discusses the ways in which including a clinical component can also provide a means to build students' confidence in their ability to complete their law studies, and also reinforce their commitment to using law as a tool to achieve justice. This can, in turn, build students' mental health and connect them with their purpose for studying law.

The thesis finds, furthermore, that reflection is central as a means to interrogate identity and privilege in students. Identity in the form of ability/disability is one aspect of identity. The thesis

finds specific means to teach this through a clinical methodology. It finds that teaching students about the medical versus the social model of understanding disability, and the centrality of people with disability in teaching students about disability, are fundamental to effective teaching of these issues. Through the lens of ability/disability, a range of facets of identity is examined. These are essential for future lawyers to reflect on in order to be effective lawyers. Within methods of legal education, clinical legal education is a particularly effective way of teaching students how to be reflective and justice-focused. It provides a path to transform legal education.

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# Chapter 1:

## Introduction

After 25 years working in education, 20 of those as a clinical legal educator, I was keen to explore some key aspects of the role of clinical legal education in creating lawyers who are able to interrogate their identity, their privilege and their role as a lawyer to improve justice. The purpose of interrogating this role is to achieve a greater experience of justice within the community through the law and the legal system. While many of the students in clinics were dedicated and keen to pursue law as a vehicle for creating social change for greater equality, some parts of legal education appear to be failing in their role to develop lawyers who challenge inequality and create a more just world.<sup>1</sup> Legal education can both entrench existing ways of thinking and operating and be a vehicle to enliven students to the equalising and progressive potential of law.<sup>2</sup> The pursuit of ‘objectivity’ and ‘professionalism’ can also encourage students

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<sup>1</sup> Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic against the System* (New York University Press, 1983); Roberto M Unger, *The Critical Legal Studies Movement* (Harvard University Press, 1983); Carrie Menkel-Meadow, ‘Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits Go to Law School”’ (1988) 38 *Journal of Legal Education* 61; Carrie Menkel-Meadow, ‘Portia in a Different Voice: Speculations on a Women’s Lawyering Process’ (1985) 1 *Berkeley Women’s Law Journal* 39; Patricia J Williams, *The Alchemy of Race and Rights* (Harvard University Press, 1991); Elizabeth Mertz, *The Language of Law School: Learning to Think Like a Lawyer* (Oxford University Press, 2007); Margaret Thornton, ‘Dreaming of Diversity in Legal Education’ in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017); Donald Nicolson, ‘Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice’ (2013) 16(1) *Legal Ethics* 36.

<sup>2</sup> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1990); Dwight Boyd, ‘The Place of Locating Oneself(ves)/Myself(ves) in Doing Philosophy of Education’ in Susan Laird (ed), *Philosophy of Education* (Philosophy of Education Society, 1997), cited in Barbara Applebaum, ‘Social Justice Education, Moral Agency, and the Subject of Resistance’ (2004) 54 *Educational Theory* 59, 60; Kevin Kumashiro, ‘Against Repetition: Addressing Resistance to Anti-Oppressive Change in the Practices of Learning, Teaching, Supervising, and Researching’ (2002) 72 *Harvard Educational Review* 67; Okianer Christian Dark, ‘Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching’ (1996) 32 *Willamette Law Review* 541; Donald Nicolson, ‘Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice’ (2013) 16(1) *Legal Ethics* 36; Karen H Rothenberg, ‘Recalibrating the Moral Compass: Expanding Thinking Like a Lawyer into Thinking Like a Leader’ (2009) 40 *University of Toledo Law Review* 411; Carrie Menkel-Meadow, ‘Narrowing the Gap by Narrowing the Field: What’s Missing from the MacCrate Report – Of Skills, Legal Science and Being a Human Being’ (1994) 69 *Washington Law Review* 593.

to separate themselves and their identities from their practice of law.<sup>3</sup> I wanted to examine how effective – and in what ways – clinical legal education can be in forming reflective, justice-focused lawyers who are able to examine aspects of who they are through their practice of law and who can contribute to building a more just legal system. While legal education may fail many students, I had a sense – from having worked in clinics myself – of the potential of clinical legal education to create lawyers who are justice-focused.<sup>4</sup> I recognised that one of the key aspects of clinical legal education as a methodology of teaching law is the role of reflection *on* practice and *in* practice. While I have taught an applied legal ethics course which incorporated a clinical component, the connections between reflection and ethical lawyering were not apparent or clearly articulated. Further, the role of examining self-identity and an understanding of self in ethical legal practice was an area which interested and challenged me. While I had glimpses of the ways in which a clinical component impacted on students, exactly *how* this happened was not apparent, and neither were the connections between ethical lawyering, reflective lawyering and concepts of self/identity/privilege. In response to these issues, I developed a range of research questions with the aim of teasing out some of these issues and coming to a deeper understanding of the role of clinical legal education in forming reflective, justice-focused lawyers. This necessitated examining facets of identity and the ways in which these influence a lawyer and how that lawyer practises law. Any aspect of identity could have been chosen, but – because it has been less examined and analysed – the facet selected here was ability/disability. I had the opportunity of working within two clinics in which

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<sup>3</sup> Julian Webb, 'Inventing the Good: A Prospectus for Clinical Education and the Teaching of Legal Ethics in England' (1996) 30(3) *The Law Teacher* 270; Karen H Rothenberg, 'Recalibrating the Moral Compass: Expanding Thinking Like a Lawyer into Thinking Like a Leader' (2009) 40 *University of Toledo Law Review* 411; Verna E Monson and Neil W Hamilton, 'Ethical Professional (Trans)Formation: Early Career Lawyers Make Sense of Professionalism' (2011) 8 *University of St. Thomas Law Journal* 129.

<sup>4</sup> Julian Webb, 'Inventing the Good: A Prospectus for Clinical Education and the Teaching of Legal Ethics in England' (1996) 30(3) *The Law Teacher* 270; Donald Nicolson, 'Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice' (2013) 16(1) *Legal Ethics* 36; Adrian Evans, 'Client Group Activism and Student Moral Development in Clinical Legal Education' (1999) 10 *Legal Education Review* 179.

students are taught about ability/disability, which enriched the research with comparative elements.

### **The reflective, justice-focused lawyer**

As can be seen from that brief introduction, the term ‘reflective, justice-focused lawyer’ is key for this thesis as it challenges the purpose of legal education and what it is currently achieving. The term is explored in depth throughout the thesis, along with the ways in which clinical education can contribute to developing reflective, justice-focused lawyers. Developing a reflective lawyer means teaching a lawyer the importance of thinking about what they do, how they do it, and whether there are other ways of doing the work of a lawyer. It includes an analysis of self in lawyering, as well as the ability to think analytically about the law and the legal system and its role in creating social justice.

Being reflective means examining one’s own identity and its multifaceted nature and also how this may impact on how each person works as a lawyer in their relationship with clients.

Reflection occurs in practice and also after engagements with clients in legal practice. It is the key to students learning and understanding concepts of justice and injustice in a broad sense, while also connecting them to a deeper understanding of what it means to be an ethical lawyer and their ethical duty to contribute to the achievement of justice in the law and the legal system. Knowing how to reflect, and on what to reflect, can encourage students to interrogate their own privilege and issues of power and identity within the law and the legal system. The concept of ‘disorienting moments’ is key to understanding how reflection can be initiated.

Teaching students reflection skills gives them the tools to understand and analyse ‘disorienting moments’: that is, the times when they experience something which their previous experience does not enable them to comprehend and which challenges them to think differently or more deeply about a particular issue. These moments have the potential to be transformative.

If students are able to reflect effectively, they will develop an ongoing and constantly changing sense of their professional identity. This will help them to fulfil their ethical duty to work

towards justice. Teaching students to reflect is a key contribution of clinical legal education to legal education. How to teach law students to reflect, what they will reflect on, and the importance of reflection in enabling students to achieve their ethical duties, are all discussed at length in chapter 4.

Developing justice-focused lawyers is another key concept which is explored throughout this thesis. While being a reflective lawyer and a justice-focused lawyer frequently accompany each other, they do not always do so. A justice-focused lawyer is someone who is conscious of how power works within relationships and how it is replicated at a societal level. Accordingly, a justice-focused lawyer is someone who wants to improve the law and the legal system in order to make it fairer for those who are less powerful and for whom law has not operated fairly. This includes women; people from culturally diverse backgrounds; people with disability; gay, lesbian, transgender and intersex people; Indigenous people; and people from low socio-economic backgrounds. While there is a spectrum of awareness of, and commitment to, justice issues, at the least, justice-focused means a consciousness of the ways in which the law operates to benefit some and disadvantage others. It includes working towards improving the law and the legal system in some way, through action. This could be through engaging in pro bono work, volunteering at a legal centre, or working full time in a poverty law practice.

This thesis explores how clinical legal education methodology can contribute to justice within the community through creating lawyers who are aware of their ethical responsibilities and who can interrogate their role as a lawyer to contribute to the community and to make the law and the legal system fairer. I examine how and in what ways clinical legal education can be used as a means to teach law students to become reflective, justice-focused lawyers. I also examine how this relates to the ethical duties of lawyers to contribute to justice and to make the legal system more equitable.

Having identified that teaching students to be reflective and justice-focused is the key focus of the thesis, the next section describes the research questions.

## **Research questions**

The three principal research questions and their sub-questions, as framed within this thesis, are:

- 1. Can teaching students how to reflect enable them to fulfil their ethical duty to contribute to the justice system?**

What is reflection within a clinical legal education model? What role does reflection play within clinical legal education and which methodologies are effective for teaching reflection? Why is reflection important? How does teaching reflection through a clinical legal education methodology contribute to developing reflective, justice-focused lawyers?

- 2. Can incorporating a clinical component within an applied legal ethics course be an effective way of teaching students about their responsibility to make law fairer and to be reflective, justice-focused lawyers?**

How does a clinical component enrich students' ideas about what ethical decisions are and the ways in which they should be made? Does including a clinical component in an applied legal ethics course change law students so that they are more committed to engaging in lawyering which contributes to the law and the legal system? Does a clinical component build students' confidence in their ability to complete their law studies and develop their sense of autonomy and purpose?

- 3. Why is it important to teach students to examine concepts of identity, power and privilege in order that they become reflective, justice-focused lawyers?**

What role does teaching students about ability/disability have in prompting their growth to being reflective, justice-focused lawyers?

## **Explanation of the research questions**

While I had extensive experience working in clinics, I had substantial questions about what methods were effective for developing the skill of reflection in students and exactly what about the clinical experience was so effective and powerful for students in building their commitment to work towards justice. For this reason, the research project centred on a detailed analysis of their learning in clinics. It was vital to learn from students their perceptions and understandings of the learning process in their ethical formation. This was achieved through developing a survey which enquired into student perceptions both before and after a clinical experience in an applied legal ethics course. This clinical experience, while short, has the potential to provide a powerful experience of the practice of law through interviewing clients.

The thesis centres on the analysis of students in an applied legal ethics course and an elective clinical course in law degrees in two countries. First, it analyses a clinical component of interviewing at Kingsford Legal Centre at the University of New South Wales (UNSW) within a compulsory applied legal ethics course. This clinical experience has the potential to provide a powerful experience of the practice of law through interviewing clients. The compulsory nature of the course means that it reaches every enrolled law student and so has wide impact. The thesis examines the impact of this clinical component on law students and how it may contribute to their future development as justice-focused lawyers. This course is examined to interrogate the following sub-questions: How does a clinical component impact on students' understandings of 'ethics' and its relationship to 'justice'? Does the interviewing component encourage students to feel responsible for contributing to the legal system in order to make it fairer for disadvantaged people? Does interviewing disadvantaged clients increase students' sense of autonomy and purpose in their legal studies?

As well as hearing from students through the surveys, I also wanted to explore how student identity and areas of disadvantage and bias were expressed through their practice of law. It was important to me to probe how students could be taught through a clinic about ways to create justice in one facet of legal practice. This enquiry draws from the experience of clinics which

operate at Kingsford Legal Centre and, to a lesser degree, at the Universidad Nacional Autónoma de México. Through consciously analysing one aspect of identity – ability/disability – the role of identity and privilege in the practice of law could be examined. Through picking just one element – students’ understandings of their identity and, particularly, ability/disability – I was able to sift through the role of identity in the work of being a lawyer with regard to one group of clients: people with disability.

The thesis could have examined another area of identity and privilege, such as cultural/racial identity, gender or sexuality. It examines ability/disability for a range of reasons. Firstly, this is an area which has not been examined to the same degree as, for example, race and gender. Secondly, the two clinics which were a part of this examination focused on disability issues, which enabled some comparative lessons to be drawn. Thirdly, with the relatively recent ratification of the Convention on the Rights of Persons with Disabilities,<sup>5</sup> it is opportune to focus on how the clinical movement can realise some of those goals.

The next section briefly outlines the content in each chapter of the thesis.

## Structure of the thesis

### Chapter 1: Introduction

Chapter 1 introduces the research questions and explains the structure of the thesis. It also includes a discussion of the key concept of ‘reflective, justice-focused’ lawyers. One of the key questions of the thesis is to determine how, and in what ways, clinical legal education can contribute to forming lawyers who are reflective and justice-focused.

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<sup>5</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

## **Chapter 2: Thesis context and literature review**

Chapter 2 analyses the meaning of key terms and controversies in the area and provides a broader context for the specific issues which are explored in depth in chapters 4, 5, 6, 7 and 8. Some of these key terms are ‘clinical legal education’, including its history and practice in Australia. This chapter looks at the unique contribution that clinical legal education can provide to legal education and the range of clinical courses which are available in universities. The chapter engages with debates around the role of different types of clinics in teaching about justice and where a clinical component and specialist clinic fit within these debates.

One of the key debates which has engaged scholars is the purpose of clinical legal education and, particularly, the widely discussed dichotomy of whether the purpose of clinical legal education is to teach skills or justice. This is particularly relevant to the discussion of teaching students about reflection and interviewing skills in chapters 4, 5, 6 and 7. The chapter discusses various definitions of ‘justice’ and proposes a particular definition for this thesis. This definition includes the concept of access to justice by disadvantaged groups, as well as the law being shaped and formed by the full diversity of the community – including disadvantaged groups.

It also reviews understandings of ‘reflection’ and the significance of reflection as a skill and as being essential for lawyers to exercise in order to interrogate the law and the legal system, as well as the ways in which doing so achieves justice. It draws connections to the meanings and processes of reflection as undertaken in clinical legal education.

Concepts of what constitutes an ethical lawyer and how we teach ethical practice are introduced, along with the importance of intrinsic motivation theory for creating lawyers who are connected to their identity and expression of self. The chapter draws on understandings of ability and disability and how these provide an illustrative lens for scrutinising the role of lawyers in understanding how they lawyer and whether they can do this in a form which contributes to a more just legal system and law.

### **Chapter 3: Methodology and key methods**

Chapter 3 discusses the overarching mixed-methods methodology and the specific methods adopted in each of the areas of enquiry. The topic is considered from a range of perspectives and thus a range of methods is utilised. The researcher was keen to understand the role of clinical legal education in forming reflective and justice-focused lawyers. The methods employed to answer these questions include documentary research and case studies looking at the meanings of reflection and ethical practice, as discussed in chapters 4 and 5. In order to ground this research and give it greater depth and richer data, students were surveyed and a constructivist-grounded theory method – through documentary research, case study and surveys – was used in chapters 5, 6 and 7. This enables me to understand more deeply how students understand the concepts of ethical lawyering, as well as the impact of engaging in a clinical component. I learnt through the survey data the importance of care for the client and the relationship with the client, which led me to look closely at aspects of identity in the practice of lawyering – specifically, ability/disability – through a documentary analysis and case study in chapter 8. Examining concepts of ability/disability provide an illustrative lens through which to apply some of the fruits of reflection and understandings of how privilege and identity can be worked through in achieving justice in an area of legal practice.

### **Chapter 4: Reflection and clinical legal education – how do students learn about their ethical duty to contribute towards justice?**

The thesis is based in two key aspects of the practice of lawyering: the centrality of reflection skills; and what makes an ethical lawyer and the ways in which they work. These two key concepts are explored in chapters 4 and 5. Chapter 4 focuses on reflection.

In this chapter, the thesis explores the central importance of the skill of reflection. It defines reflection and connects the importance of reflection to the ability to fulfil an ethical duty to contribute or work towards justice as a lawyer. The chapter examines a range of definitions of reflection across disciplines. It finds that the ability to reflect effectively enables students to

learn from their experiences and make sense of the range and depth of experiences they have during their clinical component. This reflectiveness is not only about the law and the legal system; it is also about self and the ability to analyse how a future lawyer responds in situations. Professional practice is complex and requires lawyers to resolve involved, multilayered and interdisciplinary problems. As Schön<sup>6</sup> recognises, this requires the process of reflection-in-action. The chapter draws from the use of reflection within clinical legal education and various models for teaching the skill of reflection. After discussing the definition of reflection, the chapter turns to the ways in which the skill of reflection can be taught to students. This includes methods such as debriefs, either individual or group; self-assessments; formal teaching about reflection; the use of reflective journals; and peer-to-peer learning. Knowing how to reflect on the law and the legal system, as well as a lawyer's role and identity within the practice of law, is central to a lawyer being able to contribute effectively to the legal system and fulfil their ethical duty to contribute towards the justice system.

This chapter is published as Anna Cody, 'Reflection and Clinical Legal Education: How Do Students Learn about Their Ethical Duty to Contribute towards Justice' (2020) *Legal Ethics*, doi: 10.1080/1460728x.2020.1799303.

## **Chapter 5: What does legal ethics teaching gain, if anything, from including a clinical component?**

In this chapter, the thesis examines the nature of ethical legal practice. To do so, it uses the vehicle of formation of professional identity through a short clinical experience within a legal ethics subject at Kingsford Legal Centre at UNSW. The chapter discusses concepts of professionalism and its relationship to values and identity. In order to enquire into the impact which a short clinical experience can have on the ethical formation of law students, a clear understanding of ethical legal practice, and what constitutes an ethical lawyer, is required. The

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<sup>6</sup> Donald Schön, *The Reflective Practitioner* (Taylor & Francis, 1995).

chapter explores different models for understanding ethical practice and suggests a definition of ethical legal practice. Critically, this definition includes the capacity to reflect and engage in ongoing learning. This builds on chapter 4, recognising the significance of reflection and the ways in which it can be taught. Knowing how to reflect enables an ethical legal practitioner to question their role in contributing to the community and the fairness of the law and the legal system. The chapter uses intrinsic motivation theory – as discussed by Wortham, Klein and Blaustone<sup>7</sup> – to analyse motivations of lawyers in working towards justice.

Chapter 5 establishes the theoretical framework for examining the operation and achievements of the clinical component. It examines whether three aspects of ethical practice, as included within the definition of an ethical legal practitioner, are developed through participating in a clinical experience at Kingsford Legal Centre in an applied legal ethics course. These three aspects are (1) working towards or contributing to justice, fairness and the improvement of the legal system and serving the community as part of the role of a lawyer; (2) gaining a sense of autonomy and self-direction; and (3) ongoing reflection and continual improvement.

This chapter is published as Anna Cody, 'What Does Legal Ethics Teaching Gain, If Anything, from Including a Clinical Component?' (2015) 22(1) *International Journal of Clinical Legal Education*.

## **Chapter 6: Interviewing real clients and the ways it deepens students' understandings of legal ethics**

Chapter 6 builds on chapters 4 and 5, in which the significance of reflection and an understanding of what constitutes an ethical legal practitioner were developed. The documentary analysis from chapters 4 and 5 is deepened through surveying students on their understandings of 'ethics'. The chapter examines how the clinical component influences

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<sup>7</sup> Leah Wortham, Catherine Klein and Beryl Blaustone, 'Autonomy-Mastery-Purpose: Structuring Clinical Courses to Enhance These Critical Educational Goals' (2012) 18 *International Journal of Clinical Legal Education* 105.

students' understanding of an ethical legal practitioner through surveying their views both before and after their interviewing experience. This grounded theory approach draws from the experiences and views of students to create theory. Legal ethics students completed both pre-interview and post-interview surveys about what ethical issues they anticipate experiencing, what their view of an 'ethical lawyer' is, and what the role of a lawyer is in contributing to justice or the community. Chapter 6 contrasts this with the ethical issues the students actually experience and the insights they gain through working with real clients. Once they interview real clients, students' views about what constitutes 'ethical legal practice' change markedly. Their understanding of the tools and assistance they need to deal with ethical issues are also discussed.

The chapter discusses some interesting findings about the relationship between access to justice and the ethic of care which are revealed through the survey data. After interviewing clients, students recognise the importance of communicating effectively with clients, but also the significance of spending time with, and caring for, clients in acting as an ethical lawyer. Whereas they had anticipated dealing with conflicts of interest, or repugnant clients, in fact they identify the importance of an ethic of care when working as a lawyer. They also identify systemic ethical issues, such as the failure of the legal system to help people with the problems they face and the limitations of free legal assistance services.

In this chapter, the thesis also discusses the findings of the survey in which students are asked about their understanding of their role in contributing to the community. The experience of interviewing clients consolidates and deepens students' commitment to contributing to the community, rather than changing them from believing to not believing that they have an obligation to contribute, or vice versa.

This chapter is published as Anna Cody, 'Interviewing Real Clients and the Ways It Deepens Students' Understandings of Legal Ethics' (2018) 21(1) *Legal Ethics* 46.

## **Chapter 7: Developing students' sense of autonomy, competence and purpose through a clinical component in ethics teaching**

Chapter 7 explores the motivation for students engaging in the practice of law. This draws from the documentary analysis outlined in chapter 2 on the significance of intrinsic motivation to lead students to engage deeply with the practice of law. It connects students' sense of autonomy and confidence in their own ability with their ongoing commitment to contribute meaningfully through their practice of law.

The chapter questions how effective a clinical component can be in teaching students autonomy and the impact it has on their confidence in their abilities to study law. It draws from a survey of applied legal ethics students who were surveyed both before and after engaging in a clinical component in which they interviewed clients. The findings of the survey are particularly notable for the impact that the experience has on building students' sense of identity as a law student and the impact it has on their overall confidence in their legal studies, not just their confidence in interviewing clients. As there have been multiple studies which identify the degree to which students' mental well-being and confidence are negatively impacted by studying law, this is an important finding concerning the ways in which students' confidence in themselves and their ability to study law can be strengthened during their law studies. The experience also builds on students' sense of autonomy, as they are responsible for interviewing a client. As well as building their confidence in interviewing, it also builds their confidence in continuing their law studies. For many of these students, the experience affirms their original reasons for studying law and renews a sense of purpose. The findings in this area – the connection with a sense of purpose – suggest the need for further research. Chapter 7 connects the sense of self, and confidence in self, with intrinsic motivation theory. Concepts of an ethical legal practitioner engage with the need to express self, and identity and values, through the exercise of legal practice. This relates to the discussion of what constitutes an ethical legal practitioner in chapters 5 and 6, as well as an understanding of the importance of reflection in chapter 4. It

also connects with a deeper exploration of concepts of self in lawyering, which are explored in chapter 8.

This chapter is published as Anna Cody, 'Developing Students' Sense of Autonomy, Competence and Purpose through a Clinical Component in Ethics Teaching' (2019) 29(1) *Legal Education Review* 1.

## **Chapter 8: Changing law students' ideas about ability/disability – Can we? Should we? How would we?**

Now that the concepts of ethical legal practice and how they can be learnt and enlivened for students through a clinical legal component have been explored, in chapter 8 the thesis suggests ways of teaching students about their privilege and professional identity through disability issues. Chapter 7 looked at expression of self through lawyering, specifically through interviewing clients, and how this connects with a greater sense of autonomy and confidence, drawing from intrinsic motivation theory. Chapter 8 examines self in lawyering in another way, through facets of identity. It delves deeply into one area of identity and privilege in the practice of lawyering. The chapter draws from the practice of two clinics in Mexico and Australia, which enriches the study with elements of a comparative analysis. This gives the findings greater weight and portability across international clinics. The chapter moves the focus of the thesis to a specific area of identity/privilege and disadvantage through the lens of ability/disability.

Teaching disability issues calls on students to reflect on their values and attitudes, and their ability and disability. This chapter focuses on elective clinical courses, which provide greater scope for a deeper understanding of identity, values and prejudice, seen through the lens of ability/disability. Understanding power and identity is a common theme throughout all of the chapters and links clearly to teaching students how to be reflective, justice-focused lawyers. This chapter applies that understanding to the area of ability/disability.

The chapter focuses on the design of clinics working with people with disability for a number of reasons. As the course is an elective one, there is greater opportunity for reflection and

learning-from-practice over a semester, in comparison to a short-exposure experience. The chapter focuses on the lessons to be learned from working with clients with disability, the insights student gain by making connections between their identities and the identities of others (relating to race, gender, class, disability and sexuality), and the implications of related insights to their future work as lawyers. While there is extensive scholarship on how to incorporate training around cultural competency and using critical race theory,<sup>8</sup> for example, to teach students about working with culturally diverse groups and how concepts of 'race' influence students/clients and the law, there is less scholarship around teaching disability issues effectively. This thesis contributes to this scholarship to deepen and further the learnings about teaching disability issues to students. As the number of people with disability increases, it is a growing area in which lawyers need to be equipped to work sensitively and effectively. Additionally, as there are fewer clinics which focus on teaching disability issues, insights that lead to possible models for teaching these issues are valuable. As both the clinic at Kingsford Legal Centre and the Human Rights Program clinic at the Universidad Nacional Autónoma de México teach about disability issues, it is possible to draw comparative lessons which have the potential for shaping other disability rights clinics internationally. Another reason for focusing on clinics which teach disability issues is that, with the signing of the Convention on the Rights of Persons with Disabilities, it is timely to examine how to better teach issues of disability<sup>9</sup> within clinics. These issues are highlighted within chapter 8, and in chapter 9 some of the underlying findings are emphasised.

Another reason to examine disability rights clinics is that working with clients with disability gives students grounded understandings of concepts of 'justice'. It enlivens and enriches the concept of 'justice' within the law as experienced by clients with disability. Students have the

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<sup>8</sup> Christine Zuni Cruz, 'On the Road Back In: Community Lawyering in Indigenous Communities' (1999) 5 *Clinical Law Review* 557; Sameer Ashar, 'Law Clinics and Collective Mobilization' (2008) 14 *Clinical Law Review* 355; Gerald P Lopez, 'Living and Lawyering Rebelliously' (2005) 73 *Fordham Law Review* 2041.

<sup>9</sup> Robert D Dinerstein, "'Every Picture Tells a Story, Don't It?': The Complex Role of Narratives in Disability Cases' (2007) 15(1) *Narrative* 40, 40–57.

opportunity to gain a deeper understanding of the sorts of barriers that clients with disability face when going about their daily lives, as well as how the law interacts with them. The lack of awareness of the issues faced by people with disability is dealt with in a clinic dealing with disability issues, as clients relate their experiences of attempting to access services and education, work, have relationships and children, and generally live their lives. A disability rights clinic provides an opportunity to critically assess concepts of the neutrality and objectivity of law as students begin to reflect on how clients with disability present their cases<sup>10</sup> or deal with the legal system. It brings together the importance of reflection skills and grounded concepts of justice.

Analysing in detail and exploring how to teach clinical law students about disability issues provides an entry point to discussing other values, attitudes and ways of being in the world. There are many connections between ability/disability and race, gender, sexual identity and gender identity. This provides a mechanism for examining how to teach about values and identity. These can all be defined as 'ethical' issues, as students' and lawyers' values and attitudes will influence how and where they decide to be lawyers. Understandings of what it means to be a professional and models of ethical legal practice are integral to working with diverse clients. A deeper understanding of what it means to be an ethical lawyer and how law schools teach students about ethical legal practice connects with teaching about disability issues.

This chapter is published as Anna Cody, 'Changing Law Students' Ideas about Dis/Ability: Can We? Should We? How Would We?' (2018) 25(4) *Journal of Law and Medicine* 1056.

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<sup>10</sup> Ibid.

## **Chapter 9: Conclusion**

In chapter 9, the various themes of the thesis are drawn together and connections are made between each of the research questions. Some of the unresolved questions which were discussed in the literature review in chapter 2 are identified, along with the ways in which this research answers some key questions.

Chapter 9 reviews the centrality of ‘reflection’ as a founding skill and ability which students need in order to be able to be ethical lawyers who are justice-focused. This is because the skill of reflection integrates contemplative and critical thinking, which enables students to understand and transform the law and the legal system to make it fairer. Chapter 9 also recognises the importance of reflection as the means by which students – future lawyers – are able to look inwards, at their identity, their privilege and their values. All of these elements form part of an ethical lawyer. The three-step process of reflection – experience-reflection-exploration – is essential to becoming an ethical lawyer.

Chapter 9 situates the discussion on reflection within the debate in the scholarship on whether the purpose of clinical legal education is to teach skills or justice. It makes the contribution that this is a false dichotomy and that, in fact, teaching reflection contributes to both skills and justice. This theme connects with the purpose and functioning of teaching interviewing, which is also discussed in chapters 5, 6 and 7. While a student learns to interview – how to ask questions, probe pertinent issues, and take notes – they are also taught about identity, power relationships, and ways of relating to a client by recognising their complex identity and life experience. It reviews how to teach students reflection skills.

In chapter 9, the role of a clinical component within the teaching of legal ethics is reviewed. The discussion refers to the definition of an ethical legal practitioner, as developed in chapter 5. This connects with the capacity to reflect, tying together reflection skills and ethical practice. The chapter discusses the data created through the survey of legal ethics students, along with

students' understandings of what constitutes 'ethical issues' and 'ethical legal practice', in light of the overall themes of 'reflection', 'justice-focused' and 'the role of clinical legal education'.

Another crucial theme of the thesis – that of 'identity, values and privilege' – is drawn out in chapter 9. This is connected through the discussion on teaching disability/ability in chapter 8, as well as the developing sense of confidence and autonomy through engaging in client interviewing, as discussed in chapter 7. Teaching students about identity/values/privilege and the ways this connects to being 'justice-focused' is reviewed in chapter 9. The thesis finds that students grow in confidence through their experience of interviewing clients, which in turn heightens their intrinsic motivation and adds to their sense of purpose. This grows the connectedness between their identity and expression of self through lawyering, rather than separate from lawyering. Ethical legal practice is therefore found to connect to an awareness of self and values, rather than being divorced from self. It is therefore vital to have a deeper understanding of all facets of identity, in this thesis explored through the lens of ability/disability.

The relationship between identity, values and privilege and a sense of 'diversity', and its relationship to a rich understanding of 'justice', is also clarified in chapter 9. Finally, in chapter 9, the thesis discusses the range of clinical legal education models and clinic types and the ways in which they may contribute to creating reflective, justice-focused lawyers. There are many other forms of clinics – such as policy-based clinics, community education clinics, and economic development clinics – and these are reviewed with a focus on the ways in which they teach students to become reflective and justice-focused. This thesis focuses on two types of clinical experience: a short clinical component within a legal ethics subject and a clinic which teaches students about working with clients with disability.

The thesis is connected by three overarching research questions. It is a thesis by publication, consisting of nine chapters, five of which constitute a series of published articles. Chapters 4, 5, 6, 7 and 8 have been individually published as articles in different journals. Because they are

standalone articles, these chapters contain unavoidable repetition and no cross-referencing. The connecting chapters are chapter 1, which introduces the thesis; chapter 2, which contains the literature review; chapter 3, which explains the methodology; and chapter 9, which concludes the thesis by drawing out its themes.

## **Conclusion**

I began with questions arising out of extended experience in clinical legal education and a commitment to using education as a means for social change. Having practised and taught in the area of legal ethics and community clinical legal education, I was keen to explore how concepts of improving the justice system, its equality and its accessibility can be taught and understood through clinical legal education. While having some understanding of the importance of reflection as a skill, I was eager to examine the connections between this and ethical lawyering. I wanted to examine how each person – through an awareness of their identity, values and privilege – could work towards justice, or entrench injustice. The exploration of teaching students to be justice-focused therefore necessitated teaching them to be inward looking, to reflect on who they are and how they lawyer. Justice became about who they are, and how they lawyer within an ethical framework. In order to gain a deeper understanding of the ways in which these factors operated, I undertook to examine particular aspects of clinical legal education with a critical gaze and informed by students themselves.

I broadly explored the concept of reflection and its relationship with ethical legal practice in chapter 4. I then used a documentary analysis to gain a deeper understanding of ethical practice and models for understanding ethical legal practice within clinical legal education. Having gained a deeper understanding of the nature of reflection and distinct ways of teaching it, I used a range of methods to more deeply understand how engaging in clinical practice – specifically, interviewing clients – impacts on students' understandings of what makes an ethical lawyer. These results are discussed in chapter 6. As well as examining how it shapes students' understanding of ethics, I also wanted to analyse whether or not a clinical experience influenced

their later studies and their sense of confidence. This is discussed in chapter 7. Having looked at the ways in which reflection and concepts of ethical lawyering are shaped through learning in a clinic, I also wanted to understand how a fuller understanding of justice in facets of identity could be taught through a clinic. The aspect of identity which is examined in chapter 8 is ability/disability.

The thesis finds that clinical legal education – both through a short experience of interviewing, and through an extended clinical experience learning about working with clients with disability – is effective in contributing to developing reflective, justice-focused lawyers. Teaching students to be reflective is pivotal to their ability to examine the functioning of the law and the legal system, and also their own identity as a lawyer. Through a deeper understanding of self, identity, privilege and values, lawyers can contribute to an ethical legal practice in which systemic justice issues can be addressed.

## **Chapter 2:**

### **Thesis context and literature review**

This chapter provides an overview of some of the key concepts which are relevant to this thesis. As this is a thesis by publication, each of chapters 4, 5, 6, 7 and 8 has a detailed analysis of the relevant literature, as each is a standalone published article. This chapter has two major parts. The first part discusses some of the fundamental concepts of the thesis which are necessary for the later discussion. The second part provides an overall framing of those more detailed analyses which are explored in greater depth in the following chapters. The fundamental concepts discussed in the first part are clinical legal education; the Australian approach to clinical legal education; and the aims and goals of clinics and their role in teaching skills and justice. The part also discusses concepts of justice within clinical scholarship and proposes a definition for use within the thesis. The chapter then moves to a discussion about how legal educators can teach students to be more justice-oriented within clinical legal education and, finally, the range of clinics and clinical components which teach students about justice.

The second part of the chapter introduces the specific research questions, along with the relevant scholarship. The issues which are discussed include how students learn about reflection in clinical legal education and the significance of the concept of a 'disorienting moment' in teaching reflection skills. Reflection skills are essential to clinical legal education, which leads into a discussion of enriching concepts of legal ethics with the importance of reflection and concepts of justice. Ethics are more than rules and are defined to include the responsibility to contribute to the community and engage in continuing reflection. The role of clinics in ethics teaching is introduced, along with the significance of concepts of autonomy, mastery and purpose within ethics teaching. Intrinsic motivation theory is introduced to demonstrate the importance of self within lawyering. Looking at identity in lawyering leads to a discussion of the various facets of identity and their significance in lawyering. The role of identity, values and privilege is introduced through the lens of ability/disability.

Each of these concepts is relevant to the central concern of this research: the role of clinical legal education in teaching students to become reflective, justice-focused lawyers.

## **Fundamental concepts**

### **What is clinical education?**

Teaching law students in a clinical rather than traditional classroom environment<sup>11</sup> is a methodology which has been in use in the United States since the early 20th century.<sup>12</sup> It gained greater impetus in Australia, the United Kingdom and Canada in the 1960s and 70s. Clinical legal education has thus been well established in Australia over the last 50–60 years.

It is generally agreed internationally<sup>13</sup> that clinical legal education is a means of teaching law which engages students in the practice of law in an academic context. Students are taught how to learn from experience in a learning cycle of concrete experience, active experimentation, abstract conceptualisation and reflective observation.<sup>14</sup> This clinical process relies on intensive supervision. Clinics range from clinical components within substantive law courses,<sup>15</sup> to in-house clinics (which are either wholly or substantially funded by law faculties and are for student learning), and agency clinics and externships (where students are placed in an external

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<sup>11</sup> Clinical courses generally include a classroom component in which students must participate, alongside the work within a legal centre or other organisation. One cannot therefore refer to clinical education *or* classroom teaching, as clinical education incorporates classroom teaching in addition to intensive supervision of students where they are responsible for legal work within a legal environment.

<sup>12</sup> Jeff Giddings et al, 'The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada and Australia' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011).

<sup>13</sup> David McQuoid-Mason, Ernest Ojukwu and George Mukundi Wachira, 'Clinical Legal Education in Africa: Legal Education and Community Service' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011). See generally part 1, 'The Global Reach of Clinical Legal Education' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011).

<sup>14</sup> David Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (Prentice Hall, 1984).

<sup>15</sup> See Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013).

agency and are assessed by the university with input from the placement). The experience relies on a student being responsible<sup>16</sup> for legal work for clients or organisations; learning to think critically about the law, the legal system, and clients; and learning legal skills.

However, the variety of clinical legal education endeavours internationally indicates that it is a dynamic pedagogy.<sup>17</sup> New forms continue to be developed, especially in the externship/internship arena.<sup>18</sup> Additionally, there is a growing recognition that clinical legal education endeavours ideally occur at all stages of a law degree and are integrated.<sup>19</sup> An integrated approach to clinical legal education ensures that students have a clinical component within a first-year subject and then throughout their degree. Their initial experiences of clinical legal education are further developed and the theory they learn about an issue or area of law is deepened with clinical experiences.

The integration of clinical legal education endeavours implies that experiential methodology is used in what were traditionally seen as purely classroom-taught law subjects, as well as in explicitly clinical courses. For example, a course introducing students to the legal system might include a visit to the local court to experience the bulk of legal problems being dealt with at that level. An elective course in wills and succession might involve a clinical component of drafting a

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<sup>16</sup> Students take responsibility for their decisions and their supervisors help them to reflect on their experiences. See David F Chavkin, 'Experiential Learning: A Critical Element of Legal Education in China (and Elsewhere)' (2009) 22(3) *Pacific McGeorge Global Business and Development Law Journal* 3, 17.

<sup>17</sup> Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013).

<sup>18</sup> See the research of Evans et al, which identifies the growth area in clinical legal education as being in internship courses: Evans, Adrian et al, 'Best Practices: Australian Clinical Legal Education' (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013).

<sup>19</sup> Jeff Giddings, *Promoting Justice through Clinical Legal Education* (Justice Press, 2013); Donald Nicolson, 'Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice' (2013) 16(1) *Legal Ethics* 36; Nigel Duncan, 'Ethical Practice and Clinical Legal Education' (2005) 7 *International Journal of Clinical Legal Education* 7.

will for a real client. And, finally, elective courses available to students may include clinical courses such as a human rights clinic<sup>20</sup> or community education clinic.

The part of the definition of clinical legal education endeavours which is contested relates to the use of simulation and whether or not the legal work that students engage in must be for 'real' clients. All accept the significant role of simulation<sup>21</sup> within education practice. Some see it as preparing students for clinical work and thus within a spectrum; others see it as clinical work itself, as it simulates a student's experience with a client. Internationally, there continues to be much discussion about the role and function of clinical legal education.<sup>22</sup>

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<sup>20</sup> Kingsford Legal Centre, *Clinical Legal Education Guide: Your Guide to CLE Courses Offered by Australian Universities in 2019/20* (2019) <<http://www.klc.unsw.edu.au/sites/klc.unsw.edu.au/files/2924%20CLE%20guide-WEB.pdf>>.

<sup>21</sup> James Moliterno, Plenary Presentation (International Journal of Clinical Legal Education Conference, Olomouc, Czech Republic, July 2014); Nigel Duncan, 'Ethical Practice and Clinical Legal Education' (2005) 7 *International Journal of Clinical Legal Education* 7.

<sup>22</sup> Fran Quigley, 'Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics' (1995) 2 *Clinical Law Review* 37; Linda Smith, 'Designing an Extern Clinical Program: Or As You Sow, So Shall You Reap' (1998) 5 *Clinical Law Review* 527, 528. See, eg, American Bar Association, 'Legal Education and Professional Development – An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap' (American Bar Association, 1992) (MacCrate report); Roy Stuckey et al, *Best Practices for Legal Education: A Vision and a Road Map* (Clinical Legal Education Association, 2007); William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Foundation for the Advancement of Teaching, 2007) (Carnegie report); Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (2013) 47(3) *The Law Teacher* 421; Adrian Evans, 'Client Group Activism and Student Moral Development in Clinical Legal Education' (1999) 10 *Legal Education Review* 179; Richard Moorhead, 'The Ethical Identity of Law Students' (2016) 23(3) *International Journal of the Legal Profession* 235; Mary Anne Noone and Judith Dickson, 'Teaching towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers' (2001) 4(2) *Legal Ethics* 127; Julian Webb, 'Inventing the Good: A Prospectus for Clinical Education and the Teaching of Legal Ethics in England' (1996) 30(3) *The Law Teacher* 270; Carolyn Grose, 'Beyond Skills Training, Revisited: The Clinical Education Spiral' (2013) 19 *Clinical Law Review* 489, 493. See also a critique of the Carnegie Foundation report in Anthony Alfieri, 'Against Practice' (2009) 107 *Michigan Law Review* 913, 1073; Leah Wortham, Catherine Klein and Beryl Blaustone, 'Autonomy-Mastery-Purpose: Structuring Clinical Courses to Enhance These Critical Educational Goals' (2012) 18 *International Journal of Clinical Legal Education* 105, 113; Philip Schrag, 'Constructing a Clinic' (1996) 3 *Clinical Law Review* 175, 180–85. See also Peter Hoffman, 'Clinical Scholarship and Skills Training' (1994) 1 *Clinical Law Review* 93; Adam Babich, 'The Apolitical Clinic' (2004) 22 *Tulane Lawyer* 10. See, eg, Jon Dubin, 'Clinical Design for Social Justice imperatives' (1998) 51 *SMU Law Review* 1461; Jane H Aiken, 'The Clinical Mission of Justice Readiness' (2012) 32(2) *Boston College Journal of Law and Social Justice* 231; Jane H Aiken and Stephen Wizner, 'Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice' (2004) 73 *Fordham Law Review* 997; Margaret Barry, Jon Dubin and Peter Joy, 'Clinical Education for This Millennium: The Third Wave' (2000) 7 *Clinical Law Review* 1; Shuvro Prosun Parker, 'Empowering the Underprivileged: The Social Justice Mission for Clinical Legal

Many clinics around the world have as one of their goals teaching students about the functioning of the law and the legal system from the perspective of disadvantaged clients. Some see their role as being more utilitarian, providing skills training and making graduates ‘work ready’ and able to pick up new abilities and skills in an ever-changing workplace with advances in technology.<sup>23</sup> Others emphasise the role of teachers as also teaching values and ethics,<sup>24</sup> contending that clinics do this regardless of whether they intend to or not. Some clinics do all of these things, teaching social justice, skills and ethics.<sup>25</sup> In Latin America, there is a strong tradition of teaching social justice through clinics<sup>26</sup> and a growing movement of disability rights clinics.<sup>27</sup> In this thesis, the phrase ‘clinical legal education’ is used to include clinical components within substantive courses, internship and externship courses, and in-house clinical courses, but not simulations. This is an inclusive definition of clinical legal education, with simulations being the only exclusion. This is because having some experience with ‘real clients’ is essential to a clinical experience. Simulations fall within the definition of experiential education, but ‘clinical’ connotes actual experience of the real world rather than simulated experience. This does not

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Education in India’ (2013) 19 *International Journal of Clinical Legal Education* 321; Lydia Bleasdale-Hill and Paul Wragg, ‘Models of Clinic and Their Value to Students, Universities and the Community in the post-2012 Era’ (2013) 19 *International Journal of Clinical Legal Education* 257, 267.

<sup>23</sup> For clinical teachers who focus on skills development, including simulation within the definition of clinical legal education is logical.

<sup>24</sup> Freire believes that the teaching of ethics is gaining in importance as society becomes less ethical: Paulo Freire, *Pedagogy of the Heart* (Bloomsbury Publishing, 1997) 313; Donald Nicolson, ‘Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice’ (2013) 16(1) *Legal Ethics* 36.

<sup>25</sup> Mary Anne Noone and Frank Bloch, ‘Legal Aid Origins of Clinical Legal Education’ in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011). See also Nigel Duncan and Susan Kay, ‘Addressing Lawyer Competence, Ethics and Professionalism’ in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011); Julian Webb, ‘Inventing the Good: A Prospectus for Clinical Education and the Teaching of Legal Ethics in England’ (1996) 30(3) *The Law Teacher* 270; Donald Nicolson, ‘Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice’ (2013) 16(1) *Legal Ethics* 36.

<sup>26</sup> Erika Castro-Buitrago et al, ‘Clinical Legal Education in Latin America: Toward Public Interest’ in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011).

<sup>27</sup> Two of the scheduled workshops in the Global Alliance for Justice Education 2015 conference focus on disability rights clinics from Latin America: see Global Alliance for Justice Education, ‘8th Worldwide Conference’ (Web Page, 2015) <<https://resources.gaje.org/conferences/8th-worldwide-conference/>>. The Open Society Foundations has funded a network of disability rights clinics in Latin America and Africa.

negate the value of simulation for education purposes and as part of the continuum towards clinical legal education. This thesis discusses a clinical component and elective courses with real clients.

In the next section, the chapter explores the specific characteristics of Australian clinical legal education.

### **The Australian approach to clinics**

In Australia, clinical legal education was established with dual goals: community service and educating law students.<sup>28</sup> A focus on access to justice and the need in the community for legal services triggered the early initiatives in clinical legal education.<sup>29</sup> 'A symbiotic relationship [with] legal aid agencies, in particular community legal centres ... with a deep commitment to access to justice'<sup>30</sup> has characterised the development of clinical legal education endeavours in Australia. These programs are still commonly situated within community legal centres and other law-related agencies. Community legal centres<sup>31</sup> are community-based centres which provide free legal advice and representation to their communities, engage in community education about the law, identify law reform needs, and engage in reform of the law and the legal system. These centres and agencies are often funded by government and their 'mission' of improving access to justice is typically replicated to varying degrees by their hosted clinical courses. In this

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<sup>28</sup> Jeff Giddings, 'Clinical Legal Education in Australia: A Historical Perspective' (2003) 3 *International Journal of Legal Education* 3, 7; Mary Anne Noone, 'Australian Community Legal Centres – the University Connection' in Jeremy Cooper and Louise Trubek (eds), *Educating for Justice: Social Values and Legal Education* (Ashgate, 1997). See also Anna Cody, 'Clinical Programs in Community Legal Centres, the Australian Approach' (2011) 4 *Spanish Journal Education and Law Review*.

<sup>29</sup> Jeff Giddings et al, 'The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada and Australia' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011). See also Mary Anne Noone and Frank Bloch, 'Legal Aid Origins of Clinical Legal Education' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011).

<sup>30</sup> Jeff Giddings, 'Clinical Legal Education in Australia: A Historical Perspective' (2003) 3 *International Journal of Legal Education* 3, 23; Mary Anne Noone, 'Australian Community Legal Centres – the University Connection' in Jeremy Cooper and Louise Trubek (eds), *Educating for Justice: Social Values and Legal Education* (Ashgate, 1997).

<sup>31</sup> See the homepage of the Community Legal Centres Australia website at <<https://clcs.org.au/>>.

context, it is now very common in Australia for clinical courses to seek to include social justice objectives and to promote and develop pro bono awareness in clinical graduates.

### The aims and goals of clinics and teaching skills and 'justice'

One of the ongoing debates<sup>32</sup> within clinical legal education scholarship has been the role of teaching skills to students. This issue is framed as a question of teaching only skills, rather than teaching students about how to focus on justice issues. Some have argued that it is the role of law schools not to teach about social justice, but rather to prepare graduates for legal practice.<sup>33</sup> Within the United States, various reports on legal education have influenced the development of the structure and content of law degrees. One of the earlier of these was the

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<sup>32</sup> Fran Quigley, 'Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics' (1995) 2 *Clinical Law Review* 37; Linda Smith, 'Designing an Extern Clinical Program: Or As You Sow, So Shall You Reap' (1998) 5 *Clinical Law Review* 527, 528. See, eg, American Bar Association, 'Legal Education and Professional Development – An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap' (American Bar Association, 1992); Roy Stuckey et al, *Best Practices for Legal Education: A Vision and a Road Map* (Clinical Legal Education Association, 2007); William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Foundation for the Advancement of Teaching, 2007); Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (2013) 47(3) *The Law Teacher* 421; Carolyn Grose, 'Beyond Skills Training, Revisited: The Clinical Education Spiral' (2013) 19 *Clinical Law Review* 489, 493. See also a critique of the Carnegie Foundation report in Anthony Alfieri, 'Against Practice' (2009) 107 *Michigan Law Review* 913, 1073; Leah Wortham, Catherine Klein and Beryl Blaustone, 'Autonomy-Mastery-Purpose: Structuring Clinical Courses to Enhance These Critical Educational Goals' (2012) 18 *International Journal of Clinical Legal Education* 105, 113; Philip Schrag, 'Constructing a Clinic' (1996) 3 *Clinical Law Review* 175, 180–85. See also Peter Hoffman, 'Clinical Scholarship and Skills Training' (1994) 1 *Clinical Law Review* 93; JP Ogilvy and Karen Czapanskiy 'Clinical Legal Education: An Annotated Bibliography (Second Edition)' (2001) Special Issue 1 *Clinical Law Review*; Adam Babich, 'The Apolitical Clinic' (2004) 22 *Tulane Lawyer* 10. See, eg, Jon Dubin, 'Clinical Design for Social Justice imperatives' (1998) 51 *SMU Law Review* 1461; Jane H Aiken, 'The Clinical Mission of Justice Readiness' (2012) 32(2) *Boston College Journal of Law and Social Justice* 231; Jane H Aiken and Stephen Wizner, 'Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice' (2004) 73 *Fordham Law Review* 997; Margaret Barry, Jon Dubin and Peter Joy, 'Clinical Education for This Millennium: The Third Wave' (2000) 7 *Clinical Law Review* 1; Shuvro Prosun Parker, 'Empowering the Underprivileged: The Social Justice Mission for Clinical Legal Education in India' (2013) 19 *International Journal of Clinical Legal Education* 321; Lydia Bleasdale-Hill and Paul Wragg, 'Models of Clinic and Their Value to Students, Universities and the Community in the post-2012 Era' (2013) 19 *International Journal of Clinical Legal Education* 257, 267.

<sup>33</sup> Praveen Kosuri, 'Losing My Religion: The Place of Social Justice in Clinical Legal Education' (2012) 32 *Boston College Journal of Law & Social Justice* 331.

MacCrate report,<sup>34</sup> which recognised the limits of traditional law teaching and recommended a greater emphasis on skills training. Sponsored by the American Bar Association, the MacCrate report was a response to criticisms of lawyers<sup>35</sup> who were emerging from law school without the requisite level of skills or value instruction. The emphasis of the MacCrate report differed to some degree from that of the earlier Ford Foundation initiative, referred to as the CLEPR<sup>36</sup> report, which analysed legal education from the perspective of how legal ethics were being taught. The CLEPR report suggested using law school clinics as a means of increasing access to justice, as well as enhancing student skills and teaching ethics.<sup>37</sup> Both these enquiries into the function and purpose of legal education are now relatively old, but they were influential in shaping legal education and fostering the growth of clinical legal education in the United States. More recently, the Carnegie report<sup>38</sup> into legal education incorporated the importance of teaching values, ethics and skills within a law degree.

These discussions are very location-specific, as the development of law degrees in the United States is distinct from legal education in Australia. As law in the United States is a graduate degree, after which most students enter the practice of law, law degrees have a heavy emphasis on skills training. In Australia, a law degree is often commenced immediately after high school, rather than being a graduate degree program. Some students in Australia also engage in law as a general education,<sup>39</sup> rather than as specific training for legal practice. In Australia, most

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<sup>34</sup> American Bar Association, 'Legal Education and Professional Development – An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap' (American Bar Association, 1992).

<sup>35</sup> John J Costonis, 'The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education' (1993) 43(2) *Journal of Legal Education* 157.

<sup>36</sup> Council on Legal Education for Professional Responsibility. See JP Ogilvy, 'Celebrating CLEPR's 40th Anniversary: The Early Development of the Clinical Legal Education and Legal Ethics Instruction in U.S. Law Schools' (2009) 16 *Clinical Law Review* 1.

<sup>37</sup> Ibid.

<sup>38</sup> William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Foundation for the Advancement of Teaching, 2007).

<sup>39</sup> In Australia, up to one-third of law graduates do not practise law, but rather use it in their work in business, policy, social sciences or some other field. Council of Australian Law Deans, 'Legal Education in Australia' (Web Page) <<https://cald.asn.au/slia/legal-education/>>.

jurisdictions require law students to complete an additional practical legal training course before being able to be admitted as a solicitor.<sup>40</sup> Practical legal training courses teach students some basic skills which they will need for legal practice, as well as areas of knowledge such as managing a trust account. There is no equivalent to this requirement in the United States, which explains the focus on the role of clinics as the subjects which teach students skills. Indeed, in the United States, many clinics will teach ‘interviewing, case planning, investigating facts, counselling, legal writing, witness examination, and oral argument’<sup>41</sup> as basic skills development. Many clinicians in the United States have argued, however, that graduates need to be taught to be ‘justice ready’,<sup>42</sup> rather than focusing only on teaching them to be ‘practice ready’. As the history of legal education is distinct in Australia, this body of scholarship provides a backdrop to discussions about whether or not the purpose of legal education and clinics is to teach skills or justice.

This thesis examines whether providing law students with a clinical component of interviewing clients can also provide them with a greater understanding of ethical decision-making and of their role as a future lawyer in achieving justice. It therefore combines skills teaching with justice teaching, as the two cannot be separated.

The thesis builds on existing scholarship<sup>43</sup> about the importance of teaching skills and justice. It is founded on the base assumption that clinics *should* teach justice issues. The thesis asks, in

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<sup>40</sup> Legal Profession Uniform Law (NSW) s 17(1)(b).

<sup>41</sup> Philip Schrag, ‘Constructing a Clinic’ (1996) 3 *Clinical Law Review* 175, 180–85. See also Peter Hoffman, ‘Clinical Scholarship and Skills Training’ (1994) 1 *Clinical Law Review* 93; Adam Babich, ‘The Apolitical Clinic’ (2004) 22 *Tulane Lawyer* 10.

<sup>42</sup> Jane H Aiken, ‘The Clinical Mission of Justice Readiness’ (2012) 32(2) *Boston College Journal of Law and Social Justice* 231.

<sup>43</sup> As noted above, much of the scholarship in Australia notes the connection between the access to justice purposes of clinics alongside skills teaching. Jeff Giddings, ‘Clinical Legal Education in Australia: A Historical Perspective’ (2003) 3 *International Journal of Legal Education* 3, 7; Mary Anne Noone, ‘Australian Community Legal Centres – the University Connection’ in Jeremy Cooper and Louise Trubek (eds), *Educating for Justice: Social Values and Legal Education* (Ashgate, 1997). See also Anna Cody, ‘Clinical Programs in Community Legal Centres, the Australian Approach’ (2011) 4 *Spanish Journal Education and Law Review*. Jeff Giddings et al, ‘The First Wave of

specific instances, how the methodology of clinical legal education can be used to teach students to be reflective, justice-focused lawyers.

In order to clarify any discussion of teaching justice issues, an understanding of ‘what is justice’ in clinical legal education is required. In different settings, justice can mean different things.

### **Concepts of justice within clinical scholarship**

Justice in a clinical legal education setting has a longstanding history. The origins of clinics in the United States were rooted in a recognition of the problems of teaching law only through a lecture mode<sup>44</sup> without connection to the practice of law, as well as a commitment to providing legal services to the disadvantaged.<sup>45</sup> And, internationally, the development of clinical legal education has gone hand in hand with attempts to make the law and the legal system more just.<sup>46</sup>

The clinical literature reveals several different conceptions of justice, ranging from ‘a simple metaprinciple’,<sup>47</sup> to challenging power in institutions, to an exploration of privilege, to understandings of diversity. Some define it as ‘the healthy human treating others as he or she would wish to be treated’.<sup>48</sup> This is a fairly limited and individually focused definition and does

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Modern Clinical Legal Education: The United States, Britain, Canada and Australia’ in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011). See also Mary Anne Noone and Frank Bloch, ‘Legal Aid Origins of Clinical Legal Education’ in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011). Donald Nicolson, ‘Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice’ (2013) 16(1) *Legal Ethics* 36.

<sup>44</sup> Jerome Frank, ‘Why Not a Clinical Lawyer School?’ (1933) 81 *University of Pennsylvania Law Review* 907.

<sup>45</sup> Louise Trubek, ‘U.S. Legal Education and Legal Services for the Indigent: A Historical and Personal Perspective’ (1994) 5(2) *Maryland Journal of Contemporary Legal Issues* 381. See also Mary Anne Noone and Frank Bloch, ‘Legal Aid Origins of Clinical Legal Education’ in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011).

<sup>46</sup> Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011).

<sup>47</sup> David Barnhizer, ‘The Justice Mission of American Law Schools’ (1992) 40 *Cleveland State Law Review* 285, 291.

<sup>48</sup> *Ibid*, 291.

not deal with the institutional ways in which injustice continues. The understanding of ‘justice’ is expanded further if the definition also discusses the role of clinics and clinical teachers as being that of ‘speaking truth to power’.<sup>49</sup> This thesis explores the premise that teaching about justice also requires an exploration of privilege<sup>50</sup> and identity and how these concepts shape the law and the legal system (see chapters 4 and 8). Through analysing concepts of ability and disability, or values and attitudes, privilege is explicitly a part of the analysis. The topics of privilege and identity are explored in the chapters on teaching students about reflection and how to reflect (chapter 4) and about issues of ability and disability (chapter 8).

For this thesis, ‘justice’ is defined specifically by the researcher. Justice in law means that all should be able to both gain access to, and form, the law equally. This conception includes those who have traditionally not been able to use the legal system because of its cost, its inaccessibility, and its concepts and structures – including notions of objectivity. ‘Access to justice’ is a phrase which used to mean, at its simplest, access to courts and lawyers. However, access to justice now encompasses much wider concepts, including ‘developing approaches for the early resolution of legal problems, making dispute resolution and the justice system more accessible, and devoting new resources to increasing legal literacy and legal capability, in addition to other approaches’.<sup>51</sup> So, at a base level, ‘access to justice’ means ordinary people and communities being able to know their legal rights within the law, recognise when they need

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<sup>49</sup> David Barnhizer, ‘The University Ideal and Clinical Legal Education’ (1990) 35 *New York Law School Law Review* 87, 124–25.

<sup>50</sup> Jerold Auerbach, ‘What Has the Teaching of Law to Do with Justice?’ (1978) 53 *New York University Law Review* 457, cited in bell hooks, *Yearning: Race, Gender, and Cultural Politics* (Routledge Press, 1990).

<sup>51</sup> Michele Leering, ‘Enhancing the Legal Profession’s Capacity for Innovation: The Promise of Reflective Practice and Action Research for Increasing Access to Justice’ (2017) 34 *Windsor Yearbook of Access to Justice* 189, 193. See also Pascoe Pleasence et al, ‘Reshaping Legal Assistance Services: Building on the Evidence Base: A Discussion Paper’ (Law and Justice Foundation of New South Wales, 2014); Hazel Genn, *Paths to Justice: What People Do and Think about Going to Law* (Hart Publishing, 1999); Prevention, Triage and Referral Working Group of the National Action Committee on Access to Justice in Civil and Family Matters, ‘Final Report: Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector’ (2013); Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee ‘Inquiry into Access to Justice’ (2009).

to see a lawyer, and be able to receive the advice and representation which they need.<sup>52</sup> It is not only about access to the legal system for disadvantaged groups. It builds on the recognition that not all people experience legal issues equally and, in fact, those who experience social disadvantage experience greater and more complex legal issues.<sup>53</sup> In a global review of recent national legal needs surveys, it was identified that elements of disadvantage – such as ill-health/disability, single parenthood and unemployment – are routinely found to be associated with the experience of legal problems.<sup>54</sup> A fuller understanding of access to justice creates solutions to the differing levels of access to justice experienced by different groups in society, such as designing health justice partnerships<sup>55</sup> or providing Indigenous field officers.<sup>56</sup>

A fuller understanding of ‘justice’ also means the ability of all groups, and members of groups, within the community – particularly women; people from culturally and linguistically diverse communities; Indigenous peoples; people with disability; lesbian, gay, transgender and intersex people; and people from low socio-economic backgrounds – to *shape* the law and the legal system so that they reflect their interests. Rather than the law and the legal system being used to reinforce existing power relations within society, they can be used to ensure the equality and dignity of all in the community in obtaining basic standards of living and the expression of

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<sup>52</sup> Prevention, Triage and Referral Working Group of the National Action Committee on Access to Justice in Civil and Family Matters, ‘Final Report: Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector’ (2013); Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee ‘Inquiry into Access to Justice’ (2009); Pascoe Pleasence et al, ‘Reshaping Legal Assistance Services: Building on the Evidence Base: A Discussion Paper’ (Law and Justice Foundation of New South Wales, 2014).

<sup>53</sup> Rebecca Sandefur, ‘The Importance of Doing Nothing: Everyday Problems and Responses of Inaction’ in Pascoe Pleasence, Alexy Buck and Nigel J Balmer (eds), *Transforming Lives: Law and Social Process* (The Stationery Office, 2007) 112–32; Pascoe Pleasence et al, ‘Reshaping Legal Assistance Services: Building on the Evidence Base: A Discussion Paper’ (Law and Justice Foundation of New South Wales, 2014).

<sup>54</sup> Pascoe Pleasence, Nigel J Balmer and Rebecca Sandefur, *Paths to Justice: A Past, Present and Future Roadmap* (UCL Centre for Empirical Legal Studies, 2013).

<sup>55</sup> Paula Galowitz et al, ‘Ethical Issues in Medical-Legal Partnership’ in Elizabeth Tobin Tyler et al (eds), *Poverty, Health and Law: Readings and Cases for Medical-Legal Partnership* (Carolina Academic Press, 2011).

<sup>56</sup> Fiona Allison et al, ‘Indigenous Legal Needs Project: NT Report’ (James Cook University, 2012).

individual and group identity.<sup>57</sup> This concept of law recognises the limitations of law – for example, in dealing with complex identity through incorporating concepts of intersectionality in anti-discrimination law,<sup>58</sup> or adequately recognising psychological harm in victims compensation law,<sup>59</sup> or addressing the wrongs of the Stolen Generations of Indigenous peoples removed from their families.<sup>60</sup> It suggests ways of changing the law and the legal system to make them more just and more representative of the varying interests of disadvantaged individuals and groups.<sup>61</sup>

Within a clinical legal education setting, students can be taught about their responsibility to contribute to creating a more just law and legal system through their experience of seeing how the law fails to be shaped by these various groups (for further discussion, see chapters 5, 6, 7

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<sup>57</sup> Amartya Sen, *The Idea of Justice* (Penguin, 2010); Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 1990); Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 140 *University of Chicago Legal Forum* 139; Fiona Allison et al, 'Indigenous Legal Needs Project: NT Report' (James Cook University, 2012); Chirs Cunneen and Melanie Schwartz, 'The Family and Civil Law Needs of Aboriginal People in New South Wales: Final Report' (University of NSW, 2008); Liz Curran, 'Solving Problems: A Strategic Approach – Examples, Processes & Strategies' (Legal Workshop, ANU College of Law, 2013); Alison Hannah, 'Exercising Rights as the Way to Social Inclusion' in John Grieve and Roger Howard (eds), *Communities, Social Inclusion and Crime* (Smith Institute, 2004); Martha C Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2000); Emily Grabham, 'Intersectionality: Traumatic Impressions' in Emily Grabham et al (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish, 2009); Beth Goldblatt, 'Intersectionality in International Anti-Discrimination Law: Addressing Poverty in Its Complexity' (2015) 21 *Australian Journal of Human Rights* 47.

<sup>58</sup> Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 140 *University of Chicago Legal Forum* 139; Emily Grabham et al (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish, 2009); Beth Goldblatt, 'Intersectionality in International Anti-Discrimination Law: Addressing Poverty in Its Complexity' (2015) 21 *Australian Journal of Human Rights* 47.

<sup>59</sup> Jane M Wangmann, 'DownUnderAllOver: Developments around the Country – NSW: Changes to Victims' Compensation' (2011) 36(1) *Alternative Law Journal* 64.

<sup>60</sup> Australian Human Rights Commission, 'Bringing Them Home Report: An Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families' (1997).

<sup>61</sup> Liz Curran, 'Solving Problems: A Strategic Approach – Examples, Processes & Strategies' (Legal Workshop, ANU College of Law, 2013); Alison Hannah, 'Exercising Rights as the Way to Social Inclusion' in John Grieve and Roger Howard (eds), *Communities, Social Inclusion and Crime* (Smith Institute, 2004).

and 8). This possibility is discussed in more depth below when addressing how we teach students to be reflective, justice-focused lawyers.

Clinical education enables ‘transformative experiential opportunities for exploring the meaning of justice and developing a personal sense of justice, through exposure to the impact of the legal system on subordinated persons and groups and through the deconstruction of power and privilege in the law’.<sup>62</sup> Clinics are unique in their form of law teaching about justice because of the ways in which they enable students to experience law, its flaws and its successes. As a student gets to know a client and understand some of the texture and depth of that person’s life, then they also see how the law, the student as a lawyer in training, and the legal system itself can either help, complicate or make more difficult the resolution of a client’s issue or issues. Through this process, the student gains complex understandings of whether and how the client is treated ‘justly’. While it is difficult to find an actual definition of ‘justice’ within the literature on clinical legal education, the understandings of ‘justice’ are implicit in the range of research through the discussion of methods to teach students about justice and the consideration of means to encourage students to be alert to contributing to its expression through law. Extracting from the literature, it is clear that working in a poverty law practice,<sup>63</sup> having individual interactions with clients, and analysing the place of lawyers within the community<sup>64</sup> all form a vital part of teaching and learning about the notion of justice.<sup>65</sup> Part of a concept of justice derives from working with people – including people with low incomes, people from diverse racial and cultural backgrounds, and people who have a disability or other

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<sup>62</sup> Jon Dubin, ‘Clinical Design for Social Justice Imperatives’ (1998) 51 *SMU Law Review* 1461, 1477.

<sup>63</sup> Juliet Brodie, ‘Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighbourhood-Based Community Lawyering Clinics’ (2009) 15(2) *Clinical Law Review* 333.

<sup>64</sup> Scott Cummings, ‘Mobilization Lawyering: Community Economic Development in the Figueroa Corridor’ in Austin Sarat and Stuart Scheingold (eds), *Cause Lawyers and Social Movements* (Stanford University Press, 2006); Sameer Ashar, ‘Law Clinics and Collective Mobilization’ (2008) 14 *Clinical Law Review* 355; Gerald P Lopez, *Rebellious Lawyering: One Chicano’s Vision of Progressive Law Practice* (Westview Press, 1992).

<sup>65</sup> Nina W Tarr, ‘Current Issues in Clinical Legal Education’ (1993) 37 *Howard Law Journal* 31; Jon Dubin, ‘Clinical Design for Social Justice Imperatives’ (1998) 51 *SMU Law Review* 1461.

barrier – who have not obtained justice either ‘inside or outside the legal system’.<sup>66</sup> But the concept of justice changes depending on the type of clinic and the emphasis given to how to achieve justice. This thesis examines how a short clinical component in which students interview disadvantaged clients as part of an applied legal ethics course influences students’ concepts of ethics, including their ideas of justice. The interrelationship between concepts of ethics and justice is explored through empirical work.

From this discussion, it is apparent that ‘justice’ means more than access to justice. It includes a deep sensitivity to the needs of disadvantaged groups within the community. This extends to working towards enabling these groups to shape the law so that it reflects their visions and interests. Within a clinical setting, it also means students gaining a deep understanding about their responsibility to contribute to the attainment of justice. Crucial to this aim is understanding how students learn about justice in clinics, as this influences their deepening understanding of what justice is. They also need to become conscious of their identity, values and privilege and how these may impact on their ability to lawyer effectively with diverse communities.

### **How clinics teach students to be more justice-oriented**

Within clinics, there is a range of ways in which justice issues have been taught. Some clinical teachers frame teaching about justice as teaching human rights and the ordinary work of clinics. They ground concepts of human rights<sup>67</sup> in the stories and experiences of clients and argue that clinics engage in human rights work on a daily basis. This makes the daily experiences of injustice experienced by clients of community legal centres and clinics both more mundane and more connected to larger human rights struggles. Or they focus on the importance of teaching

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<sup>66</sup> Robert D Dinerstein, ‘Clinical Scholarship and the Justice Mission’ (1992) 40 *Cleveland State Law Review* 469.

<sup>67</sup> Alison Vivian and Anna Copeland, ‘Human Rights as the Ordinary Work of Clinics’ in Bronwyn Naylor and Ross Hyams (eds), *Innovation in Clinical Legal Education: Educating Lawyers for the Future* (Legal Service Bulletin Cooperative, 2007) 34–41.

students to be not only ‘practice ready’<sup>68</sup> but also ‘justice ready’, alert to the justice implications of their lawyering. Or they examine, as discussed above, how students learn about justice through the process of ‘disorienting moments’,<sup>69</sup> or a deeper understanding of diversity.<sup>70</sup> These ways of understanding and theorising about the work of clinics are relevant to this thesis in that they demonstrate a range of ways of thinking about the work of clinics and how they prioritise different aspects of clinical teaching. As explored later in more detail (chapter 4), this thesis gives attention to justice issues in connection with clinic design and the significance of the methods for teaching reflection skills, as well as the integration of legal ethics instruction through a clinical component (chapters 5, 6 and 7) and teaching about identity and privilege through the lens of ability/disability (chapter 8).

### **The range of clinics and clinical components which teach ‘justice’**

Students in clinics engage in a variety of work. In community-based clinics,<sup>71</sup> they may represent individual clients in employment, discrimination, housing or family law matters. Or they may assist not-for-profit non-governmental organisations in establishing their legal structures.<sup>72</sup> If it is a policy clinic, students may work on law reform campaigns<sup>73</sup> or on drafting submissions to a United Nations body or representative. Other clinics train students to prepare and present easy-

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<sup>68</sup> Jane H Aiken, ‘The Clinical Mission of Justice Readiness’ (2012) 32(2) *Boston College Journal of Law and Social Justice* 231; Jane H Aiken and Stephen Wizner, ‘Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice’ (2004) 73 *Fordham Law Review* 997.

<sup>69</sup> Fran Quigley, ‘Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics’ (1995) 2 *Clinical Law Review* 37.

<sup>70</sup> Jon Dubin, ‘Clinical Design for Social Justice Imperatives’ (1998) 51 *SMU Law Review* 1461.

<sup>71</sup> Anna Cody and Barbara Schatz, ‘Community Law Clinics: Teaching Students, Working with Disadvantaged Communities’ in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011).

<sup>72</sup> *Ibid.*

<sup>73</sup> Les McCrimmon and Edward Santow, ‘Justice Education, Law Reform, and the Clinical Method’ in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011).

to-understand legal workshops to the community<sup>74</sup> or to service providers. Key common characteristics of clinics are that students are responsible for their legal work under close supervision by clinical teachers or supervisors, they participate in a concurrent formal class program while engaging in clinical work, and they have structured opportunities for reflecting on their work.<sup>75</sup> While engaging in legal work, there are many opportunities for students to experience profound learning about the law, the legal system and their role within it.

There is a broad group of clinicians who have examined how to include the perspectives and stories of individual clients as a way of teaching students about justice. The clinical teachers in these courses 'argue for the pedagogical and service value of law students spending time and practicing law in poor neighbourhoods near and around their law schools, and articulate the impact of such an experience on a student's legal education'.<sup>76</sup> Developing skills in 'community lawyering' is one way of learning about justice through clinics.

Some argue that systemic or policy-type clinics<sup>77</sup> or community economic development clinics<sup>78</sup> are an effective way of creating real change in communities. In law reform clinics, students gain

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<sup>74</sup> Richard Grimes et al, 'Street Law and Social Justice Education' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011); Ajay Pandey and Sheena Shukkur, 'Legal Literacy Projects: Clinical Experience of Empowering the Poor in India' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011).

<sup>75</sup> Frank Bloch and NR Madhava Menon, 'The Global Clinical Movement' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011); Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (2013) 47(3) *The Law Teacher* 421.

<sup>76</sup> Juliet Brodie, 'Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighbourhood-Based Community Lawyering Clinics' (2009) 15(2) *Clinical Law Review* 333.

<sup>77</sup> Les McCrimmon and Edward Santow, 'Justice Education, Law Reform, and the Clinical Method' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011) 214.

<sup>78</sup> Anna Cody and Barbara Schatz, 'Community Law Clinics: Teaching Students, Working with Disadvantaged Communities' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011); Scott Cummings, 'Mobilization Lawyering: Community Economic Development in the Figueroa Corridor' in Austin Sarat and Stuart Scheingold (eds), *Cause Lawyers and Social Movements* (Stanford University Press, 2006).

a ‘unique insight into the formulation of legal policy and the workings of government’<sup>79</sup> beyond the experience of an individual client. Or, in a community economic development clinic, students ‘handle transactional matters for nonprofits and small businesses’<sup>80</sup> and may or may not be limited to a particular community. The clinic chooses the clients and projects that it ‘thinks will best meet the needs of students and disadvantaged communities’.<sup>81</sup> This thesis does not analyse a law-reform-only clinic, or a community economic development clinic. However, the significance of systemic analysis of injustice is discussed in chapter 4, relating to teaching reflection skills, and also in chapter 8, relating to disability clinics, and is identified as an essential characteristic of any clinic which teaches justice issues. Specific law reform<sup>82</sup> or community economic development clinics<sup>83</sup> are another form of teaching students about their role in contributing to justice. These clinics are valid and important but their structures and goals are not discussed within this thesis.

Other clinics look specifically beyond models of lawyering to include how specific groups can have their particular legal needs met through a legal clinic.<sup>84</sup> Sometimes a clinic will focus on working with a particular cultural group, such as Hispanic Americans.<sup>85</sup> A clinic may also focus

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<sup>79</sup> Les McCrimmon and Edward Santow, ‘Justice Education, Law Reform, and the Clinical Method’ in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011) 214.

<sup>80</sup> Anna Cody and Barbara Schatz, ‘Community Law Clinics: Teaching Students, Working with Disadvantaged Communities’ in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011) 167.

<sup>81</sup> Ibid.

<sup>82</sup> Les McCrimmon and Edward Santow, ‘Justice Education, Law Reform, and the Clinical Method’ in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011) 214.

<sup>83</sup> Anna Cody and Barbara Schatz, ‘Community Law Clinics: Teaching Students, Working with Disadvantaged Communities’ in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011) 167.

<sup>84</sup> Sameer Ashar, ‘Law Clinics and Collective Mobilization’ (2008) 14 *Clinical Law Review* 355; Scott Cummings, ‘Mobilization Lawyering: Community Economic Development in the Figueroa Corridor’ in Austin Sarat and Stuart Scheingold (eds), *Cause Lawyers and Social Movements* (Stanford University Press, 2006).

<sup>85</sup> Ibid.

on women who have experienced domestic violence,<sup>86</sup> or clients with disability,<sup>87</sup> or clients from a culturally and linguistically diverse background,<sup>88</sup> or clients who are Indigenous.<sup>89</sup> Creating a clinic for a specific client or community group is another approach to teaching about justice to students. Such approaches have particular benefits and learnings that result from focusing on just one specific community or client group. What these clinics demonstrate is that there may be specific methodologies for working with communities, or particular client groups, which students need to learn. This is relevant to this thesis's discussion of working with clients with disability in either a specialist disability clinic or a clinic which teaches about working with clients with disability. This is explored in depth in chapter 8.

Having discussed the importance and range of ways in which clinics may teach their students about facets of justice through their legal practice, this chapter now focuses on the crucial role of teaching students reflection skills as one of the essential elements of clinical teaching.

## **Framing of the analysis**

### **How students learn about reflection and the role of 'disorienting moments'**

Kolb's formulation of the learning process comprises a cycle, which involves concrete experience, active experimentation, abstract conceptualisation and reflective observation.<sup>90</sup>

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<sup>86</sup> Paper presented at the Australian clinical legal education conference at UNSW in September 2011: Margaret Barry et al, 'Teaching Social Justice Lawyering: Systematically Including Community Legal Education in Law School Clinics' (2012) 18 *Clinical Law Review* 401.

<sup>87</sup> Robert D Dinerstein, 'Clinical Scholarship and the Justice Mission' (1992) 40 *Cleveland State Law Review* 469; Frances Gibson, 'The Convention on the Rights of Persons with Disabilities: The Response of the Clinic' (2011) 15 *International Journal of Clinical Legal Education* 11.

<sup>88</sup> Sameer Ashar, 'Law Clinics and Collective Mobilization' (2008) 14 *Clinical Law Review* 355; Scott Cummings, 'Mobilization Lawyering: Community Economic Development in the Figueroa Corridor' in Austin Sarat and Stuart Scheingold (eds), *Cause Lawyers and Social Movements* (Stanford University Press, 2006).

<sup>89</sup> Christine Zuni Cruz, 'On the Road Back In: Community Lawyering in Indigenous Communities' (1999) 5 *Clinical Law Review* 557.

<sup>90</sup> David Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (Prentice Hall, 1984).

This framing connects neatly with a clinical methodology of learning through reflection. The cycle of learning is continuous and a learner enters at various points repeatedly. The process, in order to be a learning moment, includes students experiencing aspects of legal practice, reflecting on that process and what it has meant, then re-engaging in the legal practice with the benefit of the process of reflection. A student can then use this new knowledge to experiment with different understandings and insights. Reflection is vital to the learning process. The literature on the significance of 'reflection' is varied and cross-disciplinary. Schön is often referred to for his concepts of 'reflection-in-action' and 'reflection-on-action'.<sup>91</sup> Within clinical legal education scholarship, Spencer<sup>92</sup> discusses the centrality of reflection to clinical legal education and Leering<sup>93</sup> looks at the role of reflection as a way of encouraging students to question issues of access to justice and the formation of law. Casey<sup>94</sup> is another clinical legal education scholar who examines the use of a model of reflection to teach students to reflect in a structured way when dealing with ethical issues. Noone and Dickson<sup>95</sup> also highlight the importance of reflection in ethical issues. Rothenberg focuses on the importance of reflection for creating lawyers who think like leaders, not just lawyers.<sup>96</sup> Webb also recognises the importance of the role of clinical legal education in creating 'self-critical and reflective

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<sup>91</sup> Donald Schön, 'Educating the Reflective Practitioner' (1995) 2 *Clinical Law Review* 231.

<sup>92</sup> Rachel Spencer, 'Holding up the Mirror: A Theoretical and Practical Analysis of the Role of Reflection in Clinical Legal Education' (2014) 18 *International Journal of Clinical Legal Education* 181.

<sup>93</sup> Michele Leering, 'Enhancing the Legal Profession's Capacity for Innovation: The Promise of Reflective Practice and Action Research for Increasing Access to Justice' (2017) 34 *Windsor Yearbook of Access to Justice* 189.

<sup>94</sup> Timothy Casey, 'Reflective Practice in Legal Education: The Stages of Reflection' (2014) 20 *Clinical Law Review* 317.

<sup>95</sup> Mary Anne Noone and Judith Dickson, 'Teaching towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers' (2001) 4(2) *Legal Ethics* 127.

<sup>96</sup> Karen H Rothenberg, 'Recalibrating the Moral Compass: Expanding Thinking Like a Lawyer into Thinking Like a Leader' (2009) 40 *University of Toledo Law Review* 411.

learners'.<sup>97</sup> All these theorists assert the significance of reflection as a key element of clinical legal education.

Within law, the concept of 'disorienting moments'<sup>98</sup> has been used by clinical teachers to help them and their students to think about trigger moments which provide a potential learning point leading to deeper thinking, feeling and understanding of an experience. A disorienting moment is an experience of which a student is unable to make sense because it does not fit neatly into previously known or understood experiences.

The concept of is a useful one for understanding the potential of clinical legal education for students learning about justice. The student will not be able to make sense of the disorienting moment without the capacity to reflect effectively on it. It provides an opportunity to gain new understandings. This focus emphasises the importance of naturally occurring events with real clients in clinics, against the backdrop of adult learning theory. The conceptualisation of learning triggers as 'disorienting moments' has particular resonance with clinical teaching because clinical teachers are often integral to students' exposure to frequently new, confronting and challenging experiences which can cause them to question their previously held views and knowledge about the law and the legal system. It provides the beginning of the possibility of perspective transformation. This is where students, through a new experience, reach new and different understandings from their previously held views. The combination of adult learning theory with a concept of 'disorienting moments'<sup>99</sup> experienced by students in law clinics is a unique contribution by Quigley<sup>100</sup> to how clinics teach students about justice. The concept of 'disorienting moments' is therefore a useful one which can be applied in thinking about the

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<sup>97</sup> Julian Webb, 'Inventing the Good: A Prospectus for Clinical Education and the Teaching of Legal Ethics in England' (1996) 30(3) *The Law Teacher* 270.

<sup>98</sup> Fran Quigley, 'Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics' (1995) 2 *Clinical Law Review* 37.

<sup>99</sup> Jack Mezirow, *Transformative Dimensions of Adult Learning* (John Wiley & Sons, 1991).

<sup>100</sup> Fran Quigley, 'Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics' (1995) 2 *Clinical Law Review* 37.

range of ways in which students have their world views changed through the process of reflection.

The concept of ‘disorienting moments’ and its relevance is explored in detail across chapters 4, 5, 6, 7 and 8. It also connects to a developing understanding of ‘justice’ and what justice means. Students, through their experience in a clinical component of an ethics course, have the potential to experience ‘disorienting moments’ which can provide the impulse or impetus for reflection on the law, the legal system or their role within it.

This thesis explores in depth the value of teaching students how to reflect, and the reasons why reflection is so important. The literature provides a range of means for understanding the significance of reflection, a process which often begins with a disorienting moment.

### **Enriching understandings of legal ethics with concepts of justice**

Another body of scholarship concerning clinics focuses on clinics which teach ethics<sup>101</sup> and the ways in which they teach students to formulate ethical understandings.<sup>102</sup> Rather than seeing

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<sup>101</sup> Anna Cody, ‘What Does Legal Ethics Teaching Gain, If Anything, from Including a Clinical Component?’ (2015) 22(1) *International Journal of Clinical Legal Education*; Liz Curran, Judith Dickson and Mary Anne Noone, ‘Pushing the Boundaries or Preserving the Status Quo? Designing Clinical Programs to Teach Law Students a Deep Understanding of Ethical Practice’ (2005) 8 *International Journal of Clinical Legal Education* 104; Ross Hyams, ‘On Teaching Students to “Act Like a Lawyer”: What Sort of Lawyer?’ (2008) 13 *International Journal of Clinical Legal Education* 21; Nigel Duncan and Susan Kay, ‘Addressing Lawyer Competence, Ethics and Professionalism’ in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011); Kevin Kerrigan, ‘“How Do You Feel about This Client?” – A Commentary on the Clinical Model as a Vehicle for Teaching Ethics to Law Students’ (2007) 11 *International Journal of Clinical Legal Education* 7; Leah Wortham, Catherine Klein and Beryl Blaustone, ‘Autonomy-Mastery-Purpose: Structuring Clinical Courses to Enhance These Critical Educational Goals’ (2012) 18 *International Journal of Clinical Legal Education* 105; Richard Moorhead, ‘The Ethical Identity of Law Students’ (2016) 23(3) *International Journal of the Legal Profession* 235; Julian Webb, ‘Inventing the Good: A Prospectus for Clinical Education and the Teaching of Legal Ethics in England’ (1996) 30(3) *The Law Teacher* 270; Mary Anne Noone and Judith Dickson, ‘Teaching towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers’ (2001) 4(2) *Legal Ethics* 127; Nigel Duncan, ‘Ethical Practice and Clinical Legal Education’ (2005) 7 *International Journal of Clinical Legal Education* 7; Donald Nicolson, ‘Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice’ (2013) 16(1) *Legal Ethics* 36.

<sup>102</sup> Christine Parker and Adrian Evans, *Inside Lawyers’ Ethics* (Cambridge University Press, 2014); William H Simon, ‘Thinking Like a Lawyer about Ethical Questions’ (1998) 27 *Hofstra Law Review* 1.

ethics as simply an application of professional rules, a broader conceptualisation of legal ethics examines the role of lawyers within the community and the range of ways in which they make ethical decisions. It poses the question of what responsibility students have to contribute to the community when they become lawyers. This is discussed below.

### ***Ethics are more than rules***

While it would appear easy to teach students simply to ‘follow professional rules’, this is not what ethics teaching is about. Some traditional conceptualisations of ethics are limited to considerations of what the rules are, where they came from, and how they can be applied.

The idea that ethics means merely rules assumes a traditional, positivist<sup>103</sup> conceptualisation of the role of law, which implies simply that there are rules or laws to apply and that this is done objectively and clearly in all circumstances. In other words, ‘students learn how to think like lawyers by adopting an emotionally remote, morally neutral approach to human problems and social issues, distancing themselves from the sentiments and suffering of others, avoiding emotional engagement with clients and their causes, and withholding moral judgment’.<sup>104</sup> This approach is based on the idea that law is objective and neutral and it just needs to be applied. This is a positivist concept of the law and how it functions. However, ethical decisions require

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<sup>103</sup> Positivism ... is one group of approaches to questions about the world, how we experience it, and how well the ideas we use to understand it express its actual nature ... In its earlier forms, positivism regards the world as being external to the observer, and consisting of ‘phenomena’ that can be observed. The observer makes up ‘theories’ that describe the phenomena, particularly describing the order in which events take place and making *testable predictions* about how that order will display itself in the future. Theories are improved through this testing against evidence (deductive reasoning).

Geoff Payne and Judy Payne, *Key Concepts in Social Research* (Sage, 2004) 171. Positivism separates out scientific knowledge from values, beliefs and values. Positivists advocate the primacy of the external world rather than an interpretation of it.

<sup>104</sup> Jane H Aiken, ‘The Clinical Mission of Justice Readiness’ (2012) 32(2) *Boston College Journal of Law and Social Justice* 231, 236; Jane H Aiken and Stephen Wizner, ‘Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice’ (2004) 73 *Fordham Law Review* 997.

the insertion of the decision-maker. They reflect value judgements,<sup>105</sup> based in reasoning, but still they include values and thought-out positions and decisions. They are not just an application of rules.<sup>106</sup> For example, deciding whether something is a conflict of interest is a complex decision often requiring a deep understanding of the legal service or practice, the individual client, and ideas of potential harm. Even while the focus is on a particular rule, the interpretation of that rule is influenced by the decision-maker who makes the decision.<sup>107</sup>

Understanding the ways in which lawyers approach ethical decision-making is useful in this context. Categorising decisions into four approaches helps when understanding the ways in which lawyers make ethical decisions: an ‘adversarial advocate’ is one who zealously represents their client within all allowed and legal ways; a ‘responsible lawyer’ is one who is conscious of their role as an officer of the court and a trustee of the legal system; a ‘moral activist’ is one who attempts to achieve justice through law reform; and a lawyer guided by ‘an ethics of care’ is focused on maintaining the client’s relationships with others.<sup>108</sup> Some have thought of the role of the lawyer as shifting between these categories.<sup>109</sup> The four categories form a typology<sup>110</sup> for thinking about ethical decision-making. By characterising a range of ways of approaching the role of lawyer, they also envision different ways of making ethical decisions.

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<sup>105</sup> William H Simon, ‘Thinking Like a Lawyer about Ethical Questions’ (1998) 27 *Hofstra Law Review* 1; Carrie Menkel-Meadow, ‘Narrowing the Gap by Narrowing the Field: What’s Missing from the MacCrate Report – Of Skills, Legal Science and Being a Human Being’ (1994) 69 *Washington Law Review* 593.

<sup>106</sup> Christine Parker and Adrian Evans have a framework of ethical decision-making which formulates four categories of ethical decision-making: adversarial advocate, responsible lawyering, moral activist and ethic of care. Karen H Rothenberg, ‘Recalibrating the Moral Compass: Expanding Thinking Like a Lawyer into Thinking Like a Leader’ (2009) 40 *University of Toledo Law Review* 411.

<sup>107</sup> Verna E Monson and Neil W Hamilton, ‘Ethical Professional (Trans)Formation: Early Career Lawyers Make Sense of Professionalism’ (2011) 8 *University of St. Thomas Law Journal* 129; William H Simon, ‘Thinking Like a Lawyer about Ethical Questions’ (1998) 27 *Hofstra Law Review* 1.

<sup>108</sup> William H Simon, ‘Thinking Like a Lawyer about Ethical Questions’ (1998) 27 *Hofstra Law Review* 1, 32.

<sup>109</sup> Christine Parker and Adrian Evans, *Inside Lawyers’ Ethics* (Cambridge University Press, 2014).

<sup>110</sup> *Ibid.*

This gives more texture to the discussion of ethical decision-making, beyond, ‘applying the rules’.

What is interesting about this typology is that it provides a framework for understanding the range of ways in which ethical decisions are made, as well as providing for the insertion of the individual lawyer into the ethical decision-making process. The traditional understanding of ethical decision-making is frequently limited to representing a client’s interests, on instructions, in an aggressive manner which is curtailed only by a duty to the court. This fuller understanding of how decisions are made when advising and representing a client recognises a more complex way of working with clients within a broader community, including their relationships. It connects an individual lawyer’s values with decision-making within the law, with the client’s case, and with all aspects of legal practice.

### ***Why teach ethics through clinics?***

By providing clinical teaching as a means of teaching about ethics, students are enabled to ‘engage in informed discussion – grounded in experience – about what the law is for, but before they have become fully part of the system’.<sup>111</sup> Students can explore the role of the law and lawyers, and their own role and what impact their role as lawyer may have within the law and the legal system. Another alternative for teaching ethics is the combination of weekly clinical experience and three-hour classes in which a range of issues can be examined – such as the availability of legal aid, access to justice, and the intrinsic nature of ethical issues in all legal practice. ‘Questions of where does/should the power lie in a lawyer/client relationship and

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<sup>111</sup> Kevin Kerrigan, “‘How Do You Feel about This Client?’ – A Commentary on the Clinical Model as a Vehicle for Teaching Ethics to Law Students’ (2007) 11 *International Journal of Clinical Legal Education* 7, 17; Julian Webb, ‘Inventing the Good: A Prospectus for Clinical Education and the Teaching of Legal Ethics in England’ (1996) 30(3) *The Law Teacher* 270; Nigel Duncan, ‘Ethical Practice and Clinical Legal Education’ (2005) 7 *International Journal of Clinical Legal Education* 7; Donald Nicolson, ‘Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice’ (2013) 16(1) *Legal Ethics* 36.

what do you do if you do not like your client or their cause are discussed.’<sup>112</sup> Seeing law in practice grounds the ethical discussions. While this may be an ideal way of teaching ethics, because it is a clinical subject it will only be available to a few students. This thesis examines whether a clinical component in an applied ethics course, which is more widely available, can bring some of the specific benefits of clinical teaching in ethics to a larger group of students. The thesis also examines the connection between ethical decision-making and issues of ‘justice’.

In a survey, clinical teachers who teach their students about ethics were asked to identify their learning objectives. One of the clinicians replied: ‘Teaching students about law’s injustice and the need for lawyers to be committed to addressing unmet legal need.’<sup>113</sup> Another responded: ‘For me the immediate aim is to give students a more sophisticated language for analysis, reflection and thus self-development.’<sup>114</sup> Clearly, these understandings of ethics are broader than an application of professional rules and relate to both systemic issues about the legal system and the individual lawyer’s role within that system.

### ***Autonomy, mastery and purpose within ethics teaching***

The question ‘who am I as a lawyer?’ provides a stepping-off point for looking at intrinsic motivation theory and concepts of autonomy, mastery and purpose. Intrinsic motivation theory postulates that ‘people who have a more “intrinsic”, personal/interpersonal focus – on personal growth, close relationships, helping others, or improving their community – turn out to be significantly happier and more satisfied with their lives’.<sup>115</sup> Rather than making decisions or

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<sup>112</sup> Mary Anne Noone and Judith Dickson, ‘Teaching towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers’ (2001) 4(2) *Legal Ethics* 127, 143.

<sup>113</sup> Kevin Kerrigan, “‘How Do You Feel about This Client?’ – A Commentary on the Clinical Model as a Vehicle for Teaching Ethics to Law Students’ (2007) 11 *International Journal of Clinical Legal Education* 7, 17.

<sup>114</sup> *Ibid.*

<sup>115</sup> Lawrence Krieger, *The Hidden Sources of Law School Stress: Avoiding the Mistakes That Create Unhappy and Unprofessional Lawyers* (Self-published, 2006), cited in Leah Wortham, Catherine Klein and Beryl Blaustone, ‘Autonomy-Mastery-Purpose: Structuring Clinical Courses to Enhance These Critical Educational Goals’ (2012) 18 *International Journal of Clinical Legal Education* 105, 110.

choices for external motivation or imposed rewards, people who are intrinsically motivated act because the action aligns with their internal self and this brings deeper satisfaction when that self is also outwardly focused. This is an interesting concept to explore within the legal profession, with its idea of objectivity, neutrality and ‘setting aside’ individuality. It is also thought-provoking within an exploration of ‘what it means to be an ethical lawyer’. As students in clinics start to experience themselves as lawyers in training, this concept is a key idea to explore within a clinical setting.

Wortham, Klein and Blaustone<sup>116</sup> have examined intrinsic motivation theory and its relevance to clinical legal education. They argue that clinical legal education experiences provide students with opportunities for exercising autonomy; help them develop a mastery of skills, which enables students to feel greater purpose; and provide opportunities for encouraging relatedness. They argue that engagement in clinical work enables students to develop clearer ideas of what they value and to develop their skills in particular areas. These achievements then lead to increased self-direction and the development of intrinsic motivation, rather than achieving goals for external rewards (extrinsic motivation). A characteristic of autonomy develops, which is ‘the “authenticity” dimension of autonomy, being able to act in ways that feel consistent with one’s core sense of self’.<sup>117</sup> This is an interesting theme within clinical scholarship and is explored in the thesis in relation to the clinical component of the applied ethics course.

### **Identity/Privilege and diversity**

The other area of scholarship which is analysed in this thesis concerns teaching students about ability/disability (chapter 8). This is one of the facets of identity which also connects to privilege

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<sup>116</sup> Leah Wortham, Catherine Klein and Beryl Blaustone, ‘Autonomy-Mastery-Purpose: Structuring Clinical Courses to Enhance These Critical Educational Goals’ (2012) 18 *International Journal of Clinical Legal Education* 105.

<sup>117</sup> Ibid, 113, citing Daniel Pink, *Drive: The Surprising Truth about What Motivates Us* (Riverhead Books, 2009) 77–81.

and diversity. Other aspects of identity could have been chosen for a closer analysis, such as race and cultural identity or gender. However, ability/disability has received less attention in the scholarship on how these issues can be taught within a legal clinic. The particular resonance around teaching disability issues is still relevant, as the Convention on the Rights of Persons with Disabilities was ratified and entered into force in 2008.<sup>118</sup> Its ratification has particular resonance with teaching in clinics, as people with disability are put at the centre of the teaching.<sup>119</sup> Students will learn about the social model of disability and the medical model of disability, as well as the spectrum of ability and disability. These concepts are all fundamental in teaching students to question their identity and their privilege.<sup>120</sup> The language used in talking about people with disability is important to ensure that the individual is centred.<sup>121</sup> Even in constructing a client narrative,<sup>122</sup> the role of disability is relevant when a student questions whether to challenge or reinforce a stereotype in a legal case.

The lens of ability/disability also connects with other theory<sup>123</sup> to examine identity and values in the practice of lawyering. It links with the skills of reflection and ethical lawyering, as a student

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<sup>118</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

<sup>119</sup> Frances Gibson, 'The Convention on the Rights of Persons with Disabilities: The Response of the Clinic' (2011) 15 *International Journal of Clinical Legal Education* 11.

<sup>120</sup> Lynn Z Bloom, 'Bodies of Knowledge: Ethics and Engagement in an Undergraduate Disability Studies Course' (2014) 14 *Pedagogy: Critical Approaches to Teaching Literature, Language, Composition and Culture* 179.

<sup>121</sup> James I Charlton, *Nothing about Us without Us: Disability Oppression and Empowerment* (University of California Press, 1998).

<sup>122</sup> Robert D Dinerstein, "'Every Picture Tells a Story, Don't It?': The Complex Role of Narratives in Disability Cases' (2007) 15(1) *Narrative* 40.

<sup>123</sup> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1990); Dwight Boyd, 'The Place of Locating Oneself(ves)/Myself(ves) in Doing Philosophy of Education' in Susan Laird (ed), *Philosophy of Education* (Philosophy of Education Society, 1997), cited in Barbara Applebaum, 'Social Justice Education, Moral Agency, and the Subject of Resistance' (2004) 54 *Educational Theory* 59, 60; Kevin Kumashiro, 'Against Repetition: Addressing Resistance to Anti-Oppressive Change in the Practices of Learning, Teaching, Supervising, and Researching' (2002) 72 *Harvard Educational Review* 67; Okianer Christian Dark, 'Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching' (1996) 32 *Willamette Law Review* 541.

lawyer is encouraged to question their role as a future lawyer and how their individuality may influence their relationships with clients and the ways in which they decide to lawyer.

## **Conclusion**

This chapter has provided a broad overview of the literature and themes to contextualise the more specific examination in the coming chapters. The chapter has discussed the nature and definitions of clinical legal education and has explained the definition used in this thesis. It has reviewed the specific context of Australian clinics and their combination of legal service delivery with skills teaching. The thesis builds on the clinical legal education literature which engages with the debate on whether the purpose of clinical legal education is to teach skills or justice. It situates this thesis as demonstrating that clinics, including clinical components, have the purpose of doing both – teaching skills and justice – through teaching students how to reflect and how, for example, to interview. Definitions of justice have been canvassed to reach the definition used in this thesis, that justice means that all people and communities should be able to access, and form, the law equally. This definition connects with the concepts of identity and privilege, which are explored within the thesis across chapters 4, 5, 6, 7 and 8, but in depth in chapter 8, through an examination of disability and ability.

The chapter has discussed the range of ways in which concepts of justice can be taught through different types of clinics. Indeed, understandings of justice vary across the range of clinics, depending on whether each clinic is a community-based neighbourhood clinic, a policy-influencing clinic, or a clinical component of an ethics course. Reflection is a key skill which students must learn in order to gain a fuller understanding of concepts of justice and to make sense of their ‘disorienting moments’. Other key concepts covered in this chapter are around the meanings of ‘legal ethics’ and how a clinical course can teach students to become ethical lawyers. The connection of self-identity, reflection and an ethical practice of law has been made through discussing models of ethical decision-making, making a clear connection with a lawyer’s identity and values. This relates to the importance of intrinsic motivation theory and the ways in

which law students can gain purpose and a sense of confidence in themselves through their legal practice and into their legal studies. In chapter 7, there is a deeper exploration of intrinsic motivation theory and the ways in which a law student can express themselves through their practice of law. Identity and self are further explored in chapter 8 but have been introduced in this chapter through the discussion on ability and disability and the ways in which we teach this to students.

This leads to the next chapter, which examines the key methods used to answer some of these questions.

## Chapter 3:

### Methodology and key methods

This thesis explores the role of clinical legal education in teaching students to become reflective, justice-focused practitioners through three sets of research questions.

The overarching methodology used throughout the thesis to answer these questions is one of mixed methods. It is based in grounded theory, which will be explained, and provides the axis of the thesis, with its constant movement between practice and theory. This chapter provides an overview of why a mixed methods approach was appropriate for this research project. It will also explain the importance of ethnography and reflexivity as the research examines the practice of the researcher in teaching and legal practice over a period of 20 years. The chapter then delves deeply into the range of methods used to answer each of the three main research questions, focusing on the three major methods of documentary research, case studies and surveys.

#### **Mixed methods research**

Mixed methods research ‘combines various elements of both quantitative and qualitative approaches (eg with regard to perspectives, data collection and data analysis) to research, together with the nature of the inferences made from the research, the purpose of which are to give a richer and more reliable understanding (broader and deeper) of a phenomenon than a single approach would yield’.<sup>124</sup> Each of the specific research questions required a different method in order to answer it effectively and therefore a range of methods was utilised. Using

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<sup>124</sup> John Creswell and Vicki Plano Clark, *Designing and Conducting Mixed Methods Research* (Sage, 2011), quoted in Louis Cohen, Lawrence Manion and Keith Morrison, *Research Methods in Education* (Taylor and Francis, 2017) 32.

mixed methods strengthens the research,<sup>125</sup> as it combines different approaches in order to achieve the clearest answers to the research questions. Indeed, some argue that ‘the stronger the mix of methods and their integration at all stages, the stronger the benefit of mixed methods approaches’.<sup>126</sup> In chapters 6 and 7, in which the research draws from surveys which record the participant views on ethical practice, as well as their feelings of confidence and autonomy, the use of constructivism<sup>127</sup> can be identified as the participants themselves construe their experience of interviewing.

The research is largely qualitative research with some quantitative elements within it. There are three major methods used to answer these research questions. These are documentary research, case studies, and qualitative and quantitative surveys, which create grounded theory. The documentary research provides the theoretical groundwork for answering the research questions. The examination of two case studies builds on this theoretical groundwork and applies it with a deeper examination. Those case studies focus on (1) the clinical component of an applied legal ethics course; and (2) the teaching of disability issues at Kingsford Legal Centre at the University of New South Wales (UNSW) and the teaching of disability issues at the Human Rights Project clinic at the Universidad Nacional Autónoma de México (UNAM). The surveys provide a strong quantitative and qualitative element of the research, including the voice of students within the research project in order to know from their perspective the impact of a clinical component within an applied legal ethics course. As chapters 4, 5, 6, 7 and 8 were written for publication, each chapter does not set out in detail how the overarching

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<sup>125</sup> Indeed, the world cannot be understood by either quantitative or qualitative research but rather requires a mix of methods: Louis Cohen, Lawrence Manion and Keith Morrison, *Research Methods in Education* (Taylor and Francis, 2017) 31; Geoff Payne and Judy Payne, *Key Concepts in Social Research* (Sage, 2004) 149.

<sup>126</sup> Robert K Yin, ‘Mixed Methods Research: Are the Methods Genuinely Integrated or Merely Parallel?’ (2006) 13(1) *Research in Schools* 41, 43, quoted in Louis Cohen, Lawrence Manion and Keith Morrison, *Research Methods in Education* (Taylor and Francis, 2017) 33.

<sup>127</sup> Louis Cohen, Lawrence Manion and Keith Morrison, *Research Methods in Education* (Taylor and Francis, 2017) 34.

methodology fitted together. This chapter on methodology and methods provides the means to do that.

The three major areas of analysis, and the research questions, draw from the experience of the researcher. Relying on grounded theory, they create theory from practice. ‘Practice’ has two dimensions: the practice of law with real clients; and the practice of teaching law students. The interweaving of theory with practice is a constant rhythm within this thesis. This is the key nature of grounded theory, creating theory from data and from practice. In the thesis, this process is guided by critical theory, with the researcher attempting to promote social change by creating reflective, justice-focused lawyers through the process of research: ‘its purpose is not merely to understand situations and phenomena but to change them’.<sup>128</sup> Rather than accepting the existing situation, research guided by critical theory seeks to bring about equality, social justice and inclusion.<sup>129</sup> Along with action research, which includes both the researcher and the participants in a process of collective reflection in order to enact some change, the purpose of critical theory is not only to more deeply understand an issue, but also to effect some change or some other socially responsible<sup>130</sup> goal. This was the case in the research conducted within this thesis, where the ways and effectiveness of specific methods of teaching students were examined in order to better understand how to form students who are reflective and justice-focused.

Constructivist grounded theory, which relies on the practice or experience of particular subjects, is an approach frequently used in qualitative research. Indeed, classic grounded theory emphasises the analysis of action and process. The grounded theory approach of data collection and analysis ensures that the analysis informs the data collection and vice versa.<sup>131</sup> This was the

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<sup>128</sup> Ibid, 51.

<sup>129</sup> Ibid.

<sup>130</sup> Geoffrey Mills, *Action Research: A Guide for the Teacher Researcher* (Merrill Prentice Hall, 2003).

<sup>131</sup> Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide through Qualitative Analysis* (Sage, 2006).

case in chapters 6 and 7 when administering the surveys to applied legal ethics students. The initial understandings of what is an ethical legal practitioner, discussed in chapter 5, influenced the data gathered through the survey process. It ensured that students were asked not only their views of what constitutes an ethical legal practitioner, but also how they work and what they do. 'Grounded theorists' background assumptions and disciplinary perspectives alert them to look for certain possibilities and processes in their data.'<sup>132</sup> In chapters 6 and 7, when analysing the data from the surveys, the researcher's perspectives on law and the practice of community law alerted her to particular possibilities. Working in a community law service with few resources highlights some of the structural limitations of service provision. While the identification of this as an ethical issue was not anticipated by the researcher, neither was it completely novel.

The research questions and findings draw on the researcher's own experience as a reflective practitioner and so include a degree of auto-ethnography. This auto-ethnography is included in this chapter as the researcher's reflections on the teaching of these issues and the impetus to conduct further empirical research.

### **Reflexivity/Ethnography**

Reflexivity is the practice of researchers, while carrying out their research, to be 'explicitly self-aware and self-critical'.<sup>133</sup> It requires 'regular, ongoing, self-conscious documentation'.<sup>134</sup>

Reflexivity also requires the researcher to record their responses and thoughts about particular observations. It can be relational, as the researcher is situated in the location of the research. Doing research in a reflexive way ensures that the researcher is able to think of the broader applicability of their research. Indeed, from feminist perspectives, the research must take

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<sup>132</sup> Ibid, 16.

<sup>133</sup> Geoff Payne and Judy Payne, *Key Concepts in Social Research* (Sage, 2004) 191.

<sup>134</sup> Ibid, 192.

seriously the effects of the research on both the researcher and the researched. Ezzy notes that 'an integral element of the research is the personal experience of the researcher himself/herself, reinforcing the point that objectivity is a false claim by researchers'.<sup>135</sup> While this researcher was constantly self-critiquing and attempting to be self-aware in order to view the data with objectivity, the immersion within practice also creates both a depth and an influencing of views and perceptions. A reflexive researcher must be self-aware of 'their own beliefs, values and attitudes'.<sup>136</sup> The researcher was responsible for clinical courses at Kingsford Legal Centre at UNSW. Having worked at the Centre for over 20 years means that the author brings a depth of experience and analysis which would otherwise be unavailable. The researcher has worked and taught within the applied legal ethics course, delivering essentially the same clinical component over those years. The research project arose out of a desire to enquire into the ways in which that clinical component was informing and shaping the ethical understandings of law students. While the researcher had observed the impact on students of participating in a clinical experience, *how* and *to what extent* this informed or shaped their views on ethical legal practice were unclear to her. She was also keen to explore how the experience shaped their commitment to contributing to a more just legal system. The results from this initial research then led her to explore values, identity and privilege and the impact that these have on the relationship with clients and disadvantaged groups. She chose the lens of ability/disability in order to explore more deeply this aspect of the relationship with clients and society.

The methods used to ensure that the views and experience of the researcher did not create bias were multiple. The first was to develop a survey of students so that their experiences and views were fundamental to the data. The surveys add the student voices to the thesis in order to challenge and change how the researcher may understand concepts of ethics and ethical

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<sup>135</sup> Quoted in Louis Cohen, Lawrence Manion and Keith Morrison, *Research Methods in Education* (Taylor and Francis, 2017) 59.

<sup>136</sup> Geoff Payne and Judy Payne, *Key Concepts in Social Research* (Sage, 2004) 191.

lawyering. In addition to these sources of data, the researcher drew from more than 10 educational experts to frame the survey questions in order to open the possible answers and connect theoretical concepts of ethics with the practice of ethical lawyering.

One of the findings of the survey data was that the ethic of care was very significant in the shaping of students' ethical values. The relationship between the client and the student or future lawyer, and the time spent between them, was one of the highlighted features. The researcher was particularly interested in investigating the impact of identity and privilege within that client–student relationship. She focused on the lens of ability/disability to more deeply understand how to teach students effectively about working with clients with disability, which necessitated a discussion of values, identity and privilege.

A further source of data is the practice of clinics in both Australia and Mexico when teaching students disability issues. By including the data from two clinics with regard to their teaching plans, their course outlines and structure, and observations of their practice, the researcher was able to enquire into both commonalities and differences in data, specifically in relation to the teaching and practice of ability and disability in legal practice. Data is also drawn from documentary evidence to strengthen and create alternative perspectives within the thesis. This range of data sources strengthens the findings of the thesis and ameliorates the impact of bias.

The next sections examine the specific research methods in answering the research questions and sub-questions.

### **Methodology for question 1**

Chapter 4 addresses question 1 and its sub-questions: Can teaching students how to reflect enable them to fulfil their ethical duty to contribute to the justice system? What is reflection within a clinical legal education model? What role does reflection play within clinical legal education and which methodologies are effective for teaching reflection? Why is reflection

important? How does teaching reflection through a clinical legal education methodology contribute to developing reflective, justice-focused lawyers?

The researcher was keen to explore the role of reflection skills in building students' ability to be reflective and to develop their ethical consciousness, particularly with regard to their responsibility to contribute to the justice of the law and the legal system. In order to fully understand the significance of reflection skills, the method used was one of documentary research and drawing from the practice of teaching reflection skills in clinics or case studies. Documentary research is a method which is particularly useful for analysing existing sources, whether primary or secondary. 'Primary analysis is an interpretation of raw materials whereas secondary analysis involves an examination of the interpretations of others.'<sup>137</sup> In this thesis, the documentary research concentrated on secondary sources, articles and documents created by a range of legal and other researchers, including those involved in education, social work, and psychology and other health areas.

Documentary research was used in chapter 4 to enquire into the nature and purpose of reflection skills. In answering the question about the role of teaching reflection skills and whether it provides a mechanism to teach students how to fulfil their ethical duty to contribute to the justice system, documentary evidence is important in order to fully understand what reflection means across disciplines. This involved examining what reflection skills mean in a range of disciplines, including education and the health professions as well as law. The purpose of this method was to identify whether or not reflection is a key skill taught across disciplines and whether there were meaningful differences in the way in which it is taught or how it is defined.

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<sup>137</sup> Louis Cohen, Lawrence Manion and Keith Morrison, *Research Methods in Education* (Taylor and Francis, 2017) 325.

Chapter 4 relies on a documentary evidence approach but also draws on case studies and grounded theory when discussing how to teach reflection, including the experience of the researcher in teaching this skill and the specific methods she employs. This analysis is then combined with examples from the practice of teaching students how to reflect while they engage in legal practice. The importance of teaching students reflection skills is also drawn out in chapter 8, when analysing the issues relating to teaching students about disability. Students must be taught how to reflect on their own ability/disability, as well as their own full identity and the ways in which this influences their relationships with clients. Reflecting on how to frame a narrative which does not entrench stereotypes about clients with disability<sup>138</sup> is another method for teaching students to work effectively with clients with disability.

The method of research is documentary research combined with grounded theory, drawing from the case studies of teaching at Kingsford Legal Centre at UNSW and the Human Rights Project clinic at UNAM. This combined approach intertwines practice with theory. A case study is an effective mode of research in this thesis, as it is ‘a very detailed research enquiry into a single example (of a social process, organisation or collectivity) seen as a social unit in its own right and as a holistic entity’.<sup>139</sup> In the case of teaching students how to reflect, the case study involved the teaching of clinical students within an elective course at Kingsford Legal Centre. In the case of teaching disability issues, the case study involved a social process examined across two sites (Kingsford Legal Centre and the Human Rights Program at UNAM). Using a case study method provides fresh insights into an existing unit and uses ‘observation’ and ‘participation’ as methods for collecting data.<sup>140</sup>

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<sup>138</sup> Robert D Dinerstein, “‘Every Picture Tells a Story, Don’t It?’: The Complex Role of Narratives in Disability Cases’ (2007) 15(1) *Narrative* 40.

<sup>139</sup> Geoff Payne and Judy Payne, *Key Concepts in Social Research* (Sage, 2004) 31.

<sup>140</sup> *Ibid*, 34.

The methods for teaching students how to reflect are another important part of the analysis of developing reflection skills through clinical legal education programs. While reflection skills are just one component of teaching students how to be reflective and justice-focused practitioners, they are fundamental to enabling students to interrogate themselves and their current and future role within the justice system, as well as how they can fulfil their ethical duty to contribute to improve the justice system. This is significant in developing as a fully ethical legal practitioner (see chapter 5) and also being able to work effectively and in an equality-enhancing way with clients with disability (see chapter 8).

Chapters 4 and 8 use documentary research within clinical legal education scholarship in order to gain a deeper understanding of the significance of learning reflection skills through a clinical legal education methodology for teaching law. Chapter 4 enquires into whether clinical legal education is a useful means to teach students reflection skills. It finds that clinical legal education is a particularly useful method for this purposes. The circle of practice, reflection and further practice is a useful model which students will use in their future work because it is based in real legal work and ongoing reflection.

The research was completed through documentary research and enriched and enlivened by using examples from the practice of the researcher in teaching reflection in clinical courses. It therefore combined a documentary research approach with some examples from the case study of teaching at UNSW and at the Human Rights Program at UNAM.

Having examined the function and role of reflection as a skill through a documentary analysis and the use of case study method in chapters 4 and 8, the thesis examines the impact and role of a clinical component in interviewing on shaping students ethical understandings and their sense of confidence and autonomy.

## **Methodology for question 2**

Chapters 5, 6 and 7 address question 2 and its sub-questions: Can incorporating a clinical component within an applied legal ethics course be an effective way of teaching students about their responsibility to make law fairer and to be reflective, justice-focused lawyers? How does a clinical component enrich students' ideas about what ethical decisions are and the ways in which they should be made? Does including a clinical component in an applied legal ethics course change law students so that they are more committed to engaging in lawyering which contributes to the law and the legal system? Does a clinical component build students' confidence in their ability to complete their law studies and develop their sense of autonomy and purpose?

The methods used to answer these questions are varied. They include documentary research, case studies and surveys.

In order to explore the impact on students of engaging in a clinical component, the researcher first had to understand what 'an ethical legal practitioner' is and does. Within the context of community legal practice, the researcher needed to adopt a definition of an ethical legal practitioner. In chapter 5, the thesis uses a documentary research method to examine current understandings of what is an ethical lawyer. It reviews current thinking about legal ethics through a discussion of current research on this issue. The clinical component within a community legal centre provides the opportunity for students to reflect on the standard conception of a lawyer as a value-neutral partisan advocate for their client and to consider other ethical approaches to lawyering, such as responsible lawyering, moral activist lawyering, and an ethic of care.<sup>141</sup> These models of making ethical decisions fit within a community legal centre mode of legal practice and enable students to be more conscious of the choices they make when they make ethical decisions. They include notions of contributing to the justice of

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<sup>141</sup> Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2014) ch 2.

the legal system and to ongoing improvement and reflection. These are key concepts when answering the overarching question of the thesis, which concerns the role of clinical legal education in forming reflective, justice-focused lawyers. Documentary research into the literature within clinical legal education was the method used to adopt a definition of an 'ethical legal practitioner', which then provides the basis for the later research in chapters 6 and 7. The framework is thus created for the survey data presented in chapters 6 and 7.

Having established a definition of 'ethical legal practitioner', the thesis then sets out to examine the impact – or lack thereof – of a clinical component of interviewing on students' understandings of ethical legal practice. Student surveys were used to examine the students' experience of client interviewing, their perceptions with regard to ethical legal practice, and the impact on them of a clinical component within a legal ethics course. These were in the context of a case study at Kingsford Legal Centre and within the framework created by documentary research.

Case studies are an in-depth investigation of a specific, real-life 'project, policy, institution, program or system' from multiple perspectives in order to capture its 'complexity and uniqueness'.<sup>142</sup> There is a depth and richness of description in a case study and it is important to look at a case study within its context.<sup>143</sup> This was the approach taken when looking at how engaging in an interview with a disadvantaged client, within the context of studying legal ethics, could shape and form students' understandings of legal ethics.

A case study can be understood as an 'approach capable of examining simple or complex phenomenon, with units of analysis varying from single individuals to large corporations and businesses to world-changing events; it entails using a variety of lines of action in its data-

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<sup>142</sup> Louis Cohen, Lawrence Manion and Keith Morrison, *Research Methods in Education* (Taylor and Francis, 2017) 375.

<sup>143</sup> Robert K Yin, *Case Study Research: Design and Methods* (4th edn, Sage, 2009) 18, referred to in Louis Cohen, Lawrence Manion and Keith Morrison, *Research Methods in Education* (Taylor and Francis, 2017).

gathering segments and can meaningfully make use of and contribute to the application of theory'.<sup>144</sup> Case studies can be very rich in detail. They can examine a particular aspect of the operation of an organisation or they can work across organisations.<sup>145</sup> In the area of education, the use of case study methods is widespread.<sup>146</sup> Case studies allow researchers to gather a 'thick description'<sup>147</sup> in order to develop a deeper understanding. The data gained in this study through examining how students experience their interviewing of clients was detailed and rich, providing deep insights into the impact of the experience.

The other major research method used to answer the questions posed in this thesis was the creation of a survey tool. This is grounded research, using practice to create theory. '[G]rounded theory methods consist of systematic, yet flexible guidelines for collecting and analyzing qualitative data to construct theories "grounded" in the data themselves.'<sup>148</sup> The practice is examined through the use of student surveys.

Surveys were one of the fundamental research methods used in this thesis. 'Surveys gather data at a particular point in time with the intention of describing the nature of existing conditions, or identifying standards against which existing conditions can be compared, or determining the relationships that exist between specific events.'<sup>149</sup> In order to answer the research questions about students' understandings of 'what is an ethical lawyer' and how their own sense of confidence, autonomy and purpose is affected by a clinical component, both quantitative and qualitative data were collected through the survey process.

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<sup>144</sup> Bruce Berg and Howard Lune, *Qualitative Research Methods for the Social Sciences* (Pearson, 2012) 325.

<sup>145</sup> Susan Chambré, 'Civil Society, Differential Resources, and Organisational Development: HIV/AIDS Organisations in New York City, 1982–1992' (1997) 26(4) *Nonprofit and Voluntary Sector Quarterly* 466.

<sup>146</sup> Clyde Freeman Herreid, *Start with a Story: The Case Method of Teaching College Science* (National Science Teachers Association, 2006).

<sup>147</sup> Clifford Geertz, *The Interpretation of Cultures* (Basic Books, 1973).

<sup>148</sup> Kathy Charmaz, *Constructing Grounded Theory, A Practical Guide through Qualitative Analysis* (Sage, 2006) 2.

<sup>149</sup> Louis Cohen, Lawrence Manion and Keith Morrison, *Research Methods in Education* (Taylor and Francis, 2017) 334.

Ethics approval was sought to use a brief questionnaire which asked students about ‘their understanding of ethical decision-making’ both before and after their exposure to real clients with legal problems as one component of an applied legal ethics course. The questionnaire also explored students’ interest in, and commitment to, improving the law and the legal system for disadvantaged clients and communities after their clinical component exposure. Additionally, the survey explored students’ sense of autonomy and purpose, and whether the experience had an impact on their sense of autonomy and purpose, their sense of confidence in their interviewing skills, and their later legal studies.

The survey questions were developed after reviewing the body of existing research around teaching legal ethics specifically through a clinical methodology. This assisted in defining the research questions and also in developing the survey instrument. In this way, the questions were informed by existing documentary research around the impact of clinics which teach ethics, as well as key understandings of what an ethical lawyer is. In order to collect reliable and valuable data, the questionnaire was created after developing the research questions which the thesis attempts to answer. In addition, the survey questions were developed with substantial input from experienced clinical teachers, law academics and clinic administrators. Draft survey questions were circulated among a group of more than 10 consultants,<sup>150</sup> who gave specific feedback.

The limitations of the methods are that it is difficult to isolate the impact of the clinical component on the students’ understandings of ethics, and thus how it influences their sense of purpose and their commitment to contributing to make the justice system fairer. Students were studying an applied legal ethics course, which influences their understandings of legal ethics. A

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<sup>150</sup> The consultants included Professor Judith Welch Wegner (University of North Carolina), Professor Leah Wortham (Catholic University, Washington DC), Professor Catherine Klein (Catholic University, Washington DC), Professor Mary Anne Noone (Latrobe University, Melbourne), Professor Alex Steel (UNSW), Senior Lecturer Frances Gibson (UNSW), Professor Peter Joy (Washington University), Emma Golledge (Principal Solicitor, KLC), Maria Nawaz (Clinical Supervisor, KLC), Denise Wasley (Office Manager, KLC), and Dianne Anagnos (Clinical Supervisor, KLC).

limitation of the survey process therefore relates to the ability to measure the impact of the clinical experience of interviewing clients within that applied legal ethics course, within a broader law degree, and within wider life experiences. This limitation was addressed by asking the same questions both before and after the interviewing experience.

Moreover, the survey specifically limited the questions to the experience and the reflective assignment and did not attempt to broaden that approach. The survey specifically asked respondents to focus on their clinical experience of interviewing. It is difficult to conceive of any other measures which could have been adopted to address this flaw in the method of using student surveys. Creating a control group would not have been possible within the student cohort, as all students were required to participate in the interviewing clinical component and they particularly enjoyed this aspect of the course. A control group of students studying legal ethics at another university would not have been sufficiently defined to ensure that the only impact being measured was the clinical component. Each law degree and ethics course within that law degree is distinct. Thus, using another university would not have been an effective way of providing a control group.

Another limitation within the survey is that the number of respondents is a relatively small representation (14%) of students. However, once the data were analysed, the significance of the response rates became apparent. This issue of how representative the sample is was addressed through administering the survey over three semesters, rather than in only a single semester. This approach provided a means of increasing the data set and also ensuring that there is some consistency between groups of students.

The data are analysed according to a coding system in which responses of students are coded according to the type of answer using a ‘grounded theory’<sup>151</sup> approach to analysing the data. The answers are grouped according to theme.

Some of the benefits of using surveys to answer specific research questions are that they provide a means of measuring a specific field of study – in this case, responses to an experience of interviewing legal clients and the impact of this on students’ understanding of legal ethics. Surveys also provide a way of gathering numerical data which can be processed statistically, and of providing ‘descriptive, inferential and explanatory information’<sup>152</sup> while gathering standardised data by using the same questions across a group of people.

‘Surveys can be *exploratory*, in which no assumptions or models are postulated, and in which relationships and patterns are explored’,<sup>153</sup> which is how surveys are used in chapters 6 and 7. Another important aspect of using surveys is their design. Surveys must be clearly defined with a measurable target.<sup>154</sup> They can provide open-ended questions or set answers. In this survey, students were asked an open-ended question – ‘What is an ethical legal practitioner?’ – rather than being given various characteristics of an ethical legal practitioner from which they could choose. The surveys explored the students’ ideas of ethics and ethical legal practice. Furthermore, the relationships between a clinical experience and the ways in which it shapes students’ ethical understandings, and their feelings of confidence and autonomy, were explored. In this case, the surveys were designed with the input of 10 educational experts.

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<sup>151</sup> Alan Bryman, *Social Research Methods* (Oxford University Press, 2008); Patricia Ewick and Susan Silbey, ‘The Common Place of Law’ in Simon Halliday and Patrick Schmidt, *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge University Press, 2009).

<sup>152</sup> Louis Cohen, Lawrence Manion and Keith Morrison, *Research Methods in Education* (Taylor and Francis, 2017) 334.

<sup>153</sup> *Ibid*, 335.

<sup>154</sup> *Ibid*, 336.

Students were asked open-ended questions as one of the ways to ameliorate any bias or expectations of the researcher.

The language used in the surveys was simple and easy to understand, without suggesting answers.<sup>155</sup> This is another key characteristic of good survey design. Surveys of students within the applied legal ethics clinical component provide a rigorous testing of the findings of the documentary research and a means to introduce some quantitative and qualitative data, which provides a means to balance the possible bias of the researcher through direct participant voices.

Using case studies in conjunction with surveys also enables theory to be built from practice, or building 'grounded theory'. Although the researcher is in the practice of law and teaching, there were surprises and unexpected results which enabled more 'creative insights'.<sup>156</sup> For example, the researcher did not anticipate that students would identify dealing with 'repugnant clients' as one of the ethical issues they would face. But this was one of the most highly anticipated ethical issues which students identified before interviewing clients (see chapter 6). Neither did the researcher expect that students would identify systemic problems – such as the lack of free legal services – as ethical issues, and yet they did (see chapter 6). In both these examples, by using a case study and survey method, unexpected results were generated.

To answer the research questions, the three methods – documentary research, case studies and surveys – were used for a constant interchange between data and theory. Simply put, 'grounded theory methods consist of systematic, yet flexible guidelines for collecting and analyzing qualitative data to construct theories "grounded" in the data themselves'.<sup>157</sup> This is the approach taken explicitly to answer the second research question, which concerns the ways

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<sup>155</sup> Geoff Payne and Judy Payne, *Key Concepts in Social Research* (Sage, 2004) 187.

<sup>156</sup> Bruce Berg and Howard Lune, *Qualitative Research Methods for the Social Sciences* (Pearson, 2012) 329.

<sup>157</sup> Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide through Qualitative Analysis* (Sage, 2006) 2.

in which a clinical component can shape law students' ethical understandings (chapters 5, 6 and 7). The theory arose out of the data, informed by documentary evidence. The coding process lends itself to interpretation but, in some instances, the answers from surveys were counter-intuitive and provided an effective offset to the implicit expectations of the researcher.<sup>158</sup> The finding in the survey data that students identified the importance of an 'ethic of care' in what they considered to be ethical lawyering was an example of an unexpected finding. The need to further investigate connections between concepts of 'justice' and 'care' was identified in the research.

This then led to the exploration of the importance of identity, values and privilege and the impact these have on creating reflective, justice-focused lawyers. In order to enquire into this question, the lens of ability/disability was chosen as one facet of identity.

### **Methodology for question 3**

Chapter 8 addresses question 3 and its sub-question: Why is it important to teach students to examine concepts of identity, power and privilege in order that they become reflective, justice-focused lawyers? What role does teaching students about ability/disability have in prompting their growth to being reflective, justice-focused lawyers?

Having enquired into students' understandings of ethical legal practice and having gained valuable insights into their perceptions of the importance of spending time with, and caring for, the client, the researcher wanted to dig more deeply into the relationship between the student/future lawyer and the client. The connection between being 'justice-focused' and caring for the client was suggested through the survey results. These are clearly value and identity

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<sup>158</sup> For example, the researcher expected that the clinical component would provide a motivating experience to commit students to practise law in the public interest. The survey data did not find this to be the case, in fact finding that it affirmed students' existing motives for future legal practice but did not change their commitment to practise law in the public interest.

issues related in the person-to-person relationship. In order to explore this more deeply, the researcher chose the lens of ability/disability in order to look at how identity influences the legal and lawyering process. To answer these research questions and their relationship to the formation of reflective and justice-focused lawyers, the researcher used the methods of documentary research and case study.

Rather than just looking at how students are taught about ability/disability issues in law, the researcher expanded this to research teaching disability issues in a broader context. Thus, a range of literature in tertiary education was analysed for the insights which could be applied in teaching law. Examples from teaching within literature studies,<sup>159</sup> disability studies and social work studies<sup>160</sup> then helped to frame key approaches to teaching law students about disability issues. Research into other law courses and clinical courses which teach disability issues<sup>161</sup> was also used to frame the understanding of how disability issues are currently being taught.

The researcher draws from experience working in clinics at both the Human Rights Program at UNAM in Mexico City and Kingsford Legal Centre at UNSW in Sydney in order to analyse the experience of each clinic. This, in turn, led to the formulation of recommendations and findings concerning the best ways of teaching students about disability issues. Focusing on ability/disability is an illustrative lens for the larger questions of identity and privilege. This chapter could have focused on other facets of identity, such as gender or race/culture. However, because ability/disability has been less explored within clinical legal education, it proves fruitful for thinking about and discussing effective means of teaching students about this

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<sup>159</sup> Lynn Z Bloom, 'Bodies of Knowledge: Ethics and Engagement in an Undergraduate Disability Studies Course' (2014) 14 *Pedagogy: Critical Approaches to Teaching Literature, Language, Composition and Culture* 179.

<sup>160</sup> Deirdre Heenan, 'Challenging Stereotypes Surrounding Disability and Promoting Anti-Oppressive Practice: Some Reflections on Teaching Social Work Students in Northern Ireland' (2005) 24 *Social Work Education: The International Journal* 495.

<sup>161</sup> Robert D Dinerstein, "'Every Picture Tells a Story, Don't It?': The Complex Role of Narratives in Disability Cases' (2007) 15(1) *Narrative* 40; Okianer Christian Dark, 'Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching' (1996) 32 *Willamette Law Review* 541.

facet of identity and how it impacts on their role as future lawyers. The advantage of the researcher being involved in the area being studied is the depth of knowledge and experience which this brings to the discussion. The method in chapter 8 is largely one of documentary evidence, but drawing from a case study with comparative elements.

Throughout a nine-month period in 2014–15, the researcher worked within the Human Rights Program legal clinic at UNAM and taught within this clinic. This enabled the collection of valuable data arising from participating in and assisting in the development of class content, which then informed the analysis of both this clinic and Kingsford Legal Centre. The existing course outlines and course materials were examined in order to inform the analysis of the ways in which disability rights content was taught. Drawing on both experience and existing research in this area, the researcher was able to analyse existing practice and use this analysis to develop specific guidelines within the method of documentary research.

Grounded research involves ‘attempts to improve educational practice by groups of participants by means of their own practical actions and by means of their own reflection upon the effects of those actions’.<sup>162</sup> Chapter 8 uses a documentary research approach but draws from grounded theory, as the researcher uses the case study experience of teaching within clinics at UNSW as well as in the Human Rights Clinic in Mexico in order to create theory on how to teach students effectively about disability issues.

The case study included two locations of education practice. By having these locations in different countries, the researcher attempted to provide some triangulation and amelioration of bias by including the comparative elements of the two locations in a single case study. The Human Rights Program legal clinic was chosen as a comparator because it has a specialist disability rights clinic which is relatively young. It also operates within Mexico, which provides a

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<sup>162</sup> Dave Ebbutt, ‘Educational Action Research: Some General Concerns and Specific Quibbles’ in Robert G Burgess (ed), *Issues in Educational Research: Qualitative Methods* (Falmer Press, 1985), cited in David Hopkins, *A Teacher’s Guide to Classroom Research* (4th edn, McGraw Hill, 2008).

different political and geographical situation as a generally poorer country with a range of specific challenges. Choosing a disability rights clinic within a developing country means that the recommendations can potentially apply across a greater number of countries, not just those which are wealthy and developed, such as Australia. Another benefit of choosing Mexico is that the Convention on the Rights of Persons with Disabilities<sup>163</sup> applies within Mexican law and therefore provides a contrast with Australia, where there is no direct incorporation of the Convention into domestic law. These differences mean that the lessons learned can be widely utilised internationally across clinics which teach disability issues. Data were gathered about the current practice of each clinic site through participation at each site.

Broadening a case study also enables other perspectives to be included, allowing the researcher to identify when there are interconnections. Additional data will enable other perspectives to be gained.<sup>164</sup> A collective case study may focus on one issue or concern, but the researcher selects multiple examples to illustrate the issue or to show different perspectives.<sup>165</sup> For example, including the teaching of disability issues in both Mexico and Sydney provides the case study with a breadth of perspectives and interconnections – for example, the importance of centring people with disability when teaching law students about ability/disability. These two locations have many differences, but in both it is vital to include people with disability in the teaching process so that it is not ‘about’ people with disability. Another insight gained from including the two examples was the prevalence of a medical model, rather than a social model, for understanding disability. Seeing this phenomenon in both locations made it easier to recognise and critique the importance of teaching about it. While using a case study does not automatically mean that the findings can be generalised, a case study technique is useful for

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<sup>163</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

<sup>164</sup> Bruce Berg and Howard Lune, *Qualitative Research Methods for the Social Sciences* (Pearson, 2012) 331.

<sup>165</sup> John W Creswell and Cheryl N Poth, *Qualitative Inquiry and Research Design: Choosing among Five Approaches* (Sage, 2018) 99.

studying an example. The findings from case studies can also be seen as a ‘contribution to knowledge’ and generating new ideas.<sup>166</sup>

Using this documentary research method combined with a case study, and being immersed in the practice of teaching students about disability issues at both Kingsford Legal Centre and the Human Rights Program legal clinic, the overarching approach thus draws from experience and examples of practice using grounded theory.

## **Conclusion**

From this discussion, it is apparent that having a methodology of mixed methods was a valid approach to answering the specific research questions of this thesis. The overarching approach is of grounded research using the methods of documentary research, case studies and surveys. The constant movement between practice and theory was facilitated through the use of grounded research theory. This enabled the research to incorporate the specific depth of experience of the researcher, and to enable possible social change through the research by drawing from critical theory. It also drew from a range of data sources.

The method of documentary research, combined with case studies, was vital in exploring the meaning and importance of reflection skills in answering the research question about the significance of teaching law students how to reflect. These methods enabled the research to identify the importance of teaching reflection skills in order that students can understand and fulfil their ethical duty to contribute to justice and the legal system.

To answer the research questions relating to the impact of a clinical component on students’ ethical understandings, students’ commitment to contributing to justice, and their sense of autonomy and purpose, the methods used were documentary research, case studies and

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<sup>166</sup> Geoff Payne and Judy Payne, *Key Concepts in Social Research* (Sage, 2004) 99.

surveys. Surveys were used to provide a depth of data by including the student voice and the experience of learning about ethics through interviewing clients. In order to answer the research questions, surveys were administered to law students both before and after the experience of interviewing clients. The data sources were varied in that the survey was developed through documentary research and was based on the experience of the researcher, which was then informed by the expertise of more than 10 educational experts in constructing the surveys. Some of the responses to those surveys suggested the importance of relationships and an ethic of care and values in ethical lawyering. This led to the exploration of identity, power and privilege through the lens of ability/disability.

To answer the questions concerning teaching students about disability and ability, and their own identity and its impact on being a justice-focused and reflective lawyer, a documentary research method based in a case study was used. A grounded research approach was used, drawing from the experience of teaching students about disability and ability. This relied on a case study involving working within a clinic in Sydney and a clinic in Mexico City specialising in clients with disability. A limitation of this method could be the subjectivity and specificity of the experience being analysed. By including the experience of two clinics, these issues were ameliorated. The two clinics were quite different from each other, being located in very different countries and cultural contexts. This allowed a range of data sources in order to provide alternative views on the research questions. It also enabled common themes and insights to be identified. Using a mixed methods approach ensured that the research questions were able to be answered relying on 'thick' data, and the richness of practice and theory could be explored in order to provide clear answers to the research questions.

## Chapter 4:

### Reflection and clinical legal education – how do students learn about their ethical duty to contribute towards justice?

#### Introduction

Teaching law students how to reflect effectively is an essential element of creating lawyers who are lifelong learners who will fulfil their ethical duty to contribute to the justice system. An ethical duty to contribute to justice arises partly out of a lawyer being a professional, and their concepts of professionalism,<sup>167</sup> but also out of the rule of law, which requires that all can gain access to justice equally. Professionalism is not just being able to apply technical competence. Rather, it is an understanding of self within the profession which develops over time and is influenced by relationships, by interactions with clients, and by moral development. It involves reflection ‘on how one’s authentic self intersects with organisational culture’.<sup>168</sup> A distinguishing characteristic about lawyers is that they have an ethical duty to contribute to the justice system in order to make it fairer and more just. This is part of their ethical responsibility and identity as a legal professional. Lawyers who know how to reflect on the law and the legal system, including its flaws and problems, as well as their own role within it, will be more able to fulfil this duty. Lawyers need to exercise judgement in complex ways, including through the skills of

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<sup>167</sup> Indeed, Pound famously defined professions as ‘a group of men [sic] pursuing a learned art as a common calling in the spirit of public service’: Roscoe Pound, *The Lawyer from Antiquity to Modern Times: With Particular Reference to the Development of Bar Associations in the United States* (West Publishing 1953), referred to in Andrew Boon and Avis Whyte, “‘Charity and Beating Begins at Home’: The Aetiology of the New Culture of Pro Bono Publico’ (1999) 2(2) *Legal Ethics* 169, 175.

<sup>168</sup> Verna E Monson and Neil W Hamilton, ‘Ethical Professional (Trans)Formation: Early Career Lawyers Make Sense of Professionalism’ (2011) 8 *University of St. Thomas Law Journal* 129, 160.

reflection.<sup>169</sup> Indeed, legal education is no longer – if it ever was – just about teaching law students to ‘think like a lawyer’. Students need to be taught ethical understandings, an awareness of values and diversity, and analytical and thinking skills. These are intertwined and connected, rather than independent of each other.<sup>170</sup> ‘Thinking like a lawyer’ is not divorced or separated from exercising legal judgement and empathy. Legal education should not be about training out leadership and empathy.<sup>171</sup> In fact, the concept of professionalism ‘explains how moral behavior results from the integration of cognitive, emotional, and social capacities’.<sup>172</sup> Some would define professionalism itself to include a calling to service, or to exercise skills in a way that benefits those who cannot afford legal services, in an ‘altruistic’ way.<sup>173</sup>

In this chapter, it is argued that clinical legal education has a valuable role to play in teaching students how to reflect and that it is a very useful methodology for teaching students to become reflective, justice-focused lawyers. Many have discussed the role of clinical legal

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<sup>169</sup> Thinking like a lawyer is not a simple statement but rather involves a lawyer weighing up many factors and issues in deciding the ethical course of action, using their judgement. William H Simon, ‘Thinking Like a Lawyer about Ethical Questions’ (1998) 27 *Hofstra Law Review* 1.

<sup>170</sup> Legal education should include values, skills and attributes, not just thinking skills. These are intertwined and connected, rather than separate categories. Carrie Menkel-Meadow, ‘Narrowing the Gap by Narrowing the Field: What’s Missing from the MacCrate Report – Of Skills, Legal Science and Being a Human Being’ (1994) 69 *Washington Law Review* 593; William Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Foundation for the Advancement of Teaching, 2007) 1–14. The Carnegie report into legal education in the United States also identified the importance of skills, attributes and ethical formation in legal education, not just thinking and analytical skills.

<sup>171</sup> Karen H Rothenberg, ‘Recalibrating the Moral Compass: Expanding Thinking Like a Lawyer into Thinking Like a Leader’ (2009) 40 *University of Toledo Law Review* 411; Verna E Monson and Neil W Hamilton, ‘Ethical Professional (Trans)Formation: Early Career Lawyers Make Sense of Professionalism’ (2011) 8 *University of St. Thomas Law Journal* 129.

<sup>172</sup> Verna E Monson and Neil W Hamilton, ‘Ethical Professional (Trans)Formation: Early Career Lawyers Make Sense of Professionalism’ (2011) 8 *University of St. Thomas Law Journal* 129, 135.

<sup>173</sup> Donald Nicolson, ‘Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice’ (2013) 16(1) *Legal Ethics* 36.

education in educating students to become ethical lawyers.<sup>174</sup> This has included clinical courses focused on ethical decision-making,<sup>175</sup> or developmental approaches to ethical training with clinical courses as a final step in the process.<sup>176</sup> This chapter discusses the importance of clinical legal education programs, which may assist in the ethical formation of students<sup>177</sup> through the development of their reflection skills. It examines what reflection is, drawing from a range of theorists across disciplines. It also discusses why learning how to reflect is important. Finally, the chapter draws from examples of teaching students how to reflect within a clinical legal education course in order to describe and illustrate the ways in which reflection skills can be taught through clinical legal education. It explores the connection between clinical legal education and the formation of ethical understandings and professionalism.<sup>178</sup> The chapter also highlights the significance of emotion in reflection skills and the importance of reflection in the community<sup>179</sup> – both of which are present in clinical legal education.

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<sup>174</sup> Nigel Duncan, 'Ethical Practice and Clinical Legal Education' (2005) 7 *International Journal of Clinical Legal Education* 7; Donald Nicolson, 'Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice' (2013) 16(1) *Legal Ethics* 36.

<sup>175</sup> Mary Anne Noone and Judith Dickson, 'Teaching towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers' (2001) 4(2) *Legal Ethics* 127.

<sup>176</sup> Donald Nicolson, 'Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice' (2013) 16(1) *Legal Ethics* 36; Julian Webb, 'Inventing the Good: A Prospectus for Clinical Education and the Teaching of Legal Ethics in England' (1996) 30(3) *The Law Teacher* 270.

<sup>177</sup> Moorhead found in his study that ethical formation during legal education was a complex development. The results of his survey of students from England and Wales and the United States was that there was a more positive ethical development for students who had engaged in clinics or pro bono programs. Those students appear to value 'self-transcendence' (or altruistic purpose) more highly than those who had not. This finding may, however, be a correlation rather than causal. Richard Moorhead, 'The Ethical Identity of Law Students' (2016) 23(3) *International Journal of the Legal Profession* 235, 24.

<sup>178</sup> Noone and Dickson discuss the value of the clinical method in developing an entire course which focuses on ethical development, through a clinical method: Mary Anne Noone and Judith Dickson, 'Teaching towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers' (2001) 4(2) *Legal Ethics* 127.

<sup>179</sup> Adrian Evans, 'Client Group Activism and Student Moral Development in Clinical Legal Education' (1999) 10 *Legal Education Review* 179.

## Contributing to the justice system as an ethical duty

The legal profession has long recognised that by being responsible for, and having a monopoly on, providing legal services, it also has an ethical duty to ensure that those who cannot afford legal services can still get them. 'The idea that enjoying extraordinary privileges and power creates responsibilities and moral obligations originates in Plato's notion of citizenship.'<sup>180</sup> The rule of law, which includes the concept of equal access to justice, must be ensured and upheld by lawyers.<sup>181</sup> Indeed, a lawyer is seen as having a 'special responsibility for the quality of justice'.<sup>182</sup> This has often been expressed through a commitment to pro bono, which is part of the broader understanding of lawyers' obligation to ensure access to justice.

Within various of the national legal professional rules, there is an obligation for lawyers to contribute to making the law and the legal system more fair. In the American Bar Association's model rules, there is a duty stated in the preamble which refers to the role of a lawyer to 'seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession'.<sup>183</sup> The rules also recognise that lawyers should identify the social and economic barriers which clients may face in attempting to access the law. In the Canadian professional rules, lawyers are expected to commit to 'the concept of equal

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<sup>180</sup> Andrew Boon and Avis Whyte, "'Charity and Beating Begins at Home": The Aetiology of the New Culture of Pro Bono Publico' (1999) 2(2) *Legal Ethics* 169, 174, referring to Derek Heater, *Citizenship: The Civic Ideal in World History, Politics and Education* (Longman, 1990); John Hospers, *Human Conduct: Problems of Ethics* (2nd edn, Harcourt Brace Jovanovich, 1982).

<sup>181</sup> Lisa Webley, 'Legal Professional De(Re)Regulation, Equality, and Inclusion, and the Contested Space of Professionalism within the Legal Market in England and Wales' (2015) 83(5) *Fordham Law Review* 2349.

<sup>182</sup> Karen H Rothenberg, 'Recalibrating the Moral Compass: Expanding Thinking Like a Lawyer into Thinking Like a Leader' (2009) 40 *University of Toledo Law Review* 411, 413, referring to American Bar Association, 'Model Rules of Professional Conduct: Preamble and Scope' (American Bar Association Publishing 2020) <[https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble\\_scope/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/)>.

<sup>183</sup> American Bar Association, 'Model Rules of Professional Conduct: Preamble and Scope' (American Bar Association Publishing 2020) <[https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble\\_scope/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/)>.

justice for all within an open, ordered and impartial system'.<sup>184</sup> In Australia, is it less clearly expressed that lawyers have a duty to contribute to improve justice. Nonetheless, the uniform rules for solicitors<sup>185</sup> recognise that the paramount duty of a solicitor is to the court and the administration of justice. This has been interpreted to connote the responsibility of all lawyers to contribute to the improvement of the law and the legal system. In the United Kingdom, the Solicitors Regulation Authority has developed the principles and regulations applicable to solicitors. These relevantly state that a solicitor must uphold the administration of justice 'in a way that encourages equality, diversity and inclusion'.<sup>186</sup>

From these sample model rules for solicitors, it is apparent that lawyers have a broad ethical duty to, at the least, contribute to the administration of justice and, further along the spectrum, improve the equality of the law and the legal system while being aware of the barriers that disadvantaged groups in the community experience when accessing the law. The argument of this chapter is that lawyers will fulfil this duty more effectively if they have the skill to be able to reflect on the law and the legal system. Lawyers will also need to reflect on their own role, identity and ways of exercising their legal skills and knowledge. Clinical legal education is an effective methodology for teaching students reflection skills in both these areas.

The next section discusses what reflection is and the varied reasons why it is important to teach law students how to reflect. Teaching students reflective skills helps them focus on the experience of law by disadvantaged communities. It also helps them understand and respond effectively to 'disorienting moments'. Teaching students to reflect helps them resolve the 'messy' problems of law. It also ensures that they can integrate emotion and values into their

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<sup>184</sup> Federation of Law Societies of Canada, 'Model Code of Professional Conduct' (14 March 2017) 5.6–5.6.1(2) <<https://flsc.ca/wp-content/uploads/2018/03/Model-Code-as-amended-March-2017-Final.pdf>>.

<sup>185</sup> Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (Cth).

<sup>186</sup> Solicitors Regulation Authority, 'SRA Principles' (30 May 2018) 1, 6 <<https://www.sra.org.uk/solicitors/standards-regulations/principles/>>.

practice of law and resolve dissonant experiences. All of these reasons fit within the broader goal and ethical duty of contributing to the justice system. Clinical legal educators need to both demonstrate and teach effective reflection to their students in order to help them achieve these purposes.

## **The what and why of teaching law students reflection**

As human beings, we engage in reflection in order to learn about and improve how we deal with situations. Reflection is not a mystical process:

Reflection is a form of mental processing – like a form of thinking – which we use to fulfil a purpose or to achieve some anticipated outcome. It is applied to relatively complicated or unstructured ideas for which there is not an obvious solution and is largely based on the further processing of knowledge and understanding and possibly emotions that we already possess.<sup>187</sup>

This is an interesting definition because of its inclusion of ‘why we reflect’ – that is, fulfilling a purpose or achieving some particular outcome. Moon, a scholar in education, makes the point that reflection is not about straightforward issues, but rather is particularly useful for more complicated or messy ideas. It is useful when we do not understand, or when we have only partial understanding and want to delve further into a fuller, more layered and multifaceted understanding of an issue.

Kolb,<sup>188</sup> another educational theorist, summarises the cycle of reflection in a shorthand model: ‘concrete experience; reflective observation; abstract conceptualisation; active

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<sup>187</sup> Jenny Moon, ‘Reflection in Higher Education Learning’ (PDP Working Paper No 4, Learning and Teaching Support Network Generic Centre, 2010) <<http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.503.5288>>.

<sup>188</sup> David Kolb and Alice Kolb, *The Kolb Learning Style Inventory 4.0: Guide to Theory, Psychometrics, Research & Applications* (Case Western University Press, 2013).

experimentation'. This model is developed to ensure effective learning in experiential education,<sup>189</sup> particularly in adult learning.

Understanding reflection within the context of a growth mindset is relevant to lawyers and student lawyers as it conceives of intelligence as constantly growing. Thus, lawyers can continue to grow and change in all aspects, but specifically in their ability to contribute to the justice system. In current pedagogical thinking and practice – indeed, even reaching into primary school education – the concept of a 'growth mindset' has become current.<sup>190</sup> Dweck states:

A growth mindset is based on the belief that your basic qualities are things that you can cultivate through your efforts, your strategies, and help from others. Although people may vary in every which way – in their initial talents and aptitudes, interests or temperaments – everyone can change and grow through application and experience.<sup>191</sup>

We are not born with a 'set intelligence'. Rather, we can constantly grow and expand our abilities and our intelligence. This builds on a newer understanding of the brain's plasticity.<sup>192</sup>

The theory of a growth mindset also calls into question a top-down approach to acquiring knowledge and the hierarchising of those who are educated and those who are not. As a way of thinking about intelligence, it is radical because it recognises that we are all able to constantly learn and grow our intelligence. There is no set endpoint for this process, which is empowering for all of humanity. We all have the capacity to improve and to deal with increasingly complex

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<sup>189</sup> Jenny Moon, 'Reflection in Higher Education Learning' (PDP Working Paper No 4, Learning and Teaching Support Network Generic Centre, 2010) <<http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.503.5288>>.

<sup>190</sup> Carol Dweck, *Mindset: The New Psychology for Success* (Ballantine Books, 2007).

<sup>191</sup> *Ibid*, 1.

<sup>192</sup> Neuroplasticity is the concept that neural connections in the brain change, remap and reorganise themselves when people learn new concepts, have new experiences, or practise certain skills over time. 'Brain-Based Learning', *The Glossary of Education Reform* (Web Page, 29 August 2013) <<https://www.edglossary.org/brain-based-learning/>>.

problems. That growth is mediated by our reflexivity, which can be developed in our students and in ourselves.

### **Helping students deal with ‘disorienting moments’**

Reflection is essential in legal practice in order to make sense of the messiness of law and its practice with humans who have complex issues. Yet it can be hard to do. Teaching students how to understand ‘disorienting moments’ gives them the beginning tools for challenging unfair structures within the law and the legal system and fulfilling their ethical duty. Transformative learning occurs when learners are exposed to disorienting information that they cannot reconcile with their prior experiences or beliefs – when they encounter gaps in the justice system or problems with the legal system. Transformative learning is disruptive.<sup>193</sup>

There are three stages to the disorienting moment and, critically, these include reflection. The stages are the experience itself, then the exploration and reflection on the experience, and finally the re-orientation from the experience.<sup>194</sup> The disorienting moment leads to perspective transformation. This occurs ‘when the learner confronts an experience that is disorienting or even disturbing because the experience cannot be easily explained by reference to the learner’s prior understanding – referred to in learning theory as “meaning schemes” – of how the world works’.<sup>195</sup> This theory applies across disciplines to the many ways in which people experience

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<sup>193</sup> Jane H Aiken, ‘Striving to Teach “Justice, Fairness, and Morality”’ (1997) 4 *Clinical Law Review* 1, 9.

<sup>194</sup> Jack Mezirow, ‘Perspective Transformation’ (1978) 28 *Adult Education Quarterly* 100, cited in David Boud, Rosemary Keogh and David Walker (eds), *Reflection: Turning Experience into Learning* (Routledge Falmer, 1994) 211.

<sup>195</sup> Fran Quigley, ‘Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics’ (1995) 2 *Clinical Law Review* 37, 51.

disorienting moments – in teaching, nursing, social work and law, among many others.

Increasingly, each discipline has examined how to teach students to reflect.<sup>196</sup>

Reflection can be a social and political activity rather than simply a singular one done for the purpose of individual change.<sup>197</sup> For some, ‘reflection is a political act which is shaped by ideology as, in turn, ideology shapes reflection’.<sup>198</sup> Mezirow discusses two paths to perspective transformation: ‘one is a sudden insight into the structure of the assumptions which have limited or distorted one’s understanding of oneself and one’s relationships; the other is directed towards the same end but it proceeds more slowly by a series of transitions which permit one to revise specific assumptions about oneself and others until a stage occurs in which the assumptions become transformed’.<sup>199</sup> Participating in this process of self-reflection could be seen as part of the process which Freire refers to as ‘conscientisation’.<sup>200</sup> It builds on disorienting moments to create change in self, change in interpersonal relationships, and change in society.

Schön is well known for his adaptation of the concepts of reflection for professional practice.<sup>201</sup>

He refers to the messiness of professional practice and the ability to learn how to act and think through, and from, that messiness or ‘uncertainty’ of practice. Dewey refers to ‘perplexity,

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<sup>196</sup> EM Boyd and AW Fales, ‘Reflective Learning: Key to Learning from Experience’ (1983) 23 *Journal of Humanistic Psychology* 99; David Boud, Rosemary Keogh and David Walker (eds), *Reflection: Turning Experience into Learning* (Routledge Falmer, 1994); Jenny Moon, ‘Reflection in Higher Education Learning’ (PDP Working Paper No 4, Learning and Teaching Support Network Generic Centre, 2010) <<http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.503.5288>>; Mary Ryan, ‘The Pedagogical Balancing Act: Teaching Reflection in Higher Education’ (2013) 18 *Teaching in Higher Education* 144.

<sup>197</sup> Adrian Evans, ‘Client Group Activism and Student Moral Development in Clinical Legal Education’ (1999) 10 *Legal Education Review* 179.

<sup>198</sup> David Boud, Rosemary Keogh and David Walker (eds), *Reflection: Turning Experience into Learning* (Routledge Falmer, 1994) 17.

<sup>199</sup> Jack Mezirow, ‘Perspective Transformation’ (1978) 28 *Adult Education Quarterly* 100, cited in David Boud, Rosemary Keogh and David Walker (eds), *Reflection: Turning Experience into Learning* (Routledge Falmer, 1994) 23.

<sup>200</sup> Paulo Freire, *Pedagogy of the Oppressed* (Penguin Education London, 1970).

<sup>201</sup> Donald Schön, ‘Educating the Reflective Practitioner’ (1995) 2 *Clinical Law Review* 231.

mental difficulty, in which reflective thinking originates'<sup>202</sup> or, as others have termed it, 'inner discomfort'.<sup>203</sup> Professional education often distinguishes between 'knowledge' and 'practice'. Real life involves indeterminate situations, which professionals try to resolve through knowledge, intuition and action. Schön develops concepts of 'technical rationality' and of life throwing up 'messy' indeterminate problems. He suggests a new way of thinking about resolving these indeterminate problems, through 'reflection-on-action' and 'reflection-in-action'. Schön distinguishes between reflection-on-action (conscious reflection after the event), which can lead to the skill of reflection-in-action (the ability of professionals to think about what they are doing while they are doing it).<sup>204</sup> Indeed, various theorists have talked about metacognition and the stage at which students eventually are thinking about their process of reflection.<sup>205</sup> It can also be thought of as awareness about cognitive functioning. When reflecting, this is thinking about learning.<sup>206</sup> Schön's theory could be extended to metacognition if, in the reflection-on-action process, the action is the thinking. Thus, it becomes reflection-on-thinking.

These understandings of what reflection means connect to theories about how we learn and how we construct knowledge. Constructivist learning theory postulates that students participate actively in their learning as they have experiences which challenge their current views and ideas

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<sup>202</sup> John Dewey, *How We Think* (Heath & Co, 1933) 12, quoted in David Boud, Rosemary Keogh and David Walker (eds), *Reflection: Turning Experience into Learning* (Routledge Falmer, 1994) 19.

<sup>203</sup> EM Boyd and AW Fales, 'Reflective Learning: Key to Learning from Experience' (1983) 23 *Journal of Humanistic Psychology* 99, 99–117.

<sup>204</sup> Mark Waters, 'Educating the Reflective GP: Schön Revisited' (2004) 15 *Education for Primary Care* 631, 632, quoted in Rachel Spencer, 'Holding up the Mirror: A Theoretical and Practical Analysis of the Role of Reflection in Clinical Legal Education' (2014) 18 *International Journal of Clinical Legal Education* 181.

<sup>205</sup> Tim Casey, 'Reflective Practice in Legal Education: The Stages of Reflection' (2014) 20 *Clinical Law Review* 317, 321. Casey refers to this as 'the final stage – Metacognition – the student should demonstrate an awareness of the effect of reflection on her thinking process'.

<sup>206</sup> Jenny Moon, 'Reflection in Higher Education Learning' (PDP Working Paper No 4, Learning and Teaching Support Network Generic Centre, 2010) 7 <<http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.503.5288>>.

and which they then must incorporate to create new knowledge.<sup>207</sup> There is a potential for clinical legal education as an active – rather than passive – form of learning. Schön's theory of a reflective practitioner relies on constructivist learning theory: students learning through a process of accommodation and assimilation.<sup>208</sup> When a learner has an experience which aligns with their internal understanding of the world, they assimilate that experience into the existing framework. If an experience does not fit the existing framework, then the learner re-frames their internal understanding of the world to accommodate what has happened. In this way, the learner constructs new knowledge. Constructivist-based pedagogies tend to be founded on a belief that learning is best accomplished by a hands-on approach. This fits closely with clinical legal education, where students work with clients whose experience of law is unfair, contrary to what a student may have been taught to expect.

The 'deep approach is one in which students seek an understanding of the meaning of what they are studying, relate it to their previous knowledge and interact actively with the material at hand'.<sup>209</sup> In contrast to this is a surface approach to learning, which is characterised by students memorising facts by rote and not necessarily reflecting on that knowledge. By engaging in deep learning, the student constructs new knowledge. Others have termed this 'learning for transfer', which means the ability of students to use what they have learnt in other, new, contexts.<sup>210</sup> 'Reflection is a way of getting students to realise that learning is about drawing on life experiences, not just something that takes place in a classroom. It enables students to think

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<sup>207</sup> Kaya Yilmaz, 'Constructivism: Its Theoretical Underpinnings, Variations, and Implications for Classroom Instruction' (2008) 86 *Educational Horizons* 161.

<sup>208</sup> Donald Schön, 'Educating the Reflective Practitioner' (1995) 2 *Clinical Law Review* 231.

<sup>209</sup> David Boud, Rosemary Keogh and David Walker, 'Promoting Reflection in Learning: a Model' in David Boud, Rosemary Keogh and David Walker (eds), *Reflection: Turning Experience into Learning* (Routledge Falmer, 1994) 24.

<sup>210</sup> Shaun Archer et al, 'Reaching Backward and Stretching Forward: Teaching for Transfer in Law School Clinics' (2014) 64 *Journal of Legal Education* 258, cited in Susan Brooks 'Using a Communication Perspective to Teach Relational Lawyering' (2015) 15(2) *Nevada Law Journal* 477, 512.

about *what* and *how* they learn and to understand that this impacts on how well they do.’<sup>211</sup>

Clinical legal education, coupled with the development of reflective skills, may be the key here.

## **Disorienting moments and the potential of integrating emotion and reflection**

Emotions are an integral element of the reflective process. Dewey, however, defines reflection as ‘active, persistent and careful consideration of any belief or supposed form of knowledge in the light of the grounds that support it, and further conclusions to which it leads ... it includes a conscious and voluntary effort to establish belief upon a firm basis of evidence and

rationality’.<sup>212</sup> This is interesting as a definition because it separates out the emotion, which may be the trigger for reflection or can form part of the content of the reflection process.

Others have critiqued this definition because it assumes that reflection is ‘highly rational and controlled’, whereas the emotional content of reflection is essential for both the substantive reflection and deepening the reflection process.<sup>213</sup> Ensuring that students identify their feelings is part of the reflection process, which may then be examined with rigour and a mix of emotion and rationality.<sup>214</sup> For example, a student may feel annoyed with a client who has brought a large number of documents to their legal advice appointment. The feelings of annoyance may shift for the student as they begin the interview and start to realise that the client is homeless, and so brings all their documents with them everywhere. Part of the reflection process will be for the student to recognise and name their emotional response and, when it changes, try to

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<sup>211</sup> Karen Hinett, ‘Developing Reflective Practice in Legal Education’ (Guidance Note No 6, UK Centre for Legal Education, 2002) preface.

<sup>212</sup> John Dewey, *How We Think* (Heath & Co, 1933) 9.

<sup>213</sup> David Boud, Rosemary Keogh and David Walker (eds), *Reflection: Turning Experience into Learning* (Routledge Falmer, 1994) 21.

<sup>214</sup> Colin James, ‘Seeing Things As We Are: Emotional Intelligence and Clinical Legal Education’ (2005) 8 *International Journal of Clinical Legal Education* 123, 138. Others (such as Jenny Moon), however, comment that emotion is not always an important part of the reflection process and there is differing opinion in the literature around this. This chapter argues that emotion is a significant part of reflection.

examine why they felt how they did and why those emotions changed. The student will need to ask themselves whether they would feel and act differently if this happened again. The student will need to examine their own assumptions and values which were in play when the client came into the interview with the documents. Examining societal, cultural, gender, racial and disability issues of homelessness may also be a part of this student's reflection. This can be part of the larger reflection about what role the law and the legal system play in this homeless person's life. Reflecting on this experience has the potential for the student to question their own role in contributing to the justice system, starting with the emotion of feeling 'annoyed'.

Certainly, this messiness of life can then provide rich ground for opening students to looking at the world, the law and the legal system in different ways. This 'emotional turmoil also create[s] a willingness to engage in self-reflection and cultivate[s] openness to learning about privilege'.<sup>215</sup> Indeed, the potential of reflecting on disorienting moments challenges students and lawyers 'not only to analyse the world outside of them but also to turn inward and analyse themselves. They must seize the moment of disorientation and deconstruct it'.<sup>216</sup> In this moment, the connection between thinking, emotion and values is made.<sup>217</sup> Leering discusses a continuing spiral of reflection in which critical reflection is developed so that students can question their assumptions and beliefs about the practice of law and justice. This does not occur abstractly. Rather, students question their assumptions and beliefs about law, drawing from the experience of their clients in law. They are also prompted to self-reflect. 'A reflective legal practitioner integrates all three aspects of reflection through a continuous spiralling from one aspect to another, developing additional insight, knowledge and wisdom, enhancing

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<sup>215</sup> Jane H Aiken, 'Striving to Teach "Justice, Fairness, and Morality"' (1997) 4 *Clinical Law Review* 1, 10.

<sup>216</sup> Ibid, 25, quoted in in Rachel Spencer, 'Holding up the Mirror: A Theoretical and Practical Analysis of the Role of Reflection in Clinical Legal Education' (2014) 18 *International Journal of Clinical Legal Education* 181, 194.

<sup>217</sup> Carrie Menkel-Meadow, 'Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report – Of Skills, Legal Science and Being a Human Being' (1994) 69 *Washington Law Review* 593; Susan Brooks 'Using a Communication Perspective to Teach Relational Lawyering' (2015) 15(2) *Nevada Law Journal* 477.

professional competence, and fostering authenticity.’<sup>218</sup> Reflection builds insight and builds knowledge, which further develops the ability to reflect.

Some theorists emphasise the role of emotion and metacognition. Indeed, some discern ideas of ‘reflexivity’ within reflection.<sup>219</sup> They define this as examining self within practice, including awareness of values and feelings. This chapter does not separate out self-awareness or reflexivity from concepts of reflection. Rather, it argues for the importance of including an emotional response within the reflective process, and the value of metacognition for further developing reflection. Metacognition involves thinking about one’s own reflective process, which includes self-awareness and self-examination.

## **Reflection and relationships of power**

Students and lawyers are more likely to experience disorienting moments as they are confronted with clients whose experiences of life and its barriers, prejudices and challenges are likely to be very different from their own. This is particularly so when clients come from disadvantaged backgrounds and where students and lawyers come from more privileged backgrounds. There may be an experience of ‘difference’ and clients will frequently be dealing with complex and emotionally challenging experiences, which, in turn, will make for emotionally challenging experiences for students.<sup>220</sup>

Interacting with clients necessarily asks students to examine their own privilege and their occupation of a position of power – knowing the law – rather than being on the outside looking in. It can challenge students to look at the operation of power in subtle and complex ways, with

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<sup>218</sup> Michele Leering, ‘Conceptualizing Reflective Practice for Legal Professionals’ (2014) 23 *Journal of Law and Social Policy* 82, 103.

<sup>219</sup> Lynelle Watts, ‘Reflective Practice, Reflexivity, and Critical Reflection in Social Work Education in Australia’ (2019) 72 *Australian Social Work* 8.

<sup>220</sup> Jane H Aiken, ‘Striving to Teach “Justice, Fairness, and Morality”’ (1997) 4 *Clinical Law Review* 1, 10.

textures of race, culture, disability, gender and sexuality in addition to class. Power never operates on only one plane. Rather, it functions in complex ways. The role of the teacher in this process is to make overt the functioning of privilege and power within the relationship between the student lawyer and the client – to make visible the invisibility of privilege. It is also to provide space to analyse the diverse and varied ways in which students experience the practice of law. For example, an Indigenous student who has experienced racism in their life may well experience it again from a legal client. That same Indigenous student is also learning the law and, as a student lawyer, will occupy a position of privilege in relation to the client who is racist towards them. The student has to wend their way through the complexity of that relationship. The power relationships between this student and the client will be multilayered. Indeed, if we do not provide an opportunity to reflect on some of these confronting and disorienting moments, then we run the risk that the student will have their views, assumptions and prejudices confirmed rather than challenged.<sup>221</sup> Through reflection, the student can begin to develop their personal concepts of how they will fulfil their ethical duty to work towards justice and how they will practice law. This integrates the internalisation of the ethical duty through an internal voice, rather than externally imposed rules.<sup>222</sup> Instead of being taught to ‘think like a lawyer’ – which can mean being ‘removed’, ‘analytical’ or ‘competitive’ – the student can be taught, through reflection, to be a ‘problem solver’, to be ‘focused on relationships’, or to engage in critical thinking with a focus on individual values and assumptions.<sup>223</sup> Reflection skills

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<sup>221</sup> Ibid.

<sup>222</sup> Julian Webb, ‘Inventing the Good: A Prospectus for Clinical Education and the Teaching of Legal Ethics in England’ (1996) 30(3) *The Law Teacher* 270, 282.

<sup>223</sup> Being able to solve problems, focus on relationships, and recognise emotional content also make up the essential skills of lawyering, include being a lawyer who thinks like a leader. Carrie Menkel-Meadow, ‘Narrowing the Gap by Narrowing the Field: What’s Missing from the MacCrate Report – Of Skills, Legal Science and Being a Human Being’ (1994) 69 *Washington Law Review* 593; Susan Brooks ‘Using a Communication Perspective to Teach Relational Lawyering’ (2015) 15(2) *Nevada Law Journal* 477; Karen H Rothenberg, ‘Recalibrating the Moral Compass: Expanding Thinking Like a Lawyer into Thinking Like a Leader’ (2009) 40 *University of Toledo Law Review* 411.

can improve mental health in students, through the connections they can make with their peers in the process of reflecting.<sup>224</sup>

## **Centring the lived experience of clients**

When working in a community legal service while teaching law students,<sup>225</sup> it is vital to centre the lived experience of our clients with regard to the law.<sup>226</sup> Clinical supervisors are helping their students to question how law functions to benefit and disadvantage particular groups. By centring this lived experience, the law has the potential to be more representative of the diverse experience of culturally diverse people, of women, and of Indigenous people – and thus to be more inclusive.<sup>227</sup>

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<sup>224</sup> Caroline Strevens and Rachael Field, *Educating for Well-Being in Law: Positive Professional Identities and Practice* (Routledge, 2020); Colin James, 'Seeing Things As We Are: Emotional Intelligence and Clinical Legal Education' (2005) 8 *International Journal of Clinical Legal Education* 123.

<sup>225</sup> Nicolson also wants students to be aware that their learning and education have to be secondary to actually providing a legal service to a client: Donald Nicolson, 'Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice' (2013) 16(1) *Legal Ethics* 36.

<sup>226</sup> The reasons that Leering lists for teaching reflection are (1) forming the habit of self-initiated, critical assessment of one's knowledge, skills and values; (2) understanding how to turn insights from reflection and assessment into concrete, actionable tasks to improve one's reflective learning and professional practice; (3) being able to manage and grow from shifts in values or perceptions brought on by disorienting or disruptive learning experiences or information; (4) valuing empirical research – as examples, about legal education pedagogy, people's legal needs, and the effectiveness of particular legal services approaches – and using research findings to improve all forms of legal professional practice; (5) centring the lived experiences of people impacted by the law, thus making the study of law and social justice efforts more tangible and real to students and practitioners; (6) deepening one's understanding of what constitutes actionable professional knowledge beyond black letter law, and how to bring insights from critical legal theory to professional practice; (7) challenging the assumptions and preconceived notions inherent in the law instead of taking them as given facts; (8) combatting isolation and alienation experienced in study and practice that can lead to mental health concerns or unhealthy coping mechanisms (such as depression, anxiety and substance abuse); and (9) enhancing one's understanding of what constitutes ethical legal professionalism. See Michele Leering, 'Conceptualizing Reflective Practice for Legal Professionals' (2014) 23 *Journal of Law and Social Policy* 82.

<sup>227</sup> Indeed, the Canadian Action Committee on Access to Justice discusses developing a new sense of professionalism focused on legal reform which will drive innovation and improve access to justice by filling gaps in access to justice: Action Committee on Access to Justice in Civil and Family Matters, 'Access to Civil and Family Justice: A Roadmap for Change' (Action Committee on Access to Justice in Civil and Family Matters, 2013), quoted

An example of how a disorienting moment can be experienced and then understood through reflection is when students work with victims of violence, centring on their experience of law. In Australia, there is a very limited compensation scheme for all victims of violence but particularly for domestic violence survivors. Students have frequently heard the political rhetoric of support for victims of domestic violence and the need to help them live safe lives with support mechanisms around them. When studying the law and the legal system, students do not usually learn about the compensation schemes for victims of violence. When working on files for clients who have experienced sustained, long-lasting and extreme violence from intimate partners, it is incredibly confronting for students to learn of the very small – even miniscule – amounts that victims, most often women, will receive. In the state of New South Wales, many will only receive \$1,500 for severe injuries, with greater emphasis and compensation given to physical rather than psychological injury.<sup>228</sup> The disjunct between what is said about support for victims, and the support which victims actually receive, is obvious. There is also a clear difference between the amounts provided for domestic violence and for other forms of violence, which highlights the gendered nature of the law and is also very confronting. Students will be challenged to think about what justice would look like, and how gendered the scheme itself is. They can also be prompted to think about their experience or non-experience of violence, and the myriad ways in which law is gendered in its operation. The emotional responses of shock, surprise and outrage will frequently accompany the response. These responses need to be included within the reflection process. The role of law, and of themselves as student lawyers within the legal system, will also be questioned as they become part of the process which advises the client about the limited compensation available to them. Their understanding of the

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in Michele Leering, 'Integrated Reflective Practice: A Critical Imperative for Enhancing Legal Education and Professionalism' (2017) 95 *Canadian Bar Review* 47, 51.

<sup>228</sup> Victims Rights and Support Act 2013 (NSW) s 35. This section categorises 'recognition payments' according to the type of assault. A category C payment is payable for assaults causing grievous bodily harm, not severe psychological harm.

law and the legal system will inevitably change as they incorporate new understandings and experiences of applying the law to real people's lives. This experience within a clinical legal education course has the potential to help students become more justice-focused through a reflection process as they probe this area of the law and what could be done to improve its functioning.

Clinical legal education, through its focus on the practice of law, can enable students to connect actual experience of clients with theoretical concepts of justice and injustice within the law. Engaging in reflection enables practitioners and students to connect critical legal theory in all its facets with the practice of law and the experience of real clients. Teaching students to reflect creates the important habit of reflection. This inevitably involves examining each person's self, their values and their emotional responses. Ideally, it will also include thinking about how that person is reflecting, or metacognition. Learning how to reflect offers a unique opportunity to help students, and then lawyers, to examine their values and assumptions in order to question the justice of the law and the legal system and to centre the experience of disadvantaged clients. Teaching students how to understand 'disorienting moments' gives them the beginning tools for challenging unfair structures within the law and the legal system and fulfilling their ethical duty through internalising complex responses of values, emotions and thinking.

Having discussed what reflection actually involves, and the significance of teaching 'reflection' effectively, this chapter now addresses how to do this within a clinical legal education setting. This covers a range of methods for teaching reflection, including self-assessments, regular debriefs either individually or in groups, reflective journals, oral presentations and simulations. Each of these will be discussed.

## **How we teach reflection**

One of the key observations made by various scholars when discussing how to teach reflection is the importance of valuing reflection and conveying its importance to students.<sup>229</sup> Including specific classes and courses on how to reflect is a key element of any clinical legal education course. These provide a link for students to recognise that an integral part of their work, as a student and as a future lawyer, will include thinking about the law and the legal system and their role within it. Indeed, making the link between learning how to reflect and their broader ethical duty to contribute to the justice system is vital when teaching law students. Clinical work in disadvantaged communities ‘provides a learning laboratory and basis for critical reflection about community lawyering in an urban environment with a multiracial population’.<sup>230</sup>

Teaching reflective skills has many facets and various clinical educators have developed different models for doing so. One of these models was developed by Casey and is particularly useful for developing students’ sense of professionalism and ethics.<sup>231</sup> Casey discusses the particular benefits of using a staged or stepped model. His approach begins with examining behaviour in relation to the regulatory framework or rules developed by a Bar Association or solicitors’ regulatory framework. He uses this first step to prompt students to ask themselves if they meet competence standards, and then examine their actions, thoughts and assumptions from internal, external, societal and metacognition perspectives. He focuses on ensuring that students can look at interactions and situations from a range of perspectives, in addition to their

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<sup>229</sup> Adrian Evans et al, ‘Best Practices: Australian Clinical Legal Education’ (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013); Rachel Spencer, ‘Holding up the Mirror: A Theoretical and Practical Analysis of the Role of Reflection in Clinical Legal Education’ (2014) 18 *International Journal of Clinical Legal Education* 181.

<sup>230</sup> Karen H Rothenberg, ‘Recalibrating the Moral Compass: Expanding Thinking Like a Lawyer into Thinking Like a Leader’ (2009) 40 *University of Toledo Law Review* 411, 419.

<sup>231</sup> Timothy Casey, ‘Reflective Practice in Legal Education: The Stages of Reflection’ (2014) 20 *Clinical Law Review* 317.

own. This framework is particularly useful for a very structured approach to developing students' reflective abilities.

### **Self-assessment**

Self-assessments are potentially one of the 'richest opportunities for transformational learning', as completing self-assessments positively builds on students' own values and strengths.<sup>232</sup> A self-assessment asks students to enquire into their thoughts and feelings, and often their values as well. Asking students to complete self-assessments can be particularly useful for clinical supervisors to probe students' own understandings of their strengths, their areas for growth, and the blind spots of which they are unaware. In some clinics, it is a regular part of the assessment process, used at mid-semester as one of the principal means of providing guidance to students on their current achievements and areas for improvement and growth.<sup>233</sup> Clinical teachers will provide detailed feedback about the student's own assessment of their level of achievement. Self-assessment can also be an opportunity to discuss some of the deeper learnings and to reflect on law and the functioning of the legal system as experienced by students. Using self-assessments provides a model for students in their later professional lives, as they will need to develop their capacity to self-critique in order to improve and also to identify the successes and failures of the legal system and the law. If they are able to do this, it is more likely that they will become reflective, justice-focused lawyers who know how to fulfil their ethical duty to contribute to the justice system.

Expressions of emotion in self-assessment may also be an entry point to a deeper insight into the law and the legal system, as well as a way to reach metacognition. For example, a student

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<sup>232</sup> Susan Brooks and Robert Madden, 'Epistemology and Ethics in Relationship-Centered Legal Education and Practice' (2012) 56 *New York Law School Review* 331.

<sup>233</sup> In the clinical courses at Kingsford Legal Centre at UNSW, there is a midterm assessment which is a fundamental component of the assessment process and provides a systematic means of giving structured and detailed feedback to students. This is also the case at Murdoch University in Perth.

may comment on their perceived lack of ability to interview clients effectively, or some other area of legal practice. It can provide a means then to probe feelings of lack of confidence which students may have on entering into actual legal practice.<sup>234</sup> Depending on the student, it also provides a means to explore their sense of ‘belonging’ within the legal profession and what it means to be a lawyer. Frequently, women students and students from culturally diverse backgrounds feel less confident about their legal skills. Expressing those feelings provides a means to reflect on the nature of lawyers and what it feels like to ‘belong’ within the law. This can be rich ground for talking about power and how it operates within the legal profession, replicating old patterns and reinforcing traditional ideas of ‘who’ are lawyers.<sup>235</sup> A supervisor can help students think about the ways in which lawyers have a role in shaping law, and how this can be influenced by ‘who’ the lawyers are. Identifying students’ emotions can be another way of bringing a metacognitive process into the reflection to see whether feelings of lack of confidence have changed at all over a semester and whether the process of thinking about them and analysing them has shifted or changed the way students feel about their performance and their sense of belonging. Emotions, thinking and values are combined in this example.<sup>236</sup> It

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<sup>234</sup> The integration of self into the practice of law, rather than a separation of self from law, is important for the ethical practice of law. Julian Webb, ‘Inventing the Good: A Prospectus for Clinical Education and the Teaching of Legal Ethics in England’ (1996) 30(3) *The Law Teacher* 270; Verna E Monson and Neil W Hamilton, ‘Ethical Professional (Trans)Formation: Early Career Lawyers Make Sense of Professionalism’ (2011) 8 *University of St. Thomas Law Journal* 129, 135; Karen H Rothenberg, ‘Recalibrating the Moral Compass: Expanding Thinking Like a Lawyer into Thinking Like a Leader’ (2009) 40 *University of Toledo Law Review* 411.

<sup>235</sup> Carrie Menkel-Meadow, ‘Portia in a Different Voice: Speculations on a Women’s Lawyering Process’ (1985) 1 *Berkeley Women’s Law Journal* 39; Patricia J Williams, *The Alchemy of Race and Rights* (Harvard University Press, 1991); Elizabeth Mertz, *The Language of Law School: Learning to Think Like a Lawyer* (Oxford University Press, 2007).

<sup>236</sup> Carrie Menkel-Meadow, ‘Portia in a Different Voice: Speculations on a Women’s Lawyering Process’ (1985) 1 *Berkeley Women’s Law Journal* 39; Verna E Monson and Neil W Hamilton, ‘Ethical Professional (Trans)Formation: Early Career Lawyers Make Sense of Professionalism’ (2011) 8 *University of St. Thomas Law Journal* 129; Mary Anne Noone and Judith Dickson, ‘Teaching towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers’ (2001) 4(2) *Legal Ethics* 127.

also demonstrates Leering's observation that engaging in reflection can be a means of improving students' mental health.

## **Debriefs**

Another approach to teaching students how to reflect is by using informal and formal debriefs after students have accomplished specific pieces of work. Debriefs have the potential to identify the ways in which 'law' is made through each and every little decision, which together are part of a client's experience of justice. Debriefs occur either individually or in groups. The relationships between the participants are a crucial part of the reflective process and have the potential to deepen and extend the insights gained.

Debriefing takes place in a supportive context in which students are led through a structured learning activity to draw out their experiences and reach conclusions.<sup>237</sup> For example, after a student interviews a client, the supervisor will spend some time discussing the student's responses to the client, the choices they made about questions asked of the client, how the interview was conducted, the assumptions and values which the student may have felt or experienced, the law itself, and its role in the client's life. There is a role for thinking about identity, race, gender, class, sexuality and disability and how these influence the relationship between the student and the client. These debriefs are an essential part of clinical teaching and can also happen more formally through case rounds and more regular meetings with clinical supervisors. Debriefs are an opportunity to unpack the decision-making of the student, the client and the supervising lawyer and how the law is interwoven in some of those decisions. While justice and law are frequently analysed in terms of how a judge makes a decision or how a barrister argues a case, the daily decisions that a lawyer makes – such as how to ask questions of a client, how to frame an argument, and how to interact with all stakeholders in the justice

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<sup>237</sup> David Boud, Rosemary Keogh and David Walker (eds), *Reflection: Turning Experience into Learning* (Routledge Falmer, 1994) 16.

system – all constitute a client’s experience of justice and the operation of ‘justice’ within the legal system.<sup>238</sup> These questions form part of the bigger question of how lawyers are fulfilling their ethical duty to contribute to the administration of justice or to making law more accessible.

Supervisor–supervisee relationships can enable reflection and can also be essential to its effectiveness.<sup>239</sup> Relationship-centred lawyering is based in recognising the interrelationships we hold and using an approach of mutuality and kindness.<sup>240</sup> This approach to lawyering can happen in both the student–supervisor relationship and the student–client relationship. It can be harnessed through a three-part framework, identifying broad areas of competency which every effective lawyer needs, regardless of their type of practice: (1) understanding theories about the person-in-context; (2) promoting procedural justice; and (3) appreciating interpersonal, cultural and emotional issues.<sup>241</sup>

The relationship between supervisor and student can be an intense and intimate one as they share experiences with clients who have deep and complex problems. In the supervisor-to-student relationship, scholars have discussed the use of a facilitative approach<sup>242</sup> and a ‘guide

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<sup>238</sup> The law and society movement has long studied the interrelationship between law and society in an interdisciplinary way. One of its tenets is that law is made up of the daily occurrences of law, in its minor operations as well as judges making law through deciding cases. See Austin Sarat and Stuart Scheingold (eds), *Cause Lawyers and Social Movements* (Stanford University Press, 2006).

<sup>239</sup> Shirley Grundy, ‘Three Modes of Action Research’ (1982) 2 *Curriculum Perspectives* 23, cited in David Boud, Rosemary Keogh and David Walker (eds), *Reflection: Turning Experience into Learning* (Routledge Falmer, 1994) 14.

<sup>240</sup> Susan Brooks and Robert Madden, ‘Epistemology and Ethics in Relationship-Centered Legal Education and Practice’ (2012) 56 *New York Law School Review* 331; Susan Brooks, ‘Mindful Engagement and Relational Lawyering’ (2019) 48 *Southwestern Law Review* 267.

<sup>241</sup> Susan Brooks and Robert Madden, ‘Epistemology and Ethics in Relationship-Centered Legal Education and Practice’ (2012) 56 *New York Law School Review* 331.

<sup>242</sup> Georgina Ledvinka, ‘Reflection and Assessment in Clinical Legal Education: Do You See What I See?’ (2006) 9 *International Journal of Clinical Legal Education* 29; Stephen Brookfield, ‘Self-Directed Learning: A Critical Review of Research’ (1985) 25 *New Directions for Adult and Continuing Education* 5.

by the side' or approach of 'mutual inquiry'.<sup>243</sup> It is a relationship in which the supervisor holds the power to assess the student. The relationship also provides the opportunity for clinical supervisors to share their vision and values regarding the law and the legal system within the context of the lives of clients. The supervisor and the student can model a respectful and yet challenging way of interacting and engaging in mutual learning. This can be particularly powerful when a supervisor models their own reflection process with a student.

For example, a client phones the clinic to make an appointment and speaks to a student. The client becomes increasingly annoyed when the student realises that the client does not fit the criteria for making an appointment, as they do not live in the local area. A student may seek help with the call from a supervisor and the interaction between the supervisor and the client may or may not go smoothly. If the client becomes annoyed and then expresses their frustration and sense of unfairness, the supervisor can use their skills to try and listen to the client and respond effectively. However, the client may still feel unfairly treated and hang up, saying that they have been discriminated against because of their disability. The entire interaction then provides a great opportunity to reflect on what happened and why, and whether there were alternative courses of action. Both the supervisor and the student can interrogate their feelings of frustration and their inability to communicate effectively with the client. They may examine whether there was any discrimination on the basis of psycho-social disability, or ask why the client perceived the interaction that way. The supervisor has the opportunity to question their own actions and words with the student, modelling a reflective process. The supervisor might feel defensive or criticised by the client, a feeling which they can also share within the reflection process. Both the supervisor and the student may feel hurried or find it hard to create space to properly debrief the experience. This reflection-on-reflection can occur at the time, or the supervisor and the student may think further on their reflection process and then discuss it in a

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<sup>243</sup> Fran Quigley, 'Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics' (1995) 2 *Clinical Law Review* 37.

metacognitive process later that day. Both may return to the experience. Having first thought one way about it – such as feeling that they should have been more directive, or reflected back (active listening) more clearly to the client – they may later reflect that being more directive would not necessarily have helped and that self-criticism of the approach they took in the phone call was not appropriate. The metacognition process therefore has the potential to deepen and extend the reflection into perhaps not being too self-critical. The entire experience provides an opportunity to reflect within the relationship, in an ethos of kindness and mutuality. It also has the potential for both the student and the supervisor to question how they are contributing to the justice system through that interaction with the client. The shared reflective process strengthens their ability to fulfil their ethical duty.

Debriefing may, instead, happen as a group activity. The group debrief within clinical legal education enables peer-to-peer learning. It can push some participants to reflect more deeply than they otherwise would, and to recognise the knowledge within a peer group. It helps students realise a shared experience as they can ‘discuss their attitudes and values, and the reasons for them, and [this] can lead to very productive learning situations and long-lasting relationships’.<sup>244</sup> Group debrief occurs when members of the group are asked to describe elements of their experience, and then to draw some insights – either about themselves, or about the law and the legal system – from that experience. Reflection is therefore both a solitary and a group activity.<sup>245</sup>

Peer-to-peer learning is recognised as an effective form of adult learning. It enables students to gain information from a range of sources, ‘a habit which follows the oral tradition of informal

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<sup>244</sup> Colin James, ‘Seeing Things As We Are: Emotional Intelligence and Clinical Legal Education’ (2005) 8 *International Journal of Clinical Legal Education* 123, 140.

<sup>245</sup> David Boud, Rosemary Keogh and David Walker (eds), *Reflection: Turning Experience into Learning* (Routledge Falmer, 1994) 16.

learning through tales of shared experiences'.<sup>246</sup> It can be structured as a case round,<sup>247</sup> or in the form of student meetings to discuss law reform aspects of the work that they are doing, or it may involve a facilitated conversation led by students to discuss and reflect on part of their experiences.<sup>248</sup> One of the values of peer-to-peer learning is that it can break down some of the resistance to learning from an authority figure and can make students more receptive to different ideas. Peer influence 'has a documented significant effect on the formation of political and moral attitudes and beliefs'.<sup>249</sup>

One of the risks of self-reflection is that students may be overly critical of their own thoughts and actions.<sup>250</sup> A group debrief provides a mechanism for limiting self-criticism, as peers and the clinical teacher can intervene if the reflector is overly critical – or the reverse, if the reflector is not probing deeply enough. Group debriefing also provides an opportunity to model relationship-centred lawyering. The students and supervisor can get to know each other better and build their relationships. Together, they can question how they are fulfilling their ethical duty to contribute to the justice system and working in some way towards making it fairer. An example of effective group debrief and involvement in metacognition is evident when examining the issues of compensation for victims of domestic violence, as referred to above. Various students may work on client files, facing the same injustice and disorienting moments as they realise how unfair the compensation scheme. It is likely that their thinking about this issue

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<sup>246</sup> Stephen Brookfield, 'Self-Directed Learning: A Critical Review of Research' (1985) 25 *New Directions for Adult and Continuing Education* 5, 8, quoted in Fran Quigley, 'Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics' (1995) 2 *Clinical Law Review* 37.

<sup>247</sup> A case round is a mechanism where a student presents the facts, law and current strategy on a legal file to a group of students and their clinical supervisor. The phrase is commonly used in the United States, less so in other jurisdictions.

<sup>248</sup> Liz Curran, 'Responsive Law Reform Initiatives by Students on Clinical Placement at La Trobe Law' (2004) 7 *Flinders Journal of Law Reform* 287, 293.

<sup>249</sup> Fran Quigley, 'Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics' (1995) 2 *Clinical Law Review* 37, citing Theodore Newcomb, *Persistence and Change: Bennington College and Its Students after Twenty-Five Years* (Wiley Publishing 1967) 138–65.

<sup>250</sup> Elizabeth Smith, 'Teaching Critical Reflection' (2011) 16 *Teaching in Higher Education* 211, 215.

will evolve over the semester. That developing thinking provides further stimulus for reflection-on-reflection, or metacognition. Students can be prompted to remember the shock and outrage they initially felt. As the semester continues, they can be probed to examine their current feelings and response. Many may have begun to feel less outraged. This can then provide further material for reflection on the effect of working within a legal system and the ways in which that can numb or deaden the sense of injustice felt by lawyers through repeat exposure.

### **Other methods**

There is a range of other methods that may be used instead of, or as part of, self-assessment and debriefing approaches. Reflective journals, or other reflective pieces of writing, are a means by which students are taught to engage in individual reflection. Some believe that writing is '[t]he best way to harness the powerful tool of reflection ... to provide a structured format for the development and nurturing of meaningful and considered student reflection'.<sup>251</sup>

A reflective journal is most often a regular note that is written by the student and shared with the teacher. It forms part of the process of study and can also be a form of assessment. The journal is similar in nature to a diary, but it is only semi-private as it is designed to be shared. It 'tends to be more factual and objective than emotive and subjective, but its contents may span the continuum reflected by these terms'.<sup>252</sup> Some journals may interweave facts with accounts of emotional responses, making connections between these. Journals are a space in which a student may think more deeply about specific issues with which they have dealt, some of which

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<sup>251</sup> Ross Hyams, 'On Teaching Students to "Act Like a Lawyer": What Sort of Lawyer?' (2008) 13 *International Journal of Clinical Legal Education* 21, 27.

<sup>252</sup> JP Ogilvy, 'The Use of Journals in Legal Education: A Tool for Reflection' (1996) 3 *Clinical Law Review* 55.

will have been confronting. This allows them to interrogate their disorienting moments and to integrate their expression of self, their values, their thinking and their emotions.<sup>253</sup>

There has been much written on the use of reflective journals and on the ways to teach students to write reflectively.<sup>254</sup> This chapter does not canvas that area of scholarship but recognises that students do not inherently know how to write reflectively and are not generally taught those skills in law school. Students need to be taught how to write in this way, and must be given clear rubrics of what will be assessed, if they are going to be assessed on their reflective journals.<sup>255</sup> Some have written about using a '4R' approach to structuring journal writing: 'reporting and responding', relating', 'reasoning' and 'reconstructing'.<sup>256</sup> These steps broadly correspond to the Kolb structure of reflecting and also the steps in the Casey model.<sup>257</sup> Each model involves thinking about the experience from other perspectives and using theory to inform the reflection process.

Another variation on the use of reflective journals is to allow students to read each other's journal entries and make comments. If this approach is chosen, some of the benefits of the group reflection process and peer-to-peer learning are achieved. The approach may, however,

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<sup>253</sup> Carrie Menkel-Meadow, 'Portia in a Different Voice: Speculations on a Women's Lawyering Process' (1985) 1 *Berkeley Women's Law Journal* 39; Verna E Monson and Neil W Hamilton, 'Ethical Professional (Trans)Formation: Early Career Lawyers Make Sense of Professionalism' (2011) 8 *University of St. Thomas Law Journal* 129.

<sup>254</sup> Rachel Spencer, 'Holding up the Mirror: A Theoretical and Practical Analysis of the Role of Reflection in Clinical Legal Education' (2014) 18 *International Journal of Clinical Legal Education* 181; Fran Quigley, 'Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics' (1995) 2 *Clinical Law Review* 37.

<sup>255</sup> Spencer includes various rubrics in her work which are useful to provide to students.

<sup>256</sup> Mary Ryan, 'The Pedagogical Balancing Act: Teaching Reflection in Higher Education' (2013) 18 *Teaching in Higher Education* 144, 147.

<sup>257</sup> Timothy Casey, 'Reflective Practice in Legal Education: The Stages of Reflection' (2014) 20 *Clinical Law Review* 317.

change the nature of the journal entry, as each individual will know that their peers will read and comment on their journal entry.

A range of other methods may also be used, such as oral presentations and/or simulations. Oral presentations to peers may follow a format whereby students are asked to describe an issue, analyse some difficult or complex aspect of it, and suggest a resolution. The value of oral presentation is that, ideally, students will have to simplify and clarify their thinking in order for the oral presentation to be effective. Presenting verbally may help students to refine the process of reflection. It could also be used for the reflection-on-reflection process, or metacognition, to encourage students to get as much out of their reflections as possible.

In contrast, simulations – which more commonly occur within a formal seminar program – may take place alongside the experiential learning component or in place of it.<sup>258</sup> A seminar program can involve role-plays of interviewing clients or conducting negotiations in order to teach those skills. There are clear limitations of simulations, as they cannot ever fully create the experience of real-life situations. For example, clients are varied and unpredictable and they talk about their lives in non-chronological, unconnected ways. It is difficult to construct an interviewing role-play which truly represents this. People are diverse, so no interviewing experience is ever the same as another. However, simulations can provide a base experience to prepare students for their clinical experience, which will inevitably be less structured than any simulated experience. Another benefit of simulations is that they provide a means of incorporating reflection into non-clinical classroom teaching. Students can reflect on what worked well – and what did not – within the simulated interview.

From this discussion of the ways in which reflection can be taught, it is clear that there are many options. Reflecting in community is also an essential part of reflective practice, as it provides a

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<sup>258</sup> Fran Quigley, 'Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics' (1995) 2 *Clinical Law Review* 37, 50.

range of perspectives and fosters peer-to-peer learning. Reflecting collectively also emphasises the importance of relationships in lawyering and in dealing with people. Through learning to reflect about the law, the legal system, and their role within it, students are given the tools to contribute more effectively to the justice system in order to make it function more fairly and to ensure that they are fulfilling their ethical duty to contribute to making law more equitable.

## **Conclusion**

Teaching students to reflect is an essential part of their legal education. It enables them to fulfil their ethical duty to contribute to justice. This duty arises out of the rule of law, concepts of service within professionalism and altruism, and professional codes of conduct. Within legal education, clinical legal education is an effective means for students to integrate values, attributes, emotions, thinking and knowledge with their moral development, based in the ability to reflect. Working with clients with their messy and indeterminate problems, students have the opportunity to interact with lives which differ from their own and will likely cause them to question their values, their privilege, and the operation of power within the law and the legal system.

Students will experience ‘disorienting moments’. Reflection provides a means to make sense of these moments and see the implications for justice and the law within these experiences. Reflection enables law students and lawyers to grapple with the messy and complex issues of law and legal practice. It emphasises the importance of bringing an authentic whole self into the process of lawyering. The various means of teaching students to reflect – such as through self-assessments, individual and group debriefs, modelling, using reflective journals, simulations and oral presentations – are options for ensuring that students can probe their role within the law and the legal system. Students have the opportunity to question the justice of the law, and relationships of power, within legal practice. They gain compassionate insight through their clinical experiences working with disadvantaged clients and communities and by reflecting on

these experiences.<sup>259</sup> In this way, students are encouraged to bring their authentic voice to the question which each lawyer, in considering their ethical duty, must answer: How do I contribute to ensuring the justice of the law and the legal system? Clinical legal education, through its teaching of reflection, is an effective means within legal education to help students to ask, and answer, that question.

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<sup>259</sup> Jane H Aiken, 'Striving to Teach "Justice, Fairness, and Morality"' (1997) 4 *Clinical Law Review* 1, 29.

## **Chapter 5:**

# **What does legal ethics teaching gain, if anything, from including a clinical component?**

### **Introduction**

In some law schools, legal ethics have been taught very conservatively, focusing on the law of lawyering with a heavy emphasis on ‘professional rules’ and how to ensure that solicitors and barristers behave within the professional rules.<sup>260</sup> Others, however, have proposed different models for thinking about lawyering, lawyers’ ethical duties, and the role of lawyers within the legal system. In this chapter, legal ethics, ethical decision-making, and values are explored. I ask what value can be gained by including a clinical component within a standard legal ethics course, even when it is a short-exposure experience. I explore the range of meanings ascribed to ethics and professional responsibility, and the connection between personal and professional identities. Finally, using three vital elements within the definition of an ethical legal professional, I evaluate whether the clinical component contributes to teaching students about how to be an ethical legal professional. I draw from the Best Practices of Australian Clinical Legal Education<sup>261</sup> to assist with this process. Also, I discuss some additional learnings which students gain from seeing legal practice modelled for them in a community legal centre located within a university faculty of law. Some of the challenges of developing an effective clinical component are explored, such as the importance of training volunteer lawyer supervisors and how to assess the learning of students. The ways of sharing the individual learning across the student cohort is a further challenge.

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<sup>260</sup> Australia now has model rules of legal practice, which are being used throughout each State and Territory.

<sup>261</sup> Adrian Evans et al, ‘Best Practices: Australian Clinical Legal Education’ (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013).

## Defining legal professionalism

In the United Kingdom,<sup>262</sup> as well as in Australia, there is frequently a lack of clearly defined goals for the teaching of ethics; nor are there clearly defined values to teach. This is, in part, due to the fact that the ‘written ethics are found in what are essentially disciplinary, as opposed to aspirational, codes’.<sup>263</sup> Ethics teaching frequently focuses on professional responsibility rules,<sup>264</sup> or law, rather than encompassing a discussion of the sort of lawyers we want to produce in our law schools and the ethical frameworks they should use when making decisions.

Students frequently say that they want to be ‘professional’. Yet, when probed, they are unable to describe what this means. They will often respond using words such as ‘objective’, ‘skilled’ and ‘experienced’. Sometimes they will recognise that a professional has a responsibility not just to themselves, but also to the community. Students frequently refer to the importance of professional work and the relatively high status attached to it. It is a challenge for them to be specific in their definitions.

There is an interesting tension between what it means to be ‘professional’ and, at the same time, being yourself within your work. Many have explored the tension between being a lawyer – a mouthpiece or advocate – arguing the law on behalf of someone else, and this being professional. But this can also create tensions for those whose personal values may clash with the position they are arguing.<sup>265</sup> Webb<sup>266</sup> has explored in depth the concept of ‘ethics’ and

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<sup>262</sup> Kevin Kerrigan, “‘How Do You Feel about This Client?’ – A Commentary on the Clinical Model as a Vehicle for Teaching Ethics to Law Students’ (2007) 11 *International Journal of Clinical Legal Education* 7.

<sup>263</sup> Julian Webb, ‘Conduct, Ethics and Experience in Vocational Legal Education’ in Kim Economides (ed), *Ethical Challenges to Legal Education and Conduct* (Hart Publishing, 1998), quoted in Kevin Kerrigan, “‘How Do You Feel about This Client?’ – A Commentary on the Clinical Model as a Vehicle for Teaching Ethics to Law Students’ (2007) 11 *International Journal of Clinical Legal Education* 7.

<sup>264</sup> In England, ethics are frequently taught through rules. This is similarly the case in Australia and the United States. Nigel Duncan and Susan Kay, ‘Addressing Lawyer Competence, Ethics and Professionalism’ in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011).

<sup>265</sup> Christine Parker and Adrian Evans, *Inside Lawyers’ Ethics* (Cambridge University Press, 2014).

<sup>266</sup> Julian Webb, ‘Being a Lawyer/Being a Human Being’ (2002) 5 *Legal Ethics* 130.

‘being’ and the importance of measuring who you are as a lawyer, as well as what you do. As discussed below, in order to ensure a happy and well-functioning legal professional, the person you are as a lawyer is also important, in line with what you do.

Professional identity highlights social responsibility or ethics, but it also includes creating competent<sup>267</sup> legal professionals who are responsible to the individual client as well as the community.<sup>268</sup> Each of the professions recognises that, in addition to the individual responsibility to a client or a patient, a professional also has a responsibility to the community: to contribute to it in some form, to provide a service. The Carnegie Foundation for the Advancement of Teaching has reviewed the education of various groups of professionals and discusses ‘professional formation toward a moral core of service to and responsibility for others’.<sup>269</sup>

A number of attempts have been made to try to define professionalism in light of these tensions. The MacCrate report identified key values which are essential to lawyers. These include:

- providing competent representation;
- striving to promote justice, fairness and morality;
- striving to improve the profession; and

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<sup>267</sup> In the workshop given on the theme of clinical components within ethics subjects at the 2014 International Journal of Clinical Legal Education Conference, participants included ‘competence’ as one of the key ethical teachings which should be included within even a short clinical component.

<sup>268</sup> William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Foundation for the Advancement of Teaching, 2007), as quoted in Tony Foley et al, ‘Teaching Professionalism in Legal Clinic – What New Practitioners Say Is Important’ (2012) 17 *International Journal of Clinical Legal Education* 5.

<sup>269</sup> Neil Hamilton and Verna Monson, ‘Legal Education’s Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student’s Professional Formation (Professionalism)’ (2012) 9 *University of St. Thomas Law Journal* 325, 332.

*What does legal ethics teaching gain, if anything, from including a clinical component?*

- professional self-development.<sup>270</sup>

Noone and Dickson have defined their requirements for a professionally responsible lawyer as someone who:

- fulfils the duties attached to a fiduciary relationship;
- is competent in the work they perform;
- communicates often, openly and clearly with their client;
- does not encourage the use of law to bring about injustice, oppression or discrimination;
- identifies, raises and discusses ethical issues with current/potential clients; and
- seeks to enhance the administration of justice and actively engages in serving the community.<sup>271</sup>

Ross Hyams builds on the Noone and Dickson definition, specifically adding to their six qualities with three more of his own. His responsible lawyer:

- is able to work in an autonomous way – in an independent, self-sufficient and self-directed fashion;
- is able to exercise judgment – not only relating to how to resolve a client's problems, but reflective judgement of their own behaviours and actions; and

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<sup>270</sup> American Bar Association, 'Legal Education and Professional Development – An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap' (American Bar Association, 1992).

<sup>271</sup> Mary Anne Noone and Judith Dickson, 'Teaching towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers' (2001) 4(2) *Legal Ethics* 127, 144.

- has an ongoing commitment to lifelong education – over and above what is required by continuing professional development points.

Hyams describes this last point as requiring two things. The first is an understanding that good lawyering and professionalism require an ongoing process of understanding personal limitations and a commitment to remaining fresh, innovative and knowledgeable in professional work. The second requirement is the tools to put this understanding and commitment into action.<sup>272</sup>

Hyams refers to the understanding that all professionals have an obligation to contribute to the community in some form.<sup>273</sup>

Each of these definitions includes as the key element:

- working towards or contributing to justice, fairness and the improvement of the legal system and serving the community as part of the role of a lawyer.

The other two elements which are used in this chapter as a framework of analysis are:

- gaining a sense of autonomy and self-direction; and
- ongoing reflection and continual improvement.

The last two points are key aspects of an ethically responsible lawyer. The ability to reflect on yourself, who you are, and what you do as a lawyer is vital to being a competent lawyer who is able to improve. Ongoing reflection on how a lawyer contributes to the legal system and its ability to deliver justice is also necessary in order for any lawyer to be able to contribute to the justice system and serve the community. Autonomy and self-direction form a single element in the Hyams definition. Yet, if autonomy is understood as being connected to motivation theory

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<sup>272</sup> Ross Hyams, 'On Teaching Students to "Act Like a Lawyer": What Sort of Lawyer?' (2008) 13 *International Journal of Clinical Legal Education* 21, 44.

<sup>273</sup> *Ibid*, 21.

and an expression of self (discussed below), then it unites individual values with professional work and is thus a vital element of being a responsible lawyer. The three points that I have identified also fit within a community legal centre practice. They will be used to evaluate whether or not a clinical component, based in a community legal centre,<sup>274</sup> in which students interview disadvantaged clients, can have an impact on and develop these three key aspects of professional identity, even where it is a short-exposure experience. The three elements are interconnected and contribute to each other.

The choice of any three elements is always going to be arguable. I choose these particular key elements because they are vital to a lawyer being an ethical legal practitioner and because a clinical component within a community legal centre has the potential to teach all three.

### **Individual values and professionalism**

In addition to the difficulties in defining what professionalism means in a legal context, a further significant issue exists in negotiating the connection between individual values and professionalism. There are deep concerns about the ways in which legal education and legal practice can be alienating for law students<sup>275</sup> and lawyers. Students in the common law jurisdictions learn law largely through the Socratic method. This involves using cases to demonstrate the development of law and legal principle. The rich complexity of facts and people's lives are largely extracted from the Socratic method<sup>276</sup> and thus, in large part, the human depth is also removed. Students are taught to argue a legal principle and doctrine,

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<sup>274</sup> There are over 200 community legal centres in Australia which provide free legal help (advice, casework, community education and law reform services) to disadvantaged members of the community. National Association of Community Legal Centres, *Community Legal Centres* (Website, 2019) <<http://www.nacclc.org.au/>>.

<sup>275</sup> Larry Krieger, 'The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness' (2005) 11 *Clinical Law Review* 425; Tony Foley et al, 'Teaching Professionalism in Legal Clinic – What New Practitioners Say Is Important' (2012) 17 *International Journal of Clinical Legal Education* 5.

<sup>276</sup> UNSW does not teach in a pure Socratic method and there is a range of practices that are more contextualised, such as structured class participation. See Alex Steel, Julian Laurens and Anna Huggins, 'Class Participation as a Learning and Assessment Strategy in Law: Facilitating Students' Engagement, Skills Development and Deep Learning' (2012) 36(1) *UNSW Law Journal* 30.

through case and statute law. While their views of the particular legal doctrine may be sought at some point, they are secondary to being able to argue the development of the law. This way of constructing argument can be alienating to students. Some have argued that ‘legal education and early lawyering experiences can tend to erode integrity by separating people from their personal values and beliefs, conscience, truthfulness, and intrinsic needs for caring and co-operation’.<sup>277</sup>

Others frame this a little more mildly, as the importance of a ‘value-match’ between a lawyer’s own values and the values of their firm.<sup>278</sup> Or they contend that, even earlier, it is important to find a value match within the law school experience before entering practice.<sup>279</sup>

The notion of ‘values’ has an obviously wide meaning. Some use the term to refer to a person’s individual, personal and professional values, while others consider it as meaning purely professional values.<sup>280</sup> This debate connects to the debate around professionalism. If one considers professionalism to be ‘objective’ and without judgement, then personal values should not come into professionalism. However, in this chapter, professionalism is defined to include a responsibility to the community in the practice of law. This, inevitably, means more than just professional values. It includes a person’s sense of who they are and what it means to them, personally, to be a lawyer. This is a view expounded by law and ethics teachers, who connect

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<sup>277</sup> Larry Krieger, ‘The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness’ (2005) 11 *Clinical Law Review* 425.

<sup>278</sup> Tony Foley et al, ‘Teaching Professionalism in Legal Clinic – What New Practitioners Say Is Important’ (2012) 17 *International Journal of Clinical Legal Education* 5.

<sup>279</sup> Paula Lustbader, ‘Walk the Talk: Creating Learning Communities to Promote a Pedagogy of Justice’ (2005) 4 *Seattle Journal of Social Justice* 613.

<sup>280</sup> Larry Krieger, ‘The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness’ (2005) 11 *Clinical Law Review* 425; Tony Foley et al, ‘Teaching Professionalism in Legal Clinic – What New Practitioners Say Is Important’ (2012) 17 *International Journal of Clinical Legal Education* 5.

personal and professional values.<sup>281</sup> Many argue that the two cannot be separated, as a lawyer is not merely what they do but also who they are.<sup>282</sup>

The connection between self and professionalism is something which theorists Parker and Evans<sup>283</sup> have explored. They posit a theory of ethics which includes four key frameworks within which lawyers make ethical decisions:

- **adversarial advocate**, in which a lawyer's role is to advocate zealously for the client's interests within the bounds of the law;
- **responsible lawyer**, who is seen predominantly as an officer of the court and is responsible for making the law and the legal system work as fairly as possible;
- **moral activist**, which emphasises the importance of lawyers' position within society and their role in engaging in law reform activity to make law fairer and also to advise clients about a moral course of action; and
- **ethics of care lawyering**, in which it is the lawyer's responsibility to other people and to maintain relationships, with avoiding harm as the key consideration.

A lawyer may choose to use different frameworks at different times, or may regularly feel more comfortable in one framework than another. Rarely does a lawyer always operate out of one framework.<sup>284</sup>

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<sup>281</sup> Julian Webb, 'Being a Lawyer/Being a Human Being' (2002) 5 *Legal Ethics* 130; Leah Wortham, Catherine Klein and Beryl Blaustone, 'Autonomy-Mastery-Purpose: Structuring Clinical Courses to Enhance These Critical Educational Goals' (2012) 18 *International Journal of Clinical Legal Education* 105; Verna E Monson and Neil W Hamilton, 'Ethical Professional (Trans)Formation: Early Career Lawyers Make Sense of Professionalism' (2011) 8 *University of St. Thomas Law Journal* 129.

<sup>282</sup> Julian Webb, 'Being a Lawyer/Being a Human Being' (2002) 5 *Legal Ethics* 130; Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2014).

<sup>283</sup> Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2014) 32.

<sup>284</sup> *Ibid*, 7.

Students have the opportunity to explore ethical frameworks through the clinical component of their legal ethics course.

### **How the clinical component works**

The clinical component functions as a part of the normal operations of a functioning community legal centre. This legal centre, Kingsford Legal Centre,<sup>285</sup> provides free legal advice to over 1,800 clients each year. It also undertakes casework for over 300 clients each year, as well as engaging in community education, law reform and policy work. The Centre runs three evening advice clinics each week, providing advice to 10–12 clients at each event. These evening advice clinics are each supervised by a staff clinical supervisor/solicitor, with up to six volunteer solicitors and barristers who give their time voluntarily (pro bono).

All the students who participate in the clinical component are studying the course Lawyers, Ethics and Justice. Some are undergraduate<sup>286</sup> students completing a combined degree, most of whom are in their third year of a five-year program. Others are juris doctor<sup>287</sup> students who are studying law as a graduate degree. These students are generally in their first or second semester of a three-year degree program. Before coming to the Centre, students are given a two-hour class on the functioning of the Centre and an introduction to interviewing skills as part of their regular class time for the Lawyers, Ethics and Justice course. Once students arrive at the Centre, and before their assigned evening advice clinic, they receive training from a clinical supervisor and a clinical elective student who is studying an elective clinical course at the Centre over the whole semester. During this two-hour induction, they learn about the internal processes of the Centre, how to check for conflicts of interest, the duty of confidentiality, and working with

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<sup>285</sup> Kingsford Legal Centre, 'Welcome to KLC' (Web Page) <<http://www.klc.unsw.edu.au/>>.

<sup>286</sup> University of New South Wales, 'Lawyers, Ethics and Justice – LAWS1230' (UNSW Handbook, 2017) <[www.handbook.unsw.edu.au/undergraduate/courses/2017/LAWS1230.html](http://www.handbook.unsw.edu.au/undergraduate/courses/2017/LAWS1230.html)>.

<sup>287</sup> Ibid.

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interpreters. They are also taught about the support mechanisms available to students and are given basic safety training.

Students are then ready to work with clients. After they have taken initial instructions from their first client, the client is asked to wait while the student discusses the case with a volunteer lawyer supervisor and with the supervising solicitor/clinical supervisor. The student devises legal advice in collaboration with the volunteer lawyer supervisor. The volunteer lawyer gives this advice to the client while the student makes notes of the interview and records the advice given. After the interview, the student and the volunteer lawyer have a short debrief before the student takes instructions from the next client.

This chapter examines whether a brief and intense clinical component of a substantive ethics course can teach key elements of ethics. As mentioned above, these elements are:

- working towards or contributing to justice, fairness and the improvement of the legal system and serving the community as part of the role of a lawyer;
- gaining a sense of autonomy and self-direction; and
- ongoing reflection and continual improvement.

Such a component, even if only short, can give students a sense of how law can impact on disadvantaged people. It contributes to students' understanding of *how* they can use their law degrees to improve justice and the legal system, as well as giving them a sense of autonomy. By providing a clinical component with real clients early in a law degree, students are exposed to a particular area of legal practice with which they must align their own values. Each decision on a case will affect the life of the client, as legal issues have a deep impact on the lives of

disadvantaged clients.<sup>288</sup> Working with disadvantaged clients, students see the ways in which law can harshly affect people's lives. In this way, their questioning of 'justice' and the 'law' is enlivened. Their framework for thinking about ethical decision-making and their role as a future lawyer is, therefore, particularly relevant.

Additional learnings gained by students will be explored in this chapter. In addition, attention will be given to whether the clinical component meets the Best Practices in Australian Clinical Legal Education.<sup>289</sup> This report – the first of its kind in Australia – documented each of the clinical programs in place over the period 2009 to 2011.<sup>290</sup> It was guided by an international reference group of clinical legal education experts and an Australian advisory council. The report documents existing practice across all clinical programs through a survey and interviews involving every program. From this empirical research, the research group developed the Best Practices as a guide for those reviewing clinical programs and creating new ones, in order to ensure the development of rigorous, high-quality clinical programs.

### **The value of teaching ethics through a clinical course**

Ethics have most often been taught formally in a classroom setting. However, whenever law<sup>291</sup> is taught through clinical subjects, it is unavoidable that ethics issues arise and therefore ethics

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<sup>288</sup> Law and Justice Foundation of New South Wales research on the impact of legal problems on disadvantaged clients: Christine Coumarelos et al, 'Legal Australia-Wide Survey: Legal Need in Australia' (Law and Justice Foundation of New South Wales, 2012).

<sup>289</sup> Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (2013) 47(3) *The Law Teacher* 421.

<sup>290</sup> Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013). For regional reports, see Office for Learning and Teaching Project, 'Strengthening Australian Legal Education by Integrating Clinical Experiences: Identifying and Supporting Effective Practices' (Web Page, 2013) <<https://www.monash.edu/law/home/cle/olt-project>>; Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (2013) 47(3) *The Law Teacher* 421.

<sup>291</sup> Historically, law teaching has passed through many permutations. In the early 20th century, after the division between the academe and professional practice, Jerome Frank proposed that law could be taught through a clinical law school. Some law schools have modelled themselves on being a 'clinical law school' (for example, Newcastle University in Australia and Northumbria University in the United Kingdom), but this is not the norm.

teaching<sup>292</sup> occurs. Additionally, there are some law schools which have chosen to teach ethics either wholly through a clinic, or by incorporating clinical components. For example, at the Catholic University<sup>293</sup> in Washington DC, elements of clinical teaching are incorporated into the Professional Responsibility course. In many clinical courses, learning about ethical responsibilities is one of the learning objectives.<sup>294</sup> There are also clinical courses which have the specific aim of teaching legal ethics and professional responsibility.<sup>295</sup> An alternative approach is to include a clinical component in an ethics course, which may be equally effective.

‘Once they encounter a client, the blind faith that there is a “truth” or a “law” that can be applied must give way to a more sophisticated understanding. Clients’ cases rarely present simple facts that lend themselves to right and wrong answers. It is the complexity and unpredictability of working with real people that makes clinical legal education so rich.’<sup>296</sup> This complexity of clients’ cases is rich ground for learning about ethical decision-making and the widespread occurrence of ethical issues.

However, it cannot be assumed that students will learn ‘ethics’ and ethical decision-making simply by being placed in a clinic. This does not occur through a process of osmosis. It must be

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<sup>292</sup> See the entry for Latrobe University on page 15 and the entry for UNSW on page 36 in Kingsford Legal Centre, *Clinical Legal Education Guide: Your Guide to CLE Courses Offered by Australian Universities in 2014* (2014) <[http://www.klc.unsw.edu.au/sites/klc.unsw.edu.au/files/55386\\_clinical\\_legal\\_education\\_guide\\_web.pdf](http://www.klc.unsw.edu.au/sites/klc.unsw.edu.au/files/55386_clinical_legal_education_guide_web.pdf)>.

<sup>293</sup> Leah Wortham, interview with the author, December 2014; Leah Wortham, ‘Lawyering Process: My Thanks for the Book and the Movie’ (2003) 10 *Clinical Law Review* 399 (invited submission to the symposium honoring the 25th anniversary of the publication of Gary Bellow and Bea Moulton, *The Lawyering Process* (Foundation Press, 1978)).

<sup>294</sup> Kingsford Legal Centre, ‘Welcome to KLC’ (Web Page) <<http://www.klc.unsw.edu.au/>>.

<sup>295</sup> The course conducted by Latrobe University focuses on professional responsibility and has been offered at a range of legal services, including West Heidelberg Community Legal Service and Preston Legal Aid. Australian Learning and Teaching Council, ‘Regional Report: Victoria and Tasmania – Identifying Current Practices in Clinical Legal Education’ (2011) 5 <[https://www.monash.edu/\\_\\_data/assets/pdf\\_file/0015/407130/altc-report-vic-tas.pdf](https://www.monash.edu/__data/assets/pdf_file/0015/407130/altc-report-vic-tas.pdf)>; Kingsford Legal Centre, *Clinical Legal Education Guide: Your Guide to CLE Courses Offered by Australian Universities in 2014* (2014) 16 <[http://www.klc.unsw.edu.au/sites/klc.unsw.edu.au/files/55386\\_clinical\\_legal\\_education\\_guide\\_web.pdf](http://www.klc.unsw.edu.au/sites/klc.unsw.edu.au/files/55386_clinical_legal_education_guide_web.pdf)>.

<sup>296</sup> Jane H Aiken, ‘Provocateurs for Justice’ (2001) 7 *Clinical Law Review* 287, 292.

consciously planned and incorporated.<sup>297</sup> The literature on such clinical approaches highlights a number of important pedagogical matters that are necessary in order to achieve fuller learning outcomes. Rather than assuming that experience itself will teach students, it is essential to recognise the importance of debrief and reflection. Students need the opportunity to talk with each other about what they are learning. Reflection is a key part of the learning process.<sup>298</sup> The groundedness of teaching professional responsibility or ethics through a clinic allows discussions on issues such as the importance of cultural competence.<sup>299</sup> The diversity of clients, client experiences, and the legal issues which clients face provide rich learning opportunities for students around cross-cultural communication and the importance of working effectively with a broad and diverse range of clients. Classroom components of clinical subjects should therefore also include training on cultural competence.

Conceptualising the role of a clinical office as a model for how a legal practitioner should behave and what ethical decision-making means is also highly significant. There is a legitimate range of views about what ethical legal practice is and which lawyering styles and approaches are appropriate. The individual behaviours of the clinic lawyers which students observe give students rich material to critique, analyse and reflect on in determining how to be a lawyer. As Curran and colleagues note, '[t]hrough working with solicitors and being able to observe first

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<sup>297</sup> Some have argued that a clinic is not the best place to teach ethics because the ways in which ethical issues arise are unpredictable, which means that students will have varying experiences of ethical issues and a range of different issues. Despite this, ethical issues can be shared and the learning spread among a group of students through class discussions, class presentations and group debriefs. Margaret Barry, Jon Dubin and Peter Joy, 'Clinical Education for This Millennium: The Third Wave' (2000) 7 *Clinical Law Review* 1.

<sup>298</sup> *Ibid.*

<sup>299</sup> Antoinette Sedillo Lopez, 'Teaching a Professional Responsibility Course: Lessons Learned from the Clinic' (2002) 26 *Journal of the Legal Profession* 149.

hand different lawyering styles, students will begin to develop a deep understanding of ethical practice'.<sup>300</sup>

Clinics can also highlight the public nature of the work of lawyers and, therefore, the public responsibility that lawyers also hold.<sup>301</sup> When the Latrobe University ethics course was offered through West Heidelberg Community Legal Service, it included a component which encouraged clinical students to recognise the limitations of the law and to develop law reform solutions to problems which they identified through their work on client cases.<sup>302</sup> Students, by identifying problems with the law and taking an active role in coming up with solutions, were already in the role of responsible lawyer or moral activist lawyer, amenable to ensuring that the law and the legal system operate as fairly as possible. Thus, the model of ethical lawyering which Parker and Evans discuss<sup>303</sup> was actively structured into the clinical course.

Other clinical courses generally aim to teach ethics as one of their principal learning objectives. This is defined as being about teaching law in context and the role of law in society, as well as the role of lawyers in society.<sup>304</sup> These learnings are possible within a full clinical course spanning over a semester, with students attending between one and two days a week at their clinical site – whether it be a community legal centre, a law reform agency, or a legal regulation authority.

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<sup>300</sup> Liz Curran, Judith Dickson and Mary Anne Noone, 'Pushing the Boundaries or Preserving the Status Quo? Designing Clinical Programs to Teach Law Students a Deep Understanding of Ethical Practice' (2005) 8 *International Journal of Clinical Legal Education* 104, 111.

<sup>301</sup> Stephen Parker, Michael Liffman and Fiona McLeay, 'Why Lawyers Should Do Pro Bono Work' (2001) 19 *Law in Context* 5.

<sup>302</sup> Liz Curran, 'Responsive Law Reform Initiatives by Students on Clinical Placement at La Trobe Law' (2004) 7 *Flinders Journal of Law Reform* 287.

<sup>303</sup> Parker and Evans identify the model of 'responsible lawyer' who is an officer of the court and who is concerned to make the legal system function smoothly and fairly: Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2014) ch 2, table 2.2.

<sup>304</sup> Kevin Kerrigan, '"How Do You Feel about This Client?" – A Commentary on the Clinical Model as a Vehicle for Teaching Ethics to Law Students' (2007) 11 *International Journal of Clinical Legal Education* 7, 16.

## **Embedding clinical components within courses**

Having outlined three key elements of professionalism and legal ethics and how clinical courses have the potential to explore these, this section discusses the extent to which it is possible to teach these elements when a clinical component is embedded within an ethics course.<sup>305</sup> It uses the example of the clinical component at Kingsford Legal Centre at the University of New South Wales (UNSW) to examine each of the three aspects in turn.

### **Working towards or contributing to justice, fairness and the improvement of the legal system and serving the community as part of the role of a lawyer**

In the post-client interview debrief, and also in the initial briefing of the volunteer lawyer by the student, a range of issues often emerge. These issues include the following:

- A solicitor must act on the instructions of a client. If a client has a disability, how do lawyers deal with the client? Does a psychiatric disability impact on how a lawyer thinks about a client's ability to give instructions? What is disability? How are clients impacted within the legal system by having a disability?
- Who are the legal profession? Who are clients? Does the limited diversity of the legal profession impact on the experience of disadvantaged clients seeking legal help?

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<sup>305</sup> Australian courses which include a clinical component include the Family Law course and the Dispute Resolution course developed by Charles Darwin University in the Northern Territory. The clinical component involves students studying in Darwin the theoretical component of Family Law or Dispute Resolution over a period of 10 weeks, then travelling over 5000 km south to work for two weeks in a community legal centre in Northern Victoria which specialises in family law. The other course component in Australia, as discussed in the Best Practice research project, is the Judicial Mentoring component of the Family, Society and Law course and the Criminal Procedure and Evidence course at LaTrobe University. Australian Learning and Teaching Council, 'Regional Report: Western Australia and Northern Territory – Identifying Current Practices in Clinical Legal Education' (2011) <[https://www.monash.edu/\\_\\_data/assets/pdf\\_file/0014/407120/altc-report-wa-nt.pdf](https://www.monash.edu/__data/assets/pdf_file/0014/407120/altc-report-wa-nt.pdf)>; Australian Learning and Teaching Council, 'Regional Report: Victoria and Tasmania – Identifying Current Practices in Clinical Legal Education' (2011) 5 <[https://www.monash.edu/\\_\\_data/assets/pdf\\_file/0015/407130/altc-report-vic-tas.pdf](https://www.monash.edu/__data/assets/pdf_file/0015/407130/altc-report-vic-tas.pdf)>.

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- What are conflicts of interest? How should a legal practice manage conflicts of interest within families?
- What does acting on instructions mean?
- What is a lawyer's responsibility when asked for advice about doing something which is illegal?
- What is the role of a lawyer? What are the limits on students, who cannot give legal advice?
- How much information should lawyers give clients about why they don't have a good case, taking into account issues of client autonomy versus complexity, paternalism and disadvantage?

These issues are very wide-ranging. The issues raised vary depending on the clients who are seeking legal advice. Additionally, the discussion about these issues which ensues can vary depending on the volunteer lawyer supervisor who is working with the client and the student. The strategy which Kingsford Legal Centre has developed for ensuring that some of these issues are discussed is to encourage volunteer lawyer supervisors to analyse with the student any issues which arose during the interview process. The staff clinical supervisor/solicitor may also participate in these discussions. The two challenges with this approach are the variability of the issues which arise, and the ability of volunteer lawyers to identify issues and discuss them appropriately.

***Challenges in students' thinking about their role and contribution***

Some of the volunteer lawyer supervisors come from a legal services or legal aid background and are accustomed to working with disadvantaged clients. These lawyers have, for example, thought through issues of working with clients with disability whose ability to give instructions may be challenged in some way, or issues of working with culturally diverse clients. There are

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also lawyers from large commercial firms and small suburban practices. Each volunteer lawyer supervisor brings their own perspective on the issues listed above. Because of this, each student will experience a different debrief – not only because they see different clients, but also because each lawyer will approach the client uniquely. Some may be able to see structural injustices readily, others may not. This variability is both a weakness and a strength of the clinical component.

It is a strength because it demonstrates to students that each lawyer must grapple with issues individually, with support, but there is no single ‘right answer’ to ethical issues. Each lawyer brings their own experience, individual values, and perspectives to the discussion. Often the most interesting discussions will be among the group of lawyers and the staff clinical supervisor about how to deal with an issue. Students observe these discussions and can also participate in them. They may observe disagreement or robust discussion about how to deal with a particular client. This emphasises to students that ethical issues are not clear cut and there is a range of ways of dealing with issues.

Because the issues which arise from each clinical experience vary so substantially between students, it is a challenge to ensure that these individual issues can be shared within a larger group. The lessons which can be learnt from each issue are not made available to *all* students. Rather, they are available only to the few students who are present at the evening advice session. This is a weakness of the clinical component, as the full learning potential of the issues which arise in each evening advice session is not fully developed across the cohort of students.

One way of deepening and sharing the individual learning would be by asking some students to discuss their specific experiences of the interview session in a presentation to the larger class. Another way would be by drawing on students’ individual experiences when discussing broader ethical issues, such as the duty of confidentiality or fiduciary relationships. Students could also

gain class participation points in their grades<sup>306</sup> for using anonymised examples from the interviewing clinical component. These mechanisms would draw greater learning from the clinical component. An added benefit is that these approaches would also enable peer-to-peer learning, beginning the process within the formal class setting of drawing on peers to explore and resolve ethical issues. This would have substantial benefits for the students' later legal practice.<sup>307</sup> Another method for ensuring peer-to-peer learning would be to require students to comment on assignments by three other students.

By requiring students to complete a set assignment which asks them to reflect on any ethical issues which arose during their interviewing session, they are asked to identify specific issues even though they will have experienced different issues. In this way, the experience is assessed equally among the group – although the insights that students gain are not shared with the group, limiting the potential of peer-to-peer learning.

### ***Responsibility to help make the legal system fairer***

The other implicit message which is given by incorporating a clinical component within a core course on legal ethics is that universities and law faculties have a responsibility to respond in some way to unmet legal need. Students contribute actively in providing legal services to disadvantaged people. Situating a clinical component within an 'in-house' clinic sends the clear message to students that this is the core work of the law faculty and it integrates them into this role. It communicates to students that they are part of the legal system, that they are participating in it, and that they are giving help to people who need legal help and cannot afford

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<sup>306</sup> At UNSW, students are graded for their class participation, including criteria such as preparation for class, ability to identify issues, and contributing to discussion.

<sup>307</sup> See Alex Steel, Julian Laurens and Anna Huggins, 'Class Participation as a Learning and Assessment Strategy in Law: Facilitating Students' Engagement, Skills Development and Deep Learning' (2012) 36(1) *UNSW Law Journal* 30.

to pay for it. This then prompts the question: What responsibility does each lawyer have, within the legal system, with their skills and training, to provide legal help to disadvantaged people?

The law school simultaneously answers that question implicitly by funding an in-house clinic and requiring all students to complete the clinical component:

Law school clinics continue to play an important role in making access to justice a reality for many low-income people. They do so not only by exposing law students to the legal problems that the poor face but also by allowing students to experience what amounts to a 'tactile' connection with the obligation to find substantive and creative ways to respond to unmet legal needs.<sup>308</sup>

This is another aspect of that first element, which students learn through their clinical component. The law school models the answer to the question of what responsibility each legal practitioner has to the law and the legal system.

### **Gaining a sense of autonomy and self-direction**

This is the second element of the ethical legal professional which is taught through the clinical component.

Students do not merely observe the interviewing of clients with legal problems, nor do they only role-play it. Rather, they actually interview real clients. This, ideally, supports a sense of purpose in students' lives. According to Ryan and Deci, 'the needs for autonomy, competence and relatedness "appear to be essential for facilitating optimal functioning of the natural propensities for growth and integration, as well as for constructive social development and personal well-being"'.<sup>309</sup> Ryan and Deci developed self-determination theory, which explains

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<sup>308</sup> Margaret Barry, Jon Dubin and Peter Joy, 'Clinical Education for This Millennium: The Third Wave' (2000) 7 *Clinical Law Review* 1.

<sup>309</sup> Leah Wortham, Catherine Klein and Beryl Blaustone, 'Autonomy-Mastery-Purpose: Structuring Clinical Courses to Enhance These Critical Educational Goals' (2012) 18 *International Journal of Clinical Legal Education* 105, 113, quoting Richard Ryan and Edward Deci, 'Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being' (2000) 55(1) *American Psychologist* 68, 68.

what ‘helps people to thrive and maximize positive motivation’. Experiences of autonomy and relatedness, such as interviewing clients in a supportive environment, would maximise positive motivation in students and help them to thrive. This is an issue which would warrant further research with the student group.

Students comment informally about the impact of being responsible for interviewing the client and finding out what the client needs help with and how they can contribute to providing that help. For many, it is their first experience of seeing how law can help people and how impenetrable the legal system can be for disadvantaged people. Before this experience, most students are very nervous about whether they will be able to interview clients successfully. Almost all students feel a sense of accomplishment at the end of the evening advice clinic after they have conducted their interviews. In their reflection assignment, they readily identify areas for improvement but they also refer to what they were able to achieve in their interview. Thus, it appears that the clinical component builds students’ sense of autonomy and increases their motivation. These accounts are anecdotal and warrant further empirical research.

### **Ongoing reflection and continual improvement**

This is the third of the key elements found in the various definitions of what makes an ethical legal professional. Rather than assuming that experience itself will teach students, it is essential to keep in mind the importance of debrief and reflection. Students need the opportunity to talk with each other about what they are learning and reflection is a key part of the learning process.<sup>310</sup>

This occurs both formally and informally through the clinical component in ethics at UNSW. Students are encouraged to discuss their experiences informally in a group setting at the end of, and during, the interview advice clinic. They are also asked to complete a formal assignment

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<sup>310</sup> Peter Joy, ‘The Ethics of Law School Clinic Students as Student-Lawyers’ (2004) 45 *South Texas Law Review* 815, 839.

reflecting on their interview experience. There are two aspects of reflection which should be addressed here.

One of these aspects is the student's self-reflection about how the interviewer conducted the interview, areas for improvement, and issues which arose between the interviewer and the interviewee. The other aspect concerns ethical issues which may have arisen or broader issues around the law and the legal system and the client's participation within it. Both these areas of reflection are included in the reflective assignment. Generally, students are able to effectively answer the question reflecting on their own interviewing practice.<sup>311</sup> Their ability to reflect on the legal system and the law varies.

The Best Practices include reflection as a vital element within clinical components:

In all clinical courses and components, debriefing and discussion that encourages reflection are emphasised. Further structured opportunities for reflection are a clearly articulated and important part of any clinical course. Reflection is informed by relevant literature and incorporated into every clinical course in a structured, planned and thoughtful way.<sup>312</sup>

In this way, the clinical component is structured to meet the Best Practices. The assessment of reflection will be discussed further below.

There are additional learnings that students gain from their clinical component and these will now be discussed.

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<sup>311</sup> There is no empirical evidence of the students' ability to reflect; however, the clinical component has been in place for over 14 years and a large number of reflective assignments, demonstrating reflective ability, have been submitted for assessment.

<sup>312</sup> Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013) 13.

## **Modelling collaborative teamwork and demonstrating a particular type of legal practice**

In addition to teaching ethics and ethical decision-making formally, the methodology of teaching is equally important. If collaborative teamwork is one of the values which is to be taught, then it must be modelled.<sup>313</sup> It is vital, therefore, that in supervision the clinical supervisor demonstrates respectful and mutual relationships with volunteer supervisor solicitors. The relationship between clinical supervisor and volunteer solicitor supervisor must be based in clear communication.

Discussing professional values in a clinical setting can assist students in beginning to identify their own professional sense and thus being better able to assess in the future whether a particular practice will suit their professional identity.<sup>314</sup> It is impossible to overrate the role of a clinical office as a model in legal practice of how a legal practitioner should behave and what ethical decision-making means. At Kingsford Legal Centre at UNSW, *all* first-, second- and third-year students are given the opportunity to participate in the clinical component at a functioning community legal centre. This allows them to experience a particular type of legal practice and begin thinking about whether that type of practice would suit their values and their approach to law. They see other legal professionals volunteering their time and so, by example, they see that other legal professionals believe that they should contribute to the community with their legal knowledge. Indirectly, the experience addresses the issue of the responsibility which each legal professional has to contribute to the community.

The volunteer legal professionals model for students ways of being a lawyer with disadvantaged clients. The supervising clinical solicitor works with the volunteer supervisor solicitors, thereby

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<sup>313</sup> Paula Lustbader, 'Walk the Talk: Creating Learning Communities to Promote a Pedagogy of Justice' (2005) 4 *Seattle Journal of Social Justice* 613, 628.

<sup>314</sup> Tony Foley et al, 'Teaching Professionalism in Legal Clinic – What New Practitioners Say Is Important' (2012) 17 *International Journal of Clinical Legal Education* 5, 26.

modelling collaborative teamwork for students. Through taking instructions from clients, briefing the supervising solicitor, researching the law, and writing up the advice given, students are given a high degree of responsibility. The reflection assignment and, informally, the advice session give them an opportunity to reflect on aspects of the law, the legal system, their own interviewing skills, and the experience of the client. This element of professionalism and legal ethics – student autonomy – is another critical learning.

### **Training of supervisors within the clinical component and assessment**

As discussed above, students are expected to be able to reflect on a range of issues, including the client's and their own place in the legal system and ethical issues which arise. Ideally, during the evening advice clinic, students discuss aspects of their experience with their volunteer lawyer supervisors. The volunteer lawyer supervisors should also be able to give the students formative feedback about their performance. This capacity will vary substantially among the volunteer lawyer supervisors. The Best Practices report discusses the importance of assessing reflection, using a criteria-based approach that focuses on the reflective process, the content of the reflection, and the linkage to learning outcomes.<sup>315</sup>

Currently, students' interviews are not formally assessed using criterion-based standards – although volunteer lawyer supervisors are expected to give formative feedback. Students often raise the difficulties they faced while interviewing. The volunteer lawyer supervisors, as well as the supervising clinical solicitor, give feedback about how to improve the interviewing practice. The reflection assignment, which follows the interviewing experience, is the summative assessment of the clinical component. It assesses the students' ability to evaluate their own interviewing, as well as their thinking about their own current and future contribution to the law and the legal system. There are three questions within this assignment and the mark

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<sup>315</sup> Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013) 14.

contributes to 15% of the overall grade students receive for the course. A published assessment<sup>316</sup> rubric outlines the aspects which are assessed.<sup>317</sup> Students, ideally, draw on set readings about good interviewing practice<sup>318</sup> and identify how they were or were not able to use good interviewing practice. Students must identify how they can improve in the future. They do not have the opportunity to interview additional clients.

In this way, the clinical component reflects the insight from Stuckey and colleagues that 'optimal learning from experience involves a continuous, circular four stage sequence of experience, reflection, theory and application'.<sup>319</sup> By including a reflective assignment which draws on theory, the clinical component teaches students the significance of that circular process.

Within the clinical component delivered through Kingsford Legal Centre at UNSW, volunteer supervisor solicitors who are actively working with students guide them in taking client instructions, work with them to develop legal advice for the client, and oversee their note-taking and written summaries of client advice. These volunteers are not given formal training for their role in teaching students. There are also clinical supervising solicitors who *are* trained in clinical supervision. They supervise the volunteer supervisor solicitors and provide on-the-job training by modelling appropriate student teaching and supervision. The volunteer supervisor solicitors *do* receive training in relevant areas of the law within a community legal practice, but not on *how* to supervise students. One of the concerns has been that it may be too taxing on

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<sup>316</sup> Ibid: 'Formal assessment, using publicised criteria, is combined with informal feedback delivered when opportunity presents itself or necessity requires it.'

<sup>317</sup> The rubric informs students that their identification of ethical issues is assessed, along with their ability to apply ethical frameworks to real-life situations, their reflection on experience, their identification of good interviewing technique, and their ability to incorporate theory from readings into reflection on practical experience.

<sup>318</sup> These are readings which are assigned for the formal class on interviewing, including Kay Lauchland, 'The Importance of Good Communication' in Kay Lauchland and MJ Le Brun, *Legal Interviewing: Theory, Tactics and Techniques* (Butterworths Australia, 1996) ch 2.

<sup>319</sup> Roy Stuckey et al, *Best Practices for Legal Education: A Vision and a Road Map* (Clinical Legal Education Association, 2007).

volunteer supervisor solicitors to require them to also gain training in supervision skills when they are donating their time for disadvantaged clients. Anecdotally, however, many of the volunteer supervisor solicitors also comment on the pleasure they gain from working with law students and supervising their work.<sup>320</sup>

At the very least, training in supervision skills should be offered to *all* volunteer solicitor supervisors. Even if they don't immediately identify the usefulness of receiving training in their supervising of students, supervision skills will be transferable to their workplaces where they may supervise other employees.

The Best Practices make clear that:

All supervisors, including short-term, locum and agency-employed supervisors, [should be] trained in the process of supervision and provided with the time and resources to fulfil their responsibilities.

Supervisors [should be] able to participate in specific supervision training courses and skills development processes. Universities [will] give ongoing commitment to the professional development of supervisors.<sup>321</sup>

If the aim of the clinical component is to teach the three elements outlined above, then it is key that the volunteer lawyer supervisors are trained in *how* to teach these elements. Due to the differences among the group of volunteer lawyers – some from private practice, others from large commercial law firms, and yet others from legal aid practices – they would need an opportunity to reflect themselves on the sorts of issues which arise in interviewing disadvantaged clients. Training would provide opportunities for the volunteer lawyer supervisors to reflect on these issues. They could also be asked for their views on 'good

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<sup>320</sup> Each year, there is an annual dinner to thank volunteer solicitors at Kingsford Legal Centre, at which many of the volunteer solicitors offer their observations on the sense of worth and pleasure they gain from supervising law students.

<sup>321</sup> Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013) 11.

interviewing practice'. As they are experienced lawyers, there would be room for ample discussion of both these issues in the process of teaching them to teach students how to reflect on their role as future lawyers contributing to the community and the need for continual improvement and ongoing reflection. At a base level, due to each lawyer volunteering their time, these lawyer supervisors believe that they have a responsibility to contribute in some form to the community. Small group discussions would be an effective mechanism for training them. The volunteer lawyer supervisors may then need further support during the advice clinics in encouraging students to think critically about their role and their interviewing.

In order to train the lawyers to teach student autonomy, it would be useful to outline some of the history of clinical legal education methodology and the importance of giving students responsibility<sup>322</sup> for their work within that methodology. From this, a range of ways of encouraging autonomy could be discussed – such as students participating in researching advice, students' views being sought about clients' issues, and students writing up the advice and being constructively critiqued. The broader linking between personal values and self-motivation could also be taught, with some references provided to the volunteer lawyer supervisors for their further reading. Another aspect of developing student autonomy is giving effective and timely feedback. This is also recognised in the Best Practices, which state that:

frequency of feedback [should be] planned before the use of clinical components to ensure that such feedback:

- is consistent across the student body; and
- supports the clinical process.<sup>323</sup>

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<sup>322</sup> Simon Rice, *A Guide to Implementing Clinical Teaching Method in the Law School Curriculum* (Law and Justice Foundation NSW, 1996); Jeff Giddings, 'Clinical Legal Education in Australia: A Historical Perspective' (2003) 3 *International Journal of Legal Education* 3; Leah Wortham, Catherine Klein and Beryl Blaustone, 'Autonomy-Mastery-Purpose: Structuring Clinical Courses to Enhance These Critical Educational Goals' (2012) 18 *International Journal of Clinical Legal Education* 105.

<sup>323</sup> Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013) 12.

To train the lawyers to teach ongoing reflection, the volunteer lawyer supervisors would, ideally, be trained to ask the following questions at the end of each interview: What did we do well? What could we do better? This could then model to the student the importance of self-assessment and critique on an ongoing basis. The volunteer lawyer supervisor could also be encouraged to reflect on their interviewing of the client and model the analysis of what worked well and what could be improved. The volunteer lawyer supervisors could engage in role-plays in training in order to develop their skills in these areas.

After this training, the challenge would be to measure whether the students are learning the three elements. Currently, the only way of measuring this is through the content of the reflective assignment completed by each student. These assignments demonstrate that most students *are* able to reflect on their future role as a lawyer and to critique their own interviewing. It is more difficult to assess whether students are learning autonomy. The only mechanism is the student's own evaluation of their sense of growth and learning through the experience. Learning about the need for ongoing improvement and self-reflection can probably be measured through the reflection assignment and also a student's 'before' and 'after' self-evaluations. Empirical research on each of these aspects – asking students to give their views on each aspect both before and after their clinical component – may provide a means to measure the impact of learning through the clinical component.

### **Challenges of a clinical component within a substantive law subject**

From this brief discussion, it is apparent that there are valuable learnings on ethical practice and decision-making for students to be garnered from a clinical component, even within a brief five-hour interview and advice session. Integrating clinical experiences and methodologies into the substantive curriculum has been discussed and generally recognised as a valuable innovation

within legal education.<sup>324</sup> Other law schools have attempted to incorporate clinical elements within substantive courses, such as at the University of Maryland, the University of New Mexico and New York University.<sup>325</sup> Working with actual clients within the first or second year has not been widely adopted, yet it has clear advantages.

There are two distinct areas for improvement and growth within the clinical component.

The integration between the clinical component and the substantive ethics subject at UNSW Law can be challenging. While the three elements discussed in this chapter are taught within the clinical component, the greater challenge is 'how to get the most' out of a valuable and rare clinical component within a substantive law subject across the cohort of students. A community law centre, which is largely in-house, cannot offer a clinical learning experience in a range of substantive law subjects – especially when there are over 180 students each semester. This is simply too resource intensive. As some of the learning is individually based, ways to encourage peer-to-peer learning, and deepen the learning from the clinical component, should be explored. These possible approaches could include introducing an individual oral presentation to the class, as an assessment alternative, and attributing marks for class participation where students use their clinical component to describe or analyse ethical issues in discussions occurring during the course.

The second area for growth is in training volunteer lawyer supervisors to teach the three elements more effectively and to explore the effective assessment of these elements. This has been discussed at length above.

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<sup>324</sup> Margaret Barry, Jon Dubin and Peter Joy, 'Clinical Education for This Millennium: The Third Wave' (2000) 7 *Clinical Law Review* 1.

<sup>325</sup> *Ibid*, 44.

## **Conclusion**

From this discussion, it is apparent that ethics training and awareness are a vital part of any legal education and career. Rather than focusing on the disciplinary consequences of malpractice, it is key to recognise that an ethical lawyer will identify their responsibility to contribute to the community, to the legal system, and to improving justice for the community. They will also be committed to competent, self-directed and autonomous lawyering. Ongoing reflection and continual improvement will be a further aspect of their work.

The three elements of what makes an ethical legal professional are developed, even in a brief clinical component within a broader ethics course. Clinics have particular riches to offer the teaching of ethics. A relatively short clinical component within a substantive ethics subject will provide deep learning for students – including the three key elements. It will also model teamwork and the role of other legal professionals in contributing to the community. The challenges include ensuring the training of all volunteer lawyer supervisors in supervision skills. As the supervisors will have varying skills and perspectives on the law and their role in the legal system, it is essential to provide a forum in which to explore their own interviewing practice, as well as their values and beliefs around the role of lawyers in contributing to the community. Training in giving effective feedback, including the use of role-play, will be an essential way to improve the clinical component. Another area for improvement is to gain as much as possible from the individual experiences and reflections of students, across the cohort, through additional assessment options and through sharing individual experiences in class time. Finally, clinical components are strengthened by using the Best Practices in clinical education to assist in their design.

## Chapter 6:

# Interviewing real clients and the ways it deepens students' understandings of legal ethics

### Introduction

There is significant discussion about the ways in which clinical legal education can teach students about social justice and legal ethics. Much of the literature focuses on how a full clinical course teaches students profound learnings<sup>326</sup> through 'disorienting moments',<sup>327</sup> by working with complex clients with a multitude of needs, and by identifying the responses<sup>328</sup> which those clients need. These disorienting moments frequently relate to students' perceptions of clients' experiences of 'justice' or injustice. This may provide a vehicle for exploring justice within an ethical framework, including ideas of justice and caring, particularly using an 'ethic of care' or 'morality of care' when thinking about ideas of justice. This may influence students' concepts of justice when faced with the limitations of the legal system through a client interviewing experience.

It has been argued that legal educators must do more to 'foster a culture of commitment to public service among future practitioners'.<sup>329</sup> One important means of building this

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<sup>326</sup> William Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Foundation for the Advancement of Teaching, 2007).

<sup>327</sup> Fran Quigley, 'Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics' (1995) 2 *Clinical Law Review* 37; Jane H Aiken and Stephen Wizner, 'Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice' (2004) 73 *Fordham Law Review* 997; Mary Anne Noone and Judith Dickson, 'Teaching towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers' (2001) 4(2) *Legal Ethics* 127, 143.

<sup>328</sup> Juliet Brodie, 'Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighbourhood-Based Community Lawyering Clinics' (2009) 15(2) *Clinical Law Review* 333.

<sup>329</sup> Deborah L Rhode (President, Association of American Law Schools), 'The Professional Responsibility of Professional Schools' (Speech delivered at the Association of American Law Schools House of Representatives, January 1998), in AALs House of Representatives Proceedings (1998), quoted in Cynthia F Adcock, 'Beyond

commitment is through clinical legal education embedded in a core legal ethics course. Dealing with real clients while still at law school may give students a broader and deeper understanding of themselves as future lawyers. It also has the potential to strengthen students' commitment to public service legal work by providing an opportunity for them to examine what this may mean within the context of 'ethical values' and 'ethical legal practice'.

This chapter examines students' experiences of a short clinical component embedded within an applied legal ethics course offered at the University of New South Wales (UNSW),<sup>330</sup> where students interview clients with a range of complex issues. The experience challenges students' understandings of 'what is an ethical issue' and what values and skills are needed in a lawyer in order to deal effectively with these issues. In its way, the clinical component, even if limited in nature, provides many of these students with a disorienting moment as they interview disadvantaged clients experiencing injustice. Integrating clinical methodology through a component in a substantive course reaches greater numbers of students than would otherwise be the case and therefore may have wider impact.<sup>331</sup>

The chapter explores the benefits of including clinical elements within ethics courses. Drawing upon empirical research, it reports on an Australian study which examines the impact of clinical teaching on current students. The research sought to determine the extent to which a limited clinical component may have an impact on students' learning and understanding of ethical issues, on their own professional identity, and on their commitment to contributing to the community. Initially, the chapter discusses concepts of

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Externships and Clinics: Integrating Access to Justice Education into the Curriculum' (2013) 62(4) *Journal of Legal Education* 570.

<sup>330</sup> The course is Lawyers, Ethics and Justice LAWS1230: see University of New South Wales, 'Lawyers, Ethics and Justice – LAWS1230' (UNSW Handbook, 2017) <[www.handbook.unsw.edu.au/undergraduate/courses/2017/LAWS1230.html](http://www.handbook.unsw.edu.au/undergraduate/courses/2017/LAWS1230.html)>.

<sup>331</sup> Jeff Giddings, *Promoting Justice through Clinical Legal Education* (Justice Press, 2013).

justice and their relationship to care, and how concepts of justice are used within definitions of an ethical legal practitioner. The core legal ethics course at UNSW is described, including the clinical component within it. The key research issues, set out above, are discussed, as is the development of a research survey which was administered to students both before and after interviewing real clients within the framework of that course. The survey findings are reported using a mostly qualitative approach. Finally, the chapter concludes with an assessment of the extent to which students' experiences of interviewing clients in this context have contributed to their understanding of legal ethics, justice, and the need to contribute to the legal system to make it fairer for disadvantaged people. But first, it may be helpful to consider what clinical legal education is, so as to define the decisions underpinning the way in which the clinical component operated within the applied legal ethics course that forms the basis of this study.

### **Clinical legal education**

Clinical legal education is a pedagogy that places students in real-life environments. It is a form of experiential learning where students learn by doing and then reflecting.<sup>332</sup>

There are various definitions and forms of clinical legal education, some including simulations. This chapter uses the definitions of different clinical legal education programs developed in the Australian Best Practices.<sup>333</sup> These categorise clinical programs as in-house live client clinics, external live client agency clinics, externships (including internships and placements), and clinical components of law courses.<sup>334</sup> In Australia, clinical legal education is distinguished by providing students with interactions with 'real clients', who may be individual people, non-

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<sup>332</sup> Adrian Evans et al, *Australian Clinical Legal Education* (ANU Press, 2017) 41, citing Hugh Brayne, Nigel Duncan and Richard Grimes, *Clinical Legal Education: Active Learning in Your Law School* (Blackstone Press, 1998) 2. Brayne, Duncan and Grimes state: 'Understanding through both doing and reflecting is at the centre of the clinical ethos', quoted in Jeff Giddings, *Promoting Justice through Clinical Legal Education* (Justice Press, 2013) 3.

<sup>333</sup> Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013) 41.

<sup>334</sup> *Ibid.*

government agencies, or other entities. While simulation is an important tool within experiential education, the impact of experiences with real clients is recognised within clinical legal education.<sup>335</sup> This research project analyses the impact of the fourth category of clinical legal education, a clinical component of a law course in which students interview individual clients.

### **What are ethics? What is professional responsibility/ethical decision-making?**

In some legal contexts, 'ethics' are defined narrowly to mean making decisions according to the professional rules. In contrast to this, the concept of 'professionalism' or 'professional responsibility'<sup>336</sup> has gained a deeper significance, incorporating notions of a lawyer's values and their responsibility to the justice system and the community. Some have discussed moral questions within a legal context as being ethical questions, and the role of ethics teaching as being about teaching moral judgement, relying on Kohlberg's theory of moral development.<sup>337</sup> In this chapter, ethics are defined broadly<sup>338</sup> but notably include lawyers working towards

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<sup>335</sup> Fran Quigley, 'Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics' (1995) 2 *Clinical Law Review* 37; Jane H Aiken and Stephen Wizner, 'Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice' (2004) 73 *Fordham Law Review* 997; Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013).

<sup>336</sup> Leah Wortham, 'Teaching Professional Responsibility in Legal Clinics around the World' (1999) 1 *Klinika* 241; Mary Anne Noone and Judith Dickson, 'Teaching towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers' (2001) 4(2) *Legal Ethics* 127, 143.

<sup>337</sup> Steven Hartwell, 'Moral Development, Ethical Conduct, and Clinical Education' (1990) 35 *New York Law School Law Review* 131.

<sup>338</sup> American Bar Association, 'Legal Education and Professional Development – An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap' (American Bar Association, 1992) (MacCrate report). The MacCrate report identified key values of lawyers: (1) providing competent representation; (2) striving to promote justice, fairness and morality; (3) striving to improve the profession; and (4) professional self-development.

justice and fairness. Hyams,<sup>339</sup> building on the definition of Noone and Dickson,<sup>340</sup> defined the requirements for an ethical legal professional as someone who:

- fulfils the duties attached to a fiduciary relationship;
- is competent in the work they perform;
- communicates often, openly and clearly with their client;
- does not encourage the use of the law to bring about injustice, oppression or discrimination;
- identifies, raises and discusses ethical issues with current/potential clients;
- seeks to enhance the administration of justice and actively engages in serving the community;
- works in an autonomous way – in an independent, self-sufficient and self-directed fashion;
- exercises judgement – not only relating to how to resolve a client's problems, but also reflective judgement of their own behaviours and actions; and
- has an ongoing commitment to lifelong education over and above that which is required by continuing professional development points.<sup>341</sup>

This chapter uses these definitions and explores how the clinical experience of interviewing develops students' ideas of what an ethical lawyer's values are and how an ethical lawyer works, as well as their own commitments to improving the justice system. These definitions are

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<sup>339</sup> Ross Hyams, 'On Teaching Students to "Act Like a Lawyer": What Sort of Lawyer?' (2008) 13 *International Journal of Clinical Legal Education* 21.

<sup>340</sup> Mary Anne Noone and Judith Dickson, 'Teaching towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers' (2001) 4(2) *Legal Ethics* 127, 144.

<sup>341</sup> Ross Hyams, 'On Teaching Students to "Act Like a Lawyer": What Sort of Lawyer?' (2008) 13 *International Journal of Clinical Legal Education* 21.

particularly useful because they are applied to and describe various elements of ethical legal practice. They also explicitly incorporate understandings of ethical legal practitioners making a contribution to the community and the legal system so as to make it fairer – a commitment to justice in some form.

### **Concepts of 'justice' within ethics**

It is important to consider some meanings of 'justice' before trying to measure any changes in student commitment to it. Justice has many meanings. Aristotle's theory describes forms of justice: how resources are distributed (distributive justice), agreements between people (commutative justice), and the righting of wrongs (corrective justice), with an overarching procedural justice, emphasising fair and proper processes.<sup>342</sup> These structural categories are demonstrated to students when disadvantaged clients struggle to achieve a fair result through the legal process and students participate in this process through their interviewing. 'Social justice' usually entails:

the provision to all people of basic human needs including income, housing, education and health care; equal enjoyment of human rights including non-discrimination, freedom of expression and movement, the right to liberty and the right to live free from violence; and some redistribution of resources to maximise the position of the worst-off.<sup>343</sup>

Justice is sometimes discussed within the larger context of a moral duty to care. And certainly the relationship between justice and care in decision-making is one which has been explored. These ideas were originally developed by Gilligan through her founding research.<sup>344</sup> Parker and

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<sup>342</sup> Dennis L Krebs, 'The Evolution of a Sense of Justice' in Joshua Duntley and Todd K Shackelford (eds), *Evolutionary Forensic Psychology* (Oxford University Press, 2008) 229.

<sup>343</sup> Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013) 98.

<sup>344</sup> Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982).

Evans have used this in developing their scheme of ethical decision-making, which includes four key approaches. One of those is 'an ethic of care'.<sup>345</sup> This is defined as recognising that:

preserving relationships and avoiding harm are more important than impersonal justice. The value of law, legal institutions and the institutional roles of lawyers and others are derivative on relationships. People and relationships are more important than institutions such as law. The goal of the lawyer–client relationship (like all relationships) should be moral worth and goodness of both lawyer and client, or at least the nurturing of relationships and community.<sup>346</sup>

This study examined students' perceptions of this.

Access to justice is a subset, or part, of achieving social justice. Early clinical teachers saw the role of clinical legal education as having 'a social, political and moral agenda in ... teaching, an agenda that exposes students to the maldistribution of wealth, power and rights in society, and that seeks to inculcate in them a sense of their own ability and responsibility for using law to challenge injustice by assisting the poor and the powerless'.<sup>347</sup> In this current research, the clinical component is a short exposure experience, rather than a full clinical course.

Much has been written<sup>348</sup> contending that the role of lawyers is broader than just representing clients within the existing legal system. Lawyers are particularly privileged in the education they receive and the power they hold to shape the law and interests around them. While instructing potential lawyers, law teachers are responsible for 'the professional formation toward a moral

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<sup>345</sup> Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2014) 32. The other approaches are adversarial lawyering, responsible lawyering and moral activism.

<sup>346</sup> *Ibid*, 32.

<sup>347</sup> Stephen Wizner, 'Beyond Skills Training' (2001) 7 *Clinical Law Review* 327, 331.

<sup>348</sup> Sameer Ashar, 'Law Clinics and Collective Mobilization' (2008) 14 *Clinical Law Review* 355, 389; Mary Anne Noone and Judith Dickson, 'Teaching towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers' (2001) 4(2) *Legal Ethics* 127; Kennon 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; Kennon Sheldon and Lawrence Krieger, 'Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being' (2004) 22 *Behavioral Sciences and the Law* 261; Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2014); Donald Nicolson, 'Education, Education, Education: Legal, Moral and Clinical' (2008) 42(2) *The Law Teacher* 145, 170–71.

code of service to and responsibility for others'.<sup>349</sup> Previous studies have suggested that, rather than achieving this result, in fact some law schools may dull students' commitment to pro bono work or contributing to the community.<sup>350</sup> Sheldon and Krieger in the United States found that 'students declined in their endorsement of intrinsic values over the first year, specifically moving away from community service values and moving towards appearance and image values'.<sup>351</sup> An early study<sup>352</sup> conducted between 1989 and 1995 examined the impact of a clinical course on students' desire to work in public interest law. That study found that 97% of students who were interested in public interest law before a clinical course had this interest affirmed, while 57% who did not intend to practise public interest law before the course were interested in doing so after completing a clinical course. In an Australian study, Palermo and Evans found that being involved in a clinical subject actually meant a decreasing interest in pro bono work over time,<sup>353</sup> but they explained this with other factors – including the impact of gender on the sample and other pressures that respondents were facing. They found that 'while all women and participants who had completed a clinical placement were more likely to increase their resolve to take on the pro bono case over time in the second year, this resolve weakened in the third year'.<sup>354</sup> Palermo and Evans also found that while there was some

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<sup>349</sup> Neil Hamilton and Verna Monson, 'Legal Education's Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student's Professional Formation (Professionalism)' (2012) 9 *University of St. Thomas Law Journal* 331.

<sup>350</sup> Kennon 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; Kennon Sheldon and Lawrence Krieger, 'Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being' (2004) 22 *Behavioral Sciences and the Law* 261; Kevin Kerrigan, "'How Do You Feel about This Client?'" – A Commentary on the Clinical Model as a Vehicle for Teaching Ethics to Law Students' (2007) 11 *International Journal of Clinical Legal Education* 7.

<sup>351</sup> Kennon 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; Kennon Sheldon and Lawrence Krieger, 'Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being' (2004) 22 *Behavioral Sciences and the Law* 261.

<sup>352</sup> Sally Maresh, 'The Impact of Clinical Legal Education on the Decisions of Law Students to Practice Public Interest Law' in Jeremy Cooper and Louise Trubek (eds), *Educating for Justice: Social Values and Legal Education* (Ashgate, 1997).

<sup>353</sup> Josephine Palermo and Adrian Evans, 'Almost There: Empirical Insights into Clinical Method and Ethics Courses in Climbing the Hill towards Lawyers' Professionalism' (2008) 17(1) *Griffith Law Review* 252, 272.

<sup>354</sup> *Ibid*, 276.

evidence of the impact of the clinical placement on ethical formation, there needed to be additional research to clearly connect these dimensions. This research project was the first to examine the impact of a clinical component with real clients, within a law course, while students are engaged in ongoing legal studies.

### **The teaching of judgement**

Another area in which clinical legal education is particularly valuable is in teaching students legal and ethical judgement. Frequently, students believe that ethical decision-making is governed only by professional rules and ethical guidelines. However, the ability to form a judgement is particularly significant in legal practice. The importance of judgement – ‘good judgement’ – has been discussed in the teaching of ethics, including how it is very challenging to teach this skill or ability. Kant observed that:

[a] physician, a judge, or a ruler may have at command many excellent pathological, legal, or political rules, even to the degree that he [sic] may become a profound teacher of them, and yet, none the less, may easily stumble in their application. For, although admirable in understanding, he [sic] may be wanting in natural power of judgment.<sup>355</sup>

We sought to examine this in our study.

Indeed, one of the achievements of clinical teaching is that moral judgement can be taught through clinical practice.<sup>356</sup> Some argue that the only way to teach moral judgement is through a clinical practice.<sup>357</sup> Whether this is supported in this research is interesting to explore. Others have devised courses to teach moral judgement through simulations developed from legal practice.<sup>358</sup> Ethical issues are, by their nature, complex, nuanced and demanding, generally

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<sup>355</sup> Immanuel Kant, *Critique of Pure Reason* (trans Norman Kemp Smith, Macmillan, 1968) A132/B171, quoted in David Luban and Michael Milleman, ‘Good Judgement: Ethics Teaching in Dark Times’ (1995) 9(31) *Georgetown Journal of Legal Ethics* 31, 40.

<sup>356</sup> *Ibid*, 40.

<sup>357</sup> *Ibid*.

<sup>358</sup> Steven Hartwell, ‘Promoting Moral Development through Experiential Teaching’ (1995) 1(3) *Clinical Law Review* 505, 538.

having multiple ways of resolving them. They require the decision-maker to exercise judgement. 'When all has been said ... the fact will remain that a lawyer's ethical deliberations are a process of personal thought and action.'<sup>359</sup> This study provided a means by which we were able to examine whether students' experiences with disadvantaged clients, who had suffered relatively mundane legal injustices, shaped their understanding of justice, their role as a lawyer, and their ethical responses to legal problems and the legal system. We did not seek overtly to teach them moral judgement, but we did wish to explore whether exposure to real clients in an applied legal ethics context gave them opportunities to develop their ethical decision-making and judgement.

## **Interviewing clinical component of applied ethics course**

### **UNSW curriculum and approach**

UNSW offers a law degree which aims to provide students with doctrinal knowledge while giving them the skills to critique and analyse law from the perspective of those who are disadvantaged within the legal system.<sup>360</sup> By the time students enrol in the applied ethics course,<sup>361</sup> the

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<sup>359</sup> Geoffrey C Hazard, 'Personal Values and Professional Ethics' (1992) 40(133) *Cleveland State Law Review* 140, quoted in David Luban and Michael Milleman, 'Good Judgement: Ethics Teaching in Dark Times' (1995) 9(31) *Georgetown Journal of Legal Ethics* 31, 58.

<sup>360</sup> The UNSW website states in its description that it is about '[s]eeing law differently through challenging assumptions, welcoming diversity, encouraging interdisciplinary perspectives, facilitating reflective practice, and advocating justice for all in accordance with our commitment to social justice': University of New South Wales, 'UNSW Law: About Us' (Web Page) <<https://www.law.unsw.edu.au/about-us>>.

<sup>361</sup> The course learning outcomes include the learning outcomes for the clinical component. These are:

Demonstrate awareness of the principles of legal ethics and their relationships to the role of lawyers and the legal profession in society; Critically analyse the status, purpose and workings of the legal profession in light of its wider and changing context; Demonstrate an understanding of the factors that enable and constrain ethical legal practice, from the cognitive to the cultural, in their different contexts; Explain the relationships between personal values, legal ethics, and professional identity; Engage in a deliberate process of ethical decision-making and reflection in context; Produce scholarly written and oral work that demonstrates knowledge of the course concepts, critical judgment and reflection on the course themes, and the synthesis of practical and scholarly interdisciplinary research sources; Demonstrate effective oral communication skills by debating course themes and concepts in a scholarly, reflective and respectful manner; Apply legal and ethical principles to hypothetical fact scenarios and other contexts, including within a community legal centre practice; Demonstrate client skills, including interviewing, handling ethical issues and duties and cultural

students will have been exposed to an introductory course on the legal system and concepts of justice, as well as subjects of torts, criminal law and public law. Each of these courses adopts a critical approach when teaching its subject area – analysing the law – but also encourages students to read cases critically. All applied legal ethics students participate in the clinical component of interviewing clients. The course is a core compulsory course of the law degree. Ethics and professional responsibility must be taught within Australian law degrees and form part of the core curriculum. They can be taught as a standalone course, or can be integrated within the teaching of other courses.<sup>362</sup> At UNSW, we have adopted a compulsory applied legal ethics course approach rather than a pervasive legal ethics approach.

### **Kingsford Legal Centre role and clients**

The Faculty of Law at UNSW incorporates an operational community legal centre,<sup>363</sup> Kingsford Legal Centre (KLC). Approximately 70% of the clients seen by KLC are low-income people, 55% are from culturally and linguistically diverse backgrounds, 7% are Aboriginal or Torres Strait Islander, and 25% live in public housing.<sup>364</sup> The evening advice clinic is staffed by six students, an elective clinical student, a supervising staff lawyer/clinical supervisor, and five or six volunteer lawyers. The volunteer lawyers come from a range of legal backgrounds. Some are in private practice, some are government lawyers, some are commercial lawyers, and some are legal aid

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awareness; Work effectively in teams and reflect on how their values and interpersonal styles influence teamwork; Demonstrate self-management through self-assessment of performance and use of previous feedback received in the course.

<sup>362</sup> The content of a law degree in Australia is dictated by the 'Priestley 11', a phrase used to refer in short form to 11 core areas of law which must be included in all law degrees. They were named after the person who chaired the Law Admissions Consultative Committee in 1992, which determined the minimum requirements for studying law. These requirements are now within Schedule 1 of the Uniform Admission Rules 2015 and include Ethics and Professional Responsibility: Legal Profession Uniform Admission Rules 2015 (NSW) Sch 1.

<sup>363</sup> Community legal centres are an integral element of the legal aid environment within Australia. There are over 180 community legal centres, which offer free legal advice and representation to members of the community. The centres focus on improving the law and the legal system in order to make it fairer for disadvantaged communities, through representing individual clients, educating the community about the law, and reforming the law to ensure that it represents the interests of disadvantaged groups. Productivity Commission, 'Access to Justice Arrangements' (Inquiry Report No 72, 2014); see also National Association of Community Legal Centres, *Community Legal Centres* (Website, 2019) <<http://www.naclc.org.au/>>.

<sup>364</sup> Kingsford Legal Centre, 'Annual Reports' (Web Page) <<https://www.klc.unsw.edu.au/about-us/annual-reports>>.

lawyers. The supervising staff lawyer/clinical supervisor does not advise or interview individual clients: that is the role of the volunteer lawyers. The supervising lawyer provides legal support and guidance to students and volunteer lawyers, directing them to relevant law and resources and advising on whether KLC is likely to take on a case beyond providing legal advice. Students in the applied legal ethics course participate in one interviewing session during their course.

### **Students within the applied ethics course at Kingsford Legal Centre**

All students at UNSW are taught interviewing skills by the lawyers/clinical supervisors of KLC, following a uniform class plan. This occurs in a two-hour class delivered at the beginning of the semester. In this class, there are readings<sup>365</sup> to prepare the students for interviewing. These readings emphasise the importance of active listening, using techniques such as reframing and reflecting back, as well as using engaged body language. The class content includes key concepts such as effective interviewing, including cultural competency, and being conscious of gender and disability. It provides students with an opportunity to role-play interviewing, gives them an overview of KLC's work, explains the process of writing file notes of interviews, and describes how students will work with volunteer lawyers. The class explicitly refers to and explains two ethical issues, conflict of interest<sup>366</sup> and the duty of confidentiality.<sup>367</sup> Students are further inducted into the operations and ethos of the community legal centre when they attend the evening legal advice clinic in groups of six. In their 90-minute induction at KLC, just before interviewing clients, the student groups are taught key skills when using an interpreter. They are also trained in using the client information sheet and are reminded of conflicts of interest and the duty of confidentiality. Students are also taught about the importance of putting the client

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<sup>365</sup> Kay Lauchland, *Legal Interviewing: Theory, Tactics and Techniques* (Butterworths, 1996); Ross Hyams, Susan Campbell and Adrian Evans, *Practical Legal Skills* (3rd edn, Oxford University Press, 2007).

<sup>366</sup> Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (Cth) rr 10–12.

<sup>367</sup> *Ibid*, r 9.

at the centre of the process<sup>368</sup> and thinking about how they may be feeling. They are shown KLC and some of the basic administrative aspects of the Centre.

Students interview real clients about their legal issues, which often involve employment, debt, guardianship orders, tenancy, car accidents and minor criminal cases, among the full range of legal problems. Students then reflect on this experience of interviewing clients in a reflective assignment which forms 15% of their assessment. Interviewing legal clients is not something which can be taught or learnt in a two-hour class and 90-minute induction. But this preparation provides a base level of knowledge and competency from which students can begin interviewing legal clients.

## **Methodology**

This research project was developed to test specific questions. These were:

- Whether and how the interviewing component impacts on students' understandings of ethical values and practice.
- Whether the interviewing component encourages students to feel responsible to contribute to the legal system to make it fairer for disadvantaged people.<sup>369</sup>

The research questions were determined through a process of reviewing literature on the impact of clinical teaching on students' understanding of and commitment to social justice, as well as literature about teaching ethics through a clinical methodology.<sup>370</sup> This has previously

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<sup>368</sup> No explicit mention is made of client-centred lawyering, but the concepts of the client being able to make choices about their life are central to the ethos of the Centre.

<sup>369</sup> Irene Styles and Archie Zariski, 'Law Clinics and the Promotion of Public Interest Lawyering' (2001) 19 *Law in Context* 65. Styles and Zariski have researched the area of career preferences using a group of Murdoch University law students enrolled in three different subjects, one of them being a clinical legal education course at a community legal centre. The impact of the clinical course on students' public service orientation was investigated.

<sup>370</sup> Ross Hyams, 'On Teaching Students to "Act Like a Lawyer": What Sort of Lawyer?' (2008) 13 *International Journal of Clinical Legal Education* 21; Kevin Kerrigan, '"How Do You Feel about This Client?" – A Commentary on the Clinical Model as a Vehicle for Teaching Ethics to Law Students' (2007) 11 *International Journal of Clinical Legal Education* 7; Mary Anne Noone and Judith Dickson, 'Teaching towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers' (2001) 4(2) *Legal Ethics* 127, 144; Tony Foley et al, 'Teaching Professionalism

been discussed and analysed in depth by this author.<sup>371</sup> While anecdotal evidence suggested that students are strongly influenced by the clinical experience of interviewing actual clients, there was no empirical data to test this or to prove how and in what ways the clinical experience affected students. For this reason, the project used surveys to gather data to attempt to answer these questions.

The approach adopted in this project was one of 'grounded research'. Grounded research is a 'general method of [constant] comparative analysis'.<sup>372</sup> This methodology allows for patterns to develop through a systematic method of constant comparative data analysis, which can allow a theory to emerge that explains the research questions. It can also allow a higher order theory to be generated.<sup>373</sup> Grounded theory method is qualitative in nature. Two qualitative surveys were administered to students – pre- and post-client interview – to allow them to set out their experiences. Their words were analysed comparatively to yield the results set out below.

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in Legal Clinic – What New Practitioners Say Is Important' (2012) 17 *International Journal of Clinical Legal Education* 5; Neil Hamilton and Verna Monson, 'Legal Education's Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student's Professional Formation (Professionalism)' (2012) 9 *University of St. Thomas Law Journal* 325; Fran Quigley, 'Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics' (1995) 2 *Clinical Law Review* 37; Jane H Aiken and Stephen Wizner, 'Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice' (2004) 73 *Fordham Law Review* 997, 1007; Liz Curran, Judith Dickson and Mary Anne Noone, 'Pushing the Boundaries or Preserving the Status Quo? Designing Clinical Programs to Teach Law Students a Deep Understanding of Ethical Practice' (2005) 8 *International Journal of Clinical Legal Education* 104.

<sup>371</sup> Anna Cody, 'What Does Legal Ethics Teaching Gain, If Anything, from Including a Clinical Component?' (2015) 22(1) *International Journal of Clinical Legal Education*. Teaching ethics through a clinical subject has been reviewed by Mary Anne Noone and Judith Dickson, 'Teaching towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers' (2001) 4(2) *Legal Ethics* 127; Ross Hyams, 'On Teaching Students to "Act Like a Lawyer": What Sort of Lawyer?' (2008) 13 *International Journal of Clinical Legal Education* 21. Many clinical programs include a course which teaches ethics in this way and it has been shown to be an effective methodology for grounding discussions of ethics.

<sup>372</sup> Barney Glaser, 'The Constant Comparative Method of Qualitative Analysis' in Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine DeGruyter, 1967); Patricia Ewick and Susan Silbey, 'The Common Place of Law' in Simon Halliday and Patrick Schmidt, *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge University Press, 2009); Antony Bryant and Kathy Charmaz (eds), *The Sage Handbook of Grounded Theory* (Sage, 2007).

<sup>373</sup> Hilary Engward, 'Understanding Grounded Theory' (2013) 28 *Nursing Standard (Royal College of Nursing)* 37.

The pre- and post-interviewing experience surveys were developed in consultation with a range of clinical legal education and other education experts. The questions were drafted with the aim of making them open-ended so as not to predetermine the answers of the respondent students. As students may have more limited ideas of what 'ethics' mean, the questions were deliberately written to capture notions of ethics as students may describe them. By leaving the concept of ethics undefined, students were able to suggest a more professional rules-based understanding of ethics. Or they could incorporate a more holistic justice-system-focused understanding of ethics, incorporating aspects of professionalism into their definition. Grounded theory is a useful methodology in this context, because it requires that the researcher is not predetermining what they will find, or how any social phenomena should be viewed.<sup>374</sup>

The post-interview surveys were completed over the semester, after the induction at KLC and the interviewing experience itself. As students came in groups of six throughout the semester, they answered the post-interview survey after they had completed the interviews and induction at KLC at varying times over the semester. They had, therefore, had varying levels of ethics instruction when they completed the post-interview surveys. Students undertaking the course in three semesters in 2015 were surveyed.

The questions examined two different areas: (1) the ethical dimensions of legal work and lawyers; and (2) their future responsibility for making the legal system fairer and their future role in the legal system and their career. A decision was made to ask questions of ethics and work separately in the pre-interview survey, but to combine these questions in the post-interview survey. This was because, after seeing real lawyers practising law, the values and actual work would be difficult to separate.

Ethics approval<sup>375</sup> was obtained for administering the survey. The project was designed to ensure that respondents were neither advantaged nor disadvantaged by either participating or

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<sup>374</sup> Ibid.

<sup>375</sup> HC15042.

not participating in the project. This may explain the relatively small numbers of students who completed both the pre-interview survey and the post-interview survey. The survey was announced to students through a third person who was uninvolved with the research project; the announcement was made after the student's initial class in interviewing skills.

All students who volunteered for the study completed the pre-interview survey after the two-hour class and before the 90-minute induction and interviewing session at KLC. Any contact about the surveys was made by someone uninvolved with the research project, so as not to prejudice the findings and also to ensure that there was no detrimental effect on students. The individual respondents have remained anonymous to the researcher. The data was not provided to the researcher until grades had been released to students. 'Survey Monkey' was used as a tool for students to complete the surveys.

It is important to note that students were asked open-ended questions which allowed an unlimited text response. Hence, the analysis was to determine not what choices students made between categories of response, but rather how many categories of response they were aware of. Failure to provide a response for a category does not mean that a student would not agree with that category of answer. Instead, it demonstrates that the particular category is not one which the student thinks of unprompted. This is consistent with the grounded theory approach, which 'provides a methodology to develop an understanding of social phenomena that is not pre-formed or pre-theoretically developed with existing theory and paradigms'.<sup>376</sup>

In analysing the survey responses, a coded data approach was used to classify the data. The researcher initially read through all the survey responses to gain an overall impression of the responses. Following this, a detailed analysis of the data began. Each survey was analysed in order to create a data scheme which would reflect the range of possible responses to the questions. This involved a process of cross-checking between survey responses in order to ensure that the categories and codes that were being created were accurate and useful for the

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<sup>376</sup> Hilary Engward, 'Understanding Grounded Theory' (2013) 28 *Nursing Standard (Royal College of Nursing)* 37, 38.

survey classification. Once a code had been devised, each survey was re-read in order to classify its responses into the coded answers. The data was then compiled for each of the surveys in order to make deductions from the data. Once initial trends in responses were identified, the surveys were again re-read and coded. After particular trends were identified, the data was again compared and analysed to re-categorise it. This interplay between data and theory is key to using grounded theory.<sup>377</sup>

The following demonstrates how a response was coded. In answer to the first question about the values and work of an 'ethical lawyer', one student responded:

An ethical lawyer reflects upon their actions and considers the context and different agents within a situation in making their decision. The act of reflection is active and constant. I believe an ethical lawyer should be open to diverse opinions. I also think they should be willing to make difficult decisions. I believe an ethical lawyer is a self-aware lawyer. They are conscious of their own biases and attempt to mitigate them.

This answer was coded into the category 'Stands by own moral code and values, not pressured by others/Self-reflective'. Another example of the coding used is a student who answered:

An ethical lawyer in reality would be able to recognise their values and specifically gaps in their values to make an appropriate decision. Listening and empathy I think would be the most important. Allowing the client to feel considered I think is key.

This was coded into two categories 'Cares for client/Spends time with client/Uses an ethics of care/Shows respect' and 'Stands by own moral code and values, not pressured by others/Self-reflective'. Coding answers into more than one category enabled a more complex response to be measured. Because the questions were largely open-ended, students could make multiple points in their answers. They were not confined to a specific number of responses.<sup>378</sup>

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<sup>377</sup> The theory develops as it interplays with the data and the course of the actual research. Anselm Strauss and Juliet Corbin, 'Grounded Theory Methodology, an Overview' in Norman Denzin and Yvonna Lincoln (eds), *Handbook of Qualitative Research* (Sage, 1994).

<sup>378</sup> Barney Glaser, 'The Constant Comparative Method of Qualitative Analysis' in Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine DeGruyter, 1967); Patricia Ewick and Susan Silbey, 'The Common Place of Law' in Simon Halliday and Patrick Schmidt, *Conducting Law and Society*

## **Respondent demographics**

All students across three semesters were invited to respond to the surveys. In total, 69 students participated in both the pre-interview and post-interview surveys. This comprises 28 of 212 possible students in semester one, 25 of 210 students in semester two, and 16 of 29 students in the summer semester. The students who completed both the pre- and post-interview surveys constituted 14% of all students enrolled in the subject in 2015. While this is not a large percentage, it is sufficient to provide valuable data about the impact of the clinical interviewing experience.<sup>379</sup> Of the students who completed the surveys, 21 were male and 48 were female. This represents a slightly higher proportion of women than are enrolled in the law degree program. The overall student cohort, however, has a higher percentage of female students than male. There were 12 international students and 57 non-international students, which is representative of the student cohort.

## **Research results**

In this section, the results from the research are presented. The specific questions which students were asked are described and noted. Initial discussion of the findings follows the questions.

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*Research: Reflections on Methods and Practices* (Cambridge University Press, 2009); Antony Bryant and Kathy Charmaz (eds), *The Sage Handbook of Grounded Theory* (Sage, 2007).

<sup>379</sup> For a finite population, a significant sample size is generally considered as 5% or above of the population. See Thomas Ryan, *Methods of Determining Sample Size* (John Wiley & Sons, 2013) 32.

### What students see as an ethical lawyer's values and work

What are an ethical lawyer's values and how does an ethical lawyer work?	Pre-interview	Post-interview
Focuses on justice/fairness/honesty with the client	35	15
Cares for client/Spends time with client/Uses an ethics of care/Shows respect	11	34
Balances duty to the client, court and community/Abides by professional rules	22	21
Stands by own moral code and values, not pressured by others/Self-reflective	22	6
Works hard, knows the law, works to best of ability to get a good outcome	17	18

The first questions<sup>380</sup> which students were asked pre-interview were: 'What are an ethical lawyer's values and how does an ethical lawyer work'. The category which gained the highest response rate was, 'An ethical lawyer follows values of justice, honesty and fairness', which had 35 responses. Typical responses in this category were:

[E]thical lawyers should be honest, trustworthy, professional and loyal to the clients and the law. (Student 27)

[A]n ethical lawyer is one whose behaviours correlate with their own personal, cultural and social values. They do what is right and just under the law without any biases. (Student 23)

Twenty-two students noted the need for an ethical lawyer to balance varying interests.

Responses included:

[B]y representing their client to the best of their ability but serving the court and society at the same time. (Student 12)

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<sup>380</sup> The full list of questions asked is included in the Appendix at the end of this chapter.

Pre-interview, only 11 students identified that an ethical lawyer 'cares for the client, spends time with the client and is respectful'.

After the interviewing experience, the most common responses for this question were 'a lawyer who cares for their client or who spends time with their client to understand their situation'.

There were 34 of these responses. This increase – from 11 to 34 students – represents the biggest change between the responses in the pre-interview and the post-interview surveys. The following responses were typical:

I really now appreciate and value a care of ethics approach to litigation/client. My interview really emphasised not all issues are legal, and that people's perception of the law isn't necessarily succinct with what it is. (Student 15)

Caring lawyering is very important to find an alternative way to best achieve the client's best interest. (Student 27)

The other response which changed significantly was 'follows values of justice, honesty and fairness'. This declined from 35 responses before the client interview to 15 responses after the interview. These student responses were typical:

They make sure their advice is tailored to the client's needs and provide an assessment of risks and consequence involved in taking a certain path. They are honest and understanding and believe the advice they give. In this sense they maintain their integrity. (Student 11)

An ethical lawyer doesn't cut corners, is honest and doesn't break the law. (Student 16)

An ethical lawyer works with integrity, sturdiness and resolve. Doing the best for their client but more importantly the best for the system of justice. (Student 21)

The response level which reflected the need to balance a range of interests is demonstrated by these student responses:

An ethical lawyer is a lawyer who can balance the requirements of the clients and that of their firm, or legal centre and the need to counsel the client with the need to not pursue cases with no merit. (Student 18)

An ethical lawyer approaches the client with professionalism and empathy and they work to fulfil the client's needs all while adhering to the administration of justice. That is, they find the appropriate and balanced response for every scenario. (Student 36)

These responses stayed relatively constant between the pre-interview and post-interview surveys.

### What students think they will face as ethical issues

What ethical issues do you think you are most likely to face?	Pre-interview
Conflict of interest	23
Repugnant/dishonest client/Undeserving client/Bad intentions of the client	17
Keeping information confidential	14
Ability to detach my opinions from the session/not be biased or judgemental, be objective	13
Not doing a good job of getting the client's story/Having good communication skills	8
Don't know	7
Not give legal advice	4
Empathising too much with client	4
Not meeting client's expectations	4
Cultural or religious issues	3
Access to justice	3

Students were asked: 'What ethical issues do you think you are most likely to face?' In the pre-interview survey, the most common response was 'a conflict of interest', with 23 responses, followed by 'dealing with a repugnant or dishonest client, an undeserving client or bad intentions from the client', with 17 responses. These responses included:

Disgust/moral outrage at the actions of the client. They don't deserve to be helped. (Student 3)

Bad intentions. Favour, exaggeration. (Student 21)

The next most common response was one in which the students recognised their need to 'detach my opinions from the session/not be biased or judgemental and be objective', which gained 15 responses. The next most anticipated ethical issue was the importance of 'keeping information confidential', with 13 responses.

<b>What ethical issues did you encounter during your interviewing session?</b>	<b>Post-interview</b>
Hard to tell client their case had no merit or that KLC couldn't help, or managing client expectations	24
None	11
Importance of confidentiality	9
Access to justice, lack of resources	9
Wanting to help the client as much as possible	7
Very vulnerable client/with no money/disability/Client's mother had recently died	6
Became aware of my own biases/Not making moral judgements	6
Managing the client's emotions	6
Conflict of interest	6
Role of support person and autonomy of client	5
Cross-cultural communication issues	5

In the post-interview survey, students identified the ethical issues they had actually faced in their interview. The most commonly identified issue was that it is 'hard to tell the client that their case had no merit, that KLC couldn't help and managing client expectations', with 24 responses. This is demonstrated by the following student responses:

The client's claims were sad, but had little to no legal grounding. Challenging to tell him there was nothing we could do. (Student 3)

I faced the ethical issue of dealing with a client who has brought an inherently not legal issue, and navigating as how to tell them that. (Student 15)

I faced a number of issues. One was the difficulty managing the client's expectations and catering to their interests while being clear about their limitations. Confidentiality too, of course. (Student 17)

The next most common response was 'none', with 10 responses, followed by 'access to justice or lack of resources', with nine responses, and 'the importance of confidentiality', also with nine responses. It is notable that only three students identified 'lack of truth and honesty' as an ethical issue which they had faced. This is in contrast to the 17 students who had anticipated that it would be an ethical issue they would face. The actual experience of ethical issues was quite different from what had been anticipated.

### **What students need to know to help them with ethical issues in an interview**

Another area explored was what students believed they needed to know to help them with ethical issues in an interview.

<b>What do you think you need to know to help you with ethical issues in an interview?</b>	<b>Pre-interview</b>	<b>Post-interview</b>
Professional rules and ethical guidelines, an 'approved' approach, the relevant law	38	36
Understanding the client/Building rapport, good communication skills and empathy	19	29
Support from lawyer supervisor	2	10
Knowledge of self and own moral compass and limits and potential for conflicts	17	10
Dealing with clients who want to engage in unethical conduct	4	–
Understanding access to justice	1	2

Students in the pre-interview survey stated that the main area of knowledge and skills that they needed in order to deal with ethical issues was 'An understanding of the professional rules, ethical guidelines or an approved approach', with 38 responses. This is typified by one student who replied:

I needed to know the Code of conduct for lawyers. What KLC regards as conflicts.  
(Student 19)

The next most common response was 'Understanding the client/Building rapport, good communication skills and empathy', with 19 responses. This is demonstrated by the following student responses:

Empathy, active listening, a personable and relaxed attitude. (Student 20)

I think communication, listening and note-taking skills are important as well as the ability to empathise with certain emotional situations. Additionally, professional presentation is vital especially when approaching and interviewing clients. (Student 23)

Empathy, non-judgemental listening, non-adversarial questioning, appearance of openness and approachability. Also ability to draw out most pertinent issues through targeted (but non-confrontational) questioning/conversation shaping. (Student 31)

Within the post-interview survey responses, the most frequent response to the question was 'An understanding of the professional rules, ethical guidelines or an "approved" approach, knowledge of the law', with 36 responses. The next most common response was 'Understanding the client/Building rapport, good communication skills and empathy', with 29 responses. This is significantly higher than in the pre-interview responses. There is also a significant increase in the number of students who identify the importance of 'Support from the supervising solicitor' as being necessary for ethical decision-making, which rose from two students to 10 students.

## **Discussion of results**

### **Significance of shift in emphasis to care for client**

The importance of caring for clients is identified by students as a significant ethical issue in the values and work of an ethical lawyer. Having a one-to-one interview experience with a disadvantaged client does appear to shift students' understanding of how important it is to care for clients and spend time with them in order to understand the client's issues. While, on the face of it, this may not seem to be a significant ethical issue, the building of a relationship with the client, including the importance of good, clear communication, is frequently identified as

the most significant<sup>381</sup> ethical issue which lawyers face. Students gain an insight into this issue through a clinical component in which they interview clients. It may be interesting to explore how students could gain insights into ethical practice in a commercial environment, through either a clinical component or some other exercise.<sup>382</sup>

Rather than focusing on the more traditional concept of ethics – defined by professional rules and clearly defined expectations of roles – students began to identify the significance of caring for the client and demonstrating empathy as significant ethical issues. At the least, the clinical component raises these as significant issues when working with clients. This reinforces a model of ethical decision-making involving ‘an ethic of care’. The applied legal ethics course uses this concept within the Parker and Evans<sup>383</sup> framework for understanding ethical decision-making and draws upon their textbook as the text for the course. This typifies ethical frameworks within the four approaches: adversarial lawyering, responsible lawyering, ethics of care, and moral activist lawyering.<sup>384</sup> The course does not emphasise one model over another. Rather, it uses these models to help students think of a range of ethical decision-making approaches. This, along with the clinical component, appears to help students recognise the importance of an ‘ethics of care’ as a framework for ethical lawyering.

It is also notable that, following client interviewing experiences, fewer students identify ‘justice/fairness or honesty’ as the values of an ethical lawyer. This may suggest that students are separating out ‘caring’ for the client from treating the client with ‘justice’ or ‘honesty’. In understandings of ‘justice’, some have held that justice is in contrast to ‘care’.<sup>385</sup> Justice has

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<sup>381</sup> Office of the Legal Services Commissioner, *Annual Report: 2015–2016* (2016) 10, 29  
<<http://www.olsc.nsw.gov.au/Documents/2015%202016%20OLSC%20AnnRep%20accessible.pdf>>.

<sup>382</sup> The Lawyers, Ethics and Justice course at UNSW has recently incorporated video clips drawn from legal practice of ethical issues faced by commercial and suburban legal practitioners. This may be one method of making more real the ethical issues which commercial legal practitioners face: University of New South Wales, ‘Lawyers, Ethics and Justice – LAWS1230’ (UNSW Handbook, 2017)  
<[www.handbook.unsw.edu.au/undergraduate/courses/2017/LAWS1230.html](http://www.handbook.unsw.edu.au/undergraduate/courses/2017/LAWS1230.html)>.

<sup>383</sup> Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2014).

<sup>384</sup> *Ibid.*

<sup>385</sup> Virginia Held, ‘The Meshing of Care and Justice’ (1995) 10(2) *Hypatia* 128.

sometimes been seen as something that belongs in the public sphere, while 'care' fits in the private domain. Gilligan's work brings justice and care together in both the public and private spheres. Other theorists have held that 'care is the wider moral framework into which justice should be fitted'.<sup>386</sup> In these surveys, 'care' is firmly in the public sphere of seeking legal advice. It is interesting to note that some of the student responses identify 'care' for the client as being an ethical way of working, but do not necessarily identify 'care' for the client as denoting treating a client 'justly'. The relationship between 'justice' and 'care' warrants further research with students to identify how they conceptualise the ways in which they relate.

The identification of 'caring for the client' and 'spending time with the client' also reinforces the point of ethical lawyering being about process, rather than simply substance, including how lawyers do their lawyering work. Interestingly, the need for individual clients to be treated with an ethic of care seems to have overshadowed the larger questions of a client receiving a just result through the legal system. Concepts of 'justice' appear to be personalised and individualised through student experiences with individual clients. This may explain why there was a reduction in the responses on the necessity of 'justice/fairness and honesty' for ethical legal practice after the interview.

The answers emphasising the role of an ethical lawyer balancing duties to client, community and the court were almost unchanged, which is notable. This suggests that students perceive the importance of the various interests – the client, the community and the court – when weighing up their role within the legal system. This appears to be a strong and dominating understanding of 'an ethical lawyer', which the interviewing experience does not change.

### **Discussion of results of ethical issues anticipated and then encountered**

At the pre-interview stage, students anticipate that the ethical issues they will face involve conflicts of interest, dishonest or repugnant clients, or the need to maintain confidentiality.

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<sup>386</sup> Ibid, 131.

Conflict of interest and confidentiality issues are easily identifiable ethical issues and are emphasised in the preparatory class and the induction. It is, therefore, unsurprising that students name these issues. But it is surprising that the second most common response anticipates a client who is dishonest or repugnant. It suggests some stereotyping of clients as people who are trying to manipulate the law or their response to it. The attitude of anticipating a negative client is surprising with regard to students who have had relatively little exposure to clients. This is an issue which needs to be addressed in the preparation for the interviewing experience and also in the broader course. However, it can be partially explained by the organisation of classes in the applied legal ethics course, which has a class titled 'the repugnant client'. This may serve to shape students' expectations.

Post-interview, the ethical issues noted were very different from what students had expected. The most common category can be broadly grouped as 'managing client expectations of Kingsford Legal Centre and the law itself, and access to justice issues', which received 35 responses. These responses fit together and demonstrate a more grounded understanding of the challenges of working with clients with specific and complex needs. They also raise questions of resources and access to justice. Students and lawyers must communicate sensitively but straightforwardly with the client about the merit of their case. The response also incorporates the limitations of the service that KLC can provide. Dealing with client expectations of both the law and the legal system, as well as KLC, was the most frequently noted ethical issue which was actually encountered. It can be confronting for students to realise that clients will receive only a one-off piece of legal advice from KLC, rather than ongoing assistance. This is partly due to a lack of resources, and inadequate funding, but it is also about policy choices involving where to allocate resources in casework. These two issues raise the larger systemic issues of access to justice, and who can get legal help.<sup>387</sup> For some students, it is their first time facing the limitations of the law and its capacity to provide relief. These answers, therefore,

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<sup>387</sup> In its 2014 report, the Productivity Commission noted that to deal with unmet civil legal need, an additional \$200 million should be invested into the legal assistance sector: Productivity Commission, 'Access to Justice Arrangements' (Inquiry Report No 72, 2014).

demonstrate some of the larger questions which students face through the interviewing experience.

The limitations of the legal system in providing access to justice have been well documented.<sup>388</sup> In parts of the applied course, this is discussed along with the role of community legal centres within a broader legal aid system.<sup>389</sup> This level of response demonstrates the importance of including issues of access to justice within an applied legal ethics course.

Students also struggled with managing client expectations of the law and the legal system. This related to the need to use an ethic of care approach, explaining to the client that their case had no merit or that their solution was not a legal one. Students identified the importance of 'care for the client',<sup>390</sup> rather than 'justice', when discussing 'an ethical lawyer'. These answers deepen this response to show the intertwined nature of 'care for the client' and 'justice'. Clients want more from the law and the legal system. Students' involvement in telling clients a disappointing message was raised as an ethical issue.

### **Benefit of embedding a clinical component**

These data clearly demonstrate the value of giving students an actual experience with clients so that they have real material to work with, rather than just making assumptions about ethical issues which arise. This is demonstrated by the pre-interview answers of 17 students who expected dishonest or repugnant clients, contrasted with the post-interview survey in which only three students reported this experience. From this data, it is clear that students need

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<sup>388</sup> Mary Anne Noone and Frances Gibson, 'Going to Court: Access to Legal Assistance in Australia' in Australian Institute of Judicial Administration, *Australian Courts: Serving Democracy and Its Publics* (Australasian Institute of Judicial Administration, 2013). See NSW Law and Justice Foundation research on the impact of legal problems on disadvantaged clients: Christine Coumarelos et al, 'Legal Australia-Wide Survey: Legal Need in Australia' (Law and Justice Foundation of New South Wales, 2012).

<sup>389</sup> Mary Anne Noone and Frances Gibson, 'Going to Court: Access to Legal Assistance in Australia' in Australian Institute of Judicial Administration, *Australian Courts: Serving Democracy and Its Publics* (Australasian Institute of Judicial Administration, 2013); National Association of Community Legal Centres, Submission No 91 to the Productivity Commission 'Access to Justice Arrangements' Inquiry (2013) 8.

<sup>390</sup> Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2014).

greater guidance about what to expect from their clients, rather than anticipating deceitful or 'repugnant' behaviour. The depth and range of responses to the question of actual ethical issues faced also gives weight and support to the argument that a clinical methodology is an effective one for teaching students about law and ethics. The actual ethical issues experienced raised systemic issues of access to justice and what law can deliver, as well as what a community legal centre can deliver, rather than just being individualised ethical issues. Instead of being able to rely on professional rules to answer their ethical questions, students were dealing with complex systemic issues of what clients can validly expect of a community legal service and the law itself, as well as how they can communicating effectively with clients. This experience may assist students in beginning to engage with moral and ethical judgement in a legal context, rather than simply applying rules. Student experiences appeared to be much richer and more varied than a simple answer of 'conflict of interest' or 'confidentiality', which are more obvious ethical issues. By providing students with an actual experience of real legal practice, we allow them to experience the diversity and depth of ethical issues which lawyers face.

### **Discussion of results of what students need to know to help them with ethical issues**

Student responses to the question 'What do you think you need to know to help you with ethical issues in an interview?' provide further evidence for the deeper ways in which ethical issues are understood once a student has met with a real client with a real legal problem in this context. Students weigh up a range of factors and also see lawyers doing this, rather than merely applying professional rules.<sup>391</sup>

The post-interview survey responses emphasised the need to know the professional rules and law, but were also more diverse in setting out the need to understand the specific issues faced by community legal centre clients. The pre-interview responses focused on 'knowing the rules and guidelines', or an 'approved approach', or the 'relevant law'. This was still the case after the

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<sup>391</sup> Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2014) 6; Paula Baron and Lillian Corbin, *Ethics and Legal Professionalism in Australia* (Oxford University Press Australia 2013).

interview, but students had also come to recognise the importance of understanding the client's situation as well as seeking and receiving help from the supervising lawyer. This is an interesting change in response from the pre- to the post-interview surveys, as students discovered that professional codes do not entirely solve ethical issues.<sup>392</sup> It provides support to those who argue that clinical methodology is an effective means of teaching 'judgement', as judgement includes the ability to reflect on one's abilities and seek support from those who may be able to assist in developing them.<sup>393</sup> Students realise that while rules are a useful guide, they also need help from a supervising lawyer and a clear understanding of a client's expectations. These insights are invaluable for law students learning about legal ethics.

### **A responsibility for making law fairer and contributing to the community**

Another claim made of clinical legal education is that it impacts on students' view of their role within the legal system and their commitment to work towards justice. Within an Australian context,<sup>394</sup> the connection between clinical legal education and teaching social justice is frequently drawn. As discussed above, this is through the exposure of students to 'disorienting moments' working with disadvantaged clients. In this section, the results of how students see their sense of professional responsibility within the law, and their duty to contribute to 'justice' within the law, are reported and discussed. Students were asked: 'Do you think you are responsible for making the law fairer?'

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<sup>392</sup> Deborah L Rhode, 'Legal Education: Rethinking the Problem' (2013) 40 *Pepperdine Law Review* 437, 450.

<sup>393</sup> David Luban and Michael Milleman, 'Good Judgement: Ethics Teaching in Dark Times' (1995) 9(31) *Georgetown Journal of Legal Ethics* 40.

<sup>394</sup> Jeff Giddings, *Promoting Justice through Clinical Legal Education* (Justice Press, 2013); Jeff Giddings et al, 'The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada and Australia' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011); Mary Anne Noone, 'Australian Community Legal Centres – the University Connection' in Jeremy Cooper and Louise Trubek (eds), *Educating for Justice: Social Values and Legal Education* (Ashgate, 1997); Anna Cody, 'Clinical Programs in Community Legal Centres, the Australian Approach' (2011) 4 *Spanish Journal Education and Law Review*.

<b>Do you think you are responsible for making the law fairer?</b>	<b>All responses</b>
'Yes' pre-interview and 'Yes' post-interview	55
'No' pre-interview and 'No' post-interview	5
'Yes' pre-interview and 'No' post-interview	2
'No' pre-interview and 'Yes' post-interview	3
'Maybe' pre-interview and 'Yes' post-interview	1
'Maybe' pre-interview and 'No' post-interview	1
No answer	2

Students overwhelmingly reported that they felt responsible for making the law fairer, both before and after the interview (55 students). A much smaller number (5 students) stated both before and after the interview that they were not responsible for making the law fairer. In order to understand whether the interviewing experience has any impact on students' sense of responsibility to make the law fairer, student answers need to be analysed in conjunction with the following question. Students were asked: 'Did your views about your role in the legal system and your career path change based on your experience with interviewing clients in the clinic?'

<b>Did your views about your role in the legal system and your career path change based on your experience with interviewing clients in the clinic?</b>	<b>Post-interview</b>
There are different ways I can help improve justice/Stronger commitment to helping the disadvantaged and contribute to the community	21
Confirmed my interest in legal area	17
Stronger commitment to pro bono	13
Stronger commitment to CLCs/Less cynical of CLCs/More respect for CLCs	13
No	11
Access to justice is not real in our system/Our legal system is not fair	9

## Discussion of results

In order to understand these results, it is important to look at them in a qualitative way. There were 55 students who thought that they had a responsibility to make law fairer both before and

after their interviewing experience, answering 'Yes' and 'Yes'. So, the experience for those students appears not to have had any impact. However, on a more granular study of these answers, it appears that students are confirmed in their desire – or their belief in their responsibility – to make law fairer. This is shown by these responses of students who answered 'Yes' and 'Yes':

I was much more interested in a career in legal aid or social justice after the session.  
(Student 10)

I would hope so, if I could be part of challenges to law which restrict human rights that would be incredible. (Student 12)

No it just reaffirmed and validated what I want to do and what I am currently doing.  
(Student 19)

While these last few years at law school have changed my opinion on the important role lawyers have within a fairer legal system, it was even more enlightening to actually see this process and be a part of it. (Student 25)

Vision was the same, but it became more real and achievable. (Student 28)

No my view did not change but it did get stronger with the interaction with the volunteer solicitors and their kindness to clients in the centre. (Student 29)

Yes it did. It strongly re-affirmed the belief that a lawyer should look at its role from a much broader perspective of community, rather than just seeing selfish monetary interests.  
(Student 50)

I realised that meeting a lawyer is one effective and direct way to access justice for the ordinary persons. The lawyer should be responsible for the law as well as the clients.  
(Student 60)

Not particularly as client interaction and interviewing is likely always going to be an important part of this job. I did appreciate the decency of the staff being there after work in many cases in order to help people in need of it so the upholding of fairness and better access to legal advice is admirable and motivational. (Student 69)

Looking more deeply at the five students who believed both before and after the experience that they had no responsibility, answering 'No' and 'No', this belief appears to arise either out of

a sense of limited responsibility or a belief that corporate law does not include ethical responsibilities to act fairly. This is evidenced by the following responses:

I only take liability for what I can deliver. If I can't deliver I take no responsibility. That's ethics. (Student 26)

Especially in corporate law. (Student 42)

The two students who answered 'Yes' pre-interview and 'No' post-interview perceived contributions to making law fairer as lying outside of corporate law. This is demonstrated by the following answers:

I want to be a patent attorney or something with income. (Student 58)

Unfortunately not. I would love to but my interests lie in corporate law, that is what my calling is. (Student 21)

For the three students who answered 'No' and then 'Yes', this response is typical:

If I am a practising lawyer, I feel like I'll be responsible in attempting to help people through the legal system. Like seeing the work of the solicitors tonight, I feel like that's what lawyers should be doing – volunteering to help others without payment etc, trying to give advice the best they could to help clients especially given so many people know so little about the law and they'd be lost if they didn't have any advice. (Student 40)

The one student who changed from 'Maybe' to 'No' replied:

Most legal change is done by politicians or judges, not lawyers. (Student 44)

From the answers to these questions about making the law fairer and whether the students' views had changed, it appears that the clinical component does have an immediate impact on how students see their own responsibility for making the law and the legal system fairer – but the impact lies in confirming their belief in this responsibility, rather than changing it. The clinical experience provides students with an opportunity to think about concepts of 'justice' and 'access to justice', as well as their relationship to 'care' for the client. The problems of real people are brought home to them, as well as how lawyers may help those people navigate their problems. And this experience has the effect of confirming the students' potential to help

people through law. This finding aligns with a similar finding in an earlier study<sup>395</sup> of the impact of a full clinical course on students' desire to practise public interest law. That study found that 97% of students had their interest in working in public interest law affirmed by taking a clinical course. It is impossible to deduce from the research whether students' sense of responsibility to make the law and the legal system fairer will be sustained over time after completing a clinical component. But it is an interesting finding that a short, intensive clinical component of a law course can have an impact on students' views of their future role in the legal system and the community. While the initial findings emphasise the importance of the individual relationship of care for the client, this later finding demonstrates that students are able to think more structurally and systemically<sup>396</sup> about the failings of the legal system to ensure equal access to law, and to recognise that the law and the legal system are not fair.

### **Limitations of the methodology**

Unfortunately, there was no control group of students who did not participate in an interviewing clinical component with which to compare the answers of the students who did participate in the clinical component. Participation in the interviewing advice clinic is highly valued and enjoyed by students, and it would be unethical to exclude some students from this experience in order to create a control group. The experience also forms 15% of students' assessment for the course; an equivalent assessment would be difficult to devise. The lack of a control group means that it is not possible to isolate the impact of the interviewing clinical component from the influence of the course itself, or from general life and other law courses. The project design, through the survey design, attempts to deal with this limitation. It refers

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<sup>395</sup> Sally Maresh, 'The Impact of Clinical Legal Education on the Decisions of Law Students to Practice Public Interest Law' in Jeremy Cooper and Louise Trubek (eds), *Educating for Justice: Social Values and Legal Education* (Ashgate, 1997).

<sup>396</sup> Productivity Commission, 'Access to Justice Arrangements' (Inquiry Report No 72, 2014); Mary Anne Noone and Frances Gibson, 'Going to Court: Access to Legal Assistance in Australia' in Australian Institute of Judicial Administration, *Australian Courts: Serving Democracy and Its Publics* (Australasian Institute of Judicial Administration, 2013).

specifically to the experience of interviewing itself and asks questions referring to that experience. Through this process, the design limitation is substantially overcome.

Furthermore, students who are studying the course participate in the interviewing clinical component over the semester. While all the students participate in the two-hour interviewing class at the beginning of the semester, they attend KLC in groups of six for the induction and the interviewing advice clinic over the entire semester. During the course, students gain valuable insights and practice in ethical decision-making. This is the process of reading and learning of the course. It is not possible to distinguish between the survey responses throughout the semester. The methodology for focusing on the impact of the interviewing experience itself is through the ways in which the questions are framed, specifically referring to the interviewing experience at the community legal centre. Students were asked to describe 'What ethical issues do you think you are most likely to face?' in the pre-interview survey after the two-hour class, but before the induction and interview. They were asked 'What ethical issues did you encounter during your interviewing session?' after the interview itself.

As the survey was optional, it is possible that the data set is skewed to reflect the views of students who felt strongly about the interviewing experience. It is difficult to measure whether this affected the data, or in what ways. The research questions were aimed at measuring not whether students had a positive or negative experience, but rather the ways in which their understandings of themselves as future lawyers, and their ethical understandings, developed. For this reason, the motivations for answering the surveys may not have been overly influenced by the positive or negative experiences that students had.

No conclusion can be drawn from the data about whether the perception of students of the importance of care for clients will be maintained, either throughout the rest of a student's studies or once they have graduated and are in practice. And – as no students were exposed to, for example, commercial clients – it is not possible to determine whether it is the nature of the clients that significantly influenced the way in which students rate the importance of care for clients in their views of what makes an ethical lawyer in their values and how they work. The clients that students deal with are mostly disadvantaged, facing a range of complex issues in

their lives. They have low incomes<sup>397</sup> and live in either private rental properties or public housing. Almost all clients have more than one legal issue and are referred to health, housing or counselling services. Students must employ a range of skills to help these clients. The complexity of the clients may therefore influence students' understanding of the importance of an ethic of care. It would be possible to explore this in more detail in future research, as well examining in depth, through focus group discussion, students' views on their commitment to making the law fairer, both before and after the interview. The relationship between 'caring' and concepts of 'justice' would also be rich ground for further research.

## **Conclusion**

From these empirical data, it is apparent that even a relatively short clinical experience can be influential in a number of ways and can provide students with key insights. Before their interviewing experience in their applied ethics course, students understood ethical values and the work of a lawyer to require values of justice, honesty and fairness. Following their exposure to clients through the interview process, there was a change in the emphasis students placed on the need to spend time with clients and to care for clients. Students identified this as part of an ethical lawyer's values and work. The clinical component of interviewing also gave students a much more textured and real understanding of the sorts of ethical issues they would face in practice. Rather than dealing in the main, as they had anticipated, with conflicts of interest, confidentiality and dishonest clients, they recognised communication challenges, the significance of client expectations, and the limitations of a legal service. Thus, larger systemic issues of the justice system are raised in the actual experience of students. While expecting to deal with 'repugnant' or dishonest clients, in practice this was not an issue which they faced in their clinical experience of interviewing.

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<sup>397</sup> Kingsford Legal Centre, *Annual Report 2015* (2016)  
<[https://www.klc.unsw.edu.au/sites/default/files/documents/2646%20klc\\_annual\\_report\\_WEB.pdf](https://www.klc.unsw.edu.au/sites/default/files/documents/2646%20klc_annual_report_WEB.pdf)>.

Through their interviewing experience, students recognised the responsibility of ethical lawyers to the broader community and to access to justice principles. They identified the importance of 'care' for client as forming part of many concepts of 'justice'. Students also hoped for clear direction through ethical rules and the law regulating the legal profession. They gained insight into the complex nature of ethical decision-making for which legal ethics rules and law can only provide limited guidance. The development of individual judgement was key. The interviewing component also has a positive impact on students' commitment to community legal centres and their desire to do pro bono work. A substantial majority of students were affirmed in their view that they had a responsibility to make the law and the legal system fairer.

While there are limitations of the methodology, as set out above, there are some clear deductions which can be made from the data set. As clinical courses are resource and time intensive for students, it is significant to identify that even a relatively short clinical component of an applied legal ethics course can have a substantial and positive impact on students' understanding of ethical issues and their commitment to their responsibility to make the law and the legal system fairer. Ideally, every legal ethics course should include a clinical component.

## **Appendix: Survey questions**

### **Questions in the pre-interview survey**

Values: how would you characterise an ethical lawyer in terms of their values?

Actions: In your opinion, how does an ethical lawyer work?

As you are preparing to interview clients during an advice clinic, what skills, qualities, capacities do you think will be most important to enable you to do this?

What ethical issues do you think you might face in your interviewing?

What do you think you need to know to help you with ethical issues in an interview?

How do you feel about your ability to study law or become a lawyer?

If you are a lawyer, do you think you will be responsible for making the law and legal system fairer?

### **Questions in the post-interview survey**

How would you describe your experience interviewing a client at Kingsford Legal Centre? What issues did you need to address? What worries did you have? What areas did you find you were well-prepared or less prepared to handle?

What sort of ethical issues, if any, did you encounter during your interviewing session?

Based on your experience in the interviewing session, what is your understanding of 'an ethical lawyer', and 'how an ethical lawyer works'?

What do you think you needed to know in order to help you address ethical issues that arose or might arise when interviewing clients in a community legal centre?

What do you think about your ability to interview client? Do you think differently about your ability than before your interviewing experience?

What do you think about your ability to do your law studies, after your client interviewing experience?

If you are a lawyer, do you think you will be responsible for making the law and the legal system fairer?

Did your views about your role in the legal system and your career path change based on your experience with interviewing clients in the clinic? Why or why not?

## Chapter 7:

# Developing students' sense of autonomy, competence and purpose through a clinical component in ethics teaching

### Introduction

Law students often enter law school with a clear sense of purpose and with clearly defined reasons for studying law. Often these reasons encompass a desire to help others and strengthen the community for those most disadvantaged within society.<sup>398</sup> These reasons can be lost as law studies progress. Studying law can be a confronting and difficult process as students learn with other high-achieving peers. Lawyers and law students are disproportionately impacted by mental health issues.<sup>399</sup> The numbers of law students whose mental health deteriorates during law school is of concern. The reasons for this are likely to be complex and multifaceted. Working in law can be extremely competitive and requires high-level reasoning and analytical skills. It can also be perceived as an area of work which requires people to separate themselves, and their identity, from their work. This can lead to a sense of disjunct and law students questioning their purpose and their reason for working as lawyers.<sup>400</sup> Some argue that depression and

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<sup>398</sup> Adrian Evans and Josephine Palermo, 'Preparing Australia's Future Lawyers: An Exposition of Changing Values over Time in the Context of Teaching about Ethical Dilemmas' (2006) 11(1) *Deakin Law Review* 103; Kennon Sheldon and Lawrence Krieger, 'Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being' (2004) 22 *Behavioral Sciences and the Law* 261.

<sup>399</sup> Lawyers in the United States have the highest incidence of depression of any occupation. See Lawrence Krieger, 'The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness' (2005) 11 *Clinical Law Review* 425, 426, 427, citing William Eaton et al, 'Occupations and the Prevalence of Major Depressive Disorder' (1990) 32(11) *Journal of Occupational and Environmental Medicine* 1079; Kennon 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; Prue Vines, 'Working towards the Resilient Lawyer: Early Law School Strategies' (University of New South Wales Faculty of Law Research Series 30, 2011); Rachael Field, James Duffy and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Routledge, 2016); Molly Townes O'Brien, Stephen Tang and Kath Hall, 'No Time to Lose: Negative Impact on Law Student Wellbeing May Begin in Year One' (2012) 2 *International Journal of the First Year in Higher Education* 49.

<sup>400</sup> Molly Townes O'Brien, Stephen Tang and Kath Hall, 'No Time to Lose: Negative Impact on Law Student Wellbeing May Begin in Year One' (2012) 2 *International Journal of the First Year in Higher Education* 49; Tony Foley

‘unprofessional behaviour among law students and lawyers typically proceed from a loss of integrity – a disconnection from intrinsic values and motivations, personal and cultural beliefs, conscience, or other defining parts of their personality and humanity’.<sup>401</sup> In this context, there is good reason to incorporate into courses of legal studies those experiences which build a student’s sense of purpose and competence. In the legal ethics course at the University of New South Wales (UNSW), there is an inbuilt clinical component which provides students with an opportunity to interview real clients with legal problems. Many of these clients are disadvantaged and need complex responses to deal with their issues. This chapter describes an empirical research study which examined the impact of this clinical component on students’ sense of confidence in their ability to interview and their confidence in their ability to study law, as well as the ways in which it impacts on their later legal studies. The chapter examines whether students’ sense of autonomy can be grown through a short clinical component.

Clinical legal education is a recognised methodology for teaching law through students being responsible for and engaging in client work and reflecting on their role as a lawyer, as well as the law and the legal system. Students work with real clients who are experiencing legal problems, prepare law reform submissions, or design workshops and seminars which they deliver to community groups, high school students, and other community members.<sup>402</sup>

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and Stephen Tang, ‘On Being, Not Just Thinking Like, a Lawyer: Connections between Uncertainty, Ignorance and Wellbeing’ in Rachael Field, James Duffy and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Routledge, 2016) 161; Prue Vines, ‘Working towards the Resilient Lawyer: Early Law School Strategies’ (University of New South Wales Faculty of Law Research Series 30, 2011).

<sup>401</sup> Lawrence Krieger, ‘The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness’ (2005) 11 *Clinical Law Review* 425, 426.

<sup>402</sup> Adrian Evans et al, ‘Teaching Social Justice in Clinics’ in *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (ANU Press, 2017) 97.

## **The legal ethics course at UNSW**

The legal ethics course<sup>403</sup> at UNSW is unique internationally in that it contains a compulsory clinical component in which all students interview real clients with legal problems, brief a lawyer on the client's legal issues, and record the legal advice given to the client. There are other purely clinical courses which teach ethics,<sup>404</sup> but this course is unique because it is a compulsory legal ethics course which incorporates a clinical component. The aim of this component is to provide students with an actual experience of ethical issues and/or ethical challenges which they may face in legal practice. It also brings to life the theory around access to justice issues and students' future role as lawyers within the legal system. All students are taught a two-hour class in which they begin to learn about key principles of effective interviewing and the functioning of community legal centres within Australia. In this class, they are also introduced to some of the processes of the legal service in which they will interview clients. There are readings which students must complete before the class about key principles and approaches to use when interviewing clients.<sup>405</sup> In addition to this class, students are provided with further training when

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<sup>403</sup> The course learning outcomes include the learning outcomes for the clinical component. These are:

Demonstrate awareness of the principles of legal ethics and their relationships to the role of lawyers and the legal profession in society; Critically analyse the status, purpose and workings of the legal profession in light of its wider and changing context; Demonstrate an understanding of the factors that enable and constrain ethical legal practice, from the cognitive to the cultural, in their different contexts; Explain the relationships between personal values, legal ethics, and professional identity; Engage in a deliberate process of ethical decision-making and reflection in context; Produce scholarly written and oral work that demonstrates knowledge of the course concepts, critical judgment and reflection on the course themes, and the synthesis of practical and scholarly interdisciplinary research sources; Demonstrate effective oral communication skills by debating course themes and concepts in a scholarly, reflective and respectful manner; Apply legal and ethical principles to hypothetical fact scenarios and other contexts, including within a community legal centre practice; Demonstrate client skills, including interviewing, handling ethical issues and duties and cultural awareness; Work effectively in teams and reflect on how their values and interpersonal styles influence teamwork; Demonstrate self-management through self-assessment of performance and use of previous feedback received in the course.

<sup>404</sup> The Latrobe University School of Law uses a clinical methodology to teach ethics to law students. Only small numbers of students can be taught in this way. Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013).

<sup>405</sup> Kay Lauchland, *Legal Interviewing: Theory, Tactics and Techniques* (Butterworths, 1996); Ross Hyams, Susan Campbell and Adrian Evans, *Practical Legal Skills* (3rd edn, Oxford University Press, 2007).

they attend Kingsford Legal Centre (KLC) for their evening advice clinic. They are shown the Centre and are trained in the database to conduct basic conflict checking. The client information sheet and interviewing process are explained to them further, and they receive basic training in working with interpreters. Students are taught further about the duty to maintain client confidentiality and to avoid conflict of interests.<sup>406</sup>

The Faculty of Law at UNSW is unique in that it incorporates a functioning community legal centre, KLC.<sup>407</sup> Community legal centres are an intrinsic part of the justice sector in Australia, providing free legal advice, legal representation, community legal education, and law reform services to their communities. Over 35% of the clients at KLC speak a language other than English at home, 7% are Aboriginal or Torres Strait Islanders, 28% have a disability, 28% live in social housing, and 60% receive low or no income.<sup>408</sup> Clients of KLC have a range of legal issues – including employment, debt, tenancy, discrimination, criminal or fines issues – or have had an accident.

The evening advice clinics include six UNSW students, one clinical student, a supervising staff solicitor/clinical supervisor, and up to five volunteer lawyers who come from private legal practice, corporate law and government and/or legal aid practice. The role of the UNSW student is to interview the client initially, brief the volunteer lawyer about the legal problem, work with the lawyer to devise the legal advice, record the legal advice given, and debrief the experience with the lawyer and the supervising staff solicitor. Each student interviews one or two clients on the one advice night which they attend.

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<sup>406</sup> Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW) rr 9–12.

<sup>407</sup> Within Australia, only Newcastle University also includes a community legal centre, although Monash University and Murdoch University both have very close connections with community legal centres. See Adrian Evans et al, 'Teaching Social Justice in Clinics' in *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (ANU Press, 2017) 97.

<sup>408</sup> Kingsford Legal Centre, *Annual Report 2018* (2019) 3  
<[https://www.klc.unsw.edu.au/sites/default/files/documents/2925%20klc\\_AR-2018\\_WEB.pdf](https://www.klc.unsw.edu.au/sites/default/files/documents/2925%20klc_AR-2018_WEB.pdf)>.

Students gain a deep insight into the issues faced by disadvantaged clients and what role they, as future lawyers, may have in resolving those issues. By working with a range of skilled lawyers, most of whom are volunteering their time, they see modelled before them the working out of each lawyer's responsibility to the law and the legal profession. With the supervising staff lawyer and the volunteer lawyer, they work through how to deal with a client, provide legal advice, comprehensively address the client's range of needs, and resolve any ethical issues, including managing the client's expectations and the limited resources available to provide ongoing legal help.

While the clinical component is a short experience of interviewing clients, it is nonetheless intensive and utterly immersive. It provides students with education related to their own professional formation and their own sense of identity, as well as the ethical and social meaning of the profession.<sup>409</sup> It does this through providing as role models practising lawyers who are in the process of dealing ethically with real clients, in collaboration with law students. These lawyers are themselves engaging in pro bono work, adding another layer of meaning to the role of a practising lawyer in contributing to making the law and the legal system fairer. Indeed, many teachers may see their role as one of explaining:

why what we seek to teach is of value, provide a vision of ends to which that knowledge and skills could be put, and encourage students to consider if these values are ones congruent with their own sense of self. Doing so contributes to students evolving sense of their own purpose in life and how their careers as lawyers will support their own sense of purpose.<sup>410</sup>

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<sup>409</sup> William Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Foundation for the Advancement of Teaching, 2007) 126–61.

<sup>410</sup> Leah Wortham, Catherine Klein and Beryl Blaustone, 'Autonomy-Mastery-Purpose: Structuring Clinical Courses to Enhance These Critical Educational Goals' (2012) 18 *International Journal of Clinical Legal Education* 105, 120. The lawyers who are working voluntarily (pro-bono) with the clients and the students are modelling and teaching the students through this process about their own sense of purpose in being a lawyer, having chosen to volunteer with clients.

The clinical component provides a means towards this vision. For many students, the experience also builds confidence in their abilities. It enables them to explore their sense of purpose and their confidence in being able to realise this purpose. Krieger outlines that:

Empirical research for the last two decades has shown that when intrinsic values and motivation dominate a person's choices she tends to experience satisfaction and well-being, whereas when extrinsic values and motivation are most important to her she will experience angst and distress.<sup>411</sup>

This inclusion of experiences which nurture a law student's expression of their values, and spring from their internal motivation, has the potential to improve the student's mental health status.<sup>412</sup> For some students, interviewing disadvantaged clients will affirm their reasons for studying law. It therefore has the potential to reinforce their intrinsic motivation. It also reinforces other elements of the course which teach students how to integrate their personal values with their practice at work. This is taught through the model now known as 'Giving Voice to Values'.<sup>413</sup>

Other research has demonstrated that law students often choose to study law in order to please their parents, rather than as an expression of their own will.<sup>414</sup> Students also discuss choosing law because they are committed to social justice but becoming progressively distanced from

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<sup>411</sup> Lawrence Krieger, 'The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness' (2005) 11 *Clinical Law Review* 425, 429, citing Kennon Sheldon and Tim Kasser, 'Goals, Congruence and Positive Well-Being: New Empirical Support for Humanistic Theories' (2001) 41(1) *Journal of Humanistic Psychology* 30.

<sup>412</sup> Prue Vines, 'Working towards the Resilient Lawyer: Early Law School Strategies' (University of New South Wales Faculty of Law Research Series 30, 2011).

<sup>413</sup> Mary Gentile, *Giving Voice to Values: How to Speak Your Mind when You Know What Is Right* (Yale University Press, 2010).

<sup>414</sup> The study of tertiary students at UNSW in 2005 found that law students had been influenced by external factors or motivators, such as family, when deciding to study law. The law students had poorer mental health in comparison to other university students. See Massimiliano Tani and Prue Vines, 'Law Students' Attitude to Education: Pointers to Depression in the Legal Academy and the Profession?' (2009) 19(1) *Legal Education Review* 3.

that purpose. This experience provides students with an opportunity to reconnect with a social justice purpose and connect with that intrinsic motivation.

## **Research project**

The aim of this research was to measure whether students' sense of autonomy and competence would develop and grow from a relatively short clinical component. This would support the argument that a well-structured clinical learning experience, in which a student is expressing themselves and their abilities, grows the student's sense of autonomy and ability.<sup>415</sup> This sense of autonomy<sup>416</sup> and ability may be nurtured even in a short clinical component and can add to students' sense of intrinsic motivation. This 'enhances a learner's conceptual understanding of what they are trying to learn ... [and] promotes flexibility in one's way of thinking, active information processing and tendency to learn in a way that is conceptual rather than rote'.<sup>417</sup> While other research<sup>418</sup> has examined the ways in which a full clinical course grows students' sense of autonomy and competence, the capacity of a relatively short clinical component to achieve this aim has not previously been examined. This is a new and innovative enquiry which takes the next step in asking how a relatively short and intensive clinical component impacts on students' growth in confidence and sense of autonomy.

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<sup>415</sup> Leah Wortham, Catherine Klein and Beryl Blaustone, 'Autonomy-Mastery-Purpose: Structuring Clinical Courses to Enhance These Critical Educational Goals' (2012) 18 *International Journal of Clinical Legal Education* 105.

<sup>416</sup> Wortham, Klein and Blaustone discuss this and use four 'T's to aid in understanding how to support autonomy in teaching. These are 'task', which allows the time for a student to talk and be heard; the 'time' allowed for a student to work in their own way; 'technique', where rationales are provided and informational feedback is given, offering encouragements and hints; and 'team', where the student feels like their supervisor is working with them and is responsive to student-generated questions. See *ibid*, 124, citing Johnmarshall Reeve and Hyungshim Jang, 'What Teachers Say and Do to Support Students' Autonomy during a Learning Activity' (2006) 98(1) *Journal of Educational Psychology* 209, 211.

<sup>417</sup> Leah Wortham, Catherine Klein and Beryl Blaustone, 'Autonomy-Mastery-Purpose: Structuring Clinical Courses to Enhance These Critical Educational Goals' (2012) 18 *International Journal of Clinical Legal Education* 105, 110, citing Johnmarshall Reeve and Hyungshim Jang, 'What Teachers Say and Do to Support Students' Autonomy during a Learning Activity' (2006) 98(1) *Journal of Educational Psychology* 209, 211.

<sup>418</sup> Leah Wortham, Catherine Klein and Beryl Blaustone, 'Autonomy-Mastery-Purpose: Structuring Clinical Courses to Enhance These Critical Educational Goals' (2012) 18 *International Journal of Clinical Legal Education* 105, 120.

One of the aims of the research was to determine the impact of a short clinical experience on students' sense of autonomy and purpose in their later studies. There were three parts to this research question. The first part enquired into how students experience their interviewing experience at Kingsford Legal Centre. The second part examined students' levels of confidence in their interviewing ability, both before and after interviewing clients. The third part explored how students felt about their law studies more broadly after the interviewing experience and their confidence in continuing their law studies.

The questions about students' sense of autonomy and purpose link to self-motivation theory, which is about people having a greater sense of confidence and purpose as they have structured experiences which allow self-expression.<sup>419</sup> The first and third research questions – how students experience their interviewing experience, and how they felt about their law studies more broadly and their confidence in continuing in them – enable us to explore whether or not students have their sense of purpose in studying law reinforced through the clinical experience. Intrinsic motivation theory recognises the value of people being motivated to act from internalised, rather than external, motivations. 'Comparisons between people whose motivation is authentic (literally, self-authored or endorsed) and those who are merely externally controlled for an action typically reveal that the former, relative to the latter, have more interest, excitement, and confidence, which in turn is manifest both as enhanced performance, persistence, and creativity ...'<sup>420</sup>

There are clear links between the development of intrinsic motivation and clinical teaching.<sup>421</sup> This may be because of the principle of giving students responsibility for their work in clinical

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<sup>419</sup> Kennon Sheldon and Lawrence Krieger, 'Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being' (2004) 22 *Behavioral Sciences and the Law* 261; Leah Wortham, Catherine Klein and Beryl Blaustone, 'Autonomy-Mastery-Purpose: Structuring Clinical Courses to Enhance These Critical Educational Goals' (2012) 18 *International Journal of Clinical Legal Education* 105, 120.

<sup>420</sup> Richard Ryan and Edward Deci, 'Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being' (2000) 55(1) *American Psychologist* 68, 69.

<sup>421</sup> Leah Wortham, Catherine Klein and Beryl Blaustone, 'Autonomy-Mastery-Purpose: Structuring Clinical Courses to Enhance These Critical Educational Goals' (2012) 18 *International Journal of Clinical Legal Education* 105, 120.

legal education, with consistent and clear supervision. Indeed, 'opportunities for self-direction were found to enhance intrinsic motivation because they allow people a greater feeling of autonomy'.<sup>422</sup> This is what occurs in the interviewing clinical component, as students, with support, are responsible for interviewing the client and establishing what has happened to bring a client to needing legal advice. While students' sense of purpose appears to be strengthened through the experience, this finding arises out of the comments students made. Specific questions about students' sense of purpose and motivation were not asked in the surveys. This would provide fruitful ground for further research. The development of a sense of relatedness is also connected to developing students' sense of purpose.

In traditional law teaching, a law student can feel a sense of disjunct between learning to argue and think like a lawyer, and yet not feeling their own values reflected in the results of cases. 'Their sense of relatedness is likely to suffer from the new emphasis on submerging feelings and sensitivity toward others, from the quest to create new reasoning and arguing legal personae, and from the overriding, perceived need to compete and win.'<sup>423</sup> The clinical component provides students with an opportunity to experience legal practice and to integrate their views of their own developing sense of professionalism with seeing lawyers in practice. The students are responsible for interviewing the client and responding to their human needs, as well as their legal ones. Each student must interact individually with the client and begin to apply the law they have learnt to the frequently complex legal issues the client is experiencing, mixed with a range of social, cultural, gender, economic and disability related issues. Interacting with another person also means that they must integrate their own personalities with a developing sense of identity as a future lawyer who will have to interview and give advice to clients. Students' ability

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<sup>422</sup> Richard Ryan and Edward Deci, 'Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being' (2000) 55(1) *American Psychologist* 68, 69.

<sup>423</sup> Lawrence Krieger, 'Human Nature as a New Guiding Philosophy for Legal Education and the Profession' (2008) 47 *Washburn Law Journal* 101, citing Elizabeth Mertz, *The Language of Law School: Learning to Think Like a Lawyer* (Oxford University Press, 2007).

to relate to their clients and to the solicitors they work with is essential to achieving an effective legal interview.

### **Current trends in legal education**

The teaching of doctrinal law is undergoing constant renovation. But, most recently, the case method of teaching law, sometimes known as the 'Langdellian method', has been criticised for not providing the context of law to students, or teaching students adequate problem-solving skills. Students are taught to read cases and deconstruct them for 'facts', reasoning and outcomes for developing doctrine. This, it has been assumed, teaches them problem solving. However legal issues are complex and context-based and require problem-solving skills. The case method does not necessarily teach students these skills.<sup>424</sup> The integration of complex skills development within legal education is an ongoing debate.

In Australia, another more recent analysis of legal education examined the content of the Bachelor of Law degree. Currently, there is a requirement that all courses cover the 'Priestley 11'. These are 11 areas of law which the Legal Profession Admissions Board considers that all law graduates need to have learnt before entering practice.<sup>425</sup> A more recent examination of legal education framed the key areas for legal education within the terms of 'threshold learning outcomes'. These were developed in an extensive research and consultation process over several years. They asked the question of what a law student needs to be able 'to do' at the end of their Bachelor of Law degree, rather than what a law student needs 'to know'. The findings included six key areas: (1) knowledge; (2) ethics and professional responsibility; (3) thinking

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<sup>424</sup> Debora Threedy and Aaron Dewald, 'Re-Conceptualizing Doctrinal Teaching: Blending Online Videos with In-Class Problem-Solving' (2015) 64(4) *Journal of Legal Education* 605.

<sup>425</sup> The 11 areas are criminal law, torts, contracts, property, equity, company law, administrative law, federal and state constitutional law, civil procedure, evidence, and ethics and professional responsibility. See generally Legal Profession Uniform Admission Rules 2015 (NSW).

skills; (4) research skills; (5) communication and collaboration; and (6) self-management.<sup>426</sup>

These were accepted by the Council of Australian Law Deans in November 2010.<sup>427</sup>

This 'threshold learning outcomes' project was conducted within the context of an ongoing 'tension between privileging prescribed areas of knowledge versus ongoing generic skills development'.<sup>428</sup> The research project analysed within this chapter provides another means of understanding how law can be taught within a law degree to ensure that students develop their ability to manage themselves, and also develop their sense of ethics and professional responsibility. It demonstrates how, through a relatively short clinical component, these key skills and learning outcomes can be achieved. In this way, it provides a replicable model for other faculties of law.

### **How the research was conducted**

The research questions were devised after consulting with legal education and clinical legal education experts and conducting a literature review around concepts of professionalism and ethical behaviour and attitudes in students. The questions which students were asked were deliberately open-ended in order not to predetermine or shape their responses. The approach taken to develop the project was one of 'grounded research'. Grounded research is a 'general method of [constant] comparative analysis'.<sup>429</sup> This methodology also allows for patterns to develop within the data which can explain the research questions and allow for the generation

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<sup>426</sup> Sally Kift, Mark Israel and Rachael Field, 'Learning and Teaching Academic Standards Project: Bachelor of Laws – Learning and Teaching Academic Standard Statement December 2010' (Australian Learning and Teaching Council, 11 February 2011) <<https://cald.asn.au/wp-content/uploads/2017/11/KiftetalLTASStandardsStatement2010.pdf>>.

<sup>427</sup> Ibid.

<sup>428</sup> Anna Huggins, 'Incremental and Inevitable: Contextualising the Threshold Learning Outcomes for Law' (2015) 38(1) *University of New South Wales Law Journal* 264, 265–66.

<sup>429</sup> Barney Glaser, 'The Constant Comparative Method of Qualitative Analysis' (1965) 12(4) *Social Problems* 436; Patricia Ewick and Susan Silbey, 'The Common Place of Law' in Simon Halliday and Patrick Schmidt, *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge University Press, 2009); Antony Bryant and Kathy Charmaz (eds), *The Sage Handbook of Grounded Theory* (Sage, 2007).

of theory.<sup>430</sup> Two surveys were administered to students, one before the client interview and the other after the interview.<sup>431</sup> The results of a number of the questions have been discussed elsewhere.<sup>432</sup> This chapter focuses on the ways in which a short clinical component of an applied ethics course can impact substantially on students' confidence in their interviewing skills and, more importantly, in their following legal studies.

In analysing the survey responses, a coded data approach was used to classify the data. The researcher initially read through all the survey responses to gain an overall impression of them. Following this, a detailed analysis of the data began. Each survey was analysed in order to create a data scheme which would reflect the range of possible responses to the questions. This involved a process of cross-checking between survey responses in order to ensure that the categories and codes being created were accurate and useful for the survey classification. Once a code had been devised, each survey was re-read in order to classify its answers into the coded categories. The data of each of the surveys was then compiled in order to make deductions from the data. Once initial trends in responses were identified, the surveys were again re-read and coded. After particular trends were identified, the data was again compared and analysed to re-categorise it. This interplay between data and theory is key to using grounded theory.<sup>433</sup>

The following is an example of a pre-interview response to the question 'How do you feel about your ability to study law or become a lawyer?' which was coded 'low confidence':

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<sup>430</sup> Hilary Engward, 'Understanding Grounded Theory' (2013) 28 *Nursing Standard (Royal College of Nursing)* 37.

<sup>431</sup> The researcher sought ethics approval (HC15042) to conduct a survey of LEJ students. No benefit or disadvantage was experienced by any student who participated in the survey. The survey was conducted via Survey Monkey and was announced to students by a third person, who was not involved in the analysis of the data. The respondents' identities are unknown to the researcher. *Survey Monkey* (Website) <<https://www.surveymonkey.com/>>.

<sup>432</sup> Anna Cody, 'Interviewing Real Clients and the Ways It Deepens Students' Understandings of Legal Ethics' (2018) 21(1) *Legal Ethics* 46.

<sup>433</sup> The theory develops as it interplays with the data and the course of the actual research. See Anselm Strauss and Juliet Corbin, 'Grounded Theory Methodology, an Overview' in Norman Denzin and Yvonna Lincoln (eds), *Handbook of Qualitative Research* (Sage, 1994) 273.

I feel that I am unable to become a lawyer, but I am interested in studying law, hoping to help those in need through sharing what I have learnt in university. (Student 23)

Another student answered:

Studying law is a difficult process. But my interest in the area is motivating. Further, my aspirations to help those disadvantaged motivates me to study with the best of my ability in order to achieve this outcome. (Student 11)

This response was coded 'medium confidence'.

The question asked post-interview was 'What do you think about your ability to do your law studies, after your client interviewing experience?'

One student replied:

I think after my client interviewing experience, my ability to study law has improved, but of course, I still need to learn a lot more so hopefully I am given the opportunity to do more practice. (Student 15)

This was classified as 'medium confidence'.

Another student replied:

I am encouraged by my performance in interviewing the client and it is useful to be aware of the need to improve my note taking ability if those notes are to be used by someone else. (Student 39)

That answer was coded as 'medium confidence'.

Because the questions were largely open-ended, students could make multiple points in their answers. They were not confined to a specific number of responses.<sup>434</sup>

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<sup>434</sup> Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine DeGruyter, 1967); Patricia Ewick and Susan Silbey, 'The Common Place of Law' in Simon Halliday and Patrick Schmidt, *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge University Press, 2009); Antony Bryant and Kathy Charmaz (eds), *The Sage Handbook of Grounded Theory* (Sage, 2007).

## Research results

### Respondent demographics

All students across three semesters were invited to participate. In total, 69 students participated in both the pre-interview and post-interview surveys. This comprises 28 of 212 students in semester one, 25 of 210 students in semester two, and 16 of 29 students in the summer semester. The total percentage of students who completed both the pre- and post-interview survey is 14% of all students enrolled in the subject in 2015. While this is not a large percentage of students, it is sufficient to provide valuable data about the impact of the interviewing clinical experience.<sup>435</sup> Of the students who completed the surveys, 21 were male and 48 were female. This is a slightly higher proportion of women than are enrolled in the law degree program. The overall student cohort, however, has a higher percentage of female students than male. There were 12 international students and 57 non-international students, which is representative of the student cohort.

After the students had completed the KLC interviewing experience, they were asked an open-ended question about the impact of the interviewing experience: 'How was the Kingsford Legal Centre experience?'

How was the Kingsford Legal Centre experience?	Post-interview
Interesting/Exciting/Enjoyable/Rewarding/Enlightening	64 (93%)
Confidence-building	13 (19%)

Of all respondents, 93% reported 'I really enjoyed it/Interesting/Really interesting/Very enjoyable and rewarding'. For 19% of students, the experience 'was confidence building' and/or

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<sup>435</sup> For a finite population, a significant sample size is generally considered as 5% or above of the population. See Thomas Ryan, *Sample Size Determination and Power* (John Wiley & Sons, 2013) 32.

'they were surprised at their own ability to interview well'. An example of this is the student who replied:

I found the experience very confidence building. I was worried that I would be completely incompetent but found I was well able to handle the interview. I had difficulty focusing the interview but felt I built rapport quickly with the client. (Student 10)

Another student responded:

I think that my efforts in my law studies have been revitalised after this experience which has helped me to gain a better understanding of advising clients and bearing the responsibilities of a lawyer. Indeed, being exposed to the practical aspect of the legal environment in Australia has motivated me to work harder as a law student so that one day I will be able to responsibly help people. (Student 35)

Of the other five students, four did not reply to the question and one had a negative experience.

Another student demonstrated other aspects of learning from the clinical experience, such as teamwork, commenting:

The experience showed me how easy it actually was to help people, not so much the interviewing but the inter-collaborating with [the supervisor] for each case. It was good for me to see solicitors struggling with the answers. Helped me to feel more empowered in regards to my previous experience and the law knowledge that is being drummed into me week after week. (Student 29)

### **Levels of confidence in interviewing**

The second element of the research questions focused on student confidence in their interviewing skills. Students were asked how confident they felt about their ability to interview in both the pre-interview survey and the post-interview survey.

<b>How confident did you feel about your ability to interview clients?</b>	<b>Pre-interview</b>	<b>Post-interview</b>
Low confidence	8 (12%)	5 (7%)
Medium confidence	24 (35%)	41 (59%)
High confidence	32 (46%)	21 (30%)

In the pre-interview survey, students were asked what skills and abilities they thought were most needed for an interview. The question was not asked separately in the post-interview survey.

What skills do you think you will need/were important for the interview?	Pre-interview
Empathy/Interpersonal/Cultural awareness	50 (72%)
Active listening	50 (72%)
Ability to synthesise and analyse/Research or know the law	20 (29%)
Can record information accurately	9 (13%)

In the pre-interview survey, 72% of respondents indicated that active listening was a key skill. They replied that showing empathy, having interpersonal skills, and having cultural awareness were key. This is demonstrated by one student who, when asked what skills are needed to interview, replied:

Good interpersonal skills. (Student 29)

Students were asked about their levels of confidence in doing the interview. Before the interview, 12% of students had low confidence levels; after the interview, 7% had low confidence. Before the interview, 35% of students had medium confidence levels; after the interview, 59% had medium confidence levels. Before the interview, 46% of students had high levels of confidence; after the interview, 30% had high levels of confidence. Thus, there was a shift in confidence in the pre- and post-interview surveys. More students had high levels of confidence before the interview, but after the interview more students had medium levels of confidence. This is discussed below.

### **The impact of the interviewing clinical component on students' law studies**

The final element of the research questions enquired into the impact of the interviewing experience on students' law studies, which was not confined to their study of legal ethics.

Students were asked: 'How do you feel about your ability to study law?' This question was open-ended in order to examine levels of confidence, but it also elicited some wider responses.

How do you feel about your ability to study law?	Pre-interview	Post-interview
Low	13 (19%)	3 (4%)
Medium	39 (57%)	36 (52%)
High	17 (25%)	29 (42%)
No answer		1

In this question, each of the responses was categorised into one of three categories: low, medium or high. This makes it easier to compare the pre-interview and post-interview responses by students. The total number of students in the pre-interview column adds up to 69, which is the total number of students who completed the survey. This is the same for the post-interview column, including one student who did not respond to the question.

In the **pre-interview survey**, students were asked: 'How do you feel about your ability to study law or become a lawyer?' Of the 69 student respondents, 25% said that they felt highly confident, while 57% stated that they had medium levels of confidence. This is demonstrated by the following student responses:

It's hard but doable. (Student 19)

I feel that I have the ability to study law, although it is taxing and if I am not careful can adversely affect my mental health. Because of this I do not think I want to become a lawyer – while I think I have the ability, I do not think I want to make the compromises in terms of quality of life that this might represent for me. (Student 33)

The 19% of students who stated that they had low levels of confidence are typified by this response:

Not super-confident, very worried about not being across all the different topics required and not being driven enough to just focus on school/career. (Student 38)

In the **post-interview survey**, students were asked: 'What do you think about your ability to do your law studies, after your client interviewing experience?' The highest response was 52% of students who replied that they had a medium level of confidence in their ability to complete their law studies. This is typified by the following responses:

I am more confident after the interviewing experience. I understand that more people need legal help and that is what I mean to do. (Student 27)

The experience showed me how easy it actually was to help people, not so much the interviewing but the inter-collaborating with [the supervisor] for each case. It was good for me to see solicitors struggling with the answers. Helped me to feel more empowered in regards to my previous experience and the law knowledge that is being drummed into me week after week. (Student 29)

Post-interview, 42% of students replied that they had high levels of confidence about their law studies, while 4% of students had low levels of confidence.<sup>436</sup>

In addition to the responses about low, medium or high levels of confidence, students also made comments about the ways in which experiencing a clinical component impacted on their law studies. This part of the research is more qualitative. The answers have been coded into four categories: the importance of practical skills and interest in the practice of law; assistance with analytical, research/note-taking or problem-solving skills; helping people motivates them; and, broadly, confidence building.

Nine students replied that they would like to engage in more practical experiences in their legal studies and were interested in the practice of law. This is typified by these comments:

I think continuing practice and interviewing clients and having exposure to practical legal work will improve my ability to complete my law studies. (Student 32)

I'm less intimidated by practice. (Student 10)

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<sup>436</sup> See the table on page 187.

I think my ability is fine, it's sort of change my perspective a bit though, seeing law in action and seeing how different it is from the law we learn in class. (Student 40)

Nine students commented on how the interviewing experience had changed their perspectives on the need for analytical skills, research or note-taking skills, or problem-solving skills. These responses are demonstrated in the following comments:

When it comes to real life, the problems are far more complicated than pure knowledge. It always contains a mixture of many subjects, as well as the skills of communication. (Student 66)

I think for the first time I had to engage with the people I am learning to represent – it really made me think how I approach legal issues and thinking. (Student 20)

I recognise that research skills are very important. (Student 14)

Eight students commented on how helping people was motivating for them, as demonstrated in these responses:

It was good to put myself in a practical setting to see how all the theory works together, it has given me more of a drive to work harder as I do feel passionate about working with people and working to help them. (Student 25)

I am more motivated to do my law studies as I was exposed to real clients who require lawyers' expertise to help them be in the best legal position. (Student 48)

The experience at KLC has re-affirmed my commitment towards my studies. Lawyers hold the noble ability to serve their community and contribute towards making the world a better place to live in. To eradicate poverty. Lawyers play an inevitable role towards achieving this goal. (Student 50)

I am more confident after the interviewing experience. I understand that more people need legal help and that is what I mean to do. (Student 27)

Six commented broadly on the ways in which the experience grew their confidence, as demonstrated in these responses:

I am more confident in dealing with real life clients and am certain I want to get into this area of law. (Student 45)

Helped me feel more empowered in regards to my previous experience and the law knowledge that is being drummed into me week after week. (Student 29)

It reaffirmed what I was studying and that I knew more than what I thought. (Student 19)

## **Discussion of results**

These data overwhelmingly support anecdotal reports that students very much enjoy their interviewing experience and learn a great deal from the structured learning experience. The data further demonstrate that even though relatively limited in length, the clinical interviewing experience mostly builds students' confidence in interviewing and affirms their ability to understand a client's legal issues.<sup>437</sup> If the categories of medium and high confidence are combined, then the number of students who fit in this category grows from 81% to 89%. However, the data is also interesting in that while the number of students who have medium levels of confidence increased from 35% to 59%, the number of students with high levels of confidence decreased from 46% to 30%. In this way, the study reveals that students have a more complex response to the experience of interviewing clients. Students may realise that they can engage successfully in interviewing clients, but also that it is quite a challenging and demanding task requiring multiple layers of skill and knowledge. For this reason, the number of students with high levels of confidence declines after the actual experience of interviewing. Students comment on the challenges they face in balancing communicating effectively with the client, guiding the interview, and recording the information given. This is demonstrated by these comments:

I am more confident in dealing with real life clients and am certain I want to get into this area of law. (Student 45)

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<sup>437</sup> This issue was explored in an earlier article on the same empirical research: see Anna Cody, 'Interviewing Real Clients and the Ways it Deepens Students' Understandings of Legal Ethics' (2018) 21(1) *Legal Ethics* 46.

I am encouraged by my performance in interviewing the client and it is useful to be aware of the need to improve my note taking ability if those notes are to be used by someone else.  
(Student 39)

From these data, and some of the student comments, it is apparent that the interviewing experience also reinforced the understanding of the importance of communication<sup>438</sup> and empathy<sup>439</sup> that students had also pre-identified as being key skills. After the interviewing experience, students appreciated just how hard it is to get the relevant information from clients and the importance of showing concern and empathy for clients. As one student noted:

When it comes to real life, the problems are far more complicated than pure knowledge. It always contains a mixture of many subjects, as well as the skill of communication.  
(Student 66)

Another student commented:

Work on my practical skills and maintain them to a high standard – it's important to be a strong writer but law is more so about the communication and interaction if you can communicate sufficiently, build rapport with clients and many lawyers are theory based but cannot communicate their knowledge. (Student 43)

### **Student confidence levels in their ability to complete their law studies**

From this study, it appears that the clinical experience of interviewing clients built students' sense of ability and competence – not only in interviewing, but also in their legal studies. After engaging with a real client with a legal problem, 94% of the 69 students rated their confidence in engaging in their legal studies at medium or high. It is notable that it was not just their confidence in interviewing clients which increased, but also their confidence in their ability to continue and complete their law studies.

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<sup>438</sup> William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Foundation for the Advancement of Teaching, 2007). The Carnegie report emphasised the importance of communication skills and interviewing skills within law schools.

<sup>439</sup> Susan Brooks, 'Using a Communication Perspective to Teach Relational Lawyering' (2015) 15(2) *Nevada Law Journal* 477.

From the comments of students, it appears that the experience increased their motivation to complete their law studies with a renewed understanding of why they were studying law. This is shown in the following comment:

I am more motivated to do my law studies as I was exposed to real clients who require lawyers' expertise to help them be in the best legal position. (Student 48)

This reflects the importance of building, into any law degree which teaches ethical and professional development, experiences which develop this sense of purpose or motivation of students. 'This kind of education employs principles of effective instruction – active learning and opportunities for practice, assessment and self-assessment, feedback from multiple sources, and opportunities for reflection, and feedback.'<sup>440</sup> Furthermore, it is conducted by those who are actively engaged in professional practice. These elements are key to promoting ethical development and professionalism. While the data suggest a connection between these types of clinical experiences and increasing motivation, the questions asked in the surveys did not specifically probe students' sense of motivation and purpose. This would be a useful future area of enquiry.

These responses demonstrate the significance within the law degree of including some powerful learning experiences. The clinical component of interviewing is one of those. As the Carnegie report on legal education observed, powerfully engaging law school experiences can potentially 'influence the place of moral values such as integrity and social contribution in students' sense of self'.<sup>441</sup> This connects students to their intrinsic motivation and holds the potential for students to integrate their values and their work as law students and possible future lawyers.

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<sup>440</sup> Muriel Bebeau, 'Promoting Ethical Development and Professionalism: Insights from Educational Research in the Professions' (2008) 5(2) *University of St. Thomas Law Journal* 367, 391.

<sup>441</sup> JoNel Newman and Donald Nicolson, 'A Tale of Two Clinics: Similarities and Differences in Evidence of the "Clinic Effect" on the Development of Law Students' Ethical and Altruistic Professional Identities' (University of Miami Legal Studies Research Paper No 2015-16, 2015) 17, citing William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Foundation for the Advancement of Teaching, 2007) 126–29.

This will, it is hoped, improve the mental health of students, although that has not been measured in this study. Within the teaching of law, it is vital to:

do everything possible so that the law school experience preserves and strengthens, rather than dampens the enthusiasm, idealism, and integrity (in its broadest sense) of students. Because intrinsic pursuits and basic need satisfaction are foundational to both professionalism and personal satisfaction, we need to model and encourage them persistently if we genuinely intend to produce happy, thriving, professional lawyers.<sup>442</sup>

Engaging with practising lawyers in interviewing and advising real clients appears to provide law students with an enriching and satisfying experience. They are thereby stretched in their abilities, but also reassured about their capacity to engage effectively with the client and the lawyer through the interviewing experience. They also gain confidence in completing their law studies.

This seems to reflect the emphasis of the Carnegie Foundation's Preparation for the Profession Project, which called for law schools to 'focus on law students' sense of identity and purpose as part of their professional education'.<sup>443</sup> Furthermore, it appears to have a broader impact than simply increasing students' confidence in their interviewing skills. In fact, the experience increases students' confidence in their ability to successfully complete their law studies. The responses also demonstrate the connection between students being motivated to continue in their legal studies and their experience of an opportunity to help people and put their legal skills to use. This is shown in the following comment:

The experience at [KLC] has re-affirmed my commitment towards my studies. Lawyers hold the noble ability to serve their community and contribute towards making the world a

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<sup>442</sup> Lawrence Krieger, 'The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness' (2005) 11 *Clinical Law Review* 425.

<sup>443</sup> Leah Wortham, Catherine Klein and Beryl Blaustone, 'Autonomy-Mastery-Purpose: Structuring Clinical Courses to Enhance These Critical Educational Goals' (2012) 18 *International Journal of Clinical Legal Education* 105, 108, citing William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Foundation for the Advancement of Teaching, 2007) 126–29.

better place to live in. To eradicate poverty. Lawyers play an inevitable role towards achieving this goal. (Student 50)

The strength of these responses can be encapsulated by one student's response of 'wow I think I can be a lawyer now'. This sense of a stronger feeling of confidence was repeated across a large number of responses.

It appears that the experience builds students' sense of their identity as future lawyers, forming a connection between using their skills and helping others. It reinforces students' intrinsic, rather than extrinsic, motivation.

The research would be strengthened by conducting in-depth interviews with groups of students at the beginning of law school, in order to gain a deeper understanding of their initial motivations, and further interviews when students are progressing through their law degree. Through these in-depth interviews, the role of the clinical component in developing students' autonomy and intrinsic motivation could be more effectively identified. Furthermore, conducting surveys which ask students about their motivations for studying law would be another mechanism to probe the connection between the clinical experience and the linking with students' sense of purpose in studying law.

This experience is certainly one within the paradigm of strengthening the connections for students between analytical reasoning and their intrinsic motivation, values and legal skills. But there are other opportunities within the law curriculum to similarly develop this capacity of students:

If, as psychologists have argued, identity formation is a life-long developmental process, we educators should not expect young people to come fully prepared to take on professional roles and responsibilities or to demonstrate the kind of integration of personal and professional values that are exhibited by exemplars. The main question here is not whether

young people are self-centred rather than other-centred, but the degree to which societal influences may be inhibiting rather than enhancing the development of the moral self.<sup>444</sup>

As educators – particularly those teaching legal ethics – we should be teaching our students how to be ethical lawyers, which includes recognising their duty to provide community service and make law fairer and more just.

## **Conclusion**

Including a clinical component of interviewing real clients as part of an applied legal ethics course has measurable value. It provides one means of developing students' confidence in their interviewing skills and their interest in the practice of law. But, perhaps surprisingly, it also has the benefit of increasing students' confidence in their ability to successfully complete their law studies by building their sense of purpose. The significance of including learning experiences which build students' sense of purpose through developing their intrinsic motivation in law courses has been recognised as essential for developing committed and dedicated lawyers. The Carnegie project is just one study which emphasises the importance of incorporating these experiences within a law degree. The inclusion of a clinical component within the ethics courses of a law degree is one effective means of achieving this.

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<sup>444</sup> Muriel Bebeau, 'Promoting Ethical Development and Professionalism: Insights from Educational Research in the Professions' (2008) 5(2) *University of St. Thomas Law Journal* 371.

## Chapter 8:

### Changing law students' ideas about ability/disability – Can we? Should we? How would we?

#### Introduction

In order for future lawyers to respond effectively to the needs of people with disability, they must be taught specifically about the issues which people with disability may face and the ways of thinking about disability. Access to justice for people with disability is a growing area and one which law schools and clinics<sup>445</sup> confront regularly. The Convention on the Rights of Persons with Disabilities<sup>446</sup> makes clear that States<sup>447</sup> have an obligation to ensure effective access to justice for people with disability,<sup>448</sup> including through providing training to those involved in the administration of justice (lawyers and future lawyers). Additionally, many clinics work in areas of

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<sup>445</sup> The term 'clinics' in this article refers to legal services where clinical legal education with live clients is used as the teaching methodology.

<sup>446</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

<sup>447</sup> The Convention entered into force on 3 May 2008 after 20 countries had ratified it. Both Mexico (17 December 2008) and Australia (17 July 2008) have ratified the Convention.

<sup>448</sup> Article 13 of the Convention on the Rights of Persons with Disabilities states:

1. States parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

social justice, including working with clients with disability.<sup>449</sup> It is essential, therefore, that clinical teachers are skilled to teach about disability issues.<sup>450</sup>

In clinical legal education, students learn law through their work with real clients or legal entities, attending concurrent classes on substantive law and skills development, and reflecting on the law and the legal system. This chapter provides some guidance when designing a clinical course which includes working with clients with disability. The chapter draws on examples from two clinics to demonstrate how issues of disability can be integrated and taught effectively. One of the clinics is based at Kingsford Legal Centre (KLC) at the University of New South Wales in Sydney, Australia; the other is based in the Human Rights Program (PUDH, or Programa Universitario de Derechos) at the National University of Mexico in Mexico City. These examples demonstrate that issues of disability arise across international borders and are not specific to either developed or developing world clinics. While there are differences between the clinics, there are also common approaches. The PUDH clinic was chosen because it is a member of a network of clinics specialising in disability issues in Latin America.<sup>451</sup> KLC also specialises in discrimination law and works extensively with clients with disability.

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<sup>449</sup> Among both the staff and the student body, it is likely that 18% will have a disability. Australian Bureau of Statistics, 'Survey of Disability, Ageing and Carers 2012' (Web Page, 2012) <<https://agedcare.health.gov.au/tools-and-resources/ageing-and-aged-care-research-and-statistics/general-ageing-and-aged-care/survey-of-disability-ageing-and-carers-2012>>.

<sup>450</sup> For further discussion, see Frances Gibson, 'The Convention on the Rights of Persons with Disabilities: The Response of the Clinic' (2011) 15 *International Journal of Clinical Legal Education* 11; Robert D Dinerstein, "'Every Picture Tells a Story, Don't It?': The Complex Role of Narratives in Disability Cases' (2007) 15(1) *Narrative* 40.

<sup>451</sup> Funded by the Open Society Foundations: Open Society Foundations, 'Disability Rights' (Web Page, 2017) <<https://www.opensocietyfoundations.org/topics/disability-rights>>.

## Clinical legal education

Clinical legal education<sup>452</sup> is a methodology of teaching law which has been in use in the United States since the early 20th century.<sup>453</sup> It gained greater impetus in Australia, the United Kingdom and Canada in the 1960s and 70s. In Africa (Ethiopia, Uganda, Tanzania and South Africa), clinics were established in the 1970s,<sup>454</sup> mostly using a real client, rather than simulation-based model. The methodology is now used internationally<sup>455</sup> as a means of teaching law which engages students in the practice of law in an academic context. Students are responsible<sup>456</sup> for legal work for real clients or organisations. They learn to think critically about the law, the legal system, and clients, as well as learning legal skills. Students are taught how to learn from experience in a learning cycle of concrete experience, active experimentation, abstract conceptualisation and reflective observation.<sup>457</sup> This clinical process relies on intensive supervision. Clinics range from clinical components within substantive law courses,<sup>458</sup> to in-house clinics (which are either wholly or substantially funded by law faculties and are for

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<sup>452</sup> Adrian Evans et al, *Australian Clinical Legal Education* (ANU Press, 2017) ch 3 provides a description of the models of clinical legal education; Roy Stuckey et al, *Best Practices for Legal Education: A Vision and a Road Map* (Clinical Legal Education Association, 2007); William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Foundation for the Advancement of Teaching, 2007).

<sup>453</sup> Jeff Giddings et al, 'The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada and Australia' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011).

<sup>454</sup> David McQuoid-Mason, Ernest Ojukwu and George Mukundi Wachira, 'Clinical Legal Education in Africa: Legal Education and Community Service' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011).

<sup>455</sup> David McQuoid-Mason, Ernest Ojukwu and George Mukundi Wachira, 'Clinical Legal Education in Africa: Legal Education and Community Service' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011); Richard J Wilson, 'Training for Justice: The Global Reach of Clinical Legal Education' (2004) 22 *Penn State International Law Review* 421.

<sup>456</sup> Students take responsibility for their decisions and their supervisors help them to reflect on their experiences. David F Chavkin, 'Experiential Learning: A Critical Element of Legal Education in China (and Elsewhere)' (2009) 22(3) *Pacific McGeorge Global Business and Development Law Journal* 3, 17.

<sup>457</sup> David Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (Prentice Hall, 1984).

<sup>458</sup> See Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013) ch 3 for a description of the models of clinical legal education; Roy Stuckey, 'Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses' (2006) 13 *Clinical Law Review* 807; William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Foundation for the Advancement of Teaching, 2007).

student learning), and agency clinics and externships (where students are placed in an external agency and are assessed by the university with input from the placement). Many clinics have as one of their goals 'to teach students about the functioning of the law and the legal system from the perspective of disadvantaged clients'.<sup>459</sup> Some see their role as being more utilitarian: emphasising skills training, making graduates 'work ready' and able to pick up new abilities and skills in an ever-changing workplace.<sup>460</sup> Others emphasise the role of teachers as also teaching values and ethics.<sup>461</sup> Some clinics embrace all of these viewpoints, teaching social justice, skills and ethics.<sup>462</sup> In Latin America, there is a strong tradition of teaching social justice through clinics<sup>463</sup> and a growing movement of disability rights clinics.<sup>464</sup> In Australia, where the history of clinical legal education is linked to community legal centres,<sup>465</sup> most clinics work in an area of social justice.

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<sup>459</sup> Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013) ch 5; Jon Dubin, 'Clinical Design for Social Justice Imperatives' (1998) 51 *SMU Law Review* 1461; Jane H Aiken, 'The Clinical Mission of Justice Readiness' (2012) 32 *Boston College Journal of Law and Social Justice* 231; Jane H Aiken and Stephen Wizner, 'Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice' (2004) 73 *Fordham Law Review* 997.

<sup>460</sup> Carolyn Grose, 'Beyond Skills Training, Revisited: The Clinical Education Spiral' (2013) 19 *Clinical Law Review* 489.

<sup>461</sup> Anna Cody, 'What Does Legal Ethics Teaching Gain, If Anything, from Including a Clinical Component?' (2015) 22(1) *International Journal of Clinical Legal Education*.

<sup>462</sup> Mary Anne Noone and Frank Bloch, 'Legal Aid Origins of Clinical Legal Education' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011); Nigel Duncan and Susan Kay, 'Addressing Lawyer Competence, Ethics and Professionalism' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011).

<sup>463</sup> Erika Castro-Buitrago et al, 'Clinical Legal Education in Latin America: Toward Public Interest' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011).

<sup>464</sup> Two of the scheduled workshops in the Global Alliance for Justice Education (GAJE) 2015 conference focused on disability rights clinics from Latin America: Global Alliance for Justice Education, '8th Worldwide Conference' (Web Page, 2015) <<https://resources.gaje.org/conferences/8th-worldwide-conference/>>. The Open Society Foundations has funded a number of disability rights clinics in Latin America and Africa: Open Society Foundations, 'Disability Rights' (Web Page, 2017) <<https://www.opensocietyfoundations.org/topics/disability-rights>>.

<sup>465</sup> Jeff Giddings, *Promoting Justice through Clinical Legal Education* (Justice Press, 2013); Mary Anne Noone and Frank Bloch, 'Legal Aid Origins of Clinical Legal Education' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011).

When designing a clinic, teachers face a range of issues – including the course objectives,<sup>466</sup> the desired learning outcomes,<sup>467</sup> the length of the course, the class content, and readings. A clinic based in a community legal practice will also have to weigh up the needs of clients and the communities with which they work.<sup>468</sup> Some learning outcomes are aimed at encouraging students to think critically about their responsibility in contributing to 'justice' within their role as a lawyer.<sup>469</sup> Some may correlate to students gaining a deeper understanding of their individual identities, values and attitudes and how this may impact on their lawyering. As

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<sup>466</sup> Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013) ch 4; Roy Stuckey, 'Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses' (2006) 13 *Clinical Law Review* 807; Lydia Bleasdale-Hill and Paul Wragg, 'Models of Clinic and Their Value to Students, Universities and the Community in the Post-2012 Era' (2013) 19 *International Journal of Clinical Legal Education* 257; Roy Stuckey, 'Ensuring Basic Quality in Clinical Courses' (2000) 1 *International Journal of Clinical Legal Education* 47.

<sup>467</sup> Examples of learning outcomes which are connected to justice issues and commonly included in clinical courses are 'critical analyses of legal concepts through reflective practice' and 'an awareness of lawyering as a professional role in the context of wider society (including the imperatives of corporate social responsibility, social justice and the provision of legal services to those unable to afford them)': Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013) 4.

<sup>468</sup> Anna Cody and Barbara Schatz, 'Community Law Clinics: Teaching Students, Working with Disadvantaged Communities' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011).

<sup>469</sup> Linda F Smith, 'Designing an Extern Clinical Program: Or as You Sow, So Shall You Reap' (1998) 5 *Clinical Law Review* 527, 528. See, eg, American Bar Association, 'Legal Education and Professional Development – An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap' (American Bar Association, 1992); Roy Stuckey et al, *Best Practices for Legal Education: A Vision and a Road Map* (Clinical Legal Education Association, 2007); Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013); William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Foundation for the Advancement of Teaching, 2007); Carolyn Grose, 'Beyond Skills Training, Revisited: The Clinical Education Spiral' (2013) 19 *Clinical Law Review* 489, 493; Leah Wortham, Catherine Klein and Beryl Blaustone, 'Autonomy-Mastery-Purpose: Structuring Clinical Courses to Enhance These Critical Educational Goals' (2012) 18 *International Journal of Clinical Legal Education* 105, 113; Philip Schrag, 'Constructing a Clinic' (1996) 3 *Clinical Law Review* 175, 180–85; Adam Babich, 'The Apolitical Clinic' (2004) 22 *Tulane Lawyer* 10; Jon Dubin, 'Clinical Design for Social Justice Imperatives' (1998) 51 *SMU Law Review* 1461; Jane H Aiken, 'The Clinical Mission of Justice Readiness' (2012) 32 *Boston College Journal of Law and Social Justice* 231; Jane H Aiken and Stephen Wizner, 'Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice' (2004) 73 *Fordham Law Review* 997; Margaret Barry, John Dubin and Peter Joy, 'Clinical Education for this Millennium: The Third Wave' (2000) 7 *Clinical Law Review* 1; Shuvro Prosun Parker, 'Empowering the Underprivileged: The Social Justice Mission for Clinical Legal Education in India' (2013) 19 *International Journal of Clinical Legal Education* 321; Lydia Bleasdale-Hill and Paul Wragg, 'Models of Clinic and Their Value to Students, Universities and the Community in the post-2012 Era' (2013) 19 *International Journal of Clinical Legal Education* 257, 267.

students engage with disadvantaged clients and communities, or engage in legal policy work, they will deal with clients with disability. When clinics teach about ability/disability, specific approaches and content will need to be incorporated in a clinical course in order to do this effectively. This is discussed in greater detail. Before expanding on this discussion, concepts of 'justice' are explored.

## **What is justice?**

Justice in this chapter is defined broadly:

Social justice is the process of remedying oppression, which includes 'exploitation, marginalization, powerlessness, cultural imperialism, and violence'. Issues of social justice include problems involving race, ethnicity, and interracial conflict, 'class conflict, gender distinctions, ... religious differences', and sexual orientation conflicts. Social justice also includes public interest work in its many guises.<sup>470</sup>

Justice within a legal context requires that the law should be accessible to all, including those who have traditionally not been able to use the legal system because of its cost, its inaccessibility, and its concepts and structures, including notions of objectivity. Social justice 'usually entails the provision to all people of basic human needs including income, housing, education and health care; equal enjoyment of human rights including non-discrimination, freedom of expression and movement, the right to liberty and the right to live free from violence; and some redistribution of resources to maximise the position of the worst-off'.<sup>471</sup>

The clinical literature reveals several different conceptions of justice, ranging from 'a simple metaprinciple',<sup>472</sup> to challenging power in institutions, to an exploration of privilege, to understandings of diversity. Some define it as 'the healthy human treating others as he or she would wish to be treated'.<sup>473</sup> This is a fairly limited, individually focused definition and does not

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<sup>470</sup> Pamela Edwards and Sheila Vance, 'Teaching Social Justice through Legal Writing' (2001) 7 *Legal Writing* 63, 70.

<sup>471</sup> Adrian Evans et al, *Australian Clinical Legal Education* (ANU Press, 2017) 98.

<sup>472</sup> David Barnhizer, 'The Justice Mission of American Law Schools' (1992) 40 *Cleveland State Law Review* 285, 291.

<sup>473</sup> *Ibid.*

deal with the institutional ways in which injustice continues. The concept is expanded further if the definition also discusses the role of clinics and clinical teachers as being that of 'speaking truth to power'.<sup>474</sup> In this chapter, the premise is that teaching about justice also requires an exploration of privilege<sup>475</sup> and identity and how these shape the law and the legal system. Through analysing concepts of ability and disability, or values and attitudes, privilege is explicitly a part of the analysis. Rather than law being used to reinforce existing power relations within society, it can be used to ensure the equality and dignity of all in the community in obtaining basic standards of living and the expression of individual and group identity. This definition includes people with disability as agents in the process for change. In order to ensure that this can occur, law students, lawyers and law teachers must develop their ability to reflect on their role in enacting ability and disability.

Clinical education enables 'transformative experiential opportunities for exploring the meaning of justice and developing a personal sense of justice, through exposure to the impact of the legal system on subordinated persons and groups and through the deconstruction of power and privilege in the law'.<sup>476</sup> The most important underlying principle in constructing a course around these issues is that people with disability are included actively in a clinical course, neatly encapsulated by Charlton as 'nothing about us, without us'.<sup>477</sup> This concept should permeate the entire course, through the readings, the class or seminar content, the work with individual clients, and any law reform or legal policy work. This is because frequently people with disability have not been included in the key decisions which shape their lives.

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<sup>474</sup> Ibid, 124–25.

<sup>475</sup> Jerold Auerbach, 'What Has the Teaching of Law to Do with Justice?' (1978) 53 *New York University Law Review* 457, cited in bell hooks, *Yearning: Race, Gender, and Cultural Politics* (Routledge Press, 1990).

<sup>476</sup> Jon Dubin, 'Clinical Design for Social Justice Imperatives' (1998) 51 *SMU Law Review* 1461.

<sup>477</sup> James I Charlton, *Nothing about Us without Us: Disability Oppression and Empowerment* (University of California Press, 1998).

## **A social rather than medical model of disability**

In the past and currently, many understandings of disability arise from a medical model. The medical model 'defines disability as an individual defect ... that must be cured or eliminated if the person is to achieve full capacity as a human being'.<sup>478</sup> The critical disability studies movement has been instrumental in shifting understandings of disability from a medical model to a social model.

The social model sees disability as a social construct. This model analyses disability as:

the result of the interaction between people living with impairments and an environment filled with physical, attitudinal, communication and social barriers. It therefore carries the implication that the physical, attitudinal, communication and social environment must change to enable people living with impairments to participate in society on an equal basis with others.<sup>479</sup>

There is widespread acceptance of a social model of disability,<sup>480</sup> as evidenced by its adoption within the Convention on the Rights of Persons with Disabilities.

The Convention recognises disability as 'an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others'.<sup>481</sup> The Convention adopts the social model of disability while also including a recognition of

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<sup>478</sup> Lynn Z Bloom, 'Bodies of Knowledge: Ethics and Engagement in an Undergraduate Disability Studies Course' (2014) 14 *Pedagogy: Critical Approaches to Teaching Literature, Language, Composition, and Culture* 179.

<sup>479</sup> Luisa Bustos, 'Award-Winning Actor, Filmmaker and Dancer with Disability, Daniel Monks to Lead "Evolution to Inclusion" Float', *People with Disability Australia* (Web Page, 2017) <<https://pwd.org.au/award-winning-actor-filmmaker-and-dancer-with-disability-daniel-monks-to-lead-evolution-to-inclusion-float/>>.

<sup>480</sup> Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1; Frances Gibson, 'The Convention on the Rights of Persons with Disabilities: The Response of the Clinic' (2011) 15 *International Journal of Clinical Legal Education* 11.

<sup>481</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), Preamble, para e.

impairment.<sup>482</sup> It recognises that all humanity is different in some way, or that difference is 'universal'.<sup>483</sup>

In courses taught within the broad stream of 'disability studies', teachers have discussed<sup>484</sup> the use of readings, including autobiographies,<sup>485</sup> as a way to teach students concepts of disability and what it is like to have a disability. These give students an insight into the lives of people with disability, from the perspective of those with a disability. Such teaching is imbued with the principle 'nothing about us without us'. Recent autobiographies 'are likely to be exemplars of contemporary disability studies theory, which interprets disability as "a socially constructed condition"'<sup>486</sup> rather than springing from a medical model.

Another method is to use a brief questionnaire<sup>487</sup> to assess what students understand by the term 'disability'. The questionnaire can be confidential and can serve as a means for students to begin realising what they know and do not know, and to explore concepts of disability. This provides a non-threatening way of entering into the theme of what disability means.

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<sup>482</sup> There are also critiques of critical disability studies. These critiques argue that there is an element of impairment in disability, in functioning, thinking or being, and that not to recognise this in some way is also negating of the experience of people with disability. Not only do people with disability experience exclusion, oppression and marginalisation due to discrimination, they also may have to deal with pain, fatigue or reduced functionality due to an impairment. This is one of the ways in which the experience of people with disability is distinct in that there is a corporeal element and aspect of the exclusion.

<sup>483</sup> Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1.

<sup>484</sup> Lynn Z Bloom, 'Bodies of Knowledge: Ethics and Engagement in an Undergraduate Disability Studies Course' (2014) 14 *Pedagogy: Critical Approaches to Teaching Literature, Language, Composition, and Culture* 179.

<sup>485</sup> Bloom refers to autobiographies by people such as 'John Hockenberry (1995; paraplegia), Georgina Kleege (1999; blindness – a counterpoint to Helen Keller's *The Story of My Life* [1903] ... Kay Jamison's analysis of bipolar disorder (1996), and Marisa Acocella Marchetto's graphic *Cancer Vixen* (2006), about her breast cancer discovery': Lynn Z Bloom, 'Bodies of Knowledge: Ethics and Engagement in an Undergraduate Disability Studies Course' (2014) 14 *Pedagogy: Critical Approaches to Teaching Literature, Language, Composition, and Culture* 179, 186.

<sup>486</sup> Lynn Z Bloom, 'Bodies of Knowledge: Ethics and Engagement in an Undergraduate Disability Studies Course' (2014) 14 *Pedagogy: Critical Approaches to Teaching Literature, Language, Composition, and Culture* 179, 196, quoting Cynthia G Franklin, *Academic Lives: Memoir, Cultural Theory, and the University Today* (University of Georgia Press, 2009) 303.

<sup>487</sup> Deirdre Heenan, 'Challenging Stereotypes Surrounding Disability and Promoting Anti-Oppressive Practice: Some Reflections on Teaching Social Work Students in Northern Ireland' (2005) 24 *Social Work Education: The International Journal* 495.

In the past, some courses have used simulations<sup>488</sup> as a method for teaching students an understanding of what it is like to have a disability. More recently, simulations have fallen out of use. They have been criticised<sup>489</sup> as not providing an understanding of disability and as focusing too strongly on the impairment nature of disability, rather than on a social definition of disability. Therefore, they can reinforce rather than dispel stereotypes and can encourage participants to feel pity for people with disability.

Another means of putting people with disability at the centre and deepening students' understandings of disability is to include within the class program a guest speaker who shares their experience of being a person with a disability. In the PUDH legal clinic, a member of the Chuhcan collective<sup>490</sup> is invited to share their experience of living with psycho-social disability. Students are encouraged to ask questions and discuss their ideas and views with this representative. The PUDH legal clinic also uses guest speakers to explore the models of disability. It brings speakers from a range of disciplines, such as doctors, social workers, psychologist and family welfare workers.

### **Language when talking about issues of disability**

Class discussion around the language which teachers and students should – and should not – use when talking about disability issues is a good way to explore some of the stereotypes and assumptions which people make around people with disability. Putting the person first,<sup>491</sup> and the disability second, is essential. This discussion forms an integral segment of an initial class on

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<sup>488</sup> James Herbert, 'Simulation as a Learning Method to Facilitate Disability Awareness' (2000) 23 *Journal of Experiential Education* 5.

<sup>489</sup> Priya Lalvani and Alicia Broderick, 'Institutionalized Ableism and the Misguided "Disability Awareness Day": Transformative Pedagogies for Teacher Education' (2013) 46 *Transformative Pedagogies for Teacher Education, Equity & Excellence in Education* 468.

<sup>490</sup> Colectivo Chuhcan, *Colectivo Chuhcan* (Website, 2011) <<http://colectivochuhcan.webnode.mx>>.

<sup>491</sup> Lynn Z Bloom, 'Bodies of Knowledge: Ethics and Engagement in an Undergraduate Disability Studies Course' (2014) 14 *Pedagogy: Critical Approaches to Teaching Literature, Language, Composition, and Culture* 179; Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1.

issues of disability. Students can be taught to use the language of 'person with disability', rather than 'disabled person'.<sup>492</sup> Putting the 'person' first, rather than the 'disability', emphasises the commonality between people. Using 'with disability' then demonstrates that the person could be 'with ability' or 'with disability', thus decentring the person with ability and implicitly critiquing an ableist perspective. One of the potentials when working with clients with disability is the opportunity to look at what it means to be 'able', as are many students.

In the United States context, teachers have found an assumption:

often made by nondisabled students, but sometimes by the disabled as well, that disabled persons just want to be treated like everyone else, therefore one should overlook and not mention their disability. ... [Yet] silence about disability most often works to preserve exclusion, requiring the disabled to assimilate to physical and social environments that remain unchanged and unchallenged, environments intended for others, not them.<sup>493</sup>

A discussion about why and how clinics ask clients if they have a disability is a useful introduction to how to discuss disability. This enables teachers and students to begin to analyse some of the judgement and stigma that can accompany being a person with a disability.

The role of stigma needs to be discussed, including what it is and where it comes from:

Stigma ... connotes a relationship ... vital to understanding the stigmatizing process. Stigma allows some individuals to feel superior to others. In order for the process to occur (for one person to stigmatize another and have the stigmatized person feel the effects of stigma), there must be some agreement that the differentness is inherently undesirable. Moreover, even among stigmatized people, relative comparisons are made, and people are reassured by the fact that there is someone else who is worse off. ... If stigma is a social construct, constructed by cultures, by social groups, and by individuals to designate some human

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<sup>492</sup> Sometimes people with disability prefer to be called 'consumers' of services, rather than clients or patients. Vilia Tarvydas et al, 'Collaborating with the Disability Rights Community: Co-Writing a Code of Ethics as a Vehicle for Ethics Education' (2012) 26 *Rehabilitation Education* 241. This reflects the resistance to the medical model of understanding disability and the importance of emphasising agency and decision-making with people with disability. While this is an interesting point to draw out, within a legal setting the use of the term 'client' to refer to all users of the service is likely to be adopted.

<sup>493</sup> James Wilson and Cynthia Lewiecki-Wilson, 'Constructing a Third Space: Disability Studies, the Teaching of English, and Institutional Transformation' in Sharon Snyder, Brenda Brueggemann and Rosemarie Garland-Thomson (eds), *Disability Studies: Enabling the Humanities* (Modern Language Association of America, 2002), quoted in Lynn Z Bloom, 'Bodies of Knowledge: Ethics and Engagement in an Undergraduate Disability Studies Course' (2014) 14 *Pedagogy: Critical Approaches to Teaching Literature, Language, Composition, and Culture* 179.

differences as discrediting, then the stigmatization process is indeed a powerful and pernicious social tool.<sup>494</sup>

The significance of this concept is vital in order for students to understand why they may feel some reticence about enquiring into a client's disability for the purposes of a client information sheet. Students may feel the stigma attached to having a disability and therefore, out of a desire to shield or protect the client in some way, they may resist asking about whether a client has a disability. Some clinics choose to ask in order to know whether they are providing accessible services or whether they need to tailor their services in any way to ensure accessibility for an individual client, and to measure whether they are meeting the legal needs of people with disability. But student reticence provides rich ground for exploring where disability comes from, whether in fact it is a societal construct of barriers, and how much actually relates to the impairment of a person. Concepts of stigma are particularly important when thinking about issues of people with mental health issues or psycho-social disability. Mental health is particularly misunderstood and subject to stereotypes.

In the context of clients with psycho-social disability, it is also essential to discuss which words to use. For example, 'person with schizophrenia' should be used, rather than 'schizophrenic'. Students and teachers should use 'client with bipolar disorder', rather than saying 'she's bipolar'. This demonstrates the importance of putting the person first, and then the disability. It is also important to discuss not using 'mad' or 'crazy' when discussing clients with psychiatric disability, and not using the term 'schizophrenic' to mean fractured or operating on two levels. This is a common colloquial usage and serves to perpetuate stereotypes about people with schizophrenia. Each of these discussions provides room to discuss language to use which is respectful and attempts not to perpetuate stereotypes.

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<sup>494</sup> Lerita M Coleman, 'Stigma: An Enigma Demystified' in Lennard J Davis (ed), *The Disability Studies Reader* (Routledge, 1997) 142–43, quoted in Lynn Z Bloom, 'Bodies of Knowledge: Ethics and Engagement in an Undergraduate Disability Studies Course' (2014) 14 *Pedagogy: Critical Approaches to Teaching Literature, Language, Composition, and Culture* 179.

## **Working with clients with psycho-social disability**

Working with clients with physical disability can be more straightforward for students, as the specific needs of these clients can be more apparent than those of clients with psycho-social disability. Working with clients who have psycho-social disability – such as bipolar disorder, depression, personality disorders, anxiety or post-traumatic stress disorder – can be particularly challenging. Relatively inexperienced students can become overwhelmed by the feelings and issues of the client and can find it difficult to draw clear boundaries between themselves and the client. It is important to teach students how to create these boundaries. For example, at KLC, students worked on a victims compensation case for a client who had been sexually abused as a child and who had been diagnosed with post-traumatic stress disorder and a personality disorder. The client was irregular in making and maintaining contact with the Centre and was also manipulative with students, asking them to do things which were not within their role. Some of the key learnings for students in working with this client were about setting appropriate boundaries and responding to unreasonable requests. The importance of multidisciplinary lawyering is another key skill taught to students when dealing with clients with psycho-social disability, as clients frequently have non-legal health issues.

Language use is particularly important for people with psycho-social disability. Students can easily fall into the habit of dismissing angry, aggressive or unreasonable clients as being 'mad'. This serves to perpetuate stereotypes of people with psycho-social disability. Distinguishing between angry and unreasonable clients and clients who have a psycho-social disability, and learning how to deal with them, is *essential*.

## **Adopting an empowerment or client-centred model**

It is also important to teach students the relevant skills and the ethical rules which will apply. There is a range of ethical issues which are particularly relevant, including the legal capacity of people with disability; the role of the lawyer and whether they are acting on instructions from, or in the best interests of, a client with disability; effectively communicating with a client with disability and taking instructions from them; who is the client when a client with a disability is

helped by a family member or friend; relationships of autonomy and dependence and how these impact on a client's decision-making; and constructing a narrative in litigation which does not reinforce ableist views.

## **Legal capacity**

In the Australian state of New South Wales, there is an assumption that a person has capacity to make legal decisions<sup>495</sup> and this governs how students deal with people with disability. There are specific guidelines<sup>496</sup> which lawyers and students can use to help them when working with clients whose capacity is unclear. At the PUDH legal clinic in Mexico, the ethical issues which commonly arise are around concepts of guardianship, how to work with clients who are subject to a guardianship order, and issues involving who is the client. Some of the challenges at the PUDH legal clinic are how to meld a more traditional domestic law which allows for the extensive use of 'guardianship' orders with people with disability,<sup>497</sup> and an international convention<sup>498</sup> which is progressive and empowering of people with disability.

## **Advocate or 'best interests'**

Some frame the options available to lawyers when representing clients with disability as falling into either being an 'advocate' for what the client wants once they have been given full advice, or acting 'in the best interests' of the client. 'When representing a client with a mental disability, the "advocate" approach is consistent with the requirement that the lawyer maintain a

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<sup>495</sup> 'Under common law you must presume that a person has the mental capacity (sometimes called sanity) to make all their own decisions': Law Society of New South Wales, 'When a Client's Mental Capacity Is in Doubt: A Practical Guide for Solicitors' (2016) <<https://www.lawsociety.com.au/sites/default/files/2018-03/Clients%20mental%20capacity.pdf>>.

<sup>496</sup> Ibid.

<sup>497</sup> Each of the 32 States of Mexico has its own Civil Code, which regulates guardianship and the obligations of a guardian. The provisions are substantially similar to each other, although they have some variation. Article 124 of the Mexican Constitution reserves for the States all rights which are not expressly conceded to the federation; therefore, this is an area covered by State law: Political Constitution of the United Mexican States 1917, Art 124.

<sup>498</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

“normal” lawyer–client relationship.’<sup>499</sup> While this can be challenging, it places the person with disability at the centre of the legal action and prevents a paternalistic approach. Clinical courses should discuss models of client representation explicitly when teaching these issues to students.

Students may be confronted by situations where elderly siblings have guardianship of a family member with an intellectual disability. In these situations, students and solicitors must engage in a discussion about ‘who is the client’, ‘what legal issues are present?’, ‘how to work in a multidisciplinary way with a family’, and ‘how to work with a client unable to give instructions’. These discussions about the range of ethical and practical issues arising from this case occur via email, in face-to-face discussions within the clinic, and in group meetings.

### **Who is the client?**

The discussion about whether a lawyer ‘acts on instructions’ from the client, or ‘in the best interests’ of the client, can also merge into a discussion about ‘who is the client’. If a student sees a family member/carer and a person with a disability together, it can be unclear whether the client is the person with a disability and the family member is there to support, or whether the family member is themselves the client. Knowing how to determine who is the client is an issue which is discussed in clinics working with clients with disability.

### **The nature of decisions**

With many clients who are disadvantaged, including those with disability, issues arise about the nature of the decisions they make. This is often something with which students struggle: clients make decisions with which students do not agree, or which students think are not the best options. This issue occurs among many clients. However, when the client is a person with a disability, there is also a history of not respecting the decisions of people with disability.

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<sup>499</sup> David Green, “‘I’m OK–You’re OK’: Educating Lawyers to “Maintain a Normal Client–Lawyer Relationship” with a Client with a Mental Disability’ (2003) 28 *Journal of the Legal Profession* 65, 82.

Therefore, there is more of a likelihood that a student and a lawyer could lapse into this paradigm. It is thus an interesting issue to explore.

The community clinic at KLC advises and represents many women who have experienced domestic violence. In some cases, women have been able to claim specific victims compensation as they commonly experience post-traumatic stress disorder. An aspect of the victims support scheme in New South Wales is that if an applicant is successful in claiming victims compensation, the Civil and Administrative Tribunal will attempt to recover this money from the perpetrator of the violence.<sup>500</sup> When women are advised of this, some decide not to apply for compensation. This is because they are fearful of possible reprisals when the perpetrator is notified that the victim has received financial compensation. For students working with victims of domestic violence who have post-traumatic stress disorder and/or depression and anxiety, these decisions can be hard to understand and accept.

Ethical issues which focus on the client making decisions for themselves and being at the centre of their legal case are paramount. This also demonstrates the intersection between feminist theory (women victims of violence taking control of their lives) and the need to respect the decision-making of people with disability.

### **Relationships of autonomy and dependence**

One of the insights which it is useful to keep in mind is that all people live in relationships which combine autonomy and dependence. People with disability also live in relationships and they may choose to make decisions which focus on maintaining those relationships.<sup>501</sup> This may mean that they choose not to assert their legal rights in a particular situation, as it may harm an

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<sup>500</sup> The Scheme is established by the Victims Rights and Support Act 2013 (NSW). Section 59 of the Act enables the Commissioner to recover money from convicted offenders.

<sup>501</sup> Robert D Dinerstein, "“Every Picture Tells a Story, Don’t It?”: The Complex Role of Narratives in Disability Cases’ (2007) 15(1) *Narrative* 40, 56.

important relationship.<sup>502</sup> Or, as discussed above, they may choose not to pursue a legal remedy out of fear, or because they want to maintain separation from others who have harmed them in the past.

### **Constructing a case which does not reinforce ableist views**

There is also the issue of what the narrative<sup>503</sup> will be if a case is going to hearing, and how to shape a narrative which a court is likely to find compelling while balancing this with a version of what happened that fits with the client's vision. How to construct a case which has the best chance of success is always a live issue, but when the case is of a client with a disability this has the potential to be more complex in order to avoid reinforcing ableist views.

### **Communicating effectively with clients**

Communicating effectively with clients is an essential skill to teach future lawyers: 'Lawyers must actually listen to their clients and struggle to find out what they want. Even more so than with mentally typical clients, they must communicate clearly, in language and concepts that people with disabilities understand.'<sup>504</sup> Teaching clear, simple communication is vital for work with all clients, but perhaps even more so when students are working with clients with intellectual disability.

Understanding the appropriate way to take instructions from a client with limited communication skills is important. Students who have a client who communicates through facial expressions will commonly need to research the ethical issues around taking instructions from someone with a disability. They will also need to research effective communication techniques which satisfy the ethical requirements that someone understands the advice they receive and is

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<sup>502</sup> Parker and Evans would describe this as an ethical framework of 'ethics of care' which prioritises the relationships rather than pursuing strict legal rights or other decision-making frameworks: Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2014).

<sup>503</sup> Robert D Dinerstein, "'Every Picture Tells a Story, Don't It?': The Complex Role of Narratives in Disability Cases' (2007) 15(1) *Narrative* 40.

<sup>504</sup> *Ibid*, 53.

able to give instructions. Each person must be assessed individually by the student and the solicitor for their ability to understand and to give legal authority to a trusted person to 'stand in their shoes' when making important decisions. Students must develop highly honed interviewing skills and ethical judgement. They must demonstrate a thorough understanding of the law surrounding powers of attorney.

### **Linking between sexism, ableism, racism and homophobia**

Within a clinic which teaches about disability issues, and which articulates one of its goals as developing students' awareness of the limitations of law to achieve justice for people with disability, there is potential to draw on various bodies of theory to prepare students for their work. There is first the body of feminist theory around intersectionality<sup>505</sup> and the significance of complex forms of discrimination and use of power. This discussion enables students and teachers to understand that discrimination occurs in complex ways when people have complex identities. Intersectionality demonstrates that being a black man with a disability does not mean that the person's experience of discrimination is 'being black' and 'with a disability' added together. Rather, the experience is distinct and complex. A woman with an intellectual disability may experience specific issues relating to her gender and disability which the theory of intersectionality may help the student to understand. A student who understands some of this theory may be better able to understand and therefore represent a client who has, for example, been sexually abused by a carer.

Students often unwittingly reinforce existing norms and stereotypes. Butler's concept of performativity can be a useful tool helping students realise this. When she describes gender, she argues that it 'is not a stable or essential characteristic of persons but, rather, a repeated

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<sup>505</sup> Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 140 *University of Chicago Legal Forum* 139; Anna Carastathis, 'The Concept of Intersectionality in Feminist Theory' (2014) 9 *Philosophy Compass* 304; Cherríe Moraga and Gloria Anzaldúa (eds), *This Bridge Called My Back: Writings by Radical Women of Color* (Kitchen Table/Women of Color Press, 1983); Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (Routledge, 2001).

social performance contingent upon dominant social norms and their concomitant regulatory force. Performativity, it must be underscored, is not voluntaristic but is a “forced reiteration of norms” which brings into being or enacts gender identity upon the body’.<sup>506</sup> It is the repetition of acts which then creates gender. Her work can help students understand their role in reinforcing existing norms and stereotypes and begin to explore their potential to change this. If students are able to analyse their own behaviour from a gender perspective – thinking about how they replicate gender norms in what they think, say and do – then they may also be able to use this to think about their ability/disability. It provides one theoretical tool for thinking about how ability is created as a concept between them and the client.

Drawing on these bodies of theory, there is the potential to connect the experiences of people with disability and the perpetuation of ableism with other forms of exclusion and privileging. It is challenging to teach some of this material to show students that they are “unavoidably part of something that is doing something to [them], through [them], for [them], as [them]” and that what is being done may not be attributable to any intention or choice that [they] may have’.<sup>507</sup> Many students have great good will and a commitment to concepts of social justice, but may not have a deeper understanding of the structural systems which perpetuate injustice and discrimination. People may sometimes resist change and may prefer not to learn things which tell them that they too practise oppression.<sup>508</sup> It will therefore be important to emphasise that ‘good’ lawyers can still perpetuate ableism and other forms of injustice. They may have unwittingly continued to ‘perform’ gender and ability but, once they are aware of these constructs, it is their responsibility to begin to critique their own thoughts and actions.

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<sup>506</sup> Barbara Applebaum, ‘Social Justice Education, Moral Agency, and the Subject of Resistance’ (2004) 54 *Educational Theory* 59, 63–64, quoting Judith Butler, *Bodies That Matter: On the Discursive Limits of ‘Sex’* (Routledge, 1993) 94.

<sup>507</sup> Barbara Applebaum, ‘Social Justice Education, Moral Agency, and the Subject of Resistance’ (2004) 54 *Educational Theory* 59, 61, quoting Dwight Boyd, ‘The Place of Locating Oneself(ves)/Myself(ves) in Doing Philosophy of Education’ in Susan Laird (ed), *Philosophy of Education* (Philosophy of Education Society, 1997).

<sup>508</sup> Kevin Kumashiro, ‘Against Repetition: Addressing Resistance to Anti-Oppressive Change in the Practices of Learning, Teaching, Supervising, and Researching’ (2002) 72 *Harvard Educational Review* 67.

In the same way that gender is 'performed', a similar argument can be made about being 'able'. Every time a student interviews a client, analyses a client's case, researches the law, and develops legal advice for a client, that student's understandings of the client's disability, their life choices and possibilities, and their potential for action and decision-making will be significant characteristics influencing each of these steps. Gender and disability, along with other factors, will be 'performed' within these student–client interactions. Framing this as 'performativity' may assist students in extracting their own moral culpability from their client relations and work, while still challenging them to not perpetuate injustice. 'Students' learning things that question their knowledge and identities can be emotionally upsetting.'<sup>509</sup> This reinforces the need for reflection time and discussion about the impact of the learning process on each student.

Another lens through which to see ableism and disability in order to connect the various forms of oppression is to think about why these issues are framed as 'binaries'. For example, white/black, able/with disability, male/female, and gay/straight. The 'other' or 'deviant' is created by being not the dominant group. Gender politics is interesting for what it can contribute to this discussion and its critique of the limited nature of binaries for shaping how we think. Similarly, queer theory,<sup>510</sup> which challenges the binary of male/female and gay or lesbian/heterosexual, creates the category of 'queer'. Queer theory is concerned with going beyond identity politics and deconstructing the link between sex, gender and desire. It challenges the binaries of male/female and heterosexual/homosexual. Building on the work of Butler, queer theory questions the fixed nature of each of these categories. 'Queer' 'describes a horizon of possibility whose precise extent and heterogeneous scope cannot in principle be delimited in advance'.<sup>511</sup> In the same way, the fixed nature of ability/disability as a category and as a binary can also be questioned through this theoretical lens. Ability and disability can then

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<sup>509</sup> Ibid.

<sup>510</sup> Teresa de Lauretis (ed), 'Queer Theory: Lesbian and Gay Sexualities' (1991) 3 *Differences: A Journal of Feminist Cultural Studies* iii (special issue); Lee Eldeman, 'Queer Theory: Unstating Desire' (1995) 2 *GLQ: A Journal of Lesbian and Gay Studies* 343; Annamarie Jagose, *Queer Theory: An Introduction* (New York University Press, 1996).

<sup>511</sup> David Halperin, *Saint Foucault: Towards a Gay Hagiography* (Oxford University Press, 1995).

be placed along a continuum, rather than a dichotomous model. Seeing disability as a social construction also enables students to connect this with gender as a social construct.

The assumption of 'sameness' in law, or 'objectivity', can be difficult as it assumes that all can fit into the existing pattern. In this way, some connections can be drawn between the experience of women and the experience of people with disability. For example, a teacher may discuss how the law of tort, which predominantly recognises economic loss, disadvantages those who are not in paid work. Women with caring responsibilities, as well as people with disability who do not engage in paid work, do not have their loss recognised.<sup>512</sup> These examples demonstrate the non-'objective' nature of law. The clinic enables a grounded approach to discussing some of these critiques of law and its objectivity.

Within the clinics at KLC and the PUDH, the practice of deconstructing ableism most frequently occurs in interactions with clients. For example, in the PUDH legal clinic, students dealt with a client who resided in an assisted living hostel and was able to make decisions about his life with the support of his family. This client was keen to take on a larger role in decision-making in his life. Students were challenged to question their own assumptions about his ability to live independently and the barriers he might face. Their assumptions around either 'completely independent living' or 'completely dependent living' were questioned. These models might fit some people, but they do not fit the lives of many people with intellectual or psycho-social disability. The construct of ways of living and decision-making was then challenged. Students and clinical teachers discussed these concepts within the seminar program, analysing their thoughts after visiting the hostel.

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<sup>512</sup> Okianer Christian Dark, 'Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching' (1996) 32 *Willamette Law Review* 541.

## Reflection skills

All clinical courses attempt to develop some skills in their students. These include reflection skills, which are a key element of clinical legal education.<sup>513</sup> Other law courses within a law degree may also have as one of their learning objectives 'demonstrating reflection skills'. However, if a clinic is teaching students about some aspect of justice and the law, developing students' reflection skills is essential within that clinical course.

Reflection can include reflection on the student's own actions and rationales and an ability to change their analysing consciously. It can also include reflection on the client's situation, the law and the legal system. In clinical courses in Australia, there is frequently some content which focuses on how the law and the legal system function.<sup>514</sup> In order to teach reflection skills, there should be a classroom component and some mechanism for teaching students about the importance of reflection. Sometimes this will be taught through formal class content and readings on what reflection is, why it is important, and some of the key theories<sup>515</sup> around it.

If the clinic works with disadvantaged clients, students must understand some of the barriers which these clients face. Generally, this is achieved through students working directly with clients and communities, and through supervisors debriefing students after their client interactions.<sup>516</sup> Group reflection is another mechanism for ensuring that students share their perceptions and experiences. Frequently, these issues are discussed within the classroom

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<sup>513</sup> Roy Stuckey et al, *Best Practices for Legal Education: A Vision and a Road Map* (Clinical Legal Education Association, 2007); Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013).

<sup>514</sup> Because of the longstanding and historical connection between community legal centres and clinical programs in Australia, a deeper analysis of how the legal system functions to exclude disadvantaged people is an intrinsic element of most clinical courses in Australia. Mary Anne Noone, 'Australian Community Legal Centres – the University Connection' in Jeremy Cooper and Louise Trubek (eds), *Educating for Justice: Social Values and Legal Education* (Ashgate, 1997); Anna Cody, 'Clinical Programs in Community Legal Centres, the Australian Approach' (2011) 4 *Spanish Journal Education and Law Review* 1.

<sup>515</sup> Courses at KLC use readings from John Dewey, *How We Think* (Heath & Co, 1933); David Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (Prentice Hall, 1984); and Donald Schön, 'Educating the Reflective Practitioner' (1995) 2 *Clinical Law Review* 231, in order to teach students about reflection.

<sup>516</sup> Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013).

component of the clinical course. Many clinics also use reflective journals<sup>517</sup> to encourage reflection. Some discuss using the 'disorienting moment'<sup>518</sup> as an opportunity for huge learning; others call it the 'alterable moment'<sup>519</sup> or 'teaching in crisis'.<sup>520</sup> The disorienting moment is that moment when a student is faced with a situation with which they are unfamiliar. The student may be unsure of how to deal with that moment. For the student, it can be an overwhelming and challenging moment when their ways of looking at the world, the law, and the legal system are called into question. It is also has the potential to be a moment of great learning. It begins, for example, with the client interaction and then, through the reflection process, its meaning becomes apparent. The moment occurs in a real-life interaction with the client, or in the student's engagement with a law reform process, or in the practice of the student presenting a street law workshop. The student then has the opportunity to try to understand why their previous views or knowledge do not apply and can begin to work towards new understandings, perceptions and ways of being a lawyer. That process happens through reflection.

For the teacher, the challenge is to sensitively and effectively guide the student at that point, so that they may enter new ways of looking at the world and perceiving situations.<sup>521</sup> It is also important that students are not completely overwhelmed and that they are supported through the learning process. The teacher's role involves listening and reflecting back to the student

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<sup>517</sup> Georgina Ledvinka, 'Reflection and Assessment in Clinical Legal Education: Do You See What I See?' (2006) 9 *International Journal of Clinical Legal Education* 29; Timothy Casey, 'Reflective Practice in Legal Education: The Stages of Reflection' (2014) 20 *Clinical Law Review* 317; Rachel Spencer, 'Holding up the Mirror: A Theoretical and Practical Analysis of the Role of Reflection in Clinical Legal Education' (2014) 18 *International Journal of Clinical Legal Education* 181.

<sup>518</sup> Fran Quigley, 'Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics' (1995) 2 *Clinical Law Review* 37.

<sup>519</sup> Lynn Z Bloom, 'Bodies of Knowledge: Ethics and Engagement in an Undergraduate Disability Studies Course' (2014) 14 *Pedagogy: Critical Approaches to Teaching Literature, Language, Composition, and Culture* 179.

<sup>520</sup> This is seen by clinic teachers as a key moment in the student's learning.

<sup>521</sup> Atul Gawande, *Complications: A Surgeon's Notes on an Imperfect Science* (St Martin's Press, 2002) 251: a surgeon says, of his own work, 'the fragile but crystalline opportunity for one's know-how, ability, or just gut instinct to change the course of another's life for the better', quoted in Lynn Z Bloom, 'Bodies of Knowledge: Ethics and Engagement in an Undergraduate Disability Studies Course' (2014) 14 *Pedagogy: Critical Approaches to Teaching Literature, Language, Composition, and Culture* 179; Kevin Kumashiro, 'Against Repetition: Addressing Resistance to Anti-Oppressive Change in the Practices of Learning, Teaching, Supervising, and Researching' (2002) 72 *Harvard Educational Review* 67.

what the student is seeing, observing and feeling in order to guide the student to new insights. The role is a facilitation role. When clinics work with clients with disability, there will be many of these moments which provide the opportunity to challenge how students think about ability/disability, their role, and the role of lawyers. Teachers will frequently be looking for these opportunities, as they provide great learning potential. They may also ensure that students have the chance to participate in individual client interviews, or community meetings, or visits to institutions or refuges, which frequently enable student learning. These opportunities enable students to think more deeply about the law, their own role within it, and how disadvantaged communities are served by the legal system.

### **Modelling reflective practice**

Clinical teachers can model the process of self-reflection by questioning their own ableism, racism and sexism within the supervision process and in formal class time. After students work with clients, clinical teachers should debrief them on what strategies and communication techniques they used with clients, and how these worked or did not work. In this way, supervisors model the self-critique and reflection in which they want students to engage.<sup>522</sup> Clinical supervisors must be conscious of how they teach and the lessons they give to students, both intentionally and unintentionally. For example, a supervisor may be able to discuss with a student a particular phone interaction with a client who has a psycho-social disability and the struggle they both face in placing appropriate limits on how much time to dedicate to a client, and yet make accommodations for a client who is feeling very anxious. By demonstrating an openness to discussing a teacher's own limitations, students may be encouraged to examine their own conscious and unconscious limitations.

When working with students, this involves leading them to realise that 'disablement' is a common part of human experience and a part of shared humanity. One challenge is to

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<sup>522</sup> Kevin Kumashiro, 'Against Repetition: Addressing Resistance to Anti-Oppressive Change in the Practices of Learning, Teaching, Supervising, and Researching' (2002) 72 *Harvard Educational Review* 67, 83.

recognise – particularly in a solicitor–client relationship – that there is already a power relationship. The clinical teacher and student must therefore interrogate how to ensure that working with clients with disability does not reinforce ableist patterns of thinking and lawyering.

### **Policy questions within justice issues**

If a clinic deals only with individual clients, it will need to discuss broader systemic issues in the classroom component or debriefs in order to teach about justice. A clinic may examine the impact of laws, procedures and policies on individuals, but, if an issue is recurrent or entrenched, then it will be insufficient to analyse it only on an individual basis. The cases of each individual client will frequently raise systemic issues and policy concerns. The reasons why a client must deal with particular problems will need to be addressed in any clinic, along with how, and particularly where, it relates to disability issues.<sup>523</sup> For example, the repeated exclusion of children with disability from the mainstream education system is a systemic issue. It has ramifications on individuals, but also on how the State provides education to all children. Systems which reproduce inequality will need to be examined within a justice-orientated clinic. It is ultimately disillusioning for students to advise and represent numerous clients who experience the same or similar issues which are caused by a systemic failing. Because of the nature of the social model of understanding disability – which recognises that society fails to include and encourage people with a range of abilities – the broader systemic issues will need to be addressed.

For example, it would be a logical development for a clinic to decide to take on cases which challenge the automatic use of legal ‘guardianship’ for many people with disability, regardless of their ability to make decisions for themselves.<sup>524</sup> Ideally, taking on a systemic case has greater

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<sup>523</sup> Heather Hackman, ‘Five Essential Components of Social Justice Education’ (2006) 38 *Equity & Excellence in Education* 103, 104, quoted in Priya Lalvani and Alicia Broderick, ‘Institutionalized Ableism and the Misguided “Disability Awareness Day”: Transformative Pedagogies for Teacher Education’ (2013) 46 *Transformative Pedagogies for Teacher Education, Equity & Excellence in Education* 468.

<sup>524</sup> The PUDH legal clinic litigated cases around the use of ‘guardianship’ during 2014–15.

impact, as individual clients no longer need to seek help once the systemic problem has been resolved. It is an effective and economic use of the limited resources of the clinic. A further example may be a clinic deciding to take on a case with systemic aspects, such as alterations to public housing stock which will enable a person with a disability to live there.<sup>525</sup> Bringing a legal action against a public entity can be very resource intensive, as the housing provider is a powerful agent within the provision of public housing more broadly. But any change has the potential to be wide reaching. Involving students in the process of deciding which cases to take on ensures that they too can weigh up the value of challenging social inequality, as well as the resources involved in doing so. Or a clinic may decide to take on a case in which a client with a disability instructs the clinic that they want to live outside of an institution and in the community. This type of case involves challenging a range of organisations and institutions about the ability of people with disability to live independently when they are provided with appropriate support.<sup>526</sup>

While a clinic may only represent individuals, it would fail in its justice objective if it did not discuss the broader systemic issues which arise out of the individual cases. Any clinic which aims to teach students about justice must therefore deal with systemic policy issues in some form.

## **Conclusion**

Designing a clinic which incorporates and addresses disability issues is a challenging and exciting project. In a clinic teaching disability rights, the key development feature must be the centrality to that project of people with disability. The exploration of concepts of disability and ability through theory is also a part of the project. Butler and other theorists within the critical disability studies movement have much to contribute when designing a course in which students will examine their own values, attitudes, ability and disability. A discussion about the

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<sup>525</sup> Kingsford Legal Centre litigated cases during 2015 against public housing providers around the need to make timely alterations to adjust housing stock to suit clients with disability.

<sup>526</sup> Several of the cases being litigated at the PUDH legal clinic throughout 2014–15 focused on clients with disability beginning the process of de-institutionalisation.

language to use is a good way to begin unpacking concepts of disability and ability. Additionally, students will be taught how to perceive clients and relate to them. Teaching specific skills about working with clients with disability, including which ethical rules and frameworks to apply, will be vital to developing a high-quality clinic. Readings, such as autobiographies, or questionnaire-type exercises are useful for providing students with an insight into the perspectives of people with disability. Providing sufficient time within class, debriefs and reflections for students to analyse their experiences and thoughts is essential. In any clinic teaching about justice and the law, reflection skills will be vital. Analysing some of the policy and systemic issues underlying client issues will be another essential characteristic of all clinics teaching about justice. Within clinical legal education, issues of race and gender have been explored. Clinics have focused on the issues specifically impacting on African Americans, such as the death penalty in the United States, or domestic violence affecting women. Understanding and working with clients with disability has not been as widely analysed. And yet, with over 18% of the population<sup>527</sup> having a disability and this being a constant focus within legal work, the complex issues faced by people with disability are intrinsic to any concept of achieving justice. Law students can be key agents in this project by ensuring that they learn how to work with people with disability in order to construct a more just society.

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<sup>527</sup> Australian Bureau of Statistics, 'Survey of Disability, Ageing and Carers 2012' (Web Page, 2012) <<https://agedcare.health.gov.au/tools-and-resources/ageing-and-aged-care-research-and-statistics/general-ageing-and-aged-care/survey-of-disability-ageing-and-carers-2012>>.

## **Chapter 9:**

### **Findings of the thesis and conclusion**

I began this thesis with questions arising out of the role of legal education to create reflective and justice-focused lawyers. Having worked in legal education for over 20 years, I had seen the energising potential of legal education to build on students' desire to improve society through law, making the law and the legal system fairer. I had also seen legal education fail to enliven students' commitment to improve the justice system. My engagement in clinical legal education, as one methodology for teaching law, drew me into a process of reflection on how and what role clinical legal education could play in deepening and growing students' capacity for reflection and focus on justice. I was keen to explore how including a clinical component within an applied legal ethics course could shape students' reflective ability and focus and their commitment to justice. I knew reflection skills were at the centre of students' capacity to contribute to the justice system, but the connections with a developing ethical sensibility were not clearly explained. This led to an exploration of self in lawyering and the combination of identity, values, attributes, skills and emotion. I explored this more deeply through an examination of one aspect of identity – ability/disability – as taught to students in two different clinics.

In this conclusion, I will draw together and summarise my findings throughout the thesis, arranged around the three research questions which I sought to answer. Chapter 1 set out these three questions, which were:

- 1. Can teaching students how to reflect enable them to fulfil their ethical duty to contribute to the justice system?**
- 2. Can incorporating a clinical component within an applied legal ethics course be an effective way of teaching students about their responsibility to make law fairer and to be reflective, justice-focused lawyers?**

**3. Why is it important to teach students to examine concepts of identity, power and privilege in order that they become reflective, justice-focused lawyers?**

My research has demonstrated that these questions are interconnected.

In line with these questions, in chapter I brought together some of the key themes of this thesis. Drawing on practice (both practice of law and practice of teaching), the thesis has shown how a focus on justice can – and should – be included in clinical legal education. Across all the research questions are the connecting themes of the significance of teaching students how to reflect; students' future ethical duty to contribute to justice; and concepts of professionalism, the rule of law, and model codes of conduct. Rather than separating 'skills' and 'justice', I have drawn the interconnection between skills and justice teaching. I have also developed a rich and complex understanding of 'justice', drawing on students' identity, privilege and power, as well as their understandings of themselves as ethical lawyers. Further, in teaching students how to work with clients with disability, I have shown why their own identity must be examined, along with their attributes and values. Students' understandings of ethics and themselves as ethical lawyers are also involved when discussing how clinical legal education can contribute to forming reflective, justice-focused lawyers. Concepts of identity and diversity are central to understanding self within the practice of law.

This concluding chapter connects the existing debates as highlighted in chapter 2, the literature review of this thesis, with the findings of this thesis.

In this chapter, I bring together the various strands of the thesis in chapters 4–8 to answer the overarching research question. For each research question, the relevant findings are stated as a heading with discussion of that finding underneath. In this first section of chapter 9, I discuss the role of teaching students reflection skills and I summarise the findings of the thesis in light of the literature on reflection. In this way, I answer the question around the role of teaching reflection skills through clinical legal education to create reflective, justice-focused lawyers who can fulfil their ethical duty to contribute to the justice system.

## **Question 1: Can teaching students how to reflect enable them to fulfil their ethical duty to contribute to the justice system?**

What is reflection within a clinical legal education model? What role does reflection play within clinical legal education and which methodologies are effective for teaching reflection? Why is reflection important? How does teaching reflection through a clinical legal education methodology contribute to developing reflective, justice-focused lawyers?

### **Reflection leads to the fulfilment of lawyers' ethical duty to contribute to justice**

Chapter 4 examines what reflection is. It draws from a range of disciplines, discusses different methods for teaching reflection skills, and analyses how learning to reflect enables students to fulfil their ethical duty to contribute to justice. In many model codes of professional conduct, lawyers have an ethical duty to contribute to the justice system. This extends to ensuring that law is accessible to all and operates fairly and equally. Furthermore, concepts of professionalism and the rule of law include a responsibility of lawyers to work towards justice and access to justice. In order to achieve this, lawyers need to learn reflective skills. Lawyers can reflect on clients, the law and the legal system – including whether it operates to benefit all equally. In Australia, within every clinical course, there is some content which focuses on how the law and the legal system function. Reflection skills have been defined as ‘the integration of calculative and contemplative thinking – transformation of thinking into learning’.<sup>528</sup> They enable lawyers to understand and improve the justice system and thus fulfil their ethical duty.

Reflection allows students to learn how to keep learning. They also learn to question what they see of the law around them, and their role within it. Knowing how to reflect on the law and the legal system provides a means for future lawyers to critique it and contribute to its improvement.

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<sup>528</sup> Wanda Pierson, ‘Reflection and Nurse Education’ (1998) 27 *Journal of Advanced Nursing* 165, 165–70, cited in Rachel Spencer, ‘Holding up the Mirror: A Theoretical and Practical Analysis of the Role of Reflection in Clinical Legal Education’ (2014) 18 *International Journal of Clinical Legal Education* 181.

Students also learn to self-reflect on their identity and relationships of power. This is significant in a lawyering role, where power operates in a complex way. Future lawyers must be able to recognise how their identity will inform and influence their relationships within the law. Reflection can include reflection on the student's own values, actions and rationales and can lead to improvement in how they deal with the client and complete legal work. It requires students to question themselves, their values, and what they think, feel and do:<sup>529</sup>

Reflection involves exploration of our thoughts and actions in order to better understand the assumptions, values and ethical frameworks we may be using both consciously and (often more importantly) unconsciously. Reflection also describes the process of evaluating elements of the self, the task and the environment with regard to their impact on practice, with the aim of guiding effective decision-making and action.<sup>530</sup>

They need to reflect in order to be able to contribute effectively to the justice system, thus fulfilling their ethical duty. This is discussed at length in chapters 4 and 8.

### **Reflection enables students to understand 'disorienting moments'**

Disorienting moments are moments where a student practitioner or lawyer is faced with a situation which they find hard to understand. Their prior learning and experience are insufficient to help them understand the meaning behind what is happening. In these disorienting moments, the student or lawyer is drawn into new or more layered understandings of a client's life, the operation of the law, and the complexity of relationships. It is a crucial moment to gain new insight. During or after these moments, reflection is essential in order to

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<sup>529</sup> William Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Foundation for the Advancement of Teaching, 2007); Carrie Menkel-Meadow, 'Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report – Of Skills, Legal Science and Being a Human Being' (1994) 69 *Washington Law Review* 593; Julian Webb, 'Inventing the Good: A Prospectus for Clinical Education and the Teaching of Legal Ethics in England' (1996) 30(3) *The Law Teacher* 270; Donald Nicolson, 'Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice' (2013) 16(1) *Legal Ethics* 36; Verna E Monson and Neil W Hamilton, 'Ethical Professional (Trans)Formation: Early Career Lawyers Make Sense of Professionalism' (2011) 8 *University of St. Thomas Law Journal* 129; Mary Anne Noone and Judith Dickson, 'Teaching towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers' (2001) 4(2) *Legal Ethics* 127.

<sup>530</sup> Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013) 48. See also William H Simon, 'Thinking Like a Lawyer about Ethical Questions' (1998) 27 *Hofstra Law Review* 1.

make sense of the experience. Indeed, one of the reasons that a moment is ‘disorienting’ is that it provides the student with an opportunity to question previously held values and beliefs – about not only the law and the legal system, but also their own values and attitudes. Reflection provides a means to unpack the disorienting nature of the experience.

For example, a student may encounter a situation where a client with disability is treated by doctors with indifference and receives inadequate medical treatment, leading to a worsening health situation for the client. The student, with the clinical supervisor, will reflect on why doctors and hospitals treat a client with a disability as being less worthy of thorough and attentive medical attention than a client without a disability. Reflecting on how the law can respond to this situation is one aspect of thinking about the client’s needs and the student’s role as legal representative. Reflection is therefore the means or skill which a student uses to reach deeper understandings of what justice might look like and how it can be experienced by clients within the legal system. This ability to understand how law functions is part of the ethical duty of a lawyer so that they can contribute to the justice system and work towards its improvement.

### **Clinical legal education is a good method for teaching reflection**

Clinical legal education provides students with real-life experience of legal practice. In order to instil in students the practice of reflection, they need to learn it as they practise law. Reflection skills are a key element of clinical legal education.<sup>531</sup>

Chapter 2 identified a range of theories on reflection and their connection with teaching ethics and ethical decision-making. Schön<sup>532</sup> refers to ‘reflection-in-action’ and ‘reflection-on-action’, which can help to make sense of and resolve the messy and indeterminate problems that legal practice reveals. This theory is a useful one for clinical legal education, as students engage in the messiness of legal practice and, as discussed in this thesis, interview clients and work on

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<sup>531</sup> Roy Stuckey et al, *Best Practices for Legal Education: A Vision and a Road Map* (Clinical Legal Education Association, 2007); Adrian Evans et al, ‘Best Practices: Australian Clinical Legal Education’ (Office for Learning and Teaching, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013).

<sup>532</sup> Donald Schön, ‘Educating the Reflective Practitioner’ (1995) 2 *Clinical Law Review* 231.

individual client cases. Students need to reflect on their experience in order to make sense of the law and the legal system and to be able to contribute to it. Through reflection, they come to identify the ethical course of action and how they can contribute to making the law and the legal system fairer. This research includes concepts of a ‘growth mindset’, which characterises humanity’s capacity as always changing. This theory recognises our constantly growing ability to learn and improve. In clinical legal education, these concepts of intelligence and deeper learning have the potential to increase students’ understanding of issues of justice and their own ethical duty to work towards its achievement.

In chapter 4, the methods of teaching reflection skills within a clinic are discussed with specific examples of the importance of using individual one-to-one debriefs, as well as peer-to-peer methodologies. Clinical supervisor debriefings of students (after client work) on what strategies and communication techniques they used with clients, and how these worked or did not work, are particularly valuable. In this way, supervisors model the self-critique and reflection which they want students to engage in. Modelling of reflection by supervisors is a key method for teaching students how to reflect. Classes and smaller tutorials are effective methods for engaging students in more structured reflection. These can be useful, for example, in analysing identity and the role of power in constructing legal narratives. Reflection skills are taught through formal class content and readings on what reflection is, why it is important, and some of the key theories<sup>533</sup> around it.

The sharing of reflective journal pieces is another way of encouraging peer-to-peer learning. Self-assessments and face-to-face meetings are also methods with clear benefits in teaching reflection skills. Learning to reflect is the basis of the clinical method, as otherwise legal practice can merely be the doing. In order for lawyers to be able to fully contribute to the justice system,

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<sup>533</sup> Courses at Kingsford Legal Centre use readings from Dewey (John Dewey, *How We Think* (Heath & Co, 1933)), Kolb (David Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (Prentice Hall, 1984)) and Schön (Donald Schön, ‘Educating the Reflective Practitioner’ (1995) 2 *Clinical Law Review* 231) in order to teach students about reflection.

they need to be able to understand and critique it, as well as their own role within it. Reflection skills, learnt through a clinical legal education course or component, help them to do that.

### **Clinical legal education enables integration of values, attributes, identity and thinking as understanding of ethical duties**

In the process of students learning how to reflect, they realise that the process of being a lawyer does not require them to divorce themselves from their legal work. Indeed, their values, identity and attributes all contribute to the ways in which they lawyer. One method of reflection<sup>534</sup> provides a structured process, starting with asking students to reflect on their performance in relation to a 'reasonably competent' practitioner and gradually adding further elements to the reflection process. This process of learning reflection through thinking about a 'reasonably competent' practitioner then develops so that the student can examine the decisions and choices which a student lawyer makes. This approach provides a way of thinking about lawyering performance. Within a justice context, it provides a way of teaching students to become better lawyers who are aware of how bias, attitudes, societal values and entrenched power relations can influence their lawyering.

### **Reflection includes emotion, both as a trigger and within the process**

Another benefit of learning reflection skills, particularly in relation to justice issues, is that 'the skills inherent in the act of reflection provide a vehicle for students to engage in a paradigm shift, from passive recipients of information to active learners who ask questions, view information critically and use emotional intelligence'.<sup>535</sup> These skills of reflection enable the student to become a lawyer who can fulfil their ethical duty to contribute to the justice system

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<sup>534</sup> Timothy Casey, 'Reflective Practice in Legal Education: The Stages of Reflection' (2014) 20 *Clinical Law Review* 317.

<sup>535</sup> Rachel Spencer, 'Holding up the Mirror: A Theoretical and Practical Analysis of the Role of Reflection in Clinical Legal Education' (2014) 18 *International Journal of Clinical Legal Education* 181.

as they will critique what they see and how law is practised. Reflecting can allow students to integrate the various aspects of values, attributes, thinking and emotion.<sup>536</sup>

Reflection allows students to explore the concepts of diversity and privilege and how these may, or may not, shape the specific ways of being a lawyer within the legal system. Examining these aspects of self also enables students to connect their feelings and self-awareness with the process of reflection and their ongoing practice. Rather than reflection being only an intellectual exercise, the research builds on these theories to recognise the importance of emotion and self-awareness in dealing with bias and prejudice.

### **Clinical legal education enables reflection communally**

Reflection in community, a concept developed by Leering,<sup>537</sup> also deepens the potential of reflection. It is another aspect of reflection which heightens understandings of relational lawyering.<sup>538</sup>

This research built on existing literature which emphasises the importance of community and relational lawyering<sup>539</sup> in the practice of reflection. It emphasises the importance of reflection in students identifying their own assumptions and values, which in turn will be essential to them being able to contribute to building a fairer, more just law and legal system. Group discussion can play a vital role in developing students' awareness of their assumptions, biases and prejudices when engaged in legal practice. This is because peers can give feedback which is

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<sup>536</sup> Karen H Rothenberg, 'Recalibrating the Moral Compass: Expanding Thinking Like a Lawyer into Thinking Like a Leader' (2009) 40 *University of Toledo Law Review* 411; Carrie Menkel-Meadow, 'Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report – Of Skills, Legal Science and Being a Human Being' (1994) 69 *Washington Law Review* 593; William Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Foundation for the Advancement of Teaching, 2007) 1–14; Verna E Monson and Neil W Hamilton, 'Ethical Professional (Trans)Formation: Early Career Lawyers Make Sense of Professionalism' (2011) 8 *University of St. Thomas Law Journal* 129.

<sup>537</sup> Michele Leering, 'Conceptualizing Reflective Practice for Legal Professionals' (2014) 23 *Journal of Law and Social Policy* 82.

<sup>538</sup> Susan Brooks, 'Using a Communication Perspective to Teach Relational Lawyering' (2015) 15(2) *Nevada Law Journal* 477.

<sup>539</sup> *Ibid.*

listened to more readily than feedback from a supervisor. As lawyers will frequently turn to peers for support in their practice of law, instilling this practice early is a particularly valuable contribution that clinical legal education can teach. All of these mechanisms provide a means to encourage law students to reflect on their thoughts, feelings and values in their work.<sup>540</sup> Reflection in group is an effective method for teaching students how to reflect and for helping them fulfil their ethical duty.

### **Teaching students how to reflect and how to interview demonstrates that the ‘dichotomy’ between teaching skills and justice is false**

The early literature in clinical legal education scholarship spends a great deal of time distinguishing between the role of clinics in teaching skills and in teaching justice issues. It focuses on the importance of law students being ready to enter legal practice, which requires them having sound client communication skills, good legal drafting skills, and the ability to analyse legal problems and conduct thorough legal research. Alternatively, the role of clinics is discussed as being to work within communities, to provide an organising force, to provide a means for economic empowerment, and to achieve social justice.

While the literature discusses an assumed tension between teaching students about skills and justice, this thesis has found that clinics are particularly effective when they teach students about justice *and* about skills. Indeed, in the discussion above about teaching students reflection skills, it is implicit that the ability to reflect has the potential to teach students to become more justice-focused and to fulfil their ethical duty to contribute to justice. Teaching students how to reflect ensures that they can analyse systemic issues and interrogate their identity and privilege. It provides a means for them to fulfil their ethical duty to contribute to the justice system.

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<sup>540</sup> Michele Leering, ‘Conceptualizing Reflective Practice for Legal Professionals’ (2014) 23 *Journal of Law and Social Policy* 82; Susan Brooks, ‘Using a Communication Perspective to Teach Relational Lawyering’ (2015) 15(2) *Nevada Law Journal* 477.

This thesis finds that it is wrong to insist on a binary formulation of the issue of ‘skills versus justice’, as clinics will always include skills development of some type and will frequently include social justice issues. The thesis looks particularly at the role of clinics in teaching students to become justice-focused and some of the ways in which students can do this through developing their skills, while also reflecting on themselves and their identity and role in law. Reflecting on their identity and their role in law is essential in order for a lawyer to properly fulfil their ethical duty to contribute to the law and the legal system.

Furthermore, framing the argument as skills versus justice assumes that skills are ‘value-neutral’, which they are not. For example, interviewing can be taught in various ways and will often include providing students with an awareness of the range of ways in which people communicate. People come from different social classes and from different cultural backgrounds. Power dynamics will be at play in complex ways. Thus, a skill of ‘interviewing’ is also something which is value-laden. Skills teaching is integral to a clinic’s social justice mission. It enables students to ‘suspend judgment, to communicate and listen across differences and to explore solutions creatively’.<sup>541</sup> To become reflective, justice-focused lawyers, students must be taught about how they exercise a skill. They must ensure that they are aware of their privilege and the impact of their identity within it. This is explored further in examining the experience of ethical lawyering through students exercising the ‘skill’ of interviewing. This is examined in greater detail in chapters 6 and 7.

Students were surveyed about their interviewing experience within the clinical component of the legal ethics course. Their responses regarding what legal ethics entail changed between the pre-interview and post-interview experience. In chapter 6, these survey results were discussed to reveal that students identified that ‘ethics’ encompass an ethic of care. The development of their emotional intelligence and the significance of care for the client in acting ethically is

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<sup>541</sup> Antoinette Sedillo Lopez, ‘Learning through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training’ (2001) 7 *Clinical Law Review* 307, 322. See also Susan Bryant, ‘The Five Habits: Building Cross-Culture Competence in Lawyers’ (2001) 8 *Clinical Law Review* 33.

developed in the act of learning how to interview clients. Through having an individualised interviewing experience with a client, the *process* of interviewing is reinforced for students, rather than the result for the client who is seeking some just resolution of a problem. The ‘skill’ of interviewing is therefore seen to include spending time with a client and caring for the client. When students are asked to reflect on how they interview, and how they could improve in their interviewing, they begin to think about the client, the client’s perspective, and the process of interviewing. This is part of their development as reflective lawyers who have begun to learn a skill of interviewing and who are asked to then reflect on this learning process and the new skill. The interviewing experience changes their understandings of ethics and what makes an ethical practitioner.

Chapter 6 discusses the survey results. Students initially identify ‘conflict of interest’, ‘confidentiality’ and ‘repugnant clients’<sup>542</sup> as the key ethical issues which they anticipate experiencing. After their interviewing experience, students report that one of the ethical issues they confront is that the law is limited in dealing with the concerns of their clients. They also report that there are limited services available to the clients. Students therefore move from an individualised concept of ethics to a more systemic understanding of ethical lawyering. Through learning the skills of reflection, their understanding of ethics incorporates questions of justice for the client. This again demonstrates the combination of skill and justice, rather than one or the other.

Students thus need the ability to reflect in order to recognise their ethical duty to contribute to the justice system. In learning the skill of interviewing, they are also prompted to think about broad and systemic justice issues. The skill learning and justice focus go together, rather than being in competition.

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<sup>542</sup> This is the term that students use in their response to ‘ethical issues they anticipate facing’ in the survey questions discussed in chapter 6. It is not a term used by the author.

In answering question 1 of this research project, the thesis has found that reflection skills are vitally important in developing reflective, justice-focused lawyers. The skills of reflection are essential in order for students to be able to fulfil their ethical duty to contribute to justice and to make sense of the complexity of legal practice and its disorienting moments. Emotion is a key part of the reflection process, as it can be a trigger for reflection and can lead students to a better integration of their whole selves within their understandings of ethics. A process of reflection enables students to integrate their values, attributes, thinking and feeling. The dichotomy between skills and justice is an unhelpful one, as this discussion reveals the interconnectedness between the two and finds that clinical legal education is an effective method of teaching law students about both together.

**Question 2: Can incorporating a clinical component within an applied legal ethics course be an effective way of teaching students about their responsibility to make law fairer and be reflective, justice-focused lawyers?**

How does a clinical component enrich students' ideas about what ethical decisions are and the ways in which they should be made? Does including a clinical component in an applied legal ethics course change law students so that they are more committed to engaging in lawyering which contributes to the law and the legal system? Does a clinical component build students' confidence in their ability to complete their law studies and develop their sense of autonomy and purpose?

There is a range of findings in response to these questions.

**The definition of an ethical legal practitioner includes someone who contributes to justice and has a capacity to self-reflect**

The literature discussed a range of understandings of what constitutes an ethical legal practitioner. Different theorists have discussed key elements of an ethical practitioner. The definition used in this thesis is that of Hyams, based in the work of Noone and Dickson. This approach posits that an ethical practitioner is someone who:

- fulfils the duties attached to a fiduciary relationship;
- is competent in the work they perform;
- communicates often, openly and clearly with their client;
- does not encourage the use of law to bring about injustice, oppression or discrimination;
- identifies, raises and discusses ethical issues with current/potential clients;
- seeks to enhance the administration of justice; and actively engages in serving the community.<sup>543</sup>

Additional key points augment this definition. These are the need for autonomy in a lawyer, the ability to self-reflect on their own behaviour and actions, and a commitment to ongoing development.<sup>544</sup> This thesis finds that an understanding of, and a contribution to, the justice of the legal system are key to being an ethical practitioner. The thesis uses this definition, which was developed by clinical legal educators and is therefore particularly apposite for the ethical development of law students engaging in clinical courses. The key elements from the definition are the commitment to contributing to the administration of justice and serving the community. It also includes someone who is self-reflective and who can continuously improve. The development of a capacity for autonomy is particularly relevant as it is a part of the definition of an ethical legal practitioner.

In a traditional understanding of ethics, an ethical lawyer would be defined as someone who abides by the professional rules. The analysis in this thesis found that approach inadequate. It instead drew on clinical legal education scholarship to develop a more nuanced definition. This thesis uses a broader definition that includes a responsibility to contribute to the fairness or justice of the law and the legal system. This arises from concepts of professionalism,<sup>545</sup> but also

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<sup>543</sup> Mary Anne Noone and Judith Dickson, 'Teaching towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers' (2001) 4(2) *Legal Ethics* 127, 144.

<sup>544</sup> Ross Hyams, 'On Teaching Students to "Act Like a Lawyer": What Sort of Lawyer?' (2008) 13 *International Journal of Clinical Legal Education* 21.

<sup>545</sup> Verna E Monson and Neil W Hamilton, 'Ethical Professional (Trans)Formation: Early Career Lawyers Make Sense of Professionalism' (2011) 8 *University of St. Thomas Law Journal* 129; Donald Nicolson, 'Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice' (2013) 16(1) *Legal Ethics* 36. 'The idea that enjoying extraordinary privileges and power creates responsibilities and moral obligations originates

the central premises of the rule of law,<sup>546</sup> and is recognised within professional codes of conduct.<sup>547</sup>

Thus, the concept of 'justice' and the definition of an 'ethical legal practitioner' are connected. This connection adds another facet to our understanding of 'justice' within a clinical context as students gain new understandings of this through their participation in a clinical component of interviewing clients. Ethics and justice are intertwined for students as they gain new understandings of ethics in practice through interviewing.

**A clinical component is a valuable way of teaching students about ethics and it changes the ways that students think about ethics and emphasises an ethic of care within the concept of ethical lawyering**

To inform this research project, empirical research consisting of surveys of law students was conducted. This empirical research tested the hypothesis of the thesis, that a clinical component of interviewing real clients would enrich students' understandings of what an ethical legal practitioner is and how they work; would increase their commitment to justice; and would build their confidence in their interviewing skills and in their ability to study law. Law students came to understand ethics as involving deeper and more layered concepts. They focused on the importance of lawyers spending time with clients and the significance of showing compassion to clients. Students learnt of the ways in which legal ethical issues incorporate understandings of an ethic of care within a concept of justice. The research found that, even in a short clinical

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in Plato's notion of citizenship': Andrew Boon and Avis Whyte, "'Charity and Beating Begins at Home': The Aetiology of the New Culture of Pro Bono Publico' (1999) 2(2) *Legal Ethics* 169, 174, referring to Derek Heater, *Citizenship: The Civic Ideal in World History, Politics and Education* (Longman, 1990). See also John Hospers, *Human Conduct: Problems of Ethics* (2nd edn, Harcourt Brace Jovanovich, 1982).

<sup>546</sup> Lisa Webley, 'Legal Professional De(Re)Regulation, Equality, and Inclusion, and the Contested Space of Professionalism within the Legal Market in England and Wales' (2015) 83(5) *Fordham Law Review* 2349.

<sup>547</sup> For example, the Canadian Model Code: Federation of Law Societies of Canada, 'Model Code of Professional Conduct' (14 March 2017) 5.6–5.6.1(2) <<https://flsc.ca/wp-content/uploads/2018/03/Model-Code-as-amended-March-2017-Final.pdf>>.

component, students' understandings of, and commitment to, justice can be strengthened and developed through their more systemic understanding of ethical legal practice.

### **A clinical component emphasises systemic issues of access to legal services and inadequacy of the law**

Rather than focusing on a rules-based idea of ethics, such as a duty of confidentiality, students' understandings were deepened to understand the limitations of the justice system in providing legal services to disadvantaged clients. Students specifically commented on their new insights about how hard it was to tell clients either that the legal system could not help with their particular issue, or that the legal centre did not have the resources to help that client. The systemic implications of ethical considerations were a highlight of the clinical experience for these students. This thesis found that concepts of 'justice' and its connection to ethical legal practice were connected for students through a clinical component.

### **A clinical component builds students' sense of confidence, not only in interviewing, but also in their ability to complete their legal studies**

Another key finding of the empirical study was that students' confidence in both their interviewing skills and their ability to successfully continue with their law studies was increased through engaging in a clinical component. This finding is particularly significant as other studies have demonstrated the deleterious impact of studying law on law students' mental health.<sup>548</sup> It also offers a more nuanced understanding of the ways in which students' confidence and understanding of the practice of law is affected.

Importantly, participating in basic interviewing of clients built their confidence, not only in interviewing but also in their capacity to successfully engage in law studies.

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<sup>548</sup> Kenneth Sheldon and Lawrence Krieger, 'What Makes Lawyers Happy? A Data-Driven Prescription to Redefine Professional Success' (2015) 83 *George Washington Law Review* 554; Sheldon, Kennon and Lawrence Krieger, 'Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being' (2004) 22 *Behavioral Sciences and the Law* 261; Prue Vines, 'Working towards the Resilient Lawyer: Early Law School Strategies' (University of New South Wales Faculty of Law Research Series 30, 2011).

### **A clinical component builds students' connection between expression of self through lawyering, building on concepts of intrinsic motivation and thus supporting their mental health**

In their survey responses, students referred to the affirming nature of the interviewing experience as it reconnected them with their initial motivation for studying law: 'to help people'.

Within the scholarship of legal education, the stream of studies which examines the impact of studying law on law students' mental health has grown in recent years. These scholars have found that studying law has a negative impact on students' mental health and that to counteract this, significant meaningful experiences can assist students to connect with their purpose in studying law. The thesis explores the impact of a clinical experience in this respect and finds that students have their reasons for studying law affirmed.

### **More research is needed on whether a clinic component builds students' sense of purpose**

The role of clinics in teaching autonomy, mastery and purpose is another area of scholarship. The literature discusses ways of designing clinics in order to develop students' sense of purpose and autonomy. This scholarship is developed through this research enquiring as to how effective a clinical component can be to develop students' confidence in their interviewing practice and, additionally, whether it develops their confidence in their later legal studies. Chapter 7 investigates whether a short clinical component can impact on students' sense of purpose and confidence in their later legal studies. The thesis finds that the interviewing experience has the capacity to affirm students' sense of purpose. My research again found that there is a substantial and important impact on students participating in a clinical component in their re-connecting with their purpose through a greater confidence in their law studies. As there was no direct question in the survey relating to purpose, this is an area which warrants further research.

## **Students have their desire to work towards justice consolidated through a clinical component**

The thesis found that students consolidated their desire to work towards justice through their clinical experience. The interviewing experience affirmed students' commitment to, and recognition of, their responsibility to work towards justice in some form through their legal career. This is a substantial contribution of this thesis to the body of research, as it reveals the impact of a short clinical experience in shaping students' commitment to justice in their later law careers.<sup>549</sup> Too frequently, students feel 'that they have little or no power or responsibility for ensuring substantive justice'.<sup>550</sup> This finding is constructive and important, since so many other experiences in a law course can be disengaging and disincentivising of students' commitment to justice. The finding reinforces the findings of the Carnegie Foundation's report<sup>551</sup> into the importance of learning experiences that reinforce students' sense of professional identities within their programs pursuing law degrees.

These findings are all significant within the scholarship of clinical legal education. The thesis examines the role of a short clinical component within a legal ethics course to enrich students' understandings of legal ethics; to enhance their perception of the importance of an ethic of care within ethical legal practice; and to grow their sense of confidence in themselves, both in interviewing and in their later legal studies.

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<sup>549</sup> The research in this thesis demonstrates the impact not of a whole clinical course, but of a clinical component. Donald Nicolson, 'Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice' (2013) 16(1) *Legal Ethics* 36; Nigel Duncan, 'Ethical Practice and Clinical Legal Education' (2005) 7 *International Journal of Clinical Legal Education* 7; Julian Webb, 'Inventing the Good: A Prospectus for Clinical Education and the Teaching of Legal Ethics in England' (1996) 30(3) *The Law Teacher* 270; Richard Moorhead, 'The Ethical Identity of Law Students' (2016) 23(3) *International Journal of the Legal Profession* 235.

<sup>550</sup> Jane H Aiken, 'The Clinical Mission of Justice Readiness' (2012) 32(2) *Boston College Journal of Law and Social Justice* 231.

<sup>551</sup> William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Foundation for the Advancement of Teaching, 2007) 126–29, cited in JoNel Newman and Donald Nicolson, 'A Tale of Two Clinics: Similarities and Differences in Evidence of the "Clinic Effect" on the Development of Law Students' Ethical and Altruistic Professional Identities' (University of Miami Legal Studies Research Paper No 2015-16, 2015) 13.

### **Question 3: Does teaching students concepts of identity, power and privilege help them become reflective, justice-focused lawyers?**

What role does teaching students about ability/disability have in prompting their growth to being reflective, justice-focused lawyers?

The thesis examines the ways in which understandings of ability and disability can inform students' concepts of identity, power and privilege. Concepts of teaching about privilege, diversity and systemic power are used and applied to the clinical setting of designing a disability rights clinic. The detailed analysis of the construction of a disability rights clinic is a new contribution within the scholarship on clinical legal education.

#### **It is vital to teach students about identity and diversity for them to contribute to justice and to enrich their understandings of justice**

The thesis examines concepts of identity, power and privilege in chapter 8 but also through chapters 6 and 7, which examine the clinical component of interviewing as a means to teach legal ethics to students. Diversity is a significant element of the understanding of justice within the clinical literature. In order for students to become more reflective and justice-focused lawyers, they need to understand concepts of diversity and privilege (discussed below). The literature discusses the significance of diversity among teachers, students, staff and clients and the 'inclusion of "insider" and "outsider" perspectives in the clinic [as a means of] enhancing the learning environment for lessons of multiculturalism and other forms of diversity'.<sup>552</sup> While concepts of diversity are important as a means of understanding the question of what justice is, and as a method for shifting students' perceptions of their own role within this context, the idea of privilege<sup>553</sup> pushes this notion further.

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<sup>552</sup> Isabel Gunning, 'Diversity Issues in Mediation: Controlling Negative Cultural Myths' (1995) *Journal of Dispute Resolution* 55, 86–87, quoted in Jon Dubin, 'Clinical Design for Social Justice Imperatives' (1998) 51 *SMU Law Review* 1461, 1465.

<sup>553</sup> Jane H Aiken, 'The Clinical Mission of Justice Readiness' (2012) 32(2) *Boston College Journal of Law and Social Justice* 231; Jane H Aiken and Stephen Wizner, 'Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice' (2004) 73 *Fordham Law Review* 997.

Understanding concepts of diversity is important when students interview clients in their clinical component of interviewing, and also in their work in clinics in Mexico or Australia when working with clients with disability. It is a connecting theme and an important concept which students need to learn in order to become more reflective and justice-focused. Diversity could be understood to mean that all people are different. Students in the interviewing component also identified the importance of understanding the situations of individual clients in order to be able to deal effectively with issues. Both before and after interviewing clients, students were asked what they needed to know to deal with ethical issues. Their responses after interviewing clients demonstrate that they recognise the need in professional practice to understand the client's individual situation and to empathise, rather than just knowing professional ethical rules. The proportion of students who identify the need to understand a client's situation grows from 28% before interviewing clients to 42% after interviewing clients. It is the second-most-frequent response. This recognises the importance of understanding the diversity of clients and their experience, which students gain through the interview experience. Reflection is the key tool which students use to gain some of these deeper understandings of concepts of justice and the importance of diversity.

### **Understanding concepts of privilege deepens students' understanding of justice, including in the area of ability/disability**

As mentioned above, teaching students about justice 'does not merely examine difference or diversity but pays careful attention to the systems of power and privilege that give rise to social inequality'.<sup>554</sup> Focusing on how privilege can maintain social inequality enables students to analyse themselves, their areas of privilege, and their role in perpetuating injustice. To be most effective, social justice education 'requires an examination of systems of power and

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<sup>554</sup> Heather Hackman, 'Five Essential Components of Social Justice Education' (2006) 38 *Equity & Excellence in Education* 103, 104, quoted in Priya Lalvani and Alicia Broderick, 'Institutionalized Ableism and the Misguided "Disability Awareness Day": Transformative Pedagogies for Teacher Education' (2013) 46 *Transformative Pedagogies for Teacher Education, Equity & Excellence in Education* 468.

oppression'.<sup>555</sup> It is not enough to examine how things are and to notice that they are unfair. Rather, it is vital to probe with students 'why they are unfair, for who[m], and how did it get this way?'<sup>556</sup> The disorienting moment provides an opportunity for questioning what privilege is and how it functions. This thesis discusses a range of ways of doing this. It specifically focuses on concepts of identity through the lens of 'ability' and 'disability' and how these are taught in specialist disability clinics.

Using the idea of privilege expands this concept to include the question of why some forms of identity are more valued or reflected in law than others. For example, it is possible to study why concepts of self-defence<sup>557</sup> do not adequately reflect the experiences of women who have suffered domestic violence. When those women use weapons to protect themselves, they are often accused of having a disproportionate response to violence. Analysing how privilege operates within law demands an active response from students if they probe this concept. It can be difficult for students to recognise that they can have areas of privilege in their identity that intersect with areas of disadvantage. The theory of performativity<sup>558</sup> can be helpful in understanding how all people enact oppression.

There is the potential to explore students' own identities and the impact which their identities have on their client work. In discussing these issues, some have looked particularly at issues of identity and privilege based on gender, race and class.<sup>559</sup> By introducing concepts of 'privilege',

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<sup>555</sup> Ibid.

<sup>556</sup> Heather Hackman, 'Five Essential Components of Social Justice Education' (2006) 38 *Equity & Excellence in Education* 103, 104, quoted in Priya Lalvani and Alicia Broderick, 'Institutionalized Ableism and the Misguided "Disability Awareness Day": Transformative Pedagogies for Teacher Education' (2013) 46 *Transformative Pedagogies for Teacher Education, Equity & Excellence in Education* 468.

<sup>557</sup> Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'When Self-Defence Fails' in Kate Fitz-Gibbon and Arie Freiberg (eds), *Homicide Law Reform in Victoria: Prospects and Retrospect* (Federation Press, 2015) 110–27.

<sup>558</sup> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1990).

<sup>559</sup> Jane H Aiken, 'The Clinical Mission of Justice Readiness' (2012) 32(2) *Boston College Journal of Law and Social Justice* 231; Jane H Aiken and Stephen Wizner, 'Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice' (2004) 73 *Fordham Law Review* 997; Carrie Menkel-Meadow, 'Portia in a Different Voice: Speculations on a Women's Lawyering Process' (1985) 1 *Berkeley Women's Law Journal* 39; Patricia J Williams, *The Alchemy of Race and Rights* (Harvard University Press, 1991).

the concept of diversity is made richer and more political. The thesis finds that teaching about diversity is particularly important for students learning and working in disability-focused clinics, but also in any clinic working with clients. Students can be taught about the complex ways in which law functions to benefit different communities and to reflect different values. As referred to above, interviewing clients effectively requires an understanding of the diversity of individuals. There is no longer a 'neutral' identity. Rather, the idea of privilege makes identity more complex and political, recognising that some forms of identity are advantaged. The findings of this thesis emphasise the significance of understanding this concept in order for students to have a personalised and deeper understanding of justice. This also allows for a more grounded understanding of 'justice'. The facets of a personal and yet universal understanding of diversity and identity are the contributions of this thesis to scholarship around the potential of clinical legal education to frame students' understanding of 'justice'.

### **Connections between values, identity, diversity and privilege and their relationship to practising law with a focus on justice are enriched through clinical legal education**

There are also connections between a student lawyer's values, their sense of identity, and their ethical decision-making. The Parker and Evans<sup>560</sup> model of four types of ethical decision-making recognises that different people approach ethical decision-making in a range of ways at different times. The model also incorporates the idea that people are themselves<sup>561</sup> in the decision-making, rather than it being abstracted from themselves. The ethical decision-making is an expression of them, rather than being removed from concepts of self. This enables self within the process of lawyering. The thesis develops the concept of 'self' within ethical

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<sup>560</sup> Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2014).

<sup>561</sup> Verna E Monson and Neil W Hamilton, 'Ethical Professional (Trans)Formation: Early Career Lawyers Make Sense of Professionalism' (2011) 8 *University of St. Thomas Law Journal* 129; Carrie Menkel-Meadow, 'Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report – Of Skills, Legal Science and Being a Human Being' (1994) 69 *Washington Law Review* 593; William Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Foundation for the Advancement of Teaching, 2007) 1–14; Karen H Rothenberg, 'Recalibrating the Moral Compass: Expanding Thinking Like a Lawyer into Thinking Like a Leader' (2009) 40 *University of Toledo Law Review* 411; Nigel Duncan, 'Ethical Practice and Clinical Legal Education' (2005) 7 *International Journal of Clinical Legal Education* 7.

lawyering and concepts of what an ethical lawyer is and how they work. It therefore builds on the Parker and Evans model of ethical decision-making. These concepts are discussed in chapter 5. Understanding ethical decision-making within this typology enables connections between how lawyers see themselves as individual lawyers and how that view is affected by their identities, including aspects of diversity and areas of privilege. This enables the question of ‘who am I as a lawyer?’ to be answered by student lawyers, rather than assuming that there is only one way of being a lawyer. It thereby assists in the process of deconstructing the ‘neutrality’ of law and lawyers. This connects with the clinical component within the applied ethics course, as for many students it is their first experience of feeling what it is like to be a lawyer in reality. It also relates to ideas of disability and ability and how legal educators teach about these topics. These issues are explored in detail within the thesis. In chapters 6 and 7, the thesis explores the ways in which students’ views of themselves as future lawyers, and of what constitutes an ethical lawyer, are changed through having a clinical experience of interviewing. They experience clients needing legal advice and develop their thinking on the importance of spending time with clients and communicating, as well as showing empathy. Each of these aspects of being an ethical legal practitioner – empathy, spending time and communicating – is an expression of self, rather than an objective application of law to facts. The thesis therefore builds on the theoretical framework advanced by Parker and Evans.

### **Concepts of justice are enriched through relationships and the practice of law**

The thesis finds that justice is therefore not just about a legal system but also about relationships between the student and the client, the client and the law, and the client and the legal system. The ways in which a student with the student’s particular identity, and a client with the client’s particular identity, relate to each other in the giving and receiving of legal advice become what ‘law’ and the ‘legal system’ are. Law is also the practice of law. For a client, their experience of the law and the legal system is through their relationship with their lawyer. The ways in which the lawyer and the client relate are therefore a part of the experience of law and, it is hoped, justice. The findings of the thesis in chapter 6 support this. The surveys conducted with law students reveal that spending time with the client and caring for them are

recognised as an ethical issue by 16% of students before the interview and 50% of students after the interview. Thus, the recognition of legal ethical issues is about the process of practising law as much as the ultimate result. Students focus more on the *process* of giving advice and practising law, and less on the ultimate result. This is one of the findings discussed in chapter 6. Law is not just law as written in statutes and cases, but also the practice and experience of it.<sup>562</sup>

### **In order to understand ability and disability, students must understand the social and medical models**

The thesis deeply examines one aspect of identity, power and privilege – ability/disability – in order to inform the discussion of self within the practice of law. It analyses the ways to teach students about working effectively with clients with disability. Chapter 8 reviews practice in two existing clinics, one in the Human Rights Program at the Universidad Nacional Autónoma de México and the other at Kingsford Legal Centre in Australia. Rather than using a medical model of disability, which locates disability as an aspect of an individual, the literature discusses the importance of teaching students a social model of disability. This recognises that disability is socially constructed. While disability has some aspect of impairment, it is society which creates barriers which prevent equal participation for people with disability. This social model of disability is adopted within the Convention on the Rights of Persons with Disabilities.<sup>563</sup> The thesis contributes to the clinical scholarship on concepts of justice by discussing concepts of identity, values and privilege within the concept of ability and disability, and drawing connections between this and other forms of oppression. It finds that it is essential to teach students the differences between social and medical models of disability.

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<sup>562</sup> See Austin Sarat and Stuart Scheingold (eds), *Cause Lawyers and Social Movements* (Stanford University Press, 2006).

<sup>563</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

### **Central to teaching students about ability/disability is the concept of ‘nothing about us without us’**

The thesis recommends how disability issues should be taught within a clinical framework and makes connections between other bodies of theory around exclusion and disadvantage. One of the key recommendations is the grounding theory of Charlton,<sup>564</sup> ‘nothing about us without us’, which must be centred in any discussion about concepts of ‘ability’ and ‘disability’. This refers to the importance of centring people with disability in any discussion about people with disability. Rather than the discussion being ‘about’ people with disability, people with disability need to be present or included in any discussion about disability issues. Indeed, people with disability must be involved in teaching students about the lived experiences of people with disability. Teaching students about ability and disability necessarily requires them to examine their own identity and concepts of disability, including the social and medical models. The interconnectedness of all forms of identity, disability, sexuality, gender and race should be discussed as ways of understanding how student lawyers and lawyers relate to their clients. Many people have disability. Thus, knowing how to work effectively with clients with disability is a key skill and capacity which students require.

### **Understanding decisions of clients along the continuum of autonomy and empowerment is useful for all clients, but particularly those with disability**

The literature also discusses concepts of autonomy and empowerment when working with disadvantaged clients, particularly the significance of these approaches when working with clients with disability. This intersects with feminist theory, which also places women clients at the centre of decision-making. Autonomy and empowerment theory in the context of people with disability recognises that people with disability – not other people – should make the decisions about their lives.<sup>565</sup> But, in recognising this, it is also vital to identify that decision-

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<sup>564</sup> James I Charlton, *Nothing about Us without Us: Disability Oppression and Empowerment* (University of California Press, 1998).

<sup>565</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

making happens along a continuum, where support to make decisions can be needed. Clients will sometimes be able to make a decision wholly on their own. At other times, they will need support from family or friends. There is, therefore, a continuum of decision-making, but the central concept is that the client makes decisions about their own life.

The research contributes to the scholarship on disability issues and gender issues by making connections between working effectively with clients in an empowerment or continuum of autonomy model. It connects the bodies of theory to link feminist and disability theory to help students understand the importance of centring the client in decision-making about their case or legal issue. This concept is central to theory on working with clients with disability, as well as to feminist theory.

**Intersectional feminist theory and queer theory are helpful for drawing connections between experience and drawing students' understandings away from binaries into continuums of experience**

Theories of performativity, feminist intersectionality and queer theory are all useful to help students learn about and understand the experiences of people with disability. These theories help students to escape binaries – such as ability/disability, female/male and homosexual/heterosexual – and see identity along a continuum. This helps with understandings of disability as it puts everyone on a continuum, rather than some being able and others having disability. It also centres the client, rather than having them on the margins of their own legal issue.

The concepts of disorienting moments or opportunities for learning are central and can be created around disability issues. Various methods for teaching students about working with clients with disability are discussed, including having a class on working with clients with disability, teaching students about the medical and social model of disability and including people with disability in that class, and discussing narratives in law around people with disability. Language is important when teaching students about working with clients with disability. The language which students should be taught to use is 'people with disability' in order to locate the person first, 'with disability' after that. Being able to communicate

effectively with clients with disability is also essential. For clients with psycho-social disability, this may mean communicating at particular times of the day, or when a support person is present. The thesis finds that students need to learn about empowerment theory and autonomy theory in order to represent clients with disability. In practice, this means using an 'advocate' role with clients with disability and not adopting a model of 'acting in the best interests' of the client, as this is not congruent with an autonomy and empowerment model.

### **Teachers can model anti-oppressive behaviour, thus exposing and deepening students' understandings of diversity**

Teaching disability issues is a complex set of practices. It includes teaching students how to represent clients with disability, understanding concepts of ability and disability, and analysing the law and its narratives around people with disability, among many elements. When thinking about how to teach about disability issues, or any other form of privilege, the literature discusses the importance of modelling anti-oppressive relations as another key aspect. Teachers need to be conscious of, and active in, this modelling. They must be conscious of how they teach and the lessons they give to students, both intentionally and unintentionally. Teachers must be able to critique their own practice.<sup>566</sup> The literature suggests that teachers must be able to reflect on how they work and teach, and try to improve it. This self-reflection of the teacher models for the student a key skill of reflection in order to learn more and improve practice. In chapters 4 and 8, the importance of modelling reflection is discussed at length. For example, a clinical supervisor may be working with a client with high levels of anxiety who does not respect clear boundaries and attempts to blur the personal and the professional. This interaction between client and supervisor may not go as well as the clinical supervisor would like, with the supervisor working to set boundaries while being responsive to the client's feelings of anxiety. It is vital for a clinical supervisor to debrief the experience with the student in order to demonstrate self-reflection. The supervisor can demonstrate that although

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<sup>566</sup> Kevin Kumashiro, 'Against Repetition: Addressing Resistance to Anti-Oppressive Change in the Practices of Learning, Teaching, Supervising, and Researching' (2002) 72 *Harvard Educational Review* 67, 83.

attempting to model equal and respectful relationships, they may not always succeed in this endeavour.

**Clinical legal education offers a range of clinical types, including clinical components which teach students how to be reflective and justice-focused**

The two clinical experiences which are discussed in depth in this thesis are a clinical component within an applied legal ethics course and an elective course with a focus on working with clients with disability. In fact, students engage in a range of clinical courses. Each has a role in teaching them to be reflective and justice-focused.

In community-based clinics,<sup>567</sup> students will frequently be immersed in representing individual clients or, sometimes, communities.<sup>568</sup> The benefits of these types of clinics are that they enable students to form deep connections with their clients and to gain an understanding of some of the challenging and complex issues that clients face. Alternatively, a clinic may be focused on community organising and represent groups of clients who face a similar problem, such as the underpayment of wages. Students may also work in policy clinics,<sup>569</sup> which address legal issues at a systemic rather than individual level. The benefits of these types of clinics are that students are engaged in systemic change and can feel committed to making the overall legal system fairer for disadvantaged clients. Other clinics teach students how to teach. In these clinics, students learn how to convey complex legal concepts in simple ways to communities, to people in prison, or to other groups of clients. Other clinics focus on specific client groups, such as

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<sup>567</sup> Anna Cody and Barbara Schatz, 'Community Law Clinics: Teaching Students, Working with Disadvantaged Communities' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011).

<sup>568</sup> Juliet Brodie, 'Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighbourhood-Based Community Lawyering Clinics' (2009) 15(2) *Clinical Law Review* 333.

<sup>569</sup> Les McCrimmon and Edward Santow, 'Justice Education, Law Reform, and the Clinical Method' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011) 214; Anna Cody and Barbara Schatz, 'Community Law Clinics: Teaching Students, Working with Disadvantaged Communities' in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2011); Scott Cummings, 'Mobilization Lawyering: Community Economic Development in the Figueroa Corridor' in Austin Sarat and Stuart Scheingold (eds), *Cause Lawyers and Social Movements* (Stanford University Press, 2006).

women experiencing domestic violence, Indigenous clients,<sup>570</sup> or clients with disability.<sup>571</sup> Each of these clinics has particular approaches and elements which it teaches to students.

The common characteristics of clinics are that students are responsible for their legal work under close supervision by clinical teachers or supervisors and that students are responsible for their work. They also participate in a formal class program. The class program and the clinical work must provide opportunities for students to reflect.

This thesis finds that a clinical component and a clinic which teaches about disability issues have particular benefits for students. The thesis also explores what role a clinical component of a subject – applied legal ethics – can have in teaching students to become more reflective, justice-focused lawyers. Students' integration of themselves, their values, their identity and their lawyering is strengthened through the process of reflection. It also enables them to fulfil their ethical duty to contribute to the justice system.

A clinic which teaches students about working with clients with disability provides them with the opportunity to explore their identity, their privilege, and the ways in which these influence their legal work. Understandings of one area of oppression or privilege provide an opportunity to more deeply understand the functioning of law and relationships between lawyers and clients.

## **Concluding thoughts**

In coming to the end of this thesis, in which I have reflected on the ways in which clinical legal education can contribute to forming reflective and justice-focused lawyers, I think of where I started in my practice of teaching. There are some key findings which affirmed connections

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<sup>570</sup> Christine Zuni Cruz, 'On the Road Back In: Community Lawyering in Indigenous Communities' (1999) 5 *Clinical Law Review* 557.

<sup>571</sup> Robert D Dinerstein, "'Every Picture Tells a Story, Don't It?': The Complex Role of Narratives in Disability Cases' (2007) 15(1) *Narrative* 40; Frances Gibson, 'The Convention on the Rights of Persons with Disabilities: The Response of the Clinic' (2011) 15 *International Journal of Clinical Legal Education* 11.

which I had a hunch I would find. The research project produced other findings which were surprising to me. It has been a process of validation of half-perceived thoughts and ideas, as well some new findings.

While always wanting and hoping that ethical legal practice included a responsibility to contribute to justice, I didn't actually *know* this to be the case. Through this thesis, I have found that indeed lawyers do have a responsibility, as ethical legal practitioners, to contribute to justice. I am more confident in my teaching of this responsibility, which is founded in concepts of professionalism, the rule of law, and model codes of conduct. While a rule-based teaching of ethics is common, a much more practice-based and values-based form of teaching ethical practice is key to forming ethical legal practitioners. Lawyers, with their positions of authority and power, have a clear responsibility to contribute to the justice of the law and the legal system and, in so doing, to society more broadly. The centrality of reflection skills to that process is an affirmation of something I previously perceived to be so. Indeed, without the ability to reflect on self and practice, a lawyer cannot fulfil their duty to contribute to justice.

Another constantly growing area in my reflection about being a lawyer and a teacher is the integration of the whole self into lawyering through a recognition of values, attributes and emotions. I was far more tentative and less confident in advancing this as an idea. Legal education is powerful in its instruction of 'removing self' from reasoning and being 'objective'. While I disputed that, I did so less confidently. My teaching now has changed to further encourage students integrate their diversity, their feelings, and themselves within their legal practice. I now include specific discussion about the range of ways of being a lawyer and I discuss more of myself within lawyering, rather than removing that from class discussion.

Theory has also proven helpful in my thinking about clinical legal education and its role in teaching students. The dichotomy of 'theory' and 'practice' is another unhelpful dichotomy. Incorporating queer theory, feminist intersectional theories, and disability studies into this thesis has helped me gain deeper understandings of my legal practice and my teaching. These have helped with fluid ideas of identity and continuums of autonomy for clients in their decision-making. Digging deeper into ideas of ability/disability has proven illuminating. I had

previously not had a clear understanding of the social and medical concepts of disability and how I think about our society with its creating of disability. This has also strengthened my ways of working with clients in thinking about their decision-making along a continuum of autonomy and empowerment, and the centrality of people with disability to the teaching of those issues, and the construction of narratives in telling clients' stories through law.

The findings of the impact of a short clinical component on students' ideas of ethics, and the ways in which it grew their confidence, also reinforced how powerful it is to integrate clinical legal education into a legal curriculum. This thesis demonstrates the power of people's stories, and good critical teaching within clinics, to create responsible and justice-focused lawyers. The thesis makes a range of findings on how to teach legal ethics effectively through a clinical component; the centrality of teaching students reflection skills so that they become reflective, justice-focused lawyers; and teaching lawyers how they can interrogate their identity, their privilege and their values into their practice. Each of these areas of teaching is fundamental if we want lawyers who ultimately can create a more just and equal society. This thesis supports the significance of clinical legal education as a methodology for teaching law which nurtures future lawyers in their reflective skills and their ability to contribute effectively to the justice system in order to grow its fairness and its respect for equality.

We need more of this kind of lawyer. It is thus even more pressing that we ensure that clinical legal education continues to grow and strengthen within law schools.

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