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Editorial

In Spring 2020 our 'normal' changed dramatically, on a really large scale. We, like colleagues across the globe, have been moving through the crafting of this EJLE second issue under extremely unusual circumstances, and in the wider context the crisis has created challenges for and within the higher education community. Education has not shut down during the pandemic, instead it has shifted from physical spaces to online and remote learning - and this is something the education industry was not prepared for. It is no surprise that this issue is influenced by these experiences over the last twelve months, and some of the analyses and reflections were prompted by this crisis. It is difficult to predict the ramifications for higher education and the longer term implications of the challenges we faced over the last months. However, some resulting challenges, the opportunities and the broadening of our perspectives are addressed in this second issue.

Despite the very different topics these articles represent at a first glance, a number of common themes reverberate through them. Most striking is the recognition of the extra-ordinary significance of the pandemic, the importance of student motivation, the role of values in legal education and our role as educators, as well as reflections on fresh perspectives which can prepare law graduates more fully for modern professional life as well as a critique of legal education as being overly academic. The issue is structured in the following way, moving from the topic of university governance to teaching using technologies, to our role as educators (in teaching students the meaning of judicial independence) and how we deliver teaching through fresh perspectives which can prepare law graduates better for life after university. The two contributions following this focus on critiquing clinical legal education – one exploring the clinical context and how this can encourage autonomy, relatedness, and competence. The central premise being that student motivation drives student behaviour and engagement. The final contribution, also working in the context of clinical legal education poses the question whether legal training through the clinical legal education programmes in law schools offer the opportunity for those students who want to practise in the public sector (drawing on experiences from US Law schools).

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In particular this issue offers the following:

Richard Bogue & Stuart MacLennan in "Effective Governance in English Universities: a case study of pre- and post-1992 institutions" recognise that following the COVID-19 pandemic, and resultant resource pressures, might post the risk of increased likelihood of governance failings at universities in England. This article examines governance in relation to the two major categories of universities outlined above, namely: pre-1992 universities and post-1992 universities, why the legal and regulatory framework is currently not conducive to ensuring effective governance and summarising the key shortcomings that should be addressed. There are a number of aspects where improvement can be achieved. They suggest that the focus should be on ensuring university governing bodies have the composition and relevant skills and experience they require, and that stakeholders, especially academic staff, are being effectively engaged and involved in strategic decision-making processes.

Simon Sneddon, in "Do we need to use a Best Appropriate Technology standard for Technology Enhanced Learning in Legal Education?" explores whether Technology enhanced learning is fit for purpose and whether a framework of Best Appropriate Technology is needed. The argument raised here is that inappropriate use of technology is worse than no use of technology, and the paper identifies a new approach which could be used to model the Best Appropriate Technology for any given task, and outlines a worked example of the model.

Bald de Vries in "Independence of mind: Moral reasoning and judgment in legal education" analyses how we can teach our students what judicial independence (at the individual level) means in practice and how we can teach them in developing an independent mind as a lawyer. The analysis is embedded in the wider context of the role of values in legal education, of teaching law that goes beyond the case study method or the study of black latter law.

This leads smoothly into Alex Nicholson in "Customer value theory and dispute resolution strategy" who presents the findings of an interdisciplinary, theoretical study which explored the application of customer value theory to modern dispute resolution strategy in a private law context. The author argues that the inclusion of Customer Value Theory provides insights and enhances effectiveness of strategies; and on a wider scale that the inclusion of this and

similar perspectives within the modern law degree would complement its longstanding and important doctrinal content and enhance the employability value of such programmes.

Michal Chodorowski, Amy Lawton, & David Massey in "Mapping Motivations: self-determination theory and clinical tax education" draw on Self Determination Theory and student surveys. The paper exposes the intricacies of what happens in the clinical context and how this can potentially impact the way in which an environment encourages autonomy, relatedness, and competence.

Zia Akhtar in "Legal Education in the US, Case Study method of training and public interest litigation" then offers us insights from US legal education and the case method as a medium of instruction. This paper explores whether it prepares students to enter the broad field of law including public sector practice, or if the social differentiation caused by student debts and selection leads to many of them exclusively working in the private sector.

This pandemic has taken us all by surprise. We are painfully aware that some of you may be dealing with issues resulting from the pandemic, such as medical emergencies, housing and food issues, job losses, dependent care situations, isolation and exhaustion, irregular computer or internet access, to name just a few. We wish for our journal to bring together our community (promoting kindness, compassion and solidarity), and we hope to achieve this with our second issue and our live panel debate on 23 June at the ELFA AGM.

Greta Bosch
Editor-in-Chief

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Effective governance in English Universities: a case study of pre- and post-1992 institutions

Richard Bogue & Stuart MacLennan*

Abstract

There is a marked difference in the governance structures of pre- and post-1992 universities in England. Notably, greater academic representation and involvement is evident in pre-1992 universities. By contrast, post-1992 universities more closely adhere to the 'business model' of governance endorsed by government commissioned reviews of university governance, with greater lay membership of governing bodies, and an extensive executive team, led by the vice-chancellor. It is submitted that the business model is unsuitable for ensuring effective governance, fails to reflect the core educational function of universities, and marginalises academic input into governance processes. This article aims to critically analyse the legal constitutional framework, and the regulatory framework, within which universities in England operate, and the implications for governance. Specific reference is made to the constitutions of pre-1992 universities and post-1992 universities. This article further considers the regulatory framework under the Office for Students (OfS), including the extensive the powers available to the OfS to intervene in universities, and their approach in exercising those powers. Problems in the regulatory framework's reliance on self-reporting by universities are examined, in particular, as well as the Code of Governance for Higher Education. This article concludes that the current legal and governance framework is not conducive to effective governance, and makes a number of recommendations for reform.

Keywords: Higher education governance, corporate governance, universities

* University of Birmingham & Coventry University, respectively.

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Introduction

Universities in England are corporations aggregate.[1] Until the creation of what is now University College, London in 1826 the two universities of Oxford and Cambridge were the only universities in England.[2] These two ancient English universities were established by charter and later formally incorporated as civil corporations in 1571 by Act of Parliament, to recognise and enshrine their corporate status.[3] The creation of corporations by Charter, in exercise of the Royal Prerogative, may be regarded as an anachronism little used in practice today,[4] but continued as the predominant method to incorporate new universities in England until comparatively recently. Consequently, most universities in England created before 1992 were incorporated by Royal Charter.[5]

The enactment of the Further and Higher Education Act 1992 (FHEA) departed from this model, with post-1992 universities established by, and their constitutions set out within, the Education Reform Act 1988 (ERA), as amended by the FHEA. The significance of the legal and regulatory changes introduced by the FHEA with respect to university governance can be evidenced by the fact that the governance structures of universities in England are frequently differentiated as being either pre-1992 or post-1992.

The legal and regulatory regime in which universities in England operate has undergone further significant change following the enactment of the Higher Education and Research Act 2017 (HERA). This includes the establishment of a new regulator for universities in England, the Office for Students (OfS), and a new regulatory framework under which OfS maintains a register of universities in England.

Ensuring the adequacy and appropriateness of corporate governance is as important in relation to universities as it is to other corporations, as all corporate

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[1] Graeme Moodie and Rowland Eustace, *Power and Authority in British Universities*, (Routledge 1974), p45.
[2] *Ibid.*, p25.
[3] Oxford and Cambridge Act 1571. See also Dennis Farrington and David Palfreyman, *The Law of Higher Education* (2nd edn, Oxford University Press 2012), pp134-135.
[4] *Halsbury's Laws* (5th edn, 2010) vol 24, para 406. See also, The Privy Council Office, Royal Charters, available at: https://privycouncil.independent.gov.uk/royal-charters/ [accessed 7 January 2020].
[5] Dennis Farrington and David Palfreyman, *The Law of Higher Education* (2nd edn, Oxford University Press 2012), p134.

entities need governing.[6] University governance has been a subject of repeated official and government commissioned scrutiny over the past 35 years.[7] Nonetheless there is evidence of a lack of efficacy of such scrutiny, the associated findings, and recommendations of such scrutiny, and attempts to implement those recommendations.

As the effects of the global Covid-19 pandemic continue to be felt, universities in England are again facing significant resource pressures, with some institutions predicted to lose over forty percent of their annual income and thus facing financial collapse without government intervention.[8] This, arguably creates an environment in which there is an increased likelihood of governance failings at universities in England.

This article examines governance in relation to the two major categories of universities outlined above, namely: pre-1992 universities and post-1992 universities. Particular reference will be made to the legal, constitutional, framework of The University of Birmingham (UoB) and of Coventry University (CU) as illustrative examples of pre-1992 and post-1992 institutions (respectively). This article will consider these examples in the context of their somewhat differing academic emphases. While pre-1992 universities generally seek to place equal emphasis on teaching and research, the educational objectives of post-1992 universities tend to be pre-eminent.

Universities in England operate subject to multiple regulatory regimes.[9] An examination of all such regulatory frameworks is not feasible within the constraints of this article. This examination will, therefore, focus on the

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[6] Bob Tricker, *Corporate Governance: Principles, Policies and Practices* (4th edn, Oxford University Press 2019), p3.

[7] See Committee of Vice Chancellors and Principals, Steering Committee for Efficiency Studies in Universities (Jarratt Report). (1985); National Committee of Inquiry into Higher Education, Higher Education in the Learning Society: Report of the Main Committee (Dearing Report). (1997); HM Treasury, Lambert Review of Business-University Collaboration: Final Report. (2003), Chapter 7.

[8] Universities UK, 'Achieving stability in the higher education sector following COVID-19' (10 April 2020), available at: https://universitiesuk.ac.uk/news/Documents/uuk_achieving-stability-higher-education-april-2020.pdf [accessed 10 April 2020]; David Kernohan, 'Will Doubling QR Be Enough?', *Wonkhe* (20 April 2020), available at: https://wonkhe.com/blogs/will-doubling-qr-be-enough/ [accessed 20 April 2020].

[9] Such as the Competition and Markets Authority, United Kingdom Visas and Immigration, Office of the Independent Adjudicator and Information Commissioner's Office.

regulatory framework for higher education in England, for which the OfS is the principal regulator.

This article commences with an examination of the legal and constitutional frameworks in place at pre-1992 universities and post-1992 universities, with reference to the legal frameworks of UoB and CU (respectively). It proceeds to consider whether the regulatory framework within which universities in England operate is conducive to effective governance, with examination of the new regulatory framework under the OfS, and the extent to which it resolves governance issues that had previously been identified in a regulatory context. Consideration will also be given to the approach taken by OfS in balancing the requirement for effective regulation and the principle of institutional autonomy. The adequacy of the CUC Higher Education Code of Governance will also be considered. This article concludes by analysing why the legal and regulatory framework is currently not conducive to ensuring effective governance and summarising the key shortcomings that should be addressed.

Legal and Constitutional Frameworks

There is broad acknowledgement of three components of governance within universities: i) the governing body, responsible for overseeing the activities and governance of the university (analogous to trustees); ii) the academic body, responsible for agreeing academic policies, standards, and awards; and iii) the executive of the university, usually comprised of the Vice Chancellor, Deputy and Pro-Vice Chancellors, and other senior managers who are responsible for the day-to-day management of the university.[10] According to Shattock, modern university governance is characterised by a decline in power amongst the academic body, a constitutional position of pre-eminence for the governing body – theoretically making it the supreme governing organ of a university, and an emerging trend towards an expansive executive, both in terms of size and power, increasingly making the executive the de facto pre-eminent component of modern university governance.[11]

[10] Mark Taylor, 'Shared Governance in the Modern University' (2013) 67(1) Higher Education Quarterly 80, p88; Michael Shattock, 'University Governance: An Issue for Our Time', (2012) 16(2) Perspectives: Policy and Practice in Higher Education 56, 61

[11] Michael Shattock, *ibid.*, and Centre for Global Higher Education, *Working Paper 13: University Governance in Flux. The Impact of External and Internal Pressures on the Distribution of Authority within British Universities: A Synoptic View (Michael Shattock).* (2017)

Official Reviews of University Governance

Government commissioned and endorsed scrutiny of university governance in England or the whole United Kingdom over the past 35 years has included the Jarratt Report,[12] the Dearing Report,[13] and as part of the Lambert Review.[14] Following devolution this has been mirrored and supplemented by reviews of university governance in other the other nations of the United Kingdom.[15]

The preferred governance model advocated by these official reviews attempts to mirror aspects of governance arrangements favoured by companies, and has been termed the 'business model',[16] the characteristics of which can be summarised as follows:

i) the university's governing body should be smaller rather than larger;
ii) the governing body should be separate from, and superior to, the university's academic body;
iii) the governing body should be comprised by a majority of independent, external, governors who should have knowledge and experience of business;
iv) representation on the governing body from staff and students of the university should be limited; and
v) the governing body should be distanced from the work of the university.[17]

[12] Committee of Vice Chancellors and Principals, Steering Committee for Efficiency Studies in Universities (Jarratt Report) (1985).
[13] National Committee of Inquiry into Higher Education, Higher Education in the Learning Society: Report of the Main Committee (Dearing Report) (1997).
[14] HM Treasury, Lambert Review of Business-University Collaboration: Final Report. (2003), Chapter 7
[15] Welsh Assembly Government, Report of the Independent Review of Higher Education Governance in Wales (McCormick Review) (2011); Scottish Government, Report of the Review of Higher Education Governance in Scotland (von Prondzynski Report) (2012); Universities Wales, A Review of Governance of the Universities in Wales (Camm Review) (2019).
[16] Higher Education Policy Institute, University Governance In A New Age of Regulation (HEPI Report 119) (2019) p4.
[17] Roger Brown, 'What Do We Do About University Governance? (Part 1)', (2011) 15(2) Perspectives: Policy and Practice in Higher Education 53, pp54-55.

Principles of Effective University Governance

In establishing principles to understand what effective governance means in relation to universities, Brown suggests the following principles:[18]

i. A university must have a governing body, and that governing body must be accountable to the full range of interests in the university for the university's effectiveness and efficiency.
ii. For this purpose, the governing body must be broadly representative of the university's main groups of stakeholders.
iii. The governing body must be able to exercise control over the institution, particularly to ensure that the interests of the various stakeholders in the university's activities are balanced and as far as possible integrated. This control must include control over teaching and research, delegated through the vice- chancellor as 'chief academic officer' to the senate or academic board.
iv. The governing body must be able to access specialist professional knowledge in order to be able to appraise the university's performance and to direct or oversee the appropriate remedial actions

Institutional autonomy has long been a fundamental tenet of university governance, with Moodie and Eustace observing that 'universities in the United Kingdom are autonomous institutions. They are, without exception, independent corporations, able to… regulate their own affairs within the wide powers granted to them by the instruments of their incorporation.'[19]

As Christensen has highlighted, in a regulatory context there is an inherent tension between the principle of institutional autonomy and regulatory powers of intervention, with a need to balance the two concepts.[20]

The constitution of pre-1992 universities in England

The constitution of pre-1992 universities in England, established by Royal Charter, primarily comprises its Charter and Statutes, supplemented by other subordinate legislation of the university such as its ordinances and

[18] *Ibid*., p87.
[19] *Supra* note 1, p45.
[20] Tom Christensen, 'University governance reforms: potential problems of more autonomy?' (2011) 62 Higher Education 503.

regulations.[21] The Royal Charter for UoB was issued on 24 March 1900, and subsequently revised by approval of the Privy Council, most recently in 2009.[22] UoB's Statutes were appended to, and issued with, the Charter and have since been revised by approval of the Privy Council, most recently in 2018.[23] Notably, the constitution of UoB provides a useful illustrative example for the purposes of the review and analysis undertaken below, as UoB was the first unitary civic university[24] established in England and consequently its constitution was replicated for all the subsequent unitary civic universities in England, created from 1900 onwards.[25]

Governing Body: The Council

UoB's constitution establishes its Council as the 'supreme governing body' of the university, with 'absolute power within the university', subject to the Charter, Statutes, and general law. Membership of Council is required to comprise the vice-chancellor, the provost, four academic staff members elected from amongst the academic staff members of the university's Senate, two student members from the university's guild of students, and sixteen independent members (who must not be staff or registered students of the university); giving a total Council membership of 24, two thirds of whom are independent lay members.[26] Independent members are to be selected by a membership committee of Council having regard to the need for diversity and interests on the Council.[27]

[21] University of Birmingham Legislation, available at: https://intranet.birmingham.ac.uk/as/registry/legislation/index.aspx [accessed 28 January 2020].
[22] Preamble to Charter of the University of Birmingham, available at: https://www.birmingham.ac.uk/Documents/university/legal/charter.pdf [accessed 28 January 2020].
[23] Statutes of the University of Birmingham, page 22, available at: https://www.birmingham.ac.uk/Documents/university/legal/statutes.pdf [accessed 28 January 2020].
[24] As opposed to collegiate universities like Cambridge, Durham, and Oxford.
[25] Centre for Global Higher Education, Working Paper 13: University Governance in Flux. The Impact of External and Internal Pressures on the Distribution of Authority within British Universities: A Synoptic View (Michael Shattock) (2017) p2.
[26] University of Birmingham Statutes, s8.
[27] University of Birmingham Ordinances, s2.16.6.

Academic Body: The Senate

UoB's constitution provides for a Senate, as the highest academic body within the university, responsible for 'regulating and directing the academic work of the University in teaching, examining and research' and for conferring academic awards by the university.[28] Membership of the Senate totals fifty-eight, which includes twenty-one ex officio staff members, including the vice-chancellor and the provost of the university, five academic staff nominated by their head of college, twenty academic staff (including at least one professor from each of the five academic college of the university) elected by their college's academic staff, up to six co-opted members selected by the Senate on the recommendation of the vice-chancellor, and six students of the university, one of whom is the education officer of the university's guild of students ex officio.[29]

The Executive

UoB's Charter and Statutes contains few provisions which provide for an 'executive' function, although it does specify the post of vice-chancellor.[30] The constitutional provisions relating to the role, power and function of the vice-chancellor do not focus on their executive role, but on their role as principal academic officer of the university, such as the vice-chancellor's role in chairing the Senate ex officio, and their membership ex officio of any committees of the Senate.[31]

UoB's ordinances do provide for a 'University Executive Board' comprising the vice-chancellor, the provost, the three pro-vice-chancellors, the five heads of colleges, and the registrar and secretary.[32] Other individuals may join the executive board by approval of Council.[33] Currently membership of the executive board includes twelve individuals, being the eleven ex officio postholders outlined above, together with the university's director of finance.[34]

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[28] University of Birmingham Charter, Article 8.
[29] University of Birmingham Ordinances, s2.9.1.
[30] University of Birmingham Charter, Article 6; and University of Birmingham Statutes, s5.
[31] University of Birmingham Statutes, ss5 & 10.5
[32] University of Birmingham Ordinances, s2.14.1
[33] *Ibid*, s2.14.1
[34] University of Birmingham, University Executive Board Membership, available at: https://www.birmingham.ac.uk/university/governance/ueb/index.aspx [accessed 28 January 2020].

The power and functions of this executive board include taking decisions on university strategy, operation and management, and monitoring the implementation of university strategies and policies. Crucially, however, these powers may be exercised by the executive board only 'within the authority delegated by the Council and specified in terms of reference from time to time.'[35] Furthermore, the constitutional provisions under which the existence, composition, powers, and role of the executive board arise are found within the university's ordinances, which are themselves made by Council, and accordingly Council has power to amend these provisions as it sees fit.[36]

The constitution of post-1992 universities in England

The constitution of post-1992 universities in England, established as higher education corporations, comprises its Instrument of Government and its Articles of Government. Notably, however, these documents are supplemental to, and their form and content dictated by, the statutory provisions of the ERA and associated statutory instruments used to create higher education corporations. For example, the incorporation of CU does not arise by virtue of its Instrument of Government being issued, but by a statutory instrument made by the Secretary of State for Education, pursuant to section 121 of the ERA, under which higher education corporations were incorporated.[37] Similarly the form and content of CU's Instrument of Government and its Articles of Government, issued by the Privy Council, were drafted in accordance with Schedule 7A of the ERA.[38]

Governing Body: The Board of Governors

CU's constitution establishes a Board of Governors as the governing body of the university with ultimate authority and responsibility over the educational and financial affairs of the University, responsibility for oversight of its activities, and for the appointment, appraisal and pay and conditions of executive postholders.[39] A maximum membership of 24 appointed members, plus the vice-chancellor, is mandated for the Board of Governors,[40] of which at least half must be independent lay members (up to a maximum of thirteen

[35] University of Birmingham Ordinances, s2.14.2.
[36] University of Birmingham Statutes, s12.
[37] The Education (Higher Education Corporations) Order 1988.
[38] Inserted by section 71(4) and Schedule 6 of the Further and Higher Education Act 1992.
[39] Coventry University Articles of Government, Article 3.1.
[40] Coventry University Instrument of Government, Article 3.1.

independent lay members).[41] These lay members are to be selected based on their experience in 'industrial, commercial or employment matters or the practice of any profession.'[42] Of the remaining membership, up to two may be teachers at the university nominated by the university's Academic Board,[43] and up to two may be students of the university nominated by the university's students.[44] Additionally at least one, and up to nine, individual(s) are co-opted members of the Board of Governors, nominated by the non-co-opted members, and are to have 'experience in the provision of education.'[45]

Academic Body: The Academic Board

CU's constitution also provides for an academic body, the Academic Board, with responsibility for academic matters including policies and procedures for the assessment and examination of students.[46] Notably, the role and powers of the Academic Board are expressly 'subject to… the overall responsibility of the Board of Governors',[47] and, accordingly, the Academic Board is subordinate to the Board of Governors within CU's constitutional framework. This hierarchical relationship between the Academic Board and the Board of Governors is further reinforced by provisions in CU's constitution enabling the Board of Governors to determine the scope of the Academic Board's remit,[48] and the fact that the membership of Academic Board is subject to approval by the Board of Governors.[49] The Academic Board may comprise up to 34 members, of which the vice-chancellor, the provost, the deputy-vice-chancellors, the pro-vice-chancellors, and the academic deans of each of the four academic faculties of the university are members ex-officio. Of the Academic Board's total membership at least half is to consist of the holders of senior management posts (i.e. the executive of the University), as determined by the Board of Governors.[50] Of the remaining membership, there is to be at least one member of teaching staff from each of CU's four academic faculties, and up to two students and up to two non-teaching staff, in addition to co-opted

[41] *Ibid.*, Article 4.3 and Article 3.2(a)
[42] *Ibid.*, Article 3.3
[43] *Ibid.* Article 3.2(b)
[44] *Ibid.*, Article 3.2(b)
[45] *Ibid.*, Article 3.2(c) and Article 3.4
[46] Coventry University Articles of Government, Article 3.3
[47] *Ibid.*, Article 3.3
[48] *Ibid.*, Article 3.3(c)
[49] *Ibid.*, Article 4.1
[50] *Ibid.*, Article 4.2(a) and (b), and Article 1.1(b)

members.[51] Under the terms of reference for the Academic Board approved by the Board of Governors, membership of the Academic Board currently includes, in addition to the ex officio members summarised above, the university's librarian, the registrar, and secretary ex officio, and one representative from each university subsidiary which delivers academic provision.[52] Accordingly, under the terms of reference, the total membership of the Academic Board is currently twenty-nine, of which two are students of the university. The terms of reference also provide that the four teaching staff, one from each of the university's four academic faculties, are to be senior academic staff selected by the executive deans of their respective schools, rather than their selection arising from an electoral process involving their academic colleagues, as seen in relation to UoB's Senate.[53]

The Executive

CU's constitution provides that the vice-chancellor is 'the chief executive' of the university. The vice-chancellor is responsible for the organisation and management of the university, the leadership of its staff, and the appointment, and pay and conditions, of all staff other than holders of executive posts (as determined by the Board of Governors), together with the assignment of duties of all staff including the holders of executive posts.[54]

Besides the role and powers of the vice-chancellor, CU's constitution does not otherwise prescribe specific executive roles. Consequently, the size, roles, and powers of the executive of the university is left to be determined by the vice-chancellor in conjunction with the Board of Governors. Currently, CU has a sizable executive team which, besides the vice-chancellor, comprises a provost, four deputy-vice-chancellors, eight pro-vice-chancellors, six associate pro-

[51] *Ibid.*, Article 4.2(c) to (f)
[52] Coventry University Academic Board, Constitution and Terms of Reference, Section 3.1, available at: https://www.coventry.ac.uk/globalassets/media/global/06-life-on-campus-section-assets/the-university/key-information-page/governance/academic-board-constitution-and-terms-of-reference.pdf [accessed 4 February 2020].
[53] Coventry University Academic Board, Constitution and Terms of Reference, Section 3.1(d)
[54] Coventry University Articles of Government, Article 3.2

vice-chancellors, the registrar and chief governance officer, a chief finance officer, and chief people officer.[55]

Ensuring effective governance

In order to examine whether or not university governance is effective, it is first necessary to establish principles regarding what effective governance means in relation to universities.[56] Two theories dominate the literature concerning effective governance: agency theory and stakeholder theory.

Amongst the theories to have shaped the development of corporate governance, agency theory has established a prominent position. Berle and Means highlighted the diminishing control shareholders are able to exercise over the management of their assets, owing to the separation of ownership from management in corporations, and the increasingly dispersed ownership of corporations amongst its numerous shareholders.[57]

Jensen and Meckling and Fama and Jensen have scrutinised the agency relationship inherent in corporations, whereby shareholders (owners) delegate control to management (agents) and have noted the potential for an agent to act in his own self-interest, and the information asymmetry which can prevent owners from effectively scrutinising and holding to account management.[58]

Buckland, however, has suggested that agency theory is not a suitable lens through which to view corporate governance in relation to universities, owing to the diversity of the principals (those with a legitimate interest in the outcome of a university's activities) and the difficult in identifying them.[59]

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[55] Coventry University, Vice-Chancellor's Office, available at: https://www.coventry.ac.uk/the-university/about-coventry-university/governance/vice-chancellors-office/ [accessed 21 January 2020].
[56] See note 18.
[57] Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (Macmillan 1932)
[58] Michael Jensen and William Meckling, 'Theory of the Firm: Management Behaviour, Agency Costs and Ownership Structure' (1976) 3(4) Journal of Financial Economics 305; Eugene Fama and Michael Jensen, 'Separation of Ownership and Control', (1983) 26(2) Journal of Law and Economics 175.
[59] Roger Buckland, 'Universities and Industry: Does the Lambert Code of Governance Meet the Requirements of Good Governance?', (2004) 58(4) Higher Education Quarterly 243.

In contrast, Donaldson and Davis, and Davis, Schoorman and Donaldson have argued that agency theory is built upon a flawed characterisation of managers as untrustworthy, that the interests of managers will not always diverge from those of the principal stakeholders of a corporation, and that the managers of a corporation will not inevitably act in their own self-interest. Instead, they suggest that many managers will act as stewards to safeguard a corporation's resources for the long term, for the mutual benefit of both the principals and managers of the corporation.[60]

Whilst acknowledging that stewardship theory is more sympathetic towards the position of academic staff than agency theory, Shattock nonetheless contends that stewardship theory is unsuitable as a framework for considering university governance issues, as it takes no account of legal and constitutional provisions for academic involvement in university governance.[61] Furthermore Schofield points out that stewardship theory assumes shared interests between a corporation's management and its principal stakeholders, but that it may be difficult for the objectives of an autonomous higher education institution to be fully aligned with those of its numerous stakeholders.[62]

It is, therefore, necessary, to consider the governance of higher education institutions outwith the accepted paradigms and, instead, to evaluate the governance of universities in the context of the stakeholders to whom a university is responsible.

It has been suggested that the concept of a well-governed university means a university 'that conscientiously and clearly seeks to discharge its core functions in the interests of each main group of stakeholders.'[63]This in turn leads to further questions: What are the core functions of a university? What are its objects? Who are its stakeholders?

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[60] Lex Donaldson and James Davis, 'Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns', (1991) 16(1) Australian Journal of Management 49; and James Davis, David Schoorman, and Lex Donaldson, 'Towards a Stewardship Theory of Management', (1997) 22(1) Academy of Management Review 20.
[61] Michael Shattock, *Managing Good Governance in Higher Education* (Open University Press 2006), 3
[62] Allan Schofield, *What is an Effective and High Performing Governing Body in UK Higher Education?* (Leadership Foundation for Higher Education 2009), 22
[63] *Supra* note 17, p87.

The Functions and Stakeholders of Universities

The functions (objects) of a university may be broadly defined as the advancement of education for the public benefit, which has been recognised as a charitable purpose since the sixteenth century,[64] with the charitable status of universities continuing to be recognised.[65] This core function is reflected and expanded upon within both the Charter and Statutes of UoB and within the ERA provisions which set-out CU's powers and objects. UoB's core functions stated to be conducting teaching and examination, furthering the prosecution of original research, and achieving advancement, dissemination and application of knowledge for the public benefit.[66] Similarly CU's core functions, pursuant to the ERA, include providing higher education, carrying out research and publishing the results of research,[67] and it must do so for the public benefit in order to validly discharge its charitable functions.[68] It is notable that in both cases the provision of teaching or education is provided pre-eminence.

The concept of stakeholders of a university is likely to be a dynamic one, changing over time. Such change might occur, for example, where a university expands its operations into a new geographic location, or receives a new source of external funding or other support for its activities. Consequently, effective governance will entail an ongoing process of identifying the university's stakeholders. Nonetheless a university's stakeholders will likely include its 'students, prospective and past students, staff, government, partners, and the

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[64] Dennis Farrington and David Palfreyman, *The Law of Higher Education* (2nd edn, Oxford University Press 2012), at pages 7-9 ; see also Minto Felix, 'Lessons for higher education governance from the charity sector', *Wonkhe* (23 June 2019), available at: https://wonkhe.com/blogs/practicing-what-we-preach-lessons-for-university-governors-from-charities/ [accessed 13 December 2019].

[65] See: Charities Act 2011, Schedule 3, paragraphs 2-6. See also, Charity Commission, *The Advancement of Education for the Public Benefit* (2011), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/358536/the-advancement-of-education-for-the-public-benefit.pdf [accessed 13 December 2019].

[66] University of Birmingham Charter, Article 3; and University of Birmingham Statutes, s7.

[67] Education Reform Act 1988, s123A(1).

[68] Charity Commission, *The Advancement of Education for the Public Benefit* (2011); and Charity Commission, *Research by Higher Education Institutions* (2009), pages 7 and 8, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/350471/research_by_higher_education.pdf [accessed 13 December 2019].

wider community',[69] which will include the business community, as the chief source of employment.[70]

Constitutional position of the governing body

From the governance principles suggested by Brown,[71] the key role of the university's governing body as its supreme governing organ is clear. The constitutions of both pre-1992 and post-1992 universities clearly establish the governing body (the Council of UoB and the Board of Governors of CU) as the ultimate decision-making body. There is an important distinction, however, in that in pre-1992 universities there is

> a bicameral system of governance where the senate has 'supreme' powers in academic matters, with the governing body responsible for finance, building and general management of the institution, while in [post-1992 universities] a unicameral system exists with academic affairs clearly subordinate to the authority of the governing body.[72]

As noted above, this is reflected within the constitutional frameworks of UoB and CU, with the role and powers of CU's Academic Board more clearly subordinate to the Board of Governors within CU's constitutional framework than is the case for UoB's Senate in relation to UoB's Council. Nonetheless, both CU's and UoB's constitutions clearly establish the pre-eminence of their respective governing bodies.

The constitutional primacy of the governing body within a university's legal framework is not, however, of itself a guarantee that the governing body of a university can or will discharge its governance role effectively. In particular mis-governance may arise by virtue of the governing body being unable to independently monitor and interpret information about institutional effectiveness; demonstrating an over-reliance on, and failure to exercise proper control over, the executive, especially the vice- chancellor as chief executive

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[69] Garry Carnegie and Jacqueline Tuck, 'Understanding the ABC of University Governance' (2010) 69(4) Australian Journal of Public Administration 431, p437.
[70] Malcolm Gillies, *University Governance: Questions for a New Era (HEPI Paper 52)* (2011) p13, available at: https://www.hepi.ac.uk/wp-content/uploads/2014/02/UniversityGovernance.pdf [accessed 4 April 2020].
[71] See note 18
[72] Michael Shattock, *Managing Successful Universities* (McGraw-Hill Education 2010), p118.

of the university; failing to engage effectively with internal stakeholders, particularly academic staff, or with external stakeholders; allowing too close a relationship to be formed between the vice-chancellor and the chair of the governing body, leading to a concentration of power with individual governors feeling disempowered.[73]

Size of Governing Body

Historically, another notable difference between the governing bodies of pre-1992 and post-1992 universities has been their size and their composition, with the Dearing Report finding that 'for the pre-1992 institutions… larger governing bodies or their equivalent are common' in light of which Dearing recommended that the maximum size of governing bodies for all universities should be 25.[74] Similarly, the Lambert Review criticised traditional governance arrangements at pre-1992 universities, noting that such universities 'were, historically, run as communities of scholars. Their management and governance arrangements were participatory: senates and councils were large and conservative.'[75]

At the time of the Lambert Review it was found that 'very few pre-1992 universities have managed to meet Dearing's recommendation that governing bodies should have a maximum of 25 members, despite widespread agreement that larger bodies are less effective.'[76] Many pre-1992 universities have now reduced the size of their governing bodies in accordance with Dearing's recommendations.[77] This is reflected in the limits on the size of the governing body set out within the constitutions of both UoB and CU: being twenty-four and twenty-five respectively; and in the number of members actually appointed by UoB and CU: currently twenty-one each.[78] Accordingly, both UoB and CU are adhering to the aspects of the 'business model' of university governance advocated by Dearing and Lambert, with respect to both the constitutional position and the size of their respective governing bodies: that it should occupy

[73] *Supra* note 17, p55.
[74] *Supra* note 13, p241.
[75] *Supra* note 14, p93.
[76] *Ibid*., p96.
[77] *Supra* note 26, pp5 & 6; and Shattock *supra* note 12, p59.
[78] See University of Birmingham Senate Membership 2019/20, available at: https://www.birmingham.ac.uk/university/governance/senate/index.aspx [accessed 28 January 2020]; and Coventry University, Board of Governors and Committees, available at: https://www.coventry.ac.uk/the-university/about-coventry-university/governance/board-of-governors/governors/ [accessed 21 January 2020].

a superior position to the senate or academic board, and that the governing body should be smaller rather than larger.[79]

Composition of Governing Body

The third element of the 'business model' relates to the composition of the governing body, with the requirement that it should have a clear majority of external governors, ideally with business backgrounds and expertise.[80] Students are, of course, amongst a university's stakeholder groups, as funders and direct recipients of a university's educational functions. It therefore accords with principles of effective governance that students are included as members of university governing bodies.[81]

The composition of CU's Board of Governors includes a significant majority of external governors. Of the twenty-one current members of the Board of Governors, two are students of the university, two are staff of the university, one (the vice-chancellor) is a member of the university's executive, and the remaining sixteen are external independent lay members. Of the two staff members, only one is a member of academic staff, with the other a member of the university's professional services function. Accordingly independent members comprise 76% of the Board of Governors, whereas academic staff of the university comprise just 5%. This adheres the business model concept of more limited academic representation and involvement in governance, in favour of greater external independent representation.[82]

By contrast, of the twenty-one current members of UoB's Council, two are students of the university, four are academic staff of the university elected by the Senate, two (the vice-chancellor and the provost) are members of the university's executive, and thirteen are external independent lay members, with three current external lay vacancies. Accordingly, independent members currently comprise less than two-thirds (62%) of Council, with academic staff comprising almost a fifth (19%) of Council. Even adjusted based on the three external lay member vacancies being filled, these figures are largely unchanged (67% and 17% respectively). Academic staff are, therefore, more extensively represented and included within the constitutional legal framework of pre-1992

[79] *Supra* note 17.
[80] *Supra* note 17.
[81] See principle [iii] at *supra* note 18.
[82] *Supra* note 17.

universities than under the legal constitutional framework of post-1992 universities.

It is widely accepted that there are clear governance benefits in including external lay members on university governing bodies. Universities are large, complex, corporate entities and therefore lay members can bring experience and professional expertise in finance, resource management, and other technical areas. In addition, independent members are able to

> take a long view because they are not encumbered with immediate institutional management concerns, they can act as the critical friend and as the referee over internal arguments, and they can offer a reading of the environment which may be broader, and less higher education centred, than that of an institution's senior managers.[83]

Furthermore, the wider community, including the business community, is amongst a university's stakeholder groups and therefore including external lay members from the wider community or business community helps ensure effective representation of these stakeholder groups within the governance process.[84]

This does not, however, negate the value of ensuring representation and involvement of other stakeholder groups. In particular, the business model appears to marginalise the academic community in the governance process. It has been suggested that the business model is founded on the concept that

> both effectiveness and efficiency are most likely to be served by a lean, independent governing body that is able to take decisions quickly and dispassionately, rather than being driven or even distorted by academic issues or interests.[85]

By taking such an approach, the business model fails to recognise that what may, on the face of it, seem to be a purely financial decision can have a significant academic dimension. For example, a decision to close an unprofitable course or department, or to invest in new facilities, will involve

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[83] Michael Shattock, *Managing Good Governance in Higher Education* (Open University Press 2006), pp56 and 57.
[84] See principle [ii] at *supra* note 18.
[85] *Supra* note 17, p55.

academic considerations as much as financial ones.[86] Furthermore, the Covid-19 pandemic has clearly demonstrated that universities, both pre-1992 and post-1992, have been able to rapidly take decisions and implement significant changes at pace on a range of matters, not least of which has been the method of delivery of teaching to students.

Perhaps the biggest shortcoming of the business model of university governance is that it fails to recognise that the functions of a university are different to the functions of a company. It also fails to recognise who contributes towards the operation of a university, as business is only one of the stakeholders in universities. As the core function of universities is educational university governing bodies need the detailed involvement of senior representatives of the academic community in order to properly be effective as a governing body for the university.[87]

Accordingly, there needs to be greater academic representation on university governing bodies than envisaged under the business model. The appointment of additional academics to university governing bodies would enable those individuals to act as a conduit between the governing body and the academic body of a university. This would arguably foster greater cooperative working between each body, and it is submitted that 'a strong senate/academic board, working jointly with the governing body in areas such as strategy and resource allocation, brings together the vital constituents of good governance in a university context.'[88] From this perspective the pre-1992 university legal framework is better suited to ensuring effective governance.

Furthermore, the governing body composition promoted by the business model is not actually representative of the corporate governance arrangements typically found within the business environment. Most UK public companies would have a roughly equal split between executive directors and non-executive directors, or a small majority of non-executive directors.[89] For universities, however, the vice-chancellor may often be the only member of the executive on the university's governing body, particularly at post-1992 universities (as is seen in CU's board composition). The idea of any UK public

[86] Shattock, *supra* note 12, p57.
[87] *Supra* note 78, p50.
[88] *Supra* note 78, p50.
[89] Bob Tricker, *Corporate Governance: Principles, Policies and Practices* (4th edn, Oxford University Press 2019), pp49-50.

company operating on the basis of having only one executive director, approximately 20 non-executive directors, plus staff and consumer representatives is 'impossible to imagine.'[90] To this extent the pre-1992 university governance model may be regarded as closer to the corporate governance model implemented in business, as in pre-1992 universities the provost, pro-vice-chancellors or other members of the university's executive team may be members of the governing body ex officio, and the governing body may also partly comprise academics nominated by the senate, which has executive authority for academic matters.[91] Under UoB's legal constitutional framework both the vice-chancellor and the provost are members of the Council ex officio, and four academic staff are elected to the Council by the Senate.

Moreover, insofar as external independent lay members of university governing bodies can be considered the equivalent of non-executive directors on company boards, it must also be highlighted that non-executive directors have proven to be ineffective in preventing mis-governance. As Brown observes

> [t]he example of the banks is only the latest in a long series of cases where non-executive directors have been shown to be quite ineffectual in controlling executives. Other stakeholders – employees, customers, suppliers, sub-contractors, bondholders, local communities, even the state where it owns part of the company or has lent or given it taxpayers' money – are not formally engaged at all.[92]

Accordingly, attempting to apply a university governance 'business model' which places even greater reliance on the equivalent of non-executive directors is an inadvisable method of seeking to ensure effective governance.

Background and Experience of Governing Body Members

Differences are also revealed when examining the background and experience of the current external members of UoB's and CU's respective governing bodies. UoB's independent Council members predominantly have backgrounds and experience gained in the public sector, including at local

[90] *Supra* note 78, p47.
[91] *Supra* note 90.
[92] *Supra* note 12, p88.

authorities, or national government departments and agencies. A minority have been in professional practice and hold professional qualifications as solicitors or chartered accountants. CU's independent Board of Governors member predominantly have backgrounds and experience gained in the private sector, including within engineering, manufacturing, and technologies sectors. Again, a minority have been in professional practice and hold professional qualifications as chartered accountants.

Accordingly, the profile of CU's independent governing body members adheres more closely to the business model than UoB, with an emphasis on business, commerce and private sector experience evident amongst CU's independent governing body members. This provides further evidence of a closer adherence to the business model by post-1992 universities than pre-1992 universities, although both UoB and CU have independent governors with backgrounds, experience and professional qualifications gained in professional practice.

Again, the business model is arguably not actually representative of the corporate governance arrangements typically found within the business context, as non-executive directors are selected based on the relevant experience they can bring to a company's business. The selection of external independent members of university governing bodies under the business model, however, is based upon experience and expertise gained from finance, business, and professional backgrounds, and accordingly this fails to recognise the core function of a university, namely: the advancement of education.

Considering the typical background and experience of university governing body external members it has, therefore, been suggested that certain functions that would be typically undertaken by a company board drawing on the experience and expertise of its non-executive directors may, therefore, be undertaken in a university context not by its governing body but by its academic board or senate, whose members will have relevant experience and expertise gained in a higher education setting.[93]

It is submitted that executive scrutiny by university governing bodies would be enhanced, and therefore governance in universities strengthened, if a university governing body's external members included at least one individual who had

[93] *Supra* note 78, p47.

previously held office as a vice-chancellor, deputy or pro-vice-chancellor, university registrar, or other senior executive post at a university.[94]

Engagement with the Academic Community

The ability for the academic community to input into the university's strategic decision-making process is also an important aspect of effective governance in universities. The business model appears to marginalise the academic community in the governance process. This can be seen in the conclusions of the Lambert Review which criticised traditional 'participatory' governance seen in pre-1992 universities, and praised what it described as 'dynamic management in an environment where decisions cannot wait for the next committee meeting.'[95]

Following the 'dynamic management' approach endorsed by the business model, universities in England have seen a trend towards an expansive executive within universities, both in terms of size and power, and a concurrent diminishing role for participatory governance involving the academic community. This increasingly makes the executive the de facto pre-eminent component of modern university governance. It has been suggested that the transfer of strategic decision-making powers over to 'chief executives' and executive teams in universities comprised of 'manager academics', and away from academic bodies, has been 'perhaps the greatest transformation in university governance.'[96] The trend towards a sizable and increasingly powerful executive function has been seen in pre-1992 universities,[97] but is often more clearly evident in post-1992 universities.[98] The comparative size of UoB's and CU's executive teams reflects this, with the large size of CU's executive team having been noted in Parliamentary debate.[99]

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[94] *Supra* note 18, p89.
[95] *Supra* note 14, p93.
[96] *Supra* note 26, p6. See also: Rosemary Deem, Sam Hillyard and Michael Reed, Knowledge, Higher Education, and the New Managerialism: The Changing Management of UK Universities (Oxford University Press 2008).
[97] Sue Shepherd, 'Strengthening the university executive: The expanding roles and remit of deputy and pro-vice-chancellors', (2018) 72 Higher Education Quarterly 40.
[98] Shattock, *supra* note 12, p59.
[99] See: House of Lords Written Question – HL151, 7 January 2020, available at: https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2020-01-07/HL151 [accessed 15 January 2020].

It is submitted, however, that this trend is not conducive to ensuring effective governance. Shattock correctly observes that the 'dynamic management' approach advocated by the business model, and the move away from participatory governance involving the academic community, entails management decisions being made without consultation, proper oversight, and/or collaboration across the institution, which encapsulates 'the root cause of some of the cases of mis-governance' at universities,[100] further noting that 'it has often been in those universities where dynamic management was most exercised that scandals and disasters have taken place.'[101]

Additionally, the lack of meaningful representation and involvement of university staff within governance processes has led to governing bodies being seen by university staff as remote and disconnected, such that 'the vast majority of staff – both academic and professional services – are simply unaware of the role, function, composition, power and meeting arrangements of their institution's governing body.'[102]

The position may be improved by include additional academic staff representatives on both the governing body and academic body of universities, selected via an electoral process from amongst their peers, as is seen at UoB in relation to its Senate and Council. Effective governance requires greater discursive input from the academic community into decision making processes, rather than the 'dynamic management' approach endorsed by the business model. Accordingly, a 'shared governance' approach is required which seeks to ensure that the academic community is not merely represented but is genuinely engaged in strategic decision making.[103] Such participatory governance is workable, and found within a business context, for example in large law firms, where partners of the firm (which may number several hundred in the largest firms) are balloted multiple times each year on the most important decisions made in relation to the business of the firm.[104]

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[100] *Supra* note 78, p53.
[101] *Supra* note 67, p120.
[102] Paul Greatrix, 'Governing for good: getting university governance right', *Wonkhe* (8 July 2019), available at: https://wonkhe.com/blogs/governing-for-good-getting-university-governance-right/ [accessed 5 January 2020].
[103] Mark Taylor, 'Shared Governance in the Modern University' (2013) 67(1) Higher Education Quarterly 80.
[104] *Supra* note 78, p55.

It must be recognised that merely focussing on legal structure is not a guarantee of ensuring effective participatory involvement of a university's stakeholders in its governance within universities and that

> unicameralism and multicameralism, when it comes to a university's main decision-making bodies, are neither a guarantor of improved representation of stakeholders, nor can they ensure an effective, fair, and equitable decision-making process. Such a process is also shaped by many other variables, including the composition and number of members of the assembly, the method in which they are appointed, the term of their mandate, their re-eligibility, the frequency and dynamics of meetings, and the transparency and accessibility of information relevant to deliberation and the decision-making process.[105]

As examined above, these issues are shaped by legal constitution frameworks within which universities operate. They are also shaped, however, by the regulatory framework within which universities operate, including applicable codes of governance for the sector. Consideration of this regulatory framework will be undertaken below.

The external regulatory framework

The regulatory framework within which universities in England operate has recently undergone significant change, following the enactment of HERA, with the establishment of a new regulator, the Office for Students (OfS). This has coincided with a new regulatory framework implemented by OfS, pursuant to HERA,[106] including requirements that a university is registered with OfS where it wishes to receive public grant funding, utilises the student support system to enable the university's students to access student finance facilities for payment of tuition fees and maintenance costs, and applies for and holds a Tier 4 sponsorship licence to enable the university to sponsor international

[105] Dalie Giroux, Dimitrios Karmis, and Christian Rouillard, 'Between the Managerial and the Democratic University: Governance Structure and Academic Freedom as Sites of Political Struggle', (2015) 9(2) Studies in Social Justice 142, p155.
[106] s5, Higher Education and Research Act 2017. See also Office for Students, Securing student success: Regulatory framework for higher education in England (February 2018), available at: https://www.officeforstudents.org.uk/media/1406/ofs2018_01.pdf [accessed 7 December 2019].

students.[107] Both UoB and CU are registered with OfS, along with almost four hundred other registered providers of higher education in England.[108]

This new regulatory framework has reaffirmed the general principle of governing bodies being ultimately accountable for their institution, including their institution's compliance with the conditions which allow the institution's registration with OfS.[109] In addition, the new regulatory framework imposed greater responsibilities upon governing bodies in relation to specific matters. For example, governing bodies are now required to approve their institution's financial forecasts, including financial and student number forecasts over a four-year period,[110] approve and monitor their institution's performance against its access and participation plan,[111] and notify the OfS upon becoming aware of any change in relation to the university which makes information held on the OfS Register inaccurate.[112]

In addition, as a condition of OfS registration universities are expected to demonstrate to the OfS that they have in place adequate and effective management and governance arrangements to deliver public interest governance principles.[113] These public interest principles include requirements for a university's governing body to ensure adequate and effective student engagement, academic freedom, academic governance, transparency about value for money for its students, and a requirement for the size, composition, diversity and skills mix of the university's governing body to be appropriate for the nature, scale and complexity of the university.[114] Where a university receives public funds from utilising the student support (tuition fee) system, the public interest principles also require that the university's governing body has at least one external independent member.[115]

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[107] Office for Students, Securing student success: Regulatory framework for higher education in England (February 2018), at pages 28 and 29, available at: https://www.officeforstudents.org.uk/media/1406/ofs2018_01.pdf [accessed 7 December 2019].
[108] OfS Register, available at: https://www.officeforstudents.org.uk/advice-and-guidance/the-register/the-ofs-register/ [accessed 7 December 2019].
[109] *Supra* note 107, p118 (Registration Condition E3).
[110] *Ibid.,* p107 (Registration Condition D).
[111] *Ibid.*, p84 (Registration Condition A1).
[112] *Ibid.*, p120 (Registration Condition E4).
[113] *Ibid.*, p112 (Registration Condition E2).
[114] *Ibid*., p145 (Annex B: Public Interest Governance Principles).
[115] *Ibid*., p146 (Annex B: Public Interest Governance Principles, paragraph XI).

In assessing the adequacy and effectiveness of a university's management and governance arrangement the OfS will consider whether the university has committed to adhere to any code of governance. The Higher Education Code of Governance published by the Committee of University Chairs had previously been endorsed by the previous regulator (HEFCE),[116] but OfS has not opted to do so. Nonetheless, the Committee of University Chairs Code of Governance (hereafter 'CUC Code') remains one of only two specific codes of governance developed for the UK higher education sector, with a separate governance code developed for universities in Scotland – the Scottish Code of Good Higher Education Governance.[117] The CUC Code is used extensively by universities in England, and both UoB and CU have committed to adhere to the CUC Code.[118]

It has been widely recognised by that HERA and the new regulatory framework under OfS places greater responsibility and obligations onto universities and university governing bodies than under the previous regulatory regime for universities in England. It has been observed that HERA 'puts far more onus on governors - including for the self-reporting of problems… [but it is unclear that] governance has changed as fast as regulation.'[119] Given the predominantly lay member composition of university governing bodies, and the infrequency with which university governing bodies meet, it has been suggested that 'more and more responsibility [is] being thrust onto these boards, and they are less and less able to cope with it.'[120]

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[116] Gill Evans, 'Has the OfS got its thinking straight on governance?' *Wonkhe* (23 May 2018), available at: https://wonkhe.com/blogs/has-the-office-for-students-got-its-thinking-straight-on-governance/ [accessed 7 March 2020].
[117] Advance HE, Codes of Governance, available at: https://www.advance-he.ac.uk/guidance/governance/codes-governance [accessed 24 March 2020].
[118] See: University of Birmingham Code of Practice on Corporate Governance and Related Procedural Matters, at page 4, available at: https://www.birmingham.ac.uk/Documents/university/governance/CODE-OF-PRACTICE-ON-CORPORATE-GOVERNANCE.pdf [accessed 6 March 2020]; and Coventry University Board of Governors Meeting Minutes, 21 July 2015, page 4, available at: https://www.coventry.ac.uk/globalassets/media/documents/board-of-governor-minutes/gm159-minutes-21-july-2015.pdf [accessed 6 March 2020].
[119] *Supra* note 16, p14.
[120] Michael Shattock, in John Morgan, 'Sudden V-C exits raise big question: who should run universities?', *Times Higher Education* (20 February 2019), available at: https://www.timeshighereducation.com/news/sudden-v-c-exits-raise-big-question-who-should-run-universities [accessed 29 January 2020].

Considering such concerns there is evidence that the current regulatory framework for university governance has so far failed to resolve governance issues that had previously been identified in a regulatory context. The OfS's own post-implementation report found that there is 'a lack of convincing evidence about the adequacy and effectiveness of providers' management and governance arrangements.'[121]

Brown identifies the regulatory framework issues facing university governance as including:

i. Lack of clarity regarding to whom governing bodies are accountable, and for what;
ii. Lack of clarity regarding what mechanisms exist where a governing body is clearly ineffectual; and
iii. Governing bodies are not representative, and there is lack of clarity regarding how governors are selected, on what basis, and by whom.[122]

These issues are considered below.

Lack of clarity regarding to whom governing bodies are accountable, and for what

As outlined above, the new regulatory framework does provide greater clarity regarding matters for which the governing body of a university is accountable, including several specific matters such as monitoring the university's access and participation plan. The regulatory framework also provides some direction regarding to whom governing bodies are expected to be accountable, besides the regulator itself. For example, in relation to the 'academic freedom' public interest governance principle, a governing body is required to discharge its responsibility such that the academic staff of the university have freedom within the law 'to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions' without the threat of losing their jobs or other benefits they may have at the university.[123] Similarly, in relation

[121] OfS, Registration Process and Outcomes 2019-20: Key Themes and Analysis (30 October 2019), at page 5; available at: https://www.officeforstudents.org.uk/media/1266f7d9-047c-492e-94a8-0eb6c937b983/registration-key-themes-and-analysis.pdf [accessed 7 December 2019] .
[122] *Supra* note 17, p55.
[123] *Supra* note 107, p145 (Annex B: Public Interest Governance Principles, paragraph I).

to the 'student engagement' and 'value for money' public interest governance principles, university governing bodies are expected to discharge these responsibilities for the benefit of the university's students.[124]

The regulatory framework also provides some indication of the groups of stakeholders to whom a governing body is to have accountability, including engaging in relation to academic governance with 'stakeholders, especially prospective, current and completed students,'[125] and seeking to ensure appropriate management of public funds by seeking to protect "the interests of taxpayers and other stakeholders."[126] The regulatory framework, however, does not provide adequate details of the stakeholders to whom a university's governing body is to be accountable, nor guidance on a process by which a governing body should seek to identify and engage with those stakeholders.

Furthermore, 'accountability' is itself included as a public interest governance principle, with the requirement that the university acts 'openly, honestly, accountably and with integrity and demonstrates the values appropriate to be recognised as an English higher education provider.'[127] This wording, however, is very much lacking in clarity regarding the values considered to be appropriate for universities in England, and for what, and to whom, governing bodies are expected to be accountable.

Lack of clarity regarding what mechanisms exist where a governing body is clearly ineffectual

Before considering intervention mechanisms available to the OfS under the regulatory framework it is first necessary to examine what metrics the regulatory framework uses to identify a 'clearly ineffectual' governing body.

Under the regulatory framework, OfS monitors the performance of universities in England using a range of metrics. The foundation for this monitoring comprises 'lead indicator' data routinely collected and submitted by universities, such as overall student numbers; the number of applications, offers and acceptances for students with different characteristics; student continuation and completion rates; the number, nature or pattern of student complaints to the Office of the Independent Adjudicator; and financial viability

[124] *Ibid.,* p145 (Annex B: Public Interest Governance Principles, paragraphs III and VI).
[125] *Ibid.*, p148 (Annex C: Criterion A1: Academic governance).
[126] *Ibid.*, p146 (Annex B: Public Interest Governance Principles, paragraph XII).
[127] *Ibid*., p145 (Annex B: Public Interest Governance Principles, paragraph II).

based on annual financial statements and forecasts.[128] OfS will not, however, apply performance thresholds in relation to this 'lead indicator' data, but will instead seek to determine whether the data reveals trends indicating potential mis-governance at a university, for example falls in overall student numbers, increases in the number of student complaints, or declining financial resources.[129]

In addition to the 'lead indicator' data OfS will also rely on information regarding the occurrence of 'reportable events' that universities must notify to OfS, as well as information revealed via whistleblowing and student complaints.[130] The concept of 'reportable events' is construed broadly within the regulatory framework as meaning 'any event or circumstance that, in the judgement of the OfS, materially affects or could materially affect the provider's legal form or business model, and/or its willingness or ability to comply with its conditions of registration.'[131] Specific examples included within the regulatory framework include a change in the ownership or control of a university, the university becoming aware of fraud or financial irregularity, the university becoming aware of any legal or court action, investigation or sanctions imposed by other regulators such as the Home Office, or the sale of significant assets of the university.[132] OfS has provided further guidance on what constitutes a 'reportable event' under the regulatory framework, which states that the occurrence of any of the examples provided within the regulatory framework must always be reported to the OfS.[133] Accordingly this guidance appears to suggest that the OfS considers the examples listed within the regulatory framework will always be 'material', irrespective of their relevance, significance or financial value. Whilst some of the examples provided within the framework include materiality considerations, others such as 'legal or court action' do not. The regulatory framework also lacks clarity regarding whether a reference to legal or court action would include circumstances where a university was a claimant in such proceedings, rather than a defendant,

[128] *Ibid*., pp49-50.
[129] *Ibid*., p50.
[130] *Ibid*., p49.
[131] *Ibid*., p128 (Registration Condition F3).
[132] *Ibid*., pp129-130 (Registration Condition F3).
[133] Office for Students, Regulatory Advice 16: Reportable events (15 October 2019), available at: https://www.officeforstudents.org.uk/media/768cbcfb-1669-4f97-abe6-6e61a81d8d75/regulatory-advice-16-reportable-events.pdf [accessed 7 March 2020].

although it has since been clarified within the OfS guidance that this relates to actions brought against a university.[134]

Nonetheless, the suggestion that OfS considers all legal or court action to be material, and thus constituting a 'reportable event' under the regulatory framework, has been flagged as contrary to the principles of institutional autonomy and regulatory proportionality that OfS is required by HERA to adhere to in performing its regulatory functions.[135] Further questions remain unanswered. If a university receives a clearly spurious legal claim should it really be required to report this to OfS? Similarly, if, for example, a university fails to pay a supplier on time and consequently faces a minor legal claim of, say, twenty pounds in respect of the unpaid invoice, can this truly be considered likely to have a material effect on the university's operations, or evidence of mis-governance, justifying its inclusion as a 'reportable event'? Accordingly, whilst the regulatory framework and guidance issued by the OfS has helped provide greater clarity regarding what metrics the regulatory framework uses to assess the performance of universities, including the competence and effectiveness of their governing bodies, some uncertainty remains.

The extent of the regulatory framework's reliance on self-reporting by universities is also a concern. Where serious incidents of mis-governance have occurred, it has usually been members of a university's academic community who have raised concerns with regulators, rather than members of an institution's governing body. It is submitted that those universities with the most effective institutional governance will be most pro-active in ensuring comprehensive, accurate and timely self-reporting to the OfS under the regulatory framework. Conversely, those universities with the weakest institutional governance, and which are, consequently, most at risk of serious mis-governance, will be least able to furnish the OfS with the relevant information required to ensure a proper assessment of governance effectiveness can be made by the OfS.

Where, as a result of the information available to it, OfS has concerns regarding the competence and effectiveness of a university's governing body, or other

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[134] *Ibid*. p8.
[135] s2 Higher Education and Research Act 2017. See also Gary Attlee, 'The Limits of Regulation' (6 January 2020), available at: https://www.ahua.ac.uk/the-limits-of-regulation/ [accessed 23 February 2020].

governance concerns, OfS has a range of interventions available to it. These include:

i. enhanced monitoring of the university by OfS: for example, where the OfS's concern relates to financial matters the OfS may require the university to submit monthly management accounts;[136]
ii. imposing specific ongoing conditions of registration with OfS: for example, a requirement that a university makes specific progress towards the targets in its access and participation plan before the university is permitted to increase the number of students it can recruit;[137]
iii. imposing financial penalties on the university;[138]
iv. suspending or terminating the university's registration with OfS;[139]
v. stripping the university of the use of "university" within its title;[140] and
vi. removing the university's degree awarding powers.[141]

Accordingly, the regulatory framework gives OfS wide-ranging and significant powers of intervention. What is less clear is the manner in which OfS will choose to exercise those powers, particularly in relation to concerns regarding the competence and effectiveness of a university's governing body. As outlined above, HERA requires that the OfS adheres to the principles of institutional autonomy and regulatory proportionality in performing its regulatory functions.[142] Institutional autonomy has long been a fundamental principle of university governance,[143] and recognition of institutional autonomy has been enshrined within HERA to seek to allay fears that the new regulatory framework represents an erosion of that autonomy and an intrusion of the state into universities.[144] Such fears would be exacerbated should the OfS take an

[136] *Supra* note 102, p55.
[137] *Ibid.*, p57.
[138] s15 Higher Education and Research Act 2017.
[139] ss16 & 18 Higher Education and Research Act 2017.
[140] s58 Higher Education and Research Act 2017.
[141] s45 Higher Education and Research Act 2017.
[142] *Supra* note 135.
[143] *Supra* note 1, p45.
[144] Department for Business Innovation and Skills, Higher Education and Research Bill: Factsheet, at page 2, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543500/bis-16-285-higher-education-research-bill-summary.pdf [accessed 6 January 2020]. See also: Chris Patten, 'Leave state control of universities to China', *The*

overly interventionist approach as regulator, and accordingly OfS is required by HERA to act proportionately, striking a balance between effective application of the regulatory framework, and respect of institutional autonomy. OfS has indicated that whilst it will strike such a balance, it does not regard institutional autonomy as unassailable and

> there will be times, particularly when the risk to students is great, when it will be trumped: the greater the risk to students, the less right a [university] has to institutional autonomy.[145]

Further clarity regarding OfS's approach to exercising the intervention mechanisms available to it under the regulatory framework is also emerging from practice, including an illustration of the approach the OfS will take upon receiving evidence of an ineffectual university governing body. Following such concerns having been raised with OfS in relation to De Montford University ('DMU') the OfS instigated an investigation into governance at DMU. The OfS investigation found evidence of 'significant and systemic' mis-governance, as a result of which DMU was required to issue a public statement and produce a detailed action plan setting out how the university proposed to remedy the governance failings revealed by the OfS investigation.[146] In accordance with the action plan DMU commissioned an external review of its governance.[147] The OfS's own statements have been extremely brief compared with the public statement, action plan, and governance effectiveness review published by DMU and, accordingly, it can be inferred that OfS will limit its interventions and defer to institutional autonomy where it is satisfied that remedial actions

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Guardian (1 January 2017), available at: https://www.theguardian.com/commentisfree/2017/jan/01/leave-state-control-of-universities-to-china [accessed 12 January 2020].

[145] Susan Lapworth, 'Having regard to institutional autonomy', *Office for Students* (26 October 2018), available at: https://www.officeforstudents.org.uk/news-blog-and-events/blog/having-regard-to-institutional-autonomy/ [accessed 12 January 2020].

[146] Office for Students, Statement on De Montfort University investigation (1 July 2019), available at: https://www.officeforstudents.org.uk/news-blog-and-events/press-and-media/de-montfort-university/ [accessed 15 January 2020]; De Montford University, Public Statement, available at: https://www.dmu.ac.uk/about-dmu/university-governance/public-statement/office-for-students-public-statement.aspx [accessed 15 January 2020]; and De Montford University, Office for Students' Investigation: DMU action plan, available at: https://www.dmu.ac.uk/Documents/university-governance/office-for-students-action-plan.pdf [accessed 15 January 2020].

[147] Advance HE, 'De Montfort University - Governance Effectiveness Review' (5 March 2020), available at: https://www.dmu.ac.uk/documents/university-governance/effectiveness-review-document.pdf [accessed 17 March 2020]

being taken by a university are appropriate.[148] DMU's vice-chancellor and the chair of its governing body resigned following the initiation of the OfS investigation, but before publication of its findings.[149]

Accordingly, the new regulatory framework, together with guidance and statements by OfS, and details of the approach taken in practice by OfS, provides much greater clarity regarding the intervention mechanisms available to OfS and the approach OfS will take in exercising those mechanism. Following the publication of OfS's findings on DMU's governance, it has subsequently emerged that DMU's vice-chancellor received a severance payment from DMU of £270,000 upon his departure, attracting widespread criticism.[150] Accordingly, it can be argued that the regulatory framework has failed to prevent mis-governance by universities adopting inappropriate remuneration schemes that seem to reward failure by senior university executives, and that the regulatory framework also lacks a mechanism which ensures individual accountability of the most senior university executives in the event of mis-governance during their tenure. It is, therefore, submitted that, in addition to its existing power to levy fines on institutions, consideration should also be given to vesting OfS with powers to set-aside or claw-back payments made to senior university executives where significant mis-governance has occurred during their tenure, in order to enhance individual accountability under the regulatory framework.

Furthermore, the fact that the OfS's investigation into DMU was prompted by a whistleblower raising concerns with OfS, rather than DMU's governing body raised concerns itself with the OfS is further evidence of the ineffectiveness of reliance on a self-reporting mechanism within a regulatory framework.

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[148] *Supra* note 102.
[149] Robert Wright, 'Vice-chancellor of De Montfort University resigns', *Financial Times* (11 February 2019); available at: https://www.ft.com/content/f1fb6bdc-2e0b-11e9-8744-e7016697f225 [accessed 15 January 2020].
[150] Sally Weale, 'University vice-chancellor given £270k payoff after resigning', *The Guardian* (1 July 2019), available at: https://www.theguardian.com/education/2019/jul/01/university-vice-chancellor-dominic-shellard-payoff-resigning-de-montfort [accessed 15 January 2020].

Governing bodies are not representative, and there is lack of clarity regarding how governors are selected, on what basis, and by whom

It is widely acknowledged that governing bodies are not reflective of either the diversity of their institutions, nor of society more generally, and they are frequently characterised as 'pale, male, and stale.'[151] This is reflected in data on equality characteristics collected by Higher Education Statistics Agency ('HESA'), with the latest data revealing that for academic year 2018/19 in England 92% of governing body members were white, 60% were male, and 91% were aged over 35 (of which 57% were aged over 55).[152] By contrast, HESA data for students at English universities for 2018/19 reveals that only 72% were white, 43% were male and 19% were aged over 30.[153]

Similarly, only 5% of governing body members in England declared themselves has having a disability,[154] compared with 19% of working age adults in the UK,[155] and 14% of students at English universities.[156]

As noted above, as a condition of OfS registration universities are expected to demonstrate to the OfS that they have in place adequate and effective management and governance arrangements to deliver public interest governance principles, which includes a requirement for the size, composition, diversity, and skills mix of the university's governing body to be appropriate for the nature, scale and complexity of the university.[157] In addition, the OfS requires information from universities regarding governing body recruitment and induction processes as part of a university's registration with OfS.[158]

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[151] Higher Education Policy Institute, University Governance in A New Age of Regulation (HEPI Report 119) (2019), p17.
[152] Higher Education Statistics Agency, Table 25 - Governor equality characteristics by country of HE provider 2018/19 (published February 2020), available at: https://www.hesa.ac.uk/data-and-analysis/staff/table-25 [accessed 24 March 2020].
[153] Higher Education Statistics Agency, HE student enrolments by personal characteristics (Academic years 2014/15 to 2018/19), available at: https://www.hesa.ac.uk/data-and-analysis/students/whos-in-he#characteristics [accessed 24 March 2020].
[154] *Supra* note 152.
[155] Office for National Statistics, Family Resources Survey 2018/19, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874507/family-resources-survey-2018-19.pdf [accessed 24 March 2020].
[156] *Supra* note 153.
[157] *Supra* note 107, p112 (Registration Condition E2) p145 (Annex B: Public Interest Governance Principles, paragraph VIII).
[158] *Supra* note 107, p114 (Registration Condition E2).

There is little detail within the regulatory framework regarding the level of importance attached by the OfS to seeking to ensure governing bodies are more representative of their staff, students and other stakeholders, including society more generally. The regulatory framework also provides little clarity regarding the processes expected to be adopted in relation to the recruitment and re-appointment of governing body members, the skills, background, experience, and other personal characteristics expected, and the stakeholders who should be engaged in such processes. Accordingly, it is submitted that the new regulatory framework does little to improve this shortcoming in the previous regulatory regime.

CUC Higher Education Code of Governance

As noted above, in assessing the adequacy and effectiveness of a university's management and governance arrangement the OfS will consider whether the university has committed to adhere to any code of governance, with the CUC Code widely used by universities in England. An examination of the CUC Code is therefore an important component in assessing whether the regulatory framework within which university in England operate is conducive to effective governance. The CUC periodically reviews and updates its Code, typically every four years, with the current version published in December 2014 and revised in 2018,[159] and consultation recently undertaken on a further update.[160]

The publication and adoption of such a code by universities in England was recommended by the Dearing Report, which suggested the purposes of a governance code included 'to provide a basis for familiarity with the governance arrangements within institutions' and 'to ensure there is appropriate membership of the ultimate decision-making body.'[161] It is not clear, however, that such benefits have been realised in relation to the CUC Code, or governance codes more generally, and critics note that 'observance of

[159] Committee of University Chairs, The Higher Education Code of Governance (2018 Revision), available at: https://www.universitychairs.ac.uk/wp-content/uploads/2018/06/HE-Code-of-Governance-Updated-2018.pdf [accessed 19 March 2020].
[160] Committee of University Chairs, Consultation on the Higher Education Code of Governance, available at: https://www.universitychairs.ac.uk/consultation-on-the-higher-education-code-of-governance/ [accessed 19 March 2020].
[161] *Supra* note 13, 238.

Cadbury rules did not avert a banking crisis any more than the CUC Guides did not prevent a new series of governance crises in universities in 2008–9.'[162]

Furthermore, to the extent that such governance codes are conducive to ensuring effective governance, there are shortcomings in the CUC Code and its application. These are outlined below.

First, the CUC Code is maintained as a voluntary code of governance, and it is therefore at the discretion of universities whether or not they choose to adopt it.[163]

Second, university governing bodies assess themselves against the CUC Code, and assess their own governance effectiveness. The CUC Code states that such a review should be conducted at least every four years, but there is no requirement under the CUC Code for governance effectiveness reviews to be conducted by an external reviewer, and instead it is merely noted that governing bodies can find external input into such a process 'useful.'[164]

Even if a university governing body does engage external consultants to undertake or contribute to a governance effectiveness review that the fact that such consultants would be appointed by, and reporting to, the governing body, thereby gives rise to concerns regarding an actual or perceived lack of independence and thoroughness.

Third, to the extent non-adherence with the Code is found, compliance is merely on an 'apply or explain' basis.[165] Accordingly, adoption of the CUC Code by a university should not be regarded as a guarantee of adherence by that university to its provisions and principles. By contrast, in Scotland the Scottish Government has enacted legislation to impose specific governance requirements at Scottish universities,[166] such as requiring a minimum proportion of elected academic staff representation on university governing bodies and academic boards,[167] rather than continuing to rely on a voluntary

[162] *Supra* note 72, p117.
[163] *Supra* note 159, p6.
[164] *Ibid*., p26.
[165] *Supra* note 159, p6.
[166] Higher Education Governance (Scotland) Act 2016.
[167] ss10 & 15 Higher Education Governance (Scotland) Act 2016.

code of governance for the sector to seek to drive positive behaviours in relation university governance.

Fourth, there is a lack of cohesion with the wider regulatory framework, and in particular the public interest governance principles developed by the OfS. Indeed, the latest iteration of CUC Code circulated for consultation makes no reference to or attempt to integrate the Code with these OfS principles.[168] One factor is that the CUC Code is intended to be utilised by universities throughout the UK, whereas the OfS's regulatory framework applies to universities in England only. Nonetheless, the lack of cohesion can be contrasted with the approach taken in the charity sector where the Charity Governance Code was developed collaboratively by a committee which included its sector's regulator, the Charity Commission, as a non-voting member.[169]

Finally, the level of ambition to develop and require behaviours intended to ensure effective governance is notably lacking under the CUC Code compared with the Charity Governance Code.[170] For example, in relation to accountability, whilst the CUC Code details matters for which governing bodies are expected to be accountable, the Charity Code goes further and focusses on to whom trustees are accountable, with potential stakeholders identified by the Charity Code, including beneficiaries, volunteers, staff, donors and local communities.[171] The Charity Code requires regular and effective communication and engagement with these stakeholders, with the supply of sufficient information to stakeholders to enable them to measure a charity's success in achieving its objectives.[172] Charity boards must ensure there are agreed processes and routes through which stakeholders can hold the board to account.[173] Similarly in relation to board appointments, the CUC Code requires a nominations committee to be established, whose function includes seeking to ensure an appropriate skills balance for the governing body.[174] The

[168] Committee of University Chairs, The Draft Higher Education Code of Governance 2020, available at: https://www.universitychairs.ac.uk/wp-content/uploads/2020/01/HE-Code-of-Governance-DRAFT.pdf [accessed 19 March 2020].
[169] Jim Dickinson, Does university governance need incremental or radical change?, Wonkhe (23 January 2020), available at: https://wonkhe.com/blogs/does-university-governance-need-incremental-or-radical-change/ [accessed 25 January 2020].
[170] *Supra* note 169.
[171] Charity Governance Code for Larger Charities, at page 22, available at: https://www.charitygovernancecode.org/en/pdf [accessed 27 January 2020].
[172] *Supra* note 171.
[173] *Ibid.*, p23.
[174] *Ibid.*, p 25

Charity Code, by contrast, requires a 'formal, rigorous and transparent procedure' is in place to appoint new board members and that reappointments must be subject to 'particularly rigorous review.'[175] Furthermore, on inclusion and diversity, the CUC Code notes that universities are bound by legal duties in relation to equality and diversity, and requires governing bodies to satisfy themselves that agreed action plans are in place to implement equality and diversity policies, including reflecting on the governing body's own composition.[176] Under the Charity Code charity boards are required to undertake 'training and/or reflection about diversity,' make a 'positive effort to remove, reduce or prevent obstacles to people being trustees.'[177] Additionally there is a requirement under the Charity Code that the chair 'regularly asks for feedback on how meetings can be made more accessible' and that the board publishes

> an annual description of what it has done to address the diversity of the board and the charity's leadership and its performance against its diversity objectives, with an explanation where they have not been met.[178]

As noted above, the charitable status of universities is recognised and enshrined in law.[179] Universities are mostly exempt charities and are, therefore, subject to regulation by the regulatory framework under the OfS as principal regulator, rather than the Charity Commission.[180] Accordingly, most universities in England will look to the CUC Code rather than the Charity Code in ascertaining the behaviour and standards relevant to their governance arrangements. It is, therefore, notable that bodies such as university student unions are non-exempt charities, and therefore will be expected to adhere to the Charity Code. Consequently, there frequently exists a perverse situation whereby student representative bodies at universities in England are compelled by a governance code to undertake greater measures to promote effective governance than the

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[175] *Ibid.*, pp18 & 19.
[176] *Ibid.*, p23.
[177] *Ibid.*, p20.
[178] *Ibid.*, p21.
[179] *Supra* note 65.
[180] Office for Students and Charity Commission, Memorandum of Understanding between The Charity Commission for England and Wales and The Office for Students (February 2019), at paragraph 1.3, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/810662/OfS_and_Charity_Commission_Collaboration_agreement__final_signed_.pdf [accessed 27 January 2020].

measures prescribed by the governance code applicable to their parent universities.[181]

It appears, therefore, that the effectiveness of the CUC Code is severely limited. While it may not be necessary for the CUC Code to become a statutory code, a number of changes to the voluntary code and the way in which is applied may well be desirable. This might include a truly independent audit process to assess the effectiveness of university governance structures. It is also proposed that the OfS should seek to actively engage with and apply the code across the sector, as was previously the case under HEFCE. It is also proposed that the code should specify upon whom the onus for achieving particular objectives falls and to which stakeholders they are responsible should these objectives fail to be met.

Whilst the regulatory framework plays a crucial role in ensuring effective governance, it is important to recognise that regulation is not a panacea. There is need a to be 'careful about assuming that bureaucratic remedies will resolve the problems of failing company boards, any more than they can failing university governing bodies.'[182] Within the charity sector, the 2016 inquiry following governance failings at the Kids Company concluded that 'no system of regulation can substitute effective governance by [a governing body].'[183]

Conclusion

The legal and regulatory framework within which universities in England operate is not currently conducive to ensuring effective governance. There are a number of aspects where improvement can be achieved.

The business model fails to recognise that the functions of a university are fundamentally different to those of a business, and consequently fails to recognise who contributes to the core functions of universities. Furthermore, the business model is a governance model that prescribes an overly external member dominated governing body for universities, and fails to ensure an

[181] See note 169
[182] *Supra* note 78, page 55.
[183] House of Commons Public Administration and Constitutional Affairs Committee, 'The 2015 charity fundraising controversy: lessons for trustees, the Charity Commission, and regulators' (HC Paper 431) (25 January 2016), p3, available at: https://publications.parliament.uk/pa/cm201516/cmselect/cmpubadm/431/431.pdf [accessed 18 March 2020].

appropriate range of experience amongst external members, related to the core functions of universities. External members can, and do, make valuable contributions to university governance, but their use has proven ineffective in preventing mis-governance in a university context, and in a business context in relation to non-executive directors. University governance would be enhanced if external members included at least one individual who had held a university executive post, to ensure relevant experience and expertise amongst external members.

Governing bodies and governance processes are often seen as remote and disconnected by academic staff. Accordingly, there should be greater academic representation on governing bodies, including academics elected from amongst their peers. The legal constitutional framework of pre-1992 universities may be regarded as better in this regard.

In addition, the executive of universities should ensure the academic community is genuinely consulted and engaged in relation to strategic decision, with an emphasis on participatory 'shared' governance rather than the dynamic management approach advocated under the business model. It is submitted that 'the essence of good governance in the modern age is that it delivers strategic decisions quickly and effectively with a maximum of degree of participation by the university community.'[184] A viable participatory approach of this nature is not without precedent in a business context and can be found in large professional firms.

Under the regulatory framework a greater emphasis should be placed upon universities identifying, engaging with, and demonstrating accountability to their stakeholders. Additionally, there should be greater emphasis on ensuring university governing bodies are more representative of the diversity of their institutions, and of society generally. The OfS should provide guidance on a process by which universities should seek to identify and engage with their stakeholders, and on improving governing body diversity. The CUC Code should also include enhanced requirements on these points, as is seen in the Charity Code. The CUC should also ensure its code accords with the OfS public governance principles, with guidance on the interaction between the two and how the principles have been reflected in the CUC Code.

[184] *Supra* note 72, p118.

The regulatory framework's reliance on self-reporting is an ineffective method of seeking to monitor and prevent mis-governance. Those universities with the most effective institutional governance will be most pro-active in ensuring comprehensive, accurate and timely self-reporting to the OfS under the regulatory framework, whilst those universities with the weakest institutional governance, and which are consequently most at risk of serious mis-governance, will be least able to furnish the OfS with the relevant information required to ensure a proper assessment of governance effectiveness can be made by the OfS. The lack of clarity regarding what constitutes a 'reportable event' is also unhelpful.

From the available evidence the balance being struck by OfS between regulatory intervention and institutional autonomy seems appropriate, with OfS undertaking an investigation, and ensuring transparency via public statements summarising the incidents of mis-governance, but not directly intervening in relation to remedial action upon being satisfied of its suitability. However, the regulatory framework is still relatively new, and therefore further examples of its application by OfS are required in order to properly assess the balance being struck by OfS between regulatory intervention and institutional autonomy.

In addition to its existing power to levy fines on institutions, consideration should also be given to vesting OfS with powers to set-aside or claw-back payments made to senior university executives where significant mis-governance has occurred during their tenure, in order to enhance individual accountability under the regulatory framework.

However, regulation is not a panacea, and effective governance must be led by universities themselves. Accordingly, the focus should be on ensuring university governing bodies have the composition and relevant skills and experience they require, and that stakeholders, especially academic staff, are being effectively engaged and involved in strategic decision-making processes. In relation to academic staff this should be achieved via elected staff positions on governing bodies and academic bodies, and by participatory 'shared governance' approach led by university executive teams working in partnership with the academic community, involving regular consultation and involvement with academic staff.

It is clear that lessons can be learned from the governance of universities in England. The most successful and well-governed universities seek to achieve a balance between their legal constitutional components, and involve all groups of stakeholders. It may therefore be concluded that

> governing bodies remain a crucial element in institutional governance and… lay members make key contributions, but successful universities try to ensure that governance is kept in balance between an active lay contribution, strong corporate leadership, an effective central steering core and an involved and participative senate/academic board and academic community. Where any element is weak the institution is disadvantaged.[185]

It can be seen from the foregoing analysis that adequate academic involvement in the oversight, leadership, and senior management of universities enhances the standards of governance in higher education institutions.

[185] *Supra* note 72, p116.

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Do we need to use a *Best Appropriate Technology* standard for Technology Enhanced Learning in legal education?

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Abstract

This paper identifies that technology is often used in an educational context for non-pedagogical reasons. These reasons include the novelty factor, a drive for more and continual innovation, cost saving and the belief that technology is the solution to all the education world's ills. The paper then identifies a new approach which could be used to model the Best Appropriate Technology for any given task, and outlines a worked example of the model. The conclusion is that this model, and an accompanying database, have the potential to be of great use across Legal Education in specific circumstances, as well as the HE Sector more widely.

Keywords: Technology, Appropriate, BAT, Pedagogy, Legal Education

Introduction

Despite the acknowledged growth in Technology Enhanced Learning (TEL) it is, as Kirkwood and Price rightly identify 'rare to find explicit statements about what TEL actually means'[1] and this has knock-on effects on those implementing or researching TEL.

However, whatever the lack of specificity, one of the key elements of TEL is, of course, technology. Since almost everything we use in teaching, and life, has been manufactured, from pencils and pens through paper, chalkboards, interactive whiteboards and smartphones, they can all be regarded as

* University of Northampton. I would like to express my gratitude to colleagues from the Socio-Legal Studies Association, Society of Legal Scholars and AdvanceHE for their excellent feedback on the early stages of this paper. Special thanks also to Katie for helping me clarify my thoughts and my points.

[1] Kirkwood, A., and Price, L. Technology-enhanced learning and teaching in higher education: what is 'enhanced' and how do we know? A critical literature review, *Learning, Media and Technology*, (2013), 39:1, 6–36, @9
http://dx.doi.org/10.1080/17439884.2013.770404

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technology. Indeed, the OED cites the roots of the word as early 17th Century, and says that it means the 'application of scientific knowledge for practical purposes, especially in industry.' If one were to take a literal (and pedantic) stance on TEL therefore, one could apply it to the printing press, the overhead projector or the fountain pen. The approach of this work, however, is that references to technology and current technology are limited to electronic devices and the software and applications that are used by such devices. AccessHE says 'TEL is often used as a synonym for e-learning but can also be used to refer to technology enhanced classrooms and learning *with* technology, rather than just through technology.'[2]

TEL is often portrayed as the way to make the student experience "better" and, in some cases, this is undeniable. The JISC-funded TRAFFIC project (*TRansforming Assessment and Feedback For Institutional Change*) led by Manchester Metropolitan University, for example, clearly showed that the use of technology for practical issues (timetabling, avoiding assessment bunching, revising feedback processes) has a beneficial impact on the student experience.[3] These results were echoed by JISC's "Digital Student" project which found that students are entering HE with expectations about the level of technological features such as Wi-Fi access, online library catalogues, and connectability with their own device(s).[4]

In terms of the delivery of teaching and learning (T&L), Bennett *et al*[5] write about the impact of technology on assessment design, and found that 'the desire to achieve greater efficiencies and to be contemporary and innovative [were] key drivers of technology adoption for assessment.'[6] The efficiency aspect of TEL is clear, as the ability to achieve more with less is an attractive proposition

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[2] AccessHE. (2018). Technology enhanced learning, https://www.heacademy.ac.uk/individuals/strategic-priorities/technology-enhanced-learning (emphasis in original)

[3] Forsyth, R., Cullen, R., Ringan, N., and Stubbs, M. Supporting the development of assessment literacy of staff through institutional process change, *London Review of Education*, (2015) 13 (3) 34-41, https://doi.org/10.18546/LRE.13.3.05

[4] Beethan, H., White, D., and Wild, J. (2013). Students' expectations and experiences of the digital environment literature review, JISC, http://repository.jisc.ac.uk/5573/1/JR0005_STUDENTS_EXPECTATIONS_LITERATURE_REVIEW_2.0.pdf

[5] Bennett, S., Dawson, P., Bearman, M., Molloy, E., and Boud, D. How technology shapes assessment design: Findings from a study of university teachers. *British Journal of Educational Technology*, (2017) 48, p 672-682. https://doi.org/10.1111/bjet.12439

[6] *Ibid*, 672

to HEI management teams in the current economic climate. This should not be the primary driver for the use of TEL however, as will be explored below.

One recurrent issue in current discussions about technology is the impact it is having on users. Grandner *at al*[7] looked at the impact of the use of "devices" (tv, smart phone, tablet etc.) on sleep patterns, and reported that 'the more types of devices used, the more individuals reported difficulty falling asleep and maintaining sleep, especially if the use of technology was active.'[8] Chang *et al*[9] linked the light emitted by devices such as e-readers with the time it took participants to go to sleep, and with their sleep quality. Vernon *et al*[10] found similar results in a study of over 1,100 13-16-year-olds who used their mobile phones late in the evening. The evidence suggests that using "devices" late in the evening leads to poorer sleep, regardless of the user's age.

Lim and Dinges showed that 'the link between sleep and the capacity to attend to external stimuli is both intimate and inextricable'[11] and this link was further demonstrated by Nir *et al* who showed that 'sleep deprivation had a marked effect on cognitive lapses.'[12] Furthermore, as early as GCSE level, Dunne *et al* show that students in poorer-performing groups identify poor concentration as one of the contributory factors, saying that 'teachers and pupils… highlighted

[7] Grandner, M. A., Gallagher, R. A. L., and Gooneratne, N. S. The use of technology at night: impact on sleep and health. *Journal of Clinical Sleep Medicine* (2013) 9(12): 1301-1302.
[8] *Ibid* 1301
[9] Chang, A-M., Aeschbach, D., Duffy, J., and Czeisler, C. Evening use of light-emitting eReaders negatively affects sleep, circadian timing, and next-morning alertness, *Proceedings of the National Academy of Sciences of the United States of America*, (2015) 112 (4): 1232-1237, https://doi.org/10.1073/pnas.1418490112
[10] Vernon, L., Modecki, K., and Barber, B. Mobile Phones in the Bedroom: Trajectories of Sleep Habits and Subsequent Adolescent Psychosocial Development, *Child Development*, (2017) 89(1), 66-77 https://doi.org/10.1111/cdev.12836
[11] Lim, J and Dinges, D. Sleep Deprivation and Vigilant attention, *Annals of the New York Academy of Sciences* (2008) 1129: 305–322 @305 http://dx.doi.org/10.1196/annals.1417.002
[12] Nir, Y., Andrillon, T., Marmelshtein, A., Suthana, N., Cirelli, C., Tononi, G., and Fried, I. Selective neuronal lapses precede human cognitive lapses following sleep deprivation, *Nature Medicine*, (2017) 23, 1474–1480http://dx.doi.org/10.1038/nm.4433

poor concentration in class as a major barrier to learning'[13] and a 'common view across schools is that lower attainers have difficulty with concentration.'[14]

Swain points out that to improve the experience of their students, 'some universities are … introducing innovations around assessment to help students understand how they can progress from an average 2.1 to a first'[15] thus drawing a clear correlation between levels of student attainment and levels of student satisfaction. There is plenty of research to suggest that happier students get higher grades (see for example, Bahrami *et al,*[16] Jones,[17] Schiller and Hinton[18] and Göksoy[19]). Most of these studies suggest that happier students perform better, but the cyclical nature of this relationship is identified by Göksoy, who also points out that 'since the educational system is based on examinations and grades, students become happy when they get higher grades and they become unhappy for low grades.'[20]

Three things are therefore relatively clear:

- The use of technology can have a negative impact on sleep patterns;
- Disrupted sleep patterns can impact negatively on a person's ability to concentrate on tasks, and thus likelihood of good attainment; and

[13] Dunne, M., Humphries, S., Sebba, J., Ayson, A., Gallanaugh, F and Mujis, D. (2007). Effective Teaching and Learning for Pupils in Low Attaining Groups, *Department for Children, Schools and Families, Research Report No DSCF-RR011*, 84 http://dera.ioe.ac.uk/6622/1/DCSF-RR011.pdf
[14] *Ibid*, Appendix e, 33
[15] Swain, H. How can universities ensure their students are satisfied? The Guardian, 11 September 2017, https://www.theguardian.com/higher-education-network/2017/sep/11/how-can-universities-ensure-their-students-are-satisfied
[16] Bahrami, S., Rajaeepour, S., Rizi, H., Zahmatkesh, M., and Nematolahi, Z. The relationship between students' study habits, happiness and depression, *Iranian journal of Nursing and Midwifery Research*, (2011) 16(3) 217-222
[17] Jones, V. (2015). Because I'm Happy, *Harvard Graduate School of Education*, https://www.gse.harvard.edu/news/uk/15/03/because-i%E2%80%99m-happy
[18] Schiller, L., and Hinton, C.. It's true: Happier students get higher grades, *The Conversation*, July 30, 2015, https://theconversation.com/its-true-happier-students-get-higher-grades-41488
[19] Göksoy, S. Situations that Make Students Happy and Unhappy in Schools, *Universal Journal of Educational Research* (2017) 5(12A): 77-83 https://doi.org/10.13189/ujer.2017.051312
[20] *Ibid* p77

- Lower levels of attainment contribute to a less satisfactory student experience.

There are caveats to this, of course, notably that the simplistic 'poor grades = unhappy students' equation does not account for any of the issues around added value, on which topic Simkovic writes 'Education can add substantial value even while producing unappealing outcomes, because those outcomes may still be better than realistic alternatives after considering heterogeneity in student populations. Conversely, education can fail even while producing attractive outcomes if a realistic alternative could have added more value.'[21]

However, despite the caveats, the argument can be made that *inappropriate* use of technology may well contribute towards poor student experience, which seems counter to the push for ever-wider adoption of technology in T&L, at all levels. As an example, Carter *et al*[22] demonstrated that 'permitting computers or laptops in a classroom lowers overall exam grades.'[23] However, this is not to say that technology is bad, and T&L should adopt a luddite approach to technological advances. When used correctly, and appropriately, Taradi *et al*[24] and Al-Hariri & Al-Hattami[25] suggest that the use of technology has a positive impact on student attainment.

As a piece of analysis of an ongoing action research project, this paper will not directly address the issue of attainment by students (for the rationale outlined by Simkovic, above), but will instead focus on the experience of students. How

[21] Simkovic, M. A Value-Added perspective on Higher Education, *UC Irvine Law Review*, (2017) 17(1) 123-132 123
[22] Carter, S., Greenberg, K., and Walker, M. (2016). The Impact of Computer Usage on Academic Performance: Evidence from a Randomized Trial at the United States Military Academy, *SEII Discussion Paper #2016.02*, https://seii.mit.edu/wp-content/uploads/2016/05/SEII-Discussion-Paper-2016.02-Payne-Carter-Greenberg-and-Walker-2.pdf
[23] *Ibid*, 25
[24] Taradi, S., Taradi, M., Radic, K., and Pokrajac, N. Blending problem based learning with web technology positively impacts student learning outcomes in acid-base physiology. *Advances in Physiology Education*; (2005) 29(1): 35-39. https://doi.10.1152/advan.00026.2004
[25] Al-Haridi, M., and Al-Hattami, A. Impact of students' use of technology on their learning achievements in physiology courses at the University of Dammam, *Journal of Taibah University Medical Sciences*, (2017) 12, 82-85 https://doi.org/10.1016/j.jtumed.2016.07.004

law students feel about the use of a particular aspect of technology will give an indication as to whether its continued use is likely to be beneficial.

Although the work falls in the sphere of TEL this is, as identified above, a wide and rather nebulous sphere. The specific intervention focuses upon Blackboard Collaborate Ultra (Collaborate). This is an online platform which allows students to interact with the material being delivered. There are other, similar, platforms (Adobe Connect, Skype and so on) and analogous parallels can be drawn from the literature on Adobe (see for example Karabulat & Correia[26] Cappiccie & Desrosiers[27] Martin & Parker[28]). It is important to note at this stage that the conclusions presented in this paper do not imply that Collaborate is better than any of the other technologies. Collaborate was chosen as the example of this type of platform for the pragmatic reason that the University uses the technology. Collaborate therefore is a cipher for all platforms of this type. Cramer *et al*[29] are among those who have experimented with a 'Virtual Lecture Hall' (voice-over recordings of PowerPoint™ slides), discovering that the students were in favour of such an innovation, and concluded that 'this tool enhances learning, improves grades, and should be an option in other courses.'[30] This project went beyond that approach, as the live nature of the sessions allowed for and encouraged contemporaneous student interactivity.

It is important to identify that this is not an objective observation of teaching carried out by someone else. There are my Level 5 LLB students, on a designated module (Organised Crime) which I designed and wrote, and have delivered for the last decade. The student module evaluation has been consistently positive, and so the impact of changes may be muted compared to other modules where this intervention could be tried.

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[26] Karabulat, A., & Correia, A. (2008). Skype, Elluminate, Adobe Connect, Ivisit: A comparison of Web-Based Video Conferencing Systems for Learning and Teaching, Society for Information Technology & Teacher Education International Conference, Mar 03, 2008 in Las Vegas, Nevada, USA ISBN 978-1-880094-64-8.

[27] Cappiccie, A., & Desrosiers, P. Lessons Learned from using Adobe Connect in the Social Work Classroom, *Journal of Technology in Human Services*, (2011) 29(4) https://doi.org/10.1080/15228835.2011.638239

[28] Martin, F., & Parker, M. Use of Synchronous Virtual Classrooms: Why, Who, and How? *MERLOT Journal of Online Learning and Teaching* (2014) 10(2)

[29] Cramer, K., Collins, K., Snider, D., and Fawcett, G. Virtual Lecture Hall for In-Class and Online Sections: A Comparison of Utilization, Perceptions, and Benefits, *Journal of Research on Technology in Education*, (2006) 38(4), 371-381 https://doi.org/10.1080/15391523.2006.10782465

[30] *Ibid* 376

The conclusions from the research will be of potential use to those who already use, or are considering which type of platform to use for a particular type of module. The *BAT in TEL* model will also be useful for those interested in the impact of technology more widely.

This paper has two linked research questions:

- Is TEL fit for purpose? This requires both clarification of the purpose of TEL, and assessment of the extent to which the use of TEL meets that purpose.

- Is a framework of Best Appropriate Technology (BAT) needed? This will be done by outlining the BAT model from environmental law, and applying it to TEL. These are not two spheres of research that traditionally have a large overlap. However, in environmental law, BAT allowed standards to improve across the board. Since the argument raised here is that *inappropriate* use of technology is worse than *no* use of technology, a model which can suggest the most appropriate technology to achieve a particular T&L goal will be useful.

Existing Literature

By looking at BAT through the lens of TEL, an initial model is designed to incorporate the two elements in a way which has not been attempted previously.

The body of literature on T&L and technology is undeniably vast. The decision was made to focus the project quite specifically on two areas – technological interventions in HE, and the BAT standard used in industrial emissions control.

Young[31] argues that smart classrooms are not the whole answer, and that without training teachers and students how to get the most from the technology, it is not effective. Students, he suggests, believe that a teacher using technology badly is worse than one who is not using it at all. This is backed up by Guess who says that 'good teachers are good with or without IT and … poor teachers

[31] Young, J. R. When Good Technology Means Bad Teaching, *The Chronicle of Higher Education*, (2004) 51 (12), A31 at http://www.chronicle.com/article/When-Good-Technology-Means-Bad/10922

are poor with or without IT.'[32] IT therefore, and by extension TEL, can be regarded as a tool, an enabler, or a means to an end (the *end* being better teaching and enhanced student experience) rather than the end itself. It is not a novel approach – Laurillard[33] posed the provocative question 'what is the problem for which MOOCs are the solution' and concluded that for her purposes there is a problem (global lack of teachers in primary level education) and that 'MOOCs could be *part* of the solution.'[34]

Cuban rather archly observed two unexpected outcomes of a study into e-learning in California in the early 21st century, namely that 'the overwhelming majority of teachers employed the technology to sustain existing patterns of teaching rather than to innovate … [and] … only a tiny percentage of high school and university teachers used the new technologies to accelerate student-centred and project-based teaching practices.'[35] The issue of innovation is a tricky one, and Armellini and Padilla suggest that even 'MOOCs cannot be described as inherently pedagogically innovative.'[36]

The problem with a constant demand that technological interventions in T&L are innovative, and the dismissal of those which are not deemed to be innovative, is that there is no consensus on what innovative means. Serdyukov[37] undertook a review of educational innovation in the United States, and discovered that much of the innovative practice had been adopted for pragmatic, rather than pedagogic reasons, and that 'more disquieting than even the lack of pedagogical foundation for technology-enhanced education is the sincere belief of many educators that technology will fix all the problems they encounter in the classroom, be they live or virtual.'[38]

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[32] Guess, A. (2007). Students 'Evolving' Use of Technology. *Inside Higher Ed*. http://www.insidehighered.com/news/2007/09/17/it.
[33] Laurillard, D. (2014). What is the problem for which MOOCs are the solution? *IOE London Blog*, https://ioelondonblog.wordpress.com/2014/05/14/what-is-the-problem-for-which-moocs-are-the-solution/
[34] *Ibid*, my emphasis
[35] Cuban, L. *Oversold and underused: computers in the classroom*. (Harvard University Press, 2001)
[36] Armellini, A., and Padilla, B. Are Massive Open Online Courses (MOOCs) pedagogically innovative? *Journal of Interactive Online Learning*, (2016) 14(1), 17-28 @p25 http://www.ncolr.org/jiol/issues/pdf/14.1.2.pdf
[37] Serdyukov, P. Innovation in education: what works, what doesn't, and what to do about it? *Journal of Research in Innovative Teaching & Learning*, (2017) 10(1) 4-33, https://doi.org/10.1108/JRIT-10-2016-0007
[38] Ibid p14

Students, however, have been shown to approve of new, innovative interventions even if it is just for a short period of time, and just because they are new and different. McLeod and Latheef say of the interactive whiteboard, for example, that 'there may have been an increase in excitement, enthusiasm and engagement as the shiny new toy was brought out to play, [but] there is little evidence that learning was improved.'[39]

Teachers too, are impressed by new technologies in the classroom. Belshaw says that 'new, free and shiny technologies are like catnip to educators'[40] and Guinan adds that 'the biggest danger when choosing technology for your classes is the novelty factor for the teacher.'[41]

In addition to the transient nature of *newness* in technology, some argue that the preponderance of new technologies which were adopted simply because they were new, has left a legacy in education. Mishra and Koehler for example, argue that the 'advent of digital technology has dramatically changed routines and practices in most arenas of human work. Advocates of technology in education often envisage similar dramatic changes in the T&L process. It has become clear, however, that in education the reality has lagged far behind the vision.'[42] Perhaps the reason for that lag is that academics are constantly trying to keep programmes, courses and modules "fresh" by adopting technology, rather than updating curricula.

Roberts makes the point about "appropriateness" explicitly and argues for 'the sequential transition of the format from traditional to electronic, allowing each faculty member to develop competency over time as their workload

[39] McLeod, A., and Latheef, I. (2017). Transforming education through technology: Vision vs Reality, *Australian Association for Research in Education, EduResearch Matters*, http://www.aare.edu.au/blog/?p=2640
[40] Belshaw, D. (2011). The perils of shiny shiny educational technology, *Open Educational Thinkering*, https://dougbelshaw.com/blog/2011/02/26/perils-of-shiny-edtech/
[41] Guinan, S. (2017). Classroom Technology: Tool or Toy? *IATEFL LTSIG*, https://ltsig.iatefl.org/classroom-technology-tool-or-toy/
[42] Mishra, P., and Koehler, M. (2006). Technological Pedagogical Content Knowledge: A Framework for Teacher Knowledge, Teachers College Record Volume 108, Number 6, June 2006, pp. 1017–1054 https://doi.org/10.1111/j.1467-9620.2006.00684.x 1017-8

permitted.'[43] Fastiggi[44] and Mishra & Koehler[45] both argue that one aspect of appropriateness is the "transparency" of the technology – in other words, the focus of the students and academics should be on the task in hand, rather than the software or hardware which is allowing it to happen. The adoption of several TEL innovations in a short time period is likely to be overwhelming both for academics and for students, and so this study kept the basic structure of the module unchanged (one hour-long seminar and one hour-long lecture/Collaborate session per week) and kept the content very similar. This had the added benefit that it allowed for the change in delivery style to be analysed without other changes influencing the students' responses. Serdyukov suggests that before academics start to use any new technology in their T&L practice, 'we have to ask first, "[w]hat technology tools will help our students to learn […] better, and how to use them efficiently to improve the learning outcomes?"'[46]

Mueller and Oppenheimer[47] showed, unsurprisingly, that students who took more notes in sessions performed better in terms of their recall of the information covered in the session. What is relevant here is that students who took these notes on a laptop underperformed against those who wrote them longhand, and so we are beginning to see a picture showing that it would be mistaken to assume that more use of technology makes for better students. Sana *et al*[48] showed that the negative impact of laptop use in class was not just on the students themselves, but also on their classmates.

If we are moving towards a stance where "technology for the sake of technology" is not the best approach (and we should be), then fitness for

[43] Roberts, C. Implementing Educational Technology in Higher Education: A Strategic Approach, *Journal of Educators Online* (2008) 5(1), 13 http://dx.doi.org/10.9743/JEO.2008.1.1
[44] Fastiggi, W. (2013). Appropriate Technology in Education, *Technology for Learners*, https://technologyforlearners.com/appropriate-technology-in-education/
[45] Mishra, P., and Koehler, M. *op cit* n42
[46] Serdyukov, P. (2017) *op cit*, n37, 13
[47] Mueller, P. & Oppenheimer, D. The Pen Is Mightier Than the Keyboard: Advantages of Longhand Over Laptop Note Taking, *Psychological Science*, (2014) 25 (6) 1159-1168 https://doi.org/10.1177/0956797614524581
[48] Sana, F., Weston, T., and Cepeda, N. Laptop Multitasking Hinders Classroom Learning for Both Users and Nearby Peers, *Computers & Education*, (2013) 62, 24-31, https://doi.org/10.1016/j.compedu.2012.10.003

purpose, or appropriateness, becomes the most viable lens through which to look at technology.

Legal education is not exempt from this move towards an increasingly technological approach, and even though it is frequently taught in a silo[49] there are lessons which can be learned from other disciplines. Legal education is as broadly defined as TEL, with arguments being put forward that the primary purpose of legal education is to prepare students for legal practice, or to include specific content[50] or to develop graduate skills. Equally, there are those who take a doctrinal approach,[51] a socio-legal approach,[52] an interdisciplinary approach[53] or a critical legal studies approach.[54] All of these arguments and approaches are equally valid, but it leaves us with a loosely defined concept, with overlaps to other areas of education. This is the approach which will be taken in this paper – legal education has some elements which are not common to other disciplines, but there is nothing pedagogically unique about legal education, and we should fill in that silo and move on.

The BAT model

The idea of "appropriate technology" almost certainly has its roots with Schumacher's seminal economics text 'Small is Beautiful'[55] in which he argues, without defining the term specifically that there is a 'need for appropriate technology'[56] and that a '"regional" or "district" approach has no chance of success unless it is based on the employment of a suitable

[49] Codling, A.R., Thinking Critically about Law: a student's guide, London: Routledge (2018), 76
[50] For example, see recent discussions on the inclusion of EU law post-Brexit. See for example Cotter, J., & Dewhurst, E., Lessons from Roman law: EU law in England and Wales after Brexit, *The Law Teacher*, 2019, Vol 53 Issue 2, 173-188 https://doi.org/10.1080/03069400.2019.1585074
[51] Posner, R., Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution (1986) 37 *Case Western Reserve Law Review* 179, 182
[52] Cownie, F. & Bradney A, *Socio-legal studies: A challenge to the doctrinal approach*, in Watkins, D. & Burton, M., (eds), Research Methods in Law. Abingdon: Routledge, 2011) 34.
[53] Siems, M., the taxonomy of interdisciplinary legal research: finding the way out of the desert, *Journal of Commonwealth Law and Legal Education*, Vol 7 No 1 (2009) 5-17 https://doi.org/10.1080/14760400903195090
[54] Hunt, A., 1986, The Theory of Critical Legal Studies, *Oxford Journal of Legal Studies*, Volume 6, Issue 1, SPRING 1986, Pages 1–45, https://doi.org/10.1093/ojls/6.1.1
[55] Schumacher, E. *Small is Beautiful: A Study of Economics as if People Mattered* (Blond & Briggs, 1973)
[56] *Ibid* 147

technology.'[57] For 'regional' or 'district' we can substitute 'subject' or 'task specific' approach to allow for the adaptation of the ideas to a T&L context.

The key question is how to identify the suitable technology or technologies for each task, or at the very least to identify a range of unsuitable technologies. This is where an adaptation of the BAT model could be useful.

The BAT model is now firmly ensconced in environmental law as part of the process for allowing large industrial processes to be constructed and operated. This does not, at first glance appear to have much (if any), overlap with the T&L and to outline the potential for adaptation of this model, it is first necessary to give a brief background to its development and operation within the environmental legal sphere.

The conceptual origins of the BAT model started with the introduction of *best practicable means* in the Salmon Fisheries Act 1861. The term was used as a defence in court, and allowed the accused to demonstrate that they had used the "best practicable means" to mitigate the impact of pollution.[58] This remained the standard for avoiding prosecution for pollution for more than a century, until the introduction of a new standard – the Best Available Technique Not Entailing Excessive Costs by EEC Directive 84/360/EEC in June 1984. This new standard was not actually defined by the Directive itself, and by the nature of the Directive was only applicable to air pollution emissions from larger industrial plants.

The idea for this standard, say Pearce and Brisson[59] was to reduce emissions from industrial plant as far as possible, while keeping in mind that some technological fixes are experimental or prohibitively expensive. Cripps confirms this, adding that 'Where technically and economically feasible, designing to eliminate harmful discharges is the preferred approach to process pollution control.'[60]

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[57] *Ibid*
[58] Higgins, C. *A Treatise on the Law Relating to the Pollution & Obstruction of Watercourses*, (Stevens & Haynes, 1877) 175
[59] Pearce, D., & Brisson, I. BATNEEC: the economics of technology-based environmental standards with a UK case illustration, *Oxford Review of Economic Policy*, (1993) 9 (4), 24-40 https://doi.org/10.1093/oxrep/9.4.24
[60] Cripps, H. BATNEEC III, *Process Safety and Environmental Protection*, (1996) 74 (4), Pages 295-296, 296

In England and Wales, the responsibility for deciding on the "BAT" element for a particular industry was delegated, initially to HM Inspectorate of Pollution, and then to the Environment Agency. The strength of the model was also part of its inherent weakness. Since the "excessive cost" element was not defined in the Directive, it left those covered by its reach to argue that in their specific instance, the costs were excessive.

In 1996, the BATNEEC standard was replaced by the Best Available Techniques (BAT) standard, introduced by EC Directive 96/61/EC on Integrated Pollution Prevention and Control. Unlike its predecessor, the 1996 Directive set out what was meant in general terms by BAT, in Article 2:

'"best available techniques" shall mean the most effective and advanced stage in the development of activities and their methods of operation which indicate the practical suitability of particular techniques for providing in principle the basis for emission limit values designed to prevent and, where that is not practicable, generally to reduce emissions and the impact on the environment as a whole:

- "techniques" shall include both the technology used and the way in which the installation is designed, built, maintained, operated and decommissioned,
- "available" techniques shall mean those developed on a scale which allows implementation in the relevant industrial sector, under economically and technically viable conditions, taking into consideration the costs and advantages, whether or not the techniques are used or produced inside the Member State in question, as long as they are reasonably accessible to the operator,
- "best" shall mean most effective in achieving a high general level of protection of the environment as a whole.'

In order to set out what the BAT is for a particular industry, Article 11 of Directive 2010/75/EU developed the idea of BAT Reference (BREF) Documents which are the reference points created by a combination of experts from government, industry and NGOs. The advantage of the BREF documents is that they are standard across the EU, and are updated regularly, so with the five-yearly licence renewal cycle, the standards are raised across the EU.

Table 1: Proposed definition of a TEL BAT, and an explanation of each stage.

Definition	Explanation
BAT: The most effective and advanced stage in the development of activities and their methods of operation which indicate the practical suitability of particular technologies for providing the basis for the enhancement of student experience and attainment.	Innovation which is adopted for its own sake will never be BAT-compliant. However, innovation which is adopted as a pilot, in order to understand its pedagogic implications and applicability, could become the BAT of the future.
'Techniques' includes both the technology used and the way in which the teaching space is designed, built, and operated	This satisfies the points discussed above regarding appropriate use of smart classrooms, the IT provision and the ability to develop competency.
'Appropriate' techniques are those developed on a scale which allows implementation in the relevant sector, under technically viable conditions, as long as they are accessible to the institution	For large-scale adoption of an aspect of technology, and the way in which it is used, the approach would have to have a proven track history of pedagogic value. It would not include, for example, techniques that have not been previously applied in a T&L context, but would allow for innovations which have been used in one subject area, or for one particular task, to be used in a different subject area, or a different task.
'Best' shall mean most effective in achieving a high general level of student enhancement	As with the 1996 BAT, and notwithstanding the grammatical problems, there can be more than one "best" in each sector, and across sectors.

It is the approach of the 1996 model of BAT which it is proposed could be adopted for TEL purposes. Taking the four elements outlined in the Directive, each can be amended to fit a new role, based on the literature which has been identified above, resulting in the series of definitions (and accompanying explanations) in Table 1 (above).

What this table demonstrates is that mapping the pollution control BAT onto a TEL BAT is possible. In addition to the basic framework, which could be adopted at subject, faculty, institutional or sectoral level, further guidance could be provided by subject centres and AdvanceHE, in the form of BREF Documents.

These would need to be a central repository for research into the use and effectiveness of different technological interventions. Whether this is classed as 'dwarves perched on the shoulders of giants' (Bernard of Chartres, c1100),[61] 'sharing best practice,'[62] or even 'avoiding worst practice'[63] is purely a matter of semantics. The important aspect is that such a database, which is already starting to emerge in a fragmentary way (for example the HEA / Paul Hamlyn Foundation / Action on Access "What Works" programme), would allow T&L practitioners to assess the viability of different approaches to their own teaching, their own subject areas, their own expertise and their own students.

There would still be space for those at the cutting edge of technological T&L research – as Sharma puts it 'what is normal today will soon be obsolete, and what is innovative today will soon be normal. Adoption and keeping pace with new technology is not an option but is core.'[64]

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[61] Troyan, S. *Medieval Rhetoric*, (Routledge, 2004)
[62] McCarthy, J., & Bagaeen, S. (2014). *Sharing Good Practice in Planning Education*, York: Higher Education Academy, https://www.heacademy.ac.uk/system/files/resources/sharing-good-practice-in-planning-education1.pdf
[63] Felder, R., & Brent, R. (2015). *Teaching Blunders to Avoid: Ten Worst Teaching Mistakes*, Iowa State University, Centre for Excellence in Learning and Teaching, http://www.celt.iastate.edu/teaching/effective-teaching-practices/teaching-blunders-to-avoid-ten-worst-teaching-mistakes
[64] Sharma, A. (2017). If you are not innovating today, you won't be around tomorrow, *forge Autodesk*, https://forge.autodesk.com/blog/if-you-are-not-innovating-today-you-wont-be-around-tomorrow

Methods and Results

Methodologically, the research fell within the Action Research classification. It started in the 2016/17 academic year, when the impact of introducing new technology in the delivery of lessons was assessed. The information gained from these questionnaires has been evaluated and was used to plan the revised use of TEL in the second iteration of the cycle. This cycle will be used to make changes to the third cycle of the model.

Rowland says that an action research process is one 'in which individuals seek to improve their practice of teaching by subjecting it to scrutiny and development.'[65] and by improving practice in an iterative process, Roberts' concerns about the 'sequential transition'[66] towards TEL are mitigated.

In the context of this project, the original intervention was triggered by an institutional move, both of geographical location, and of pedagogic approach to T&L. The institution has adopted a pedagogic approach it calls "Active Blended Learning" (ABL) and defines as being 'taught through student-centred activities that support the development of subject knowledge and understanding, independent learning and digital fluency.'[67]

The project replaced the one-hour in-class lecture with a one-hour online session using Blackboard's Collaborate Ultra webinar system. The timetabled slots and content of each session remained the same. In the old lectures, students could ask questions whenever they wanted. In the Collaborate sessions the "chat" function was available throughout the session, so students could ask live questions, and there were two additional "time outs" when students could ask, or answer questions using the "chat" function. The sessions were recorded, and remained on the VLE for the duration of the module. The seminar sessions remained unchanged.

The students' views were gained by two questionnaires, one in each year / stage of the AR cycle. The sample of students was taken pragmatically using the

[65] Rowland, S. (2000). The Enquiring University Teacher, Buckingham, SRHE and the Open University Press 31
[66] Roberts, C. (2008), *op cit*, n43
[67] UoN, 2016, Learning and Teaching, University of Northampton Institute of Learning and Teaching, https://www.northampton.ac.uk/wp-content/uploads/sites/2/2016/06/Defining-Active-Blended-Learning.pdf

students who attended the module. Convenience sampling[68] has its limitations, and will provide a sample that is not necessarily generalizable to a wider context.

McMillan suggests that this method may skew the results of the research, suggesting as an illustration 'if the available sample for studying the impact of college is the group of alumni who return on alumni day, their responses would probably be quite different from those of all alumni.'[69] This potential for bias would also apply for a self-selecting group, however, such as those who complete the National Student Survey and, as the results of the first series of questionnaires will be tested with the second series of questionnaire, they become more robust.

Farrokhi and Mahmoudi-Hamidabad fight something of a rear-guard action for this type of sampling however, arguing that 'in humanities and particularly in educational field we are not dealing with static materials or consistent states'[70] and, as such, provided the circumstances in which the research was conducted are precisely reported, it can be wholly valid.

This approach, of clearly and overtly stating how the research was carried out, suggests that this work is taking more of an interpretive or interpretivist approach to research. Holloway and Galvin suggests that 'the interpretivist view can be linked back to Weber's *Verstehen* approach'[71] which emphasised that *understanding* was the Social sciences' equivalent to the natural sciences' *explaining*.

The questionnaires were kept as simple as possible. This was for two reasons:

- It allowed for quick completion, without distraction from elaborate phrasing or complex scenarios.

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[68] Etikan, I., Musa, S., Alkassim, R.. Comparison of Convenience Sampling and Purposive Sampling. *American Journal of Theoretical and Applied Statistics*. (2016) 5 (1). 1-4. https://doi.org/10.11648/j.ajtas.20160501.11. P1

[69] McMillan, J.H. *Educational Research: Fundamentals for the Consumer* (2nd edition, HarperCollins, 1996) 91

[70] Farrokhi, F., & Mahmoudi-Hamidabad, A. Rethinking Convenience Sampling: Defining Quality Criteria, *Theory and Practice in Language Studies*, (2012) 2 (4), 784-792, @p792 https://doi.org.10.4304/tpls.2.4.784-792

[71] Holloway I., & Galvin, A. (2017). Qualitative Research in Nursing and Healthcare, 4th Edition, Chichester, Wiley Blackwell 25

- The less the questions related to specific aspects of the specific module, the higher the chance of replication of the results – this was important for Stage 2 of the project.

The results from the two questionnaires can be regarded as being fairly reliable. The proportion of the cohort of students who responded was high, and repeating the questionnaire over two academic years controlled for differences arising from the makeup of a specific cohort of students. Nulty[72] looked at literature around response rates to paper-based and online surveys, and contrasted the two methods. Table 2 (below) extracts the part of Nulty's results which relates to paper-based questionnaires and it is clear that the response rate to this survey is at an acceptable level. There will inevitably be gaps and omissions, and this is always the case with student-based surveys. There is, for example, no way of knowing accurately what the responses might have been from the students who did not attend the sessions in which the questionnaires were distributed. Likewise, the extent to which students truly believed that the information would remain anonymous cannot be ascertained. However, the high response rates for the Questionnaires does strongly suggest that the results can be taken as being indicative of the group as a whole.

Although a study of precisely this nature has not been carried out before, the results will be discussed below in the wider context of TEL, experiences of using Collaborate, and Legal Education. This will help to locate the results within an existing framework of research and knowledge, and plug a gap which previously existed.

The generalisability of the results to a wider group of students is difficult to ascertain at this stage, and the third iteration of the project will involve the application of the approach to a different subject area, and comparing the results across a wider data set.

[72] Nulty, D. The adequacy of response rates to online and paper surveys: what can be done? *Assessment & Evaluation in Higher Education*, (2008) 33 (3), 301–314. https://doi.org/10.1080/02602930701293231

Table 2: Response rates to paper based surveys (adapted from Nulty)

Source	Response Rate (%)
Cook et al[73]	55.6
Dommeyer, et al[74]	75
Ballantyne[75]	55
Ogier[76]	65
Nair et al[77]	56
Watt et al[78]	32.6
Questionnaire Round 1	87
Questionnaire Round 2	86

[73] Cook, C., Heath, F., & Thompson, R. A meta-analysis of response rates in web or internet-based surveys. *Educational and Psychological Measurement* (2000) 60, no. 6: 821–836

[74] Dommeyer, C., Baum, P., Hanna, R., & Chapman, K., Gathering faculty teaching evaluations by in-class and online surveys: their effects on response rates and evaluations. *Assessment & Evaluation in Higher Education* (2004) 29, no. 5: 611–623.

[75] Ballantyne, C., *Moving student evaluation of teaching online: reporting pilot outcomes and issues with a focus on how to increase student response rate*. Paper presented at the 2005 Australasian Evaluations Forum: University Learning and Reaching: Evaluating and Enhancing the Experience, UNSW, Sydney, 28–29 November 2005

[76] Ogier, J., *The response rates for online surveys—a hit and miss affair*. Paper presented at the 2005 Australasian Evaluations Forum: University Learning and Teaching: Evaluating and Enhancing the Experience, UNSW, Sydney. 28–29 November 2005

[77] Nair, C., Wayland, C., Soediro, S., *Evaluating the student experience: a leap into the future*. Paper presented at the 2005 Australasian Evaluations Forum: University Learning and Teaching: Evaluating and Enhancing the Experience, UNSW, Sydney, 28–29 November 2005

[78] Watt, S., Simpson, C., McKillop, C., & Nunn, V., Electronic course surveys: does automating feedback and reporting give better results? *Assessment & Evaluation in Higher Education* (2002) 27, no. 4: 325–337.

The basis for the ethics section of this work has been the British Educational Research Association's Ethical Guidelines for Educational Research.[79] Busher clarifies that 'ultimately it is the researcher who has to decide how to carry out research as ethically as possible to minimise the intrusion to other people's working and social lives that social and educational research implies'[80] and that is true to an extent, although there are processes and procedures in place to support that decision-making process.

The questionnaires were part of a project funded by Institute of Learning and Teaching's Learning Enhancement and Innovation Fund and the funding was contingent on successful ethics approval from the University ethics committee.

The questionnaires were completed by Level 5 undergraduate students on a designated law module. Since its inception in 2001, the module has consistently received positive feedback from students, and has run with a weekly hour-long lecture and hour-long seminar. In the first cycle of this project, the existing delivery style (lecture/seminar) was maintained for Term 1, but for Term 2 the face to face lecture was replaced with either a podcast lecture with an embedded quiz (using Kaltura) or a live broadcast online lecture (using Collaborate).

The students were asked to indicate, using a 3-part Likert scale, whether they liked, disliked or felt neutral about different aspects of the delivery style. None of these aspects were further defined, and it was left to the respondents to interpret them as they saw fit:

- *The content of the session*. This was a control question, as the content of the sessions would have been the same regardless of the way in which it was delivered.

- *The ease of accessing the sessions / recordings*. Coy states that the online learning environment is proving attractive to parents of children with disabilities in the United States, partly because of 'the advantage

[79] BERA, 2018, *Ethical Guidelines for Education Research* 4th Ed, British Educational Research Association https://www.bera.ac.uk/publication/ethical-guidelines-for-educational-research-2018-online
[80] Busher, H. 'Ethics of research in education' in Coleman, M. and Briggs, A. (eds) *Research Methods in Educational Leadership and Management*. (Sage, 2011), 87

of remaining [at] home.'[81] Many HEIs identify the ability to access recordings of sessions, or live online sessions which were being recorded, had great advantages for students with a range of SpLD (Specific Learning Difficulties or Differences). An additional comment from a student (#1-56) was that "Collaborate allowed me to take part even when I could not come to uni"

- *The speed of delivery*. The content and length of the sessions remained unchanged, thus the speed of delivery should not have changed. The two fixed "time out" slots during the session may have compromised the timings a little. However, the difficulty for those delivering the session is the absence of live visual cues from the audience. Foster *et al*[82] point out (in the context of guidance for students presenting to a judge in court) that it is crucial to 'watch the judge's pen as you are speaking and make sure he or she has time to note down what you are saying.'[83] In the context of an online session, there is no pen to watch, and so the rationale for this question was to inform the speed at which future sessions were planned.

- *The live or recorded nature of the session*. This question was used to distinguish between the use of Collaborate (live) and Kaltura (recorded). Although the Collaborate sessions were recorded in both rounds of the research, the primary focus was to ascertain students' feelings towards the live sessions.

- *The ability to ask questions*. Interactivity is at the heart of the institution's ABL model, and there is some evidence that students who do not feel sufficiently confident or empowered to ask questions in front of their peers, are more willing to do so online (see for example, Sullivan[84], Wang *et al*[85]). One of the students (#2-29) commented that

[81] Coy, K. Special educators' roles as virtual teachers. *Teaching Exceptional Children*, (2014) 46(5), 110–116. http://doi.org/10.1177/0040059914530100 , 110
[82] Foster, C., Gilliatt, J., Bourne, C., and Popat, P. *Civil Advocacy: A Practical Guide*, (Cavendish, 2011, 2nd Ed
[83] Ibid, 11
[84] Sullivan, P. "It's Easier to Be Yourself When You Are Invisible": Female College Students Discuss Their Online Classroom Experiences, *Innovative Higher Education*, (2002) 27 (2), 129–144
[85] Wang, M., Sheng, R., Novak, D., and Pan, X. The impact of mobile learning on students' learning behaviours and performance: Report from a large blended classroom,

even though the "chat box" was not anonymous, and they were still identifiable "I felt more confident asking a question in that environment than I did in the lecture theatre."

Table 3: Round 1 Respondents' views (by percentage) of the sessions (n=69)

Method	Content		Access		Speed		Nature		Questions	
	L	D	L	D	L	D	L	D	L	D
Kaltura	36	25	42	29	31	31	32	31	n/a	
Collaborate	55	20	39	30	49	24	38	22	49	30
Face to face	34	30	23	42	39	30	28	32	20	41

L = Like, D = Dislike

Table 4: Round 2 Respondents' views of Collaborate (n=51)

Method	Content		Access		Speed		Nature		Questions	
	L	D	L	D	L	D	L	D	L	D
Collaborate	60	12	52	17	62	12	72	19	68	2

L = Like, D = Dislike

The surprising result here is that there was a difference in the students' reactions to the content, depending on the medium of delivery. Collaborate scored more highly on "content" than the other methods of delivery. This could relate to the week-by-week coverage, as one student (#1-18) noted "I really like the environmental crime sessions [delivered using Kaltura] but found the session on gun crime [delivered using Collaborate] quite boring." This premise is reinforced by Round 2 of the questionnaire, where Collaborate was the only delivery mechanism, and 60 per cent of students liked the content aspect.

The students' responses to the Ease of Access question was less surprising, as the literature had predicted that students are generally in favour of recorded sessions. The Collaborate sessions scored slightly less well, and part of the rationale for this is explained by the student comments. Student #1-35 said "I like it, but the Wi-Fi is awful and I keep being logged out" and student #1-56 said "I am giving up trying to access the sessions live as the Wi-Fi is so [poor]." This has resonance as to the "techniques" defined above, which "include both the technology used and the way in which the teaching space is designed, built, and operated." Without viable institutional infrastructure to support it, this suggested that Collaborate would never become suitable as a BAT standard. By Round 2, the issue of accessibility scored reasonably high levels of student satisfaction, despite the recurring issue of Wi-Fi accessibility.

The responses to the question about speed of delivery were among the most evenly distributed, and again there was a marked increase in the percentage of students liking this aspect between rounds.

Initially, students did not seem to be particularly concerned about the live or recorded nature of the delivery. This is slightly at odds with the comments of the students about accessibility, as recorded and online sessions are often regarded as being more accessible than face to face sessions. In Round 2, more than 70 per cent of students liked the nature of delivery. This cohort of students had experienced occasional sessions using Collaborate in their compulsory Level 4 modules, and so they were not coming to the technology as a new experience. This is analogous to Roberts's point, above, about the benefits of a "sequential transition"[86] to technology, and that experience leads to competence which leads to contentment.

Nearly half of the students "liked" the ability to ask questions in the Collaborate sessions, and only one fifth in the face-to-face sessions. This fits with the literature discussed above, which suggests that the pseudo-anonymity afforded by online chat functions makes students feel more emboldened. However, despite the high numbers saying they liked the ability to ask questions in the Collaborate sessions, very few did so, which leads to an interesting conclusion that it is the *possibility* of doing things which students like, rather than the reality of actually doing them. By Round 2, engagement had improved, partly

[86] Roberts, C. Implementing Educational Technology in Higher Education: A Strategic Approach, Journal of Educators Online (2008) 5(1), 13 http://dx.doi.org/10.9743/JEO.2008.1.1

because the "time out" sessions were more discursive – if students did not ask questions, they were asked questions so they could demonstrate their understanding of the topic.

On the whole, it is clear that while the use of Collaborate is no silver bullet, and is not popular with all students, it does seem broadly popular. Anonymised headline data on the students' achievement has been logged as part of the standard institutional annual module review process, but more longitudinal data will need to be collected before this can be assessed.[87]

Discussion and Conclusion

If the use of Collaborate within the context of this module can be categorised as broadly successful (ie the students felt they gained more in comparison to the other options offered), the next step is to look at whether such technology will fit within the draft BAT in TEL model developed earlier (Table 1). There are three components to this criterion which need to be addressed in turn:

Firstly, is Collaborate the most effective technique (of those tested) in terms of its activities and method of operation? In isolation is it difficult to assess whether Collaborate is the most effective at doing this, but the results from the Round 1 questionnaires show that more students were positive about Collaborate than about Kaltura or the face-to -face delivery, which goes a long way towards satisfying this aspect. Round 2 results showed that as users become more familiar with the technology, mistakes which might have detracted from its overall suitability are avoided.

Secondly, does Collaborate provide the basis for enhancing the student experience? The students are generally happy with the use of Collaborate, and the Student Module Evaluation for 2017/18 shows that 77 per cent of students are "satisfied with the quality of the module." This means that we can clearly see that the Student Experience element of this criterion has been met.

Thirdly, does Collaborate provide the basis for enhancing student attainment? This aspect was assessed using data from the University Boards, which showed

[87] In March 2020, in common with HEIs across the world, delivery of this module moved online as a result of the Coronavirus pandemic, and so the use of Blackboard became the norm rather than the exception. The latest round of this ongoing project which was due to take place in October 2021 has therefore been postponed until the Autumn of 2022.

a slight increase in average grade. Longer term data will need to be collected to analyse this in more detail.

Collaborate, as it is used in this module, does therefore broadly fit the BAT in TEL model, and with further work on the use of the technology in the third cycle of the research, the fit will be stronger.

Serdyukov[88] set out the question which *should* be at the forefront of the minds of those adopting new technology, but it appears that enhancing student experience is the driver for many HEI policy interventions, particularly in those which are subjected to the annual National Student Survey. This is a pragmatic reason for introducing technology, and pragmatism may be a stronger force than pedagogy when it comes to introducing new technology.[89] Once a body of research had started to show that happier students got higher grades and vice versa (see section 2 above), it was inevitable HEIs would start to introduce technological innovations to 'help students… progress from a 2:1 to a first.'[90]

What has been demonstrated here though is that the stated purpose for adopting TEL may not be the real purpose. We have seen strong arguments (see section 2 above) that the novelty factor of a piece of technology or an application is what tends to underlie its adoption.

Some aspects of TEL have the potential to change the very fabric of society and, by extension, education. Sir Tim Berners-Lee's work on the World Wide Web, for example, has had an incalculable impact on T&L. Some of it (for example, the ability to teach students remotely in areas where education is sparse) has been extremely positive. Some of it has been extremely negative (for example the ease with which students are able to buy completed essays online), but since the objective of the WWW was to democratise information, it has achieved that aim, and is largely fit for purpose.

Having outlined the operation of the BAT model in the IPPC sphere of environmental law, the model was exploded and reconfigured to apply to L&T, and then tested by applying the results from the two cycles of the case study research project to it, and the results were promising. The use of Collaborate in

[88] Serdyukov, P. (2017) *op cit*, n37
[89] *Ibid*.
[90] Swain, H. 2017, *op cit* n15

this fashion fits almost all the parameters of the model already and, when the final data from the resit assessments is added, it is likely to fit it completely.

With further research, and engagement from practitioners across disciplines, a BREF repository held by AccessHE would start to contain richer data on the use of different types of technology for different purposes in different subject areas. A willingness to share best (and worst, and mediocre) results is key here. There are too many T&L researchers who are reticent about publicising their non-successes, the "What didn't Work" projects.

Such a model, were it to be widely adopted, would allow for the sharing of information about successful and unsuccessful interventions and help lead to an overall improvement in student experience.

The BAT in TEL model needs further testing, as it is currently just a prototype. Other technological interventions will be sought from the literature (they will, for reasons identified above, almost all be reporting positive outcomes) and will be plugged in to the model to see if they fit.

The surveys which form the basis of this paper predated the 2020/1 COVID-19 Pandemic which affected learning and teaching for legal (and all) education to a unprecedented level. As Rapanta et al put it "teachers have, almost overnight, been asked to become both designers and tutors, using tools which few have fluently mastered."[91] It was not just a case of more and more teaching moving online, however. Within, and between HEIs, the range of platforms being used by HEIs exploded – within the University which forms the basis of this study, at different stages between March 2020 and March 2021, Zoom, Microsoft's Teams, Blackboard's Collaborate and Collaborate Ultra, Cisco's Webex and Jabber and LogMeIn's GoToMeeting were all used either for student sessions or meetings.

This paper has demonstrated that within the limited context of the application discussed (a Level 5 designated module) we can use the model to make an assessment that the "best" technology is Collaborate. We can pull out from this the conclusion that live, interactive sessions are "better" than pre-recorded

[91] Rapanta, C., Botturi, L., Goodyear, P., Guàrdia, L., and Koole, M., Online University Teaching During and After the Covid-19 Crisis: Refocusing Teacher Presence and Learning Activity, Postdigital Science and Education, (2020) 2: 923-945 https://dx.doi.org/10.1007/s42438-020-00155-y

broadcasts. This may not be the "best" approach when covering different aspects of the law curriculum – what works for application of vicarious liability in Tort may not work for clinical legal education or mooting.

Clearly, the massive growth in online teaching will not be maintained at quite the same levels once the pandemic ends and increasing numbers of students return to campus life, but it is likely that increased use of TEL will become part of the "new normal." The need for a model such as this will therefore become more pressing, and the model will gain enhanced richness from inclusion of the different methods and systems which have been successfully used over the pandemic.

As suggested above, in order for a model such as that proposed here to be successful, legal and other academics need to have a willingness to share best (and worst, and mediocre) results. What this paper has demonstrated is that before the pandemic we *could* make a BAT out of TEL model for legal education. However, in the post-pandemic world, the need for such a model becomes paramount, to ensure that academics don't simply repeat mistakes and dead-ends (Second Life?) and students are given the highest-quality legal education.

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Independence of Mind: Moral reasoning and judgment in legal education

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Abstract

This article has as its central question how we can teach our students what judicial independence (at the individual level) means in practice and how we can teach them in developing an independent mind as a lawyer, with a sovereign voice. In doing so, the article explores the idea that law is about making decisions, referring to the work of Jerome Frank and Paul Scholten. This legal theoretical context allows me to introduce three important factors that we have to bear in mind if we seek to foster an education that prepares students for professional life: education as a means of coming into the world, education as a means of suspending judgement and education as a means of moral reasoning. Each are worked out. In the end, the strength of legal education lies in teaching our students legal consciousness: the ability to make judgments, forming opinions, taking a stance, acquire courage, and the responsibility that comes with it.

Keywords: moral reasoning, realism, legal education, legal consciousness, subjectivism

Introduction

The function of the judiciary lies in the administration of justice, which consists of judging individual cases and in doing so it contributes to the development of law. Considering the fluid boundaries amongst state powers, the judiciary is considered to be independent. The Dutch constitutional framework provides for this independence and can be visualised as overlapping constructs on three levels:

1. Independence at the institutional level

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2. Independence at the (hierarchical) organisational level

3. Independence at the individual level

Judicial independence is, at least in the formal sense, guaranteed by the way judges are appointed,[1] and the manner the administration of justice is managed and financed (including the salaries of judges), in which the Council for the Judiciary fulfils the role of intermediary.[2] Indeed, as an institution, the Dutch judiciary enjoys a high standing in Dutch society.[3] Nevertheless, the judiciary is as an organisation under financial pressure.[4] And surely this forms a threat to the independence of the judiciary as an institution. I suggest that this sketch is similar in other democratic countries based upon the rule of law.

But this is not the central question this essay seeks to address. It rather focuses on the independence of individual judges (and courts) in finding the law, how this demands a particular professional attitude and what this implies for legal education. Hence, the central question is how can we teach our students what judicial independence (at the individual level) means in practice and how we can teach them in developing an independent mind as a lawyer, with a sovereign voice.

Essentially, the essay ties in in with the discussion about the role of values in legal education. To what extent should these values be made explicit and how do they impact upon the development of the student as a future legal professional, as Ferris points out.[5] What is our role as educators? Indeed, there

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[1] See art. 117 of the Dutch Constitution. For an extensive review, see: P.M. van den Eijnden, *Onafhankelijkheid van de Rechter in Constitutioneel Perspectief (Staat en Recht nr. 3* (Kluwer 2011).

[2] See also: M.C. Burkens, H.R.B.M. Kummeling, B.P. Vermeulen & R.J.G.M. Widdershoven, *Beginselen van de Democratische Rechtsstaat*, (7th edn. Kluwer 2012.), 161.

[3] See the recent results of the Central Bureau of Statistics: << https://www.cbs.nl/nl-nl/nieuws/2018/22/meer-vertrouwen-in-elkaar-en-instituties>> (last accessed 14 February 2021).

[4] See, for example, the recent letter (September 2018) of the Dutch Association of the Administration of Justice (NVR): https://nvvr.org/uploads/afbeeldingen/20180914-brief-TK-en-MvRB-over-rechtspraak.pdf, and the letter send by a group of individual judges (November 2018) to the Mister for Justice and parliament: <<https://nos.nl/nieuwsuur/artikel/2258390-brandbrief-rechters-wij-vrezen-voor-de-toekomst-van-de-rechtspraak.html>> (last accessed 14 February 2021).

[5] Graham Ferris*, Uses of Values in Legal Education* (Intersentia 2015). See also the series of essays in the special issue of The Law Teacher on the issue, 'The Values of Common Law Legal Education' (2008) The Law Teacher, 42(3), 263-354.

is increasing legal education literature addressing ways of teaching law that goes beyond the case study method or the study of black latter law. A few examples of the last decade are the edited volumes *Affect and Legal Education*, *The Moral Imagination and the Legal Life* and *Academic Learning in Law*.[6]

Independence of individual judges

This is what we usually tell our students: we paint a formal picture of judicial independence and the administration of justice, without problematising this. In doing so, we take a positivist approach, in which we tend to teach students the model of subsumption, based on the case study method. We present students with a set of facts from which a legal question is distilled that is answered by reference to the law in the books, without critical reflection. James Boyd White succinctly put it like this:-[7]

> The implied contract between the student and teacher shifts focus: our insistence to the student that 'You are responsible for these texts [the law in the books] as you have never been responsible for anything in your life', all too frequently entails the acceptance of a correlative as well: 'and responsible for nothing else in the world'.

But do we do justice, in our education and our programmes and courses, to what it is to *judge*? How do judges make decisions – decisions that have, by necessity, an impact on persons that exist behind the parties in individual cases and have an impact on society as a whole?

An example: Urgenda

The Urgenda case is a good illustration. In 2015, the District Court of the Hague found the Dutch State liable in failing to implement measures to reduce sufficiently CO_2 emissions, which for industrialised countries is set at a

[6] Caroline Maughan & Paul Maharg, Affect and Legal Education. Emotion in Learning and Teaching the Law (Routledge 2011); Maksymilian Del Mar & Zenon Bankowski, The Moral Imagination and the Legal Life. Beyond Text in Legal Education (Routledge 2013); Bart van Klink & Ubaldus de Vries, Academic Learning in Law. Theoretical Positions, Teaching Experiments and Learning Experiences (Edward Elgar, 2016).
[7] James Boyd White, 'Doctrine in a Vacuum: Reflections on What a Law School Ought (and Ought Not to Be)' (1986) Journal of Legal Education, 36, 155-166.

minimum of 25%.[8] The court was quite explicit in its formulation. At paragraph 4.83 of the judgment, it states:-

Due to the severity of the consequences of climate change and the great risk of hazardous climate change occurring – without mitigating measures – the court concludes that the State has a duty of care to take mitigation measures. The circumstance that the Dutch contribution to the present global greenhouse gas emissions is currently small does not affect this.

The decision was affirmed on appeal and by the Dutch Supreme Court. This affirmation stressed the State's legal duty to protect the life of citizens, also in the long term, as it is enshrined in the European Convention of Human Rights (ECHR).[9] The decision is hailed as a triumph for the claimant – Urgenda – and the fight against climate change and its (social) consequences.[10] The decision is considered unexpected by many lawyers. Indeed, as Giesen says: the decision in first instance was a very "courageous decision of a judge who explored boundaries", and others considered the decision "revolutionary", in which courts did not avoid dealing with a politically volatile case.[11] At the same time, critics have argued that the courts overstepped their mark in this case, suggesting, as Hommes does, that the decision is a political decision by bringing climate change (and its consequences) within the realm of article 2

[8] District Court of The Hague, 24 June 2015 (Urgenda), ECLI:NL:RBDHA:2015:7196. This is the reference to the English translation. The authoritative Dutch version of the decision is archived under: ECLI:NL:RBDHA:2015:7145.

[9] Court of Appeal of The Hague, 9 October 2018 (Urgenda), ECLI:NL:GHDHA:2018:2610. This is the reference to the English translation. The authoritative Dutch version of the decision is archived under: ECLI:NL:GHDHA:2018:2591. Dutch Supreme Court, 20 December 2019 (Urgenda) ECLI:NL:HR:2019:2006. All decisions and related information can be found at << https://www.rechtspraak.nl/Bekende-rechtszaken/klimaatzaak-urgenda >> (last accessed 14 February 2021).

[10] Urgenda is a Dutch foundation that, according its website, aims "for a fast transition towards a sustainable society" <<https://www.urgenda.nl/>> (last accessed 14 February 2021).

[11] P. van den Dool & T. Ketelaar, 'Zit de rechter nu op de stoel van de politiek?' (2018) *NRC Handelsblad*, 10 October 2018. <<https://www.nrc.nl/nieuws/2018/10/10/zit-de-rechter-nu-op-de-stoel-van-de-politiek-a2417570>> (last accessed 14 February 2021).

and 8 of the European Convention, imposing positive obligations upon the state,[12] dictating policy.[13]

Consciousness of mind

The decision in the Urgenda case leads to many interesting legal questions.[14] One of these questions concerns the relationship between the judiciary on the one hand and the legislator and executive on the other. What is at stake is to what extent the judiciary can cross the fluid boundaries of executive and legislative power. Is the case an example of judicial activism in which political biases and particular world views play an important role in the administration of justice? Is the decision and example of judicial independence gone astray, impermissibly directing governmental policy, or an example of judicial courage?[15] Is it an example of legal realism *in extremis*?

How to think about the judges (such as in the Urgenda case) as independent minds? How to explain the thought processes that involve making choices and decisions that do not necessarily follow from the law directly or logically. In addressing these questions, the focus of this essay is first on the relationship between judicial independence and professional and ethical attitudes, and second on how to enshrine this in legal education. The strength of legal education should lie in teaching our students legal consciousness: the ability to make judgments, forming opinions and taking a stance and to acquire the

[12] W. Hommes, 'Het hof bedrijft politiek met Urgenda-uitspraak' (2018) *De Volkskrant*, 16 October 2018. <<https://www.volkskrant.nl/columns-opinie/het-hof-bedrijft-politiek-met-urgenda-uitspraak~b528c988>> (last accessed 14 February 2021).

[13] For a detailed analysis of the appeal court's decision, see: L. Burgers & T. Staal (2019) 'Climate Action as Positive Human Rights Obligation: The Appeals Judgment in Urgenda v The Netherlands, in: R.A. Wessel, W. Werner & B. Boutin (eds.) *Netherlands Yearbook of International Law 2018* (T.M.C. Asser Press 2019). See also: <<https://ssrn.com/abstract=3314008>> (last accessed: 14 February 2021).

[14] See, for example, questions concerning risk regulation: Elbert de Jong 'Urgenda: Rechterlijke Risicoregulering als Alternatief voor Risicoregulering door de Overheid' (2015) NTBR 46; health and safety risks through non-intervention, Roger Cox, 'Klimaat, Veiligheid en Recht' (2015) Cahiers Politiestudies 38, 197-233 (Cox was one of the lawyers for the claimant in Urgenda); public interest litigation, Liesbeth Enneking, Elbert de Jong, 'Regulering van Onzekere Risico's via Public Interest Litigation' (2014) NJB 1136, 1542-1551; and the complexity of harmful consequences of climate change, Tim Bleeker, 'Aansprakelijkheid voor Klimaatschade: een Driekoppige Draak' (2018) NTBR 2, 2-11.

[15] See for example Van Gestel & Loth for an insightful analysis; Marc Loth & Rob van Gestel (2015) 'Urgenda: Roekeloze Rechtspraak of Rechtsvinding 3.0' (2015) NJB, 37, 2598-2605.

(judicial) courage, referring to Van Domselaar,[16] and the responsibility that comes with it.[17]

Finding the law, professional attitude and legal education

Sections 2 and 3 focus on individual judicial independence and the idea of "decisional choice" in finding the law. This is done by reference to legal theory, in particular the work of the American jurist Jerome Frank,[18] and the Dutch legal scholar and practitioner Paul Scholten.[19] Jerome Frank (1889-1957) was an American legal realist (and judge) who emphasised that "justice requires close attention to trial courts, to their judges, jurors and witnesses",[20] or in other words, to the surrounding context in which law is used, by whom and for which purpose. Scholten (1875-1946) was a Dutch legal scholar and practitioner writing around the same time as Frank. Scholten too stresses the importance of understanding why "a decision is made one way and not another, what the factors are which determine that decision".[21] Frank and Scholten find each other in the enclosed space of non-rationality – there where rational reasoning stops and a decision is or must be made. The realm of consciousness resides in this enclosed space. With non-rationality is meant that a decision does not follow from the facts and the law as if it were a (simple) syllogism – it also involves normative evaluation and hence a choice.

Section 4 seeks to integrate the two approaches on judicial decision making, and addresses the question how we can and should teach our students if we take seriously that decision-making – coming to judgments – entails more than applying rules to facts. It involves a process of *moral* reasoning as well as

[16] Iris van Domselaar, 'Moral Quality in Adjudication: On Judicial Virtues and Civic Friendship' (2015) NJLP (1), 24-46.
[17] To note: legal consciousness here is not meant as a socio-legal concept, referring to how a social group experiences law in society; see for example: P. Ewick & S. Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998).
[18] Jerome Frank, *Law and the Modern Mind* (Transaction, 2009).
[19] Paul Scholten, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands Burgerlijk recht: Algemeen Deel* (Tjeenk Wilink 1931), Preface [*v*]. The Digital Paul Scholten Project works on a full English translation of Scholten's work; see: << https://www.paulscholten.eu/>> (last accessed 14 February 2021). In this contribution, that translation, referred to as *General Part*, is used (unless otherwise indicated). It refers to the paragraph in the English translation and to the [*page number*] in the original Dutch edition of 1931.
[20] S.A. Beatty. 'On Legal Realism – Some Basic Ideas of Jerome Frank' (1959) *Alabama Law Review*, 12(2), 239-253, 239.
[21] Scholten 1931, n 19, Preface. [*v*].

rational reasoning. Section 4 spells out a didactic of moral reasoning. Decision-making is an intrinsic trait of any professional who is called upon to make decisions at the detriment to or for the benefit of others. What is our task as legal philosophers and educators here? Is it enough that we teach the theory, or should we do more and explore with students what it is to act, decide and take responsibility?[22]

Finding law: Frank

Legal realism

American legal realism, as Schauer noted in Twining's *Karl Llewellyn and the Realist Movement*, is "contested terrain" about what is central to the realist claim.[23] Is it the relative importance of facts in adjudication, the sequencing of decision making and justification, the personality of the judge or the observation that law is indeterminate and instrumental? Other perspectives on realism consider it an empirical and external method of examining law and what lawyers do. More recent, in the tradition of critical legal studies, realism challenges law's assumed neutrality. Be that as it may, the core of legal realism, arguably, is that it takes issue with the old positivist view that adjudication is the application of rules to facts. Obviously, this sells legal positivism short, in particular when we consider the immense impact of people like Herbert Hart. At the same time, it could be argued that some of the realist insights may have paved the way for Hart's *The Concept of Law*.[24] Realism fills the gap of positivism as it addresses that what lies beneath law or is concealed by it.

It is not the aim to provide an analysis of the realist movement. Rather, I focus on one exponent – Jerome Frank – to try to illustrate the central theme of my contribution, *viz.* what it is to find the law and how to cope with the (professional) responsibility that comes with it. As Twining noted, *Law and the*

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[22] To be sure, it is not the aim of this contribution to give a critical analysis of law's indeterminacy, I take that as a given.

[23] William Twining, *Karl Llewellyn and the Realist Movement* (2nd edn. Cambridge University Press 2012), with a foreword by Frederick Schauer, ix.

[24] Hart observes in Chapter VII legal realism's rule scepticism but does so in the context of the open texture of law and the idea that, in any event, judges reach decisions "by genuine effort to conform to rules consciously taken as guiding standards of decision or, if intuitively reached, are justified by rules which the judge was antecedently disposed to observe and whose relevance to the case at hand would generally be acknowledged" – H.L.A. Hart, *The Concept of Law* (2nd edn. OUP 1994), 141. See also Schauer, in Twining (2012), xxiv (note 48 in the text).

Modern Mind is not without controversy, considering its polemic and provocative claims.[25] But, I have selected Frank predominantly because Frank, like Scholten, emphasises a normative element, showing that adjudication involves selection, evaluation and choice without these being accounted for in a logical way. It shows that in adjudication there is more at stake, of which students should be aware when studying law and judicial decisions.

Frank's realism

Reading *Law and the Modern Mind*, the four questions central to the realist movement (as mentioned above) are addressed by Frank:

- The relative importance of facts in adjudication,
- The sequencing of decision making and justification,
- The personality of the judge and other biases, and
- Law as indeterminate and instrumental

Frank is sceptical, to say the least, about the positivist view on adjudication: "in theory, the judge begins with some rule or principle of law as his premise, applies this premise to the facts, and thus arrives at his decision".[26] In doing so, Frank rejects the idea of legal certainty, considering it a legal myth.[27] The law, is per definition "vague and variable" as it deals with "human relations in their most complicated aspects"; and Frank considers this of "immense social value".[28] Indeed, law deals with social interaction and provides a normative framework for expectations and their disappointments in respect of social interdependency.[29] The law allows for redress when an expectation – respect my property, commit to the contract, reduce co_2 emissions as agreed – is violated or disappointed. But it falls short of stipulating when exactly property is not respected, when a contract is not committed to, when agreements are not met. The facts, and their evaluation, here are key rather than the law. Frank

[25] Twining 2012, n 23, 71.
[26] Frank 2009, n 18,101.
[27] Frank partially explains this myth by reference to child psychology and the "father-as-infallible-judge", see Frank (2009), 19, inspired, in his time, by the work of Freud and Piaget.
[28] Frank 2009, n 18, 6-7.
[29] Cf. Niklas Luhmann, *Law as a Social System* (2004 OUP), 142 ff.

argues that a judicial decision depends to a large extent upon what a judge "believes to be the facts of a case" and it makes Frank a fact sceptic as he observes himself.[30] It is incorrect in his view to consider adjudication as the mere application of a rule to the facts. It is also incorrect to take facts at face value, as if they were data. Rather, a trial court finding or establishing the facts involves "a multitude of elusive factors" such as mistaken or contradictory witnesses and (hidden or unconscious) prejudices and biases.[31] It leads him to conclude that "[t]he law, therefore, consists of decisions, not rules".[32] Frank does not dismiss rules. He considers rules to be "among the many sources to which judges go in making the law of the case tried before them".[33]

In practice then, Frank argues that in adjudication the reverse takes place: the judge comes first with a conclusion tentatively formulated and then looks for a premise to substantiate the conclusion, to either affirm or reject the conclusion. The tentative conclusion is an initial *intuition* as to what the outcome should be, based on the facts of the case and how these are evaluated by the judge (as if he were a "witness").[34] Critics regard this position as nihilistic and relativistic, ignoring altogether the role and value of rules and principles.[35] It sells Frank short. True, it is an instrumental view on law and adjudication but there is merit in his contention that rules and principles serve as justification for the conclusions tentatively reached – as non-exclusive sources. Indeed, the strength in the contention lies in how judges deal with the non-rational initial inclination as to how a case should (or could) be decided and facts are evaluated and weighed, rather than suggesting, as critics do, that Frank places "intuition above reason and therefore brute instinct above reflection".[36]

Hunches and hunch-producers

A judge, in reaching a decision, makes a judgment and like other judgments, judicial judgments "are worked out backward from conclusions tentatively

[30] Frank 2009, n 18,xxiv.
[31] Ibid, xxiv-xxv.
[32] Ibid, 138.
[33] Ibid, 137.
[34] Ibid, xxxv, citing his own opinion in *In re J.P. Linahan*, 138 F. (2d) 650, 652-654.
[35] For an overview, see: N. Duxbury, 'Jerome Frank and the Legacy of Legal Realism' (1991) *Journal of Law and Society* 8(2), 175-205.
[36] Ibid , 194, referring to Harris, R.C. (1936) 'Idealism Emergent in Jurisprudence' (1936) *Tulane Law Review* 10, 169-187.

formulated".[37] It goes against how we view adjudication when we *read* the written decision – these opinions are written in the syllogistic style:[38]

They picture the judge applying the rules and principles (usually derived from opinions in earlier cases) as his major premise, employing the facts of the case as the minor premise, and then coming to his judgment by process of pure reasoning.

Referring to Hutcheson (a US federal judge of the early twentieth century), Frank argues that judicial decisions are based upon hunches. Hutcheson: "[t]he judge really decides by feeling and not by judgment, by hunching and not by ratiocination, such ratiocination appears only in the opinion".[39] Thus, decisions, based on conclusions tentatively formulated imply decisions that are initially based and driven by "hunches". The consequence is that "the way in which the judge gets his hunches is the key to the judicial process".[40]

These hunches are produced by or emanate from different sources. Frank first refers to the rules and principles (the written law). These constitute the normative framework that guides a judge in accounting for his tentative conclusion. But there are other sources that are more introspective and refer to judge's "political, economic and moral prejudices".[41] Frank, though, is critical of referring to such crude and wide categories and suggests that these prejudices – when it comes to the hunch – are interconnected with distinctly personal biases. The first category of prejudices express themselves and become meaningful in connection with these "idiosyncratic biases".[42] Furthermore, these personal biases play a role as to the judge's "sympathies and antipathies" in respect to the persons involved – parties, attorneys, witnesses, etc.[43] Indeed, as Frank observes, a judge is in many ways a witness

[37] Frank 2009, n 18, 109.
[38] Ibid, 111.
[39] Ibid, 112, citing J.C. Hutcheson, 'The Judgment Intuitive: The Function of the Hunch in Judicial Decisions' (1929) *Cornell Law Quarterly* 4(2), 274-288. Discussed also in Duxbury (1991), 184. Duxbury reports that Hutcheson, in his turn, borrowed the idea of the hunch from Rabelais – the 16th Century French satirist, probably in *Gargantua and Pantagruel*, book 2 (chapter 10-14). I used the Dutch translation by J.M. Vermeer-Pardoen: Rabelais, *Gargantua en Pantagruel* (Van Gennep, 1999). In fact, reading the text, I think Hutcheson refers to judge Bridlegoose's trial, book 3 (chapter 41).
[40] Ibid, 112.
[41] Ibid, 113-114.
[42] Ibid, 114.
[43] Ibid, 115. Witnesses too, make judgments, often erroneous; see, for example, E.F. Loftus, *Eyewitness Testimony* (1996 Harvard University Press).

of what happens in his or her court, which means that "the determination of facts is no mechanical act", as witnesses make judgments too when recalling events.[44]

The uncomfortable conclusion seems to be as follows:[45]

> The peculiar traits, disposition, biases and habits of the particular judge will, then, often determine what he decides to be the law. […] To know the judge's hunch producers which make the law we must know thoroughly that complicated congeries we loosely call the judge's personality.

The question is whether this seemingly uncomfortable conclusion leads to another conclusion, which is that law is essentially arbitrary and at the mercy of the discretion of a judge as an autonomous law giver. One could easily understand Frank in this way, and dismiss his argument as nihilistic, holding on to the basic legal myth of subsumption. But Frank argues that a judge's discretion is "the life of the law" and removing his discretion implies removing its creativity.[46] Frank comes with a warning though, so to speak. If judicial discretion (fed by hunches, extrinsic and idiosyncratic biases) is the life and soul of the law, it demands something of judges: constant self-reflection and introspection, critical self-awareness and ethical integrity. Frank:[47]

> The honest, well-trained judge with the completest possible knowledge of the character of his powers and of his own prejudices and weaknesses is the best guarantee of justice.

It is *this* aspect of self-awareness – consciousness – that plays an important role in the work of Paul Scholten, to which we can turn now.

Finding law: Paul Scholten

Paul Scholten takes a different perspective on law – Scholten cannot be considered a legal realist in the American tradition. His portrait of law is less instrumental in colour and tends to be more reflexive and existential, although he too refers to the initial intuition, where a judge takes note of the facts and

[44] Ibid, 118.
[45] Ibid, 119-220.
[46] Ibid, 149.
[47] Ibid, 148.

"has a solution in mind which he deems right at first sight".[48] Scholten has had a great influence in the Dutch understanding of the methodology of private law and its administration. Scholten's theory rests on three anchors, as previously explained by Hartendorp & Wagenaar.[49] The first anchor refers to the idea that the rule is given through the decision. The second anchor is the idea that finding law is the result of both a rational and a non-rational (moral) process. The third anchor concerns the leap of faith (the "jump") that precedes the ultimate decision.

With the rule, a decision is not a given

Scholten, like Frank, rejects the simple notion that the administration of justice is the mere application of the rule to the facts, even though this might have been the idea of the legislator at the time of the great codification in the late nineteenth century. Echoes of this formalist idea are still found in Dutch law. Scholten points to the General Provisions Act, that states in art. 11 that the judge must administer the law according to the written law and art. 13, that the judge can be prosecuted for refusing to administer law ("*regtsweigering*") under the pretext that the (written) law is silent, dark or incomplete. In respect of cassation too, it is visible. The Dutch Supreme Court will set aside a lower court decision if the law is violated or the law is applied incorrectly, and not because "a ruling […]is in any general sense unjust".[50]

But with the rule, the decision is not a given. Scholten argues that "[t]he rule is given simultaneously *with* the decision. The decision itself has an autonomous meaning".[51] Finding the law is *more* than applying the law but does not entail creating law. Scholten provides two reasons for this. The first is that in finding the law the facts of the case are, by necessity, evaluated. When are the facts such that it can be established they amount to, for example, a lack of good faith, a violation of public decency or reasonableness?[52] The second is that in finding the law a choice must be made which rules to apply. To bring the facts under the relevant rule is more complicated than it seems or the law (the Code) can

[48] Scholten 1931, n 19, par. 26 [*160*].
[49] Following: R.C. Hartendorp & H. Wagenaar, 'De praktische rechter. De opmerkelijke relevantie van Paul Scholten voor een eigentijdse rechtsvindingstheorie' (2004) R *& R* [now referred to as *NJLP*], 1 60-89, 62.
[50] Scholten 1931, n 19, par. 1 [*2*]. See also art. 79 of the Dutch Judicial Organisation Act (Wet RO).
[51] Ibid, par. 2 [*11*]. Emphasis in the original.
[52] Ibid, par. 2 [*10-11*].

foresee. Finding law is more than the "logical work of subsuming the facts under the rule"; it entails an "intuitive choice" of evaluation and selection.[53] These choices of evaluation and selection are not rule-based but are found in case law; in judicial decisions that are entitled to an "autonomous normative position" vis-a-vis the written rule.[54]

Interpretation, analogy and refinement

More is needed in finding the law, when it comes to the administration of justice. This "more" (evaluation and selection) has a rational element as well as an element that appeals to consciousness – to the independence of mind – which calls for a leap of faith (the "jump" as Scholten calls it) and addressed below. The rational element refers to the logical activity in respect of understanding and explaining the law within the factual context of the case at hand.[55] It is the (only) activity students are subjected to in most of their positive law courses.

The law demands interpretation, how perverse ("*perversio*") some might consider this to be.[56] Legal scholarship contributes to spell out the methodology of interpreting and explaining the law. In analysing case law, we traditionally distinguish four different methods of interpretation: grammatical, historic, systematic and teleological. Lawyers employ these methods but, as Scholten questions, to what extent do lawyers account for what they are doing when explaining and applying the law (why employing this or that method?) and whether they can do what they do – what or who authorises them to do what they choose? In other words, Scholten stresses the point that lawyers who are called upon to decide, also decide how to apply the law, deciding (intuitively) upon a method of interpretation to fit the outcome: is it a logical consideration or "is the choice made on some grounds other than intellectual ones?",[57] amounting to a process of rationalisation as Frank would have it?

Furthermore, in explaining or interpreting the law something else happens. Explaining the law, using interpretation, may lead to an analogy, where a legal

[53] Ibid, par. 2 [*13 and 14*].
[54] Ibid, par. 2 [*14*].
[55] Most of Scholten's analysis in the *General Part* is concerned with this rational aspect; an extensive summary lies outside the scope of this contribution.
[56] Scholten refers to Justinianus: interpretation was given only to the "*augusto auctoritas*" of the emperor, cf. Codex I, 17, 2, 21. See Scholten 1931, n 19, par. 1 [*3*].
[57] Ibid, par. 1 [*5*].

rule designed for a particular set of circumstances, is used for another set of circumstances and, in effect, broadening the scope of the written rule in question. Again, the question arises as to what we mean with this analogy and whether it is justified and if so, why. The same can be asked in respect of the contrary, in cases where the written rule is restricted ("refinement"[58]). In the end, Scholten makes the point that in respect of interpretation, analogy and refinement something "quite different takes place than simply subsuming a case under a rule which lays ready for use in the law".[59] Again, finding the law – administrating law – is much more than a simple logical procedure of the syllogism.

Leap of faith

Thus, Scholten shows that a concrete legal relation not merely depends on the rules but also on decisions. And these decisions cannot be found through the model of subsumption of rules (legal reasoning). Each time a decision is made, the realm of rules and reasoning is transcended by the realm of Conscience (moral reasoning). In the end, the decision is anchored in the judge's Conscience from where he or she "jumps" to the conclusion (the judicial decision). Scholten:-[60]

> I think that there is more than merely observation and logical argument in every scientific judgment, but in any case, the judicial judgment is more than that — it can never be reduced to those two. It is not a scientific proposition, but a declaration of will: this is how it should be. In the end it is a leap, just like any deed, any moral judgment is.

This is how it shall be!

The decision is an act.[61] It nests in the judge's moral conscience for which he or she takes responsibility. Scholten stresses this point of responsibility, explaining that the decision is perhaps not the only possibility that fits within the legal system and perhaps another judge would have come to a different

[58] Ibid, par. 1 [*5*].
[59] Ibid, par. 1 [*7*].
[60] Ibid, par. 28 [*172*].
[61] Akin to want Frank refers to as a judge "reaching a decision, is making a judgment", Frank 2009, n 18, 108.

decision, but for the judge, *this* judge, because it is a decision of conscience, the decision is the only option left, excluding all other options.

Scholten says that the conscience is fed by (his) Christian faith and he seems to reject the notion that conscience is or should be fed by a "conception of idealism" (seen by Scholten in "Hegelian-pantheistic form").[62] I agree with Dunné that, nowadays, it is less important what conscience refers to and by what it is fed. The point is that judicial decisions entail more than observation and logical argumentation.[63] It is, as Borst argues,[64] Scholten's dialectic of subjective and objective factors. In this respect, Scholten resembles Frank but where Frank considers subjective factors to reside in the personality of the judge, Scholten emphasises the judge's conscience as subjective factor.

Independence of mind – teaching law

Scholten's view on judicial thinking and acting is powerful and dramatic, whereas Frank's view is disturbing and challenging. Both views bring home that there is something at stake when deciding cases. In a sense, each judicial decision causes harm (as well as relief). The act has impact: losing or winning custody, recovery of damages or not, freedom or incarceration, life or death, climate change, the list is endless. How to expose students to this aspect of law – that law implies making decisions and that there is something at stake?

To perform the act – to decide and take responsibility cannot be done light-heartedly – it takes courage. For two reasons: it takes courage as the decision is taken in relative uncertainty (of knowing to be right or wrong). It also takes courage as the act of the decision is also one of vulnerability – open to criticism, by the media, the public, peers and legal scholars. That's perhaps why the judge is "disguised", presented as a functionary and his or her decision being cloaked in legal language and form. But, at the same time, his or her Independence here implies also loneliness, in bearing the burden of the consequences of the judicial act.

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[62] Scholten 1931, n 19, par. 28 [*178*].
[63] J. Van Dunné, 'Recht en Cultuur. Lof der Oppervlakkigheid'?, in: A.G. Castermans, Jac. Hijma, K.J.O. Jansen, P. Memelink, H.J. Snijders & C.J.J.M. Stolker (eds.), *Ex Libris Hans Nieuwenhuis* (Kluwer 2009), 171-185, 174.
[64] W. Borst. W. (2019) 'De Dialectiek bij Paul Scholten: Haar Aard, Oorsprong en Bronnen' (2019) NJLP 48(1), 48-65, 63.

Courage, or judicial courage, to use Iris van Domselaar's concept, is virtuous. It is not the courage of a war hero, but the courage, following Kant, that resides within the intellectual dimension: "the one who dares to speak up in public life".[65] Projecting this on a judge, Van Domselaar concludes that:-[66]

> A courageous judge simply has the inner strength to remain stoical and do his virtuous duty even if it has repercussions for him such as criticism, unpopularity, or loneliness.

So how can we understand judicial independence, considering the work of Jerome Frank, Paul Scholten and the virtue of judicial courage? It is clear, at least to this author, that independence is much more than a formal construct, constitutionally enshrined and illuminated by symbols and rituals. Judicial independence at the individual level amounts to a particular *professional attitude* that entails courage, introspection and critical self-awareness, as well knowledge of the law and its procedures and rituals.

When looking at legal education, three important factors should be borne in mind if we seek to foster an education that prepares students for professional life with an independence of mind and a sovereign voice:

- Education as a means of coming into the world
- Education as a means of suspending judgment
- Education as a means of moral reasoning

Education as a means of coming into the world

Gert Biesta considers education to consist of three overlapping elements: qualification, socialisation and subjectification. Biesta's pedagogy underpins, philosophically this author's view on education, in which we teach students not merely to become lawyers, qualified and socialised to fit the realm of legal practice but also to become free and responsible adults, able to deal with the

[65] Iris van Domselaar, 'Moral Quality in Adjudication: On Judicial Virtues and Civic Friendship' (2015) NJLP 44(1), 24-46, 32.
[66] Ibid, 32.

world and its challenges. In doing so, Biesta connects education with freedom, democracy and the rule of law.[67]

In teaching law, we tend to stress the importance of analytical skills. We teach students to analyse the case, evaluate the given facts and distil the legal question that is at stake. We then teach them to analyse the law and seek out the principle of rule that underpins the case and how this rule or principle is dealt with in case law. It sets students up to develop an answer to the legal question of the case. And then we move on to the next case dealing with a different legal concept. While doing so, we "socialise" students within the legal realm – students become lawyers. In our education we stress the importance of qualification and socialisation.

We tend to ignore the importance of "subjectification", which Biesta worked out in *Beyond Learning: Democratic Education for a Human Future*.[68] With subjectification Biesta describes the way in which education (also legal education) should contribute to the learning process in which "newcomers come into the world as unique, singular beings".[69] He warns that without paying attention to this aspect of education, education is merely an instrument of social reproduction.[70] What is needed for this, is attention to the importance of *Erziehung* rather than *Bildung*. The latter is geared towards the formation of persons (subjects) based on a particular ideal image (for example that of Von Humboldt). But Biesta points out that becoming a person also means "*wanting to be a person*", a unique, singular being. A person, here, means the way in which a human exists and tries to (want to) be a person, to act in freedom, based upon choices we can make, while acknowledging responsibility for our actions.[71] What is at stake is "to encourage [students] to take up the challenge of their being-a-person and assist them in discovering what is involved".[72]

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[67] Worked out in Gert J.J. Biesta*, The Beautiful Risk of Education* (Paradigm, 2013).
[68] (Routledge, 2006).
[69] See: Gert J.J. Biesta, *Tijd voor Pedagogiek*, Oratie Universiteit voor Humanistiek, Utrecht, 2018; see: https://www.uvh.nl/actueel/april-2018/tijd-voor-pedagogiek-download-oratie-gert-biesta?sresult=1686081706&swords=biesta (last accessed 14 February 2021).
[70] Consider here Duncan Kennedy's thesis that legal education encompasses "ideological training for willing service in the hierarchies of the corporate welfare state"; Duncan Kennedy, 'Legal Education and the Reproduction of Hierarchy' (1982) Journal of Legal Education, 591, 591.
[71] Biesta 2018, n 69, 20.
[72] Ibid, 21.

How is it possible to introduce elements of "subjectification" in legal education? The first step is in taking distance and *suspend* judgment.

Education as a means of suspending judgment

Our task as legal philosophers is not merely to teach the theory, such as that of Scholten or Frank, Hart, Dworkin, etc. We should do more and explore with students what it is to act and take responsibility, what it is to be self-reflexive and being able to embrace the uncertainty of one's conscience to figure out what is the right thing to do when reasoning ultimately stops.

I think we can if and when we create room for introspection and critical self-awareness, in addition to the study of law through the case study method and the training of what it is to be a lawyer.[73] Studying is also a process of self-realisation (cf. Biesta). Students have the privilege to study and think in a separate place, which we call the university. Following Van Klink & De Vries, who refer to Oakeshott, learning is:[74]

> liberal, not in the political sense but in the existential sense of 'liberated' or 'freed': at least for a couple of years, learners do not have to worry too much about 'satisfying contingent wants'. What the university offers, is 'the gift of an interval'.

Within this interval, students can "suspend judgment", and are subjected, following Gert Biesta,[75] to the processes of qualification, socialisation and subjectification (self-realisation). Qualification then, refers to learning the law through the case study method, whereas socialisation refers to thinking like a lawyer and the necessary toolkit that comes with it. Subjectification goes

[73] To a large extent this applies to the whole of academia and, hence, the importance of the humanities who traditionally are in the position to foster the *Bildung* and *Erziehung* element of university education: how to challenge students to come into the world (Biesta 2018, note 71).
[74] B. van Klink & B. de Vries, 'Skeptical Legal Education – How to Develop a Critical Attitude' (2016) Law & Method, 3(2), 37-52, 38, citing Michael Oakeshott, *The Voice of Liberal Learning* (Liberty Fund 2001). See also the views of Roger Burridge and Julian Webb on liberal legal education as "an enterprise of intellectual development"; Roger Burridge & Julian Webb, 'The values of common law legal education reprised' (2008), The Law Teacher, 42(3), 263-269, 264.
[75] Biesta 2018, n 69.

beyond this and involves the process of self-realisation through critical philosophical and social reflection.

In stressing the process of self-realisation, Van Klink & De Vries go beyond the interval of Oakeshott's and emphasise the importance of moral and intellectual integrity of legal education, which we refer to as skeptical legal education:-[76]

> Skeptical legal education stresses the importance of conversation, discussion and suspended judgment and in doing so it promotes the students' critical potential. A skeptical attitude starts with the intellectual awareness that knowledge claims cannot be taken for granted but must continuously be questioned in order to properly understand and use them in a critical way, and to do so from a detached point of view rather than on the basis of a particular political ideology.

Skeptical legal education goes beyond the study of law and seeks to contribute to students finding their own voice in the legal debate, being able to become reflective on how they understand law and its normative context. Legal theory and philosophy have an important role in this process of self-realisation, preparing a student to come to judgment and for them to figure out what kind of lawyer-citizen he or she seeks to be.

Moral reasoning is one way to contribute to self-realisation. How can moral reasoning be integrated in legal education?

Education as a means of moral reasoning

In the English language, we refer to the judicial function as the administration of *justice*. It implies, arguably, that this goes beyond the mere application of rules to facts and involves, as both Frank and Scholten illustrate, an evaluation – a normative evaluation. This normative evaluation entails two approaches of moral reasoning.

The first approach is exposing students to how to understand law from the point of view of *legal theory*. Theories like positivism and realism, but also natural law theory or critical legal studies, worked out by thinkers like Scholten and

[76] Van Klink & De Vries 2016, 49. The concept of skeptical legal education is worked out in Bart van Klink, 'Knowledge and Aphasia. What Is the Use of Skeptical Legal Education', in: Van Klink & De Vries 2016, 15-34.

Frank, Fuller, Kennedy, Hart and Dworkin and many others show their worth as they challenge students to discover their position vis-à-vis law: am I, as a point of departure, more of a positivist or a realist? Am I conscious of the non-rational or normative element in decision-making? Do I recognise that decisions are based upon conclusions tentatively formulated? This discovery cannot be done my merely teaching theory – out of context. Rather, it should be taught in the context of positive law and is an aspect of what Biesta calls an engaged science of action and involvement ("*handelingswetenschap*").[77]

At Utrecht University, for example, but not only there, students are exposed to legal theory in a particular way.[78] In the *Foundations of law* course, we introduce students to positivism, natural law theory and realism, by reference to the well-known *Case of the Speluncean Explorers*, developed by Lon Fuller.[79] We ask them to take position and discuss why they take this position. It is followed by an essay assignment in which they are confronted with another fictional case – the *Terror* case, developed as a play by Von Schirach.[80] This fictional case involves a German fighter pilot who intercepts a passenger plane that is hijacked by terrorists. The terrorists seek to crash the plane into a football stadium full of people. German law prohibits taking down a plane in these circumstances. The pilot nevertheless shoots the plane to avert a greater tragedy. The question is whether the pilot should be prosecuted and convicted. Students were asked to take position vis-à-vis the law and the facts from either a positivist or realist perspective. Exposing students to such a classical dilemma helps students to understand real-world dilemmas, such as the one the courts were confronted with in the Urgenda case mentioned above. It shows them that such a dilemma does not have a "quick fix" but that a different perspective on law (and the dilemma) leads to different conclusions.

But it is not enough to only introduce students to legal theory. If we take seriously the idea that there is more at stake in legal decision-making – the administration of justice – and that this involves a leap of faith or, recalling

[77] Biesta 2017, n 69, 11. It is difficult to find an English expression but Biesta refers to pedagogy as an engaged science of acting and involvement.
[78] There seems to be a cluster of law schools in the Netherlands (Utrecht University, Tilburg University, the Free University Amsterdam and University of Amsterdam), that expose students to legal theory in more or less the same way: in context with positive law – as an instrument to understand law better.
[79] Lon L. Fuller, 'The Case of the Speluncean Explorers' (1949) Harvard Law Review 62(4), 1-28.
[80] F. von Schirach, *Terror* (trnsl: D. Tushingham, Faber & Faber 2017).

Frank, a judge who knows him- or herself,[81] students should be challenged to explore and discover the moral foundations of law in order to discover the variety of normative positions that exist. The Case of the Speluncean Explores teaches students perspectives on understanding law but does not address an understanding of the moral basis of, in this case, the absolute or relative value of life which, in the end is instrumental to evaluate what to do with the accused. Political philosophy can address this, when we explore, for example, utilitarian theory, Kantian liberalism or Aristotelian ethics.

This is the second perspective of moral reasoning.

One way of exposing students to *this* type of moral reasoning is explained by Michael Sandel in *Justice. What's the Right Thing to Do?*[82] In it, he explores theories of justice by reference to all kinds of moral dilemmas. Each time, the central question is whether a just society should seek (through law) to promote the virtue of its citizens, their general welfare or should the law be neutral about conceptions of virtue and general welfare and let citizens be free to choose the best way to live. Sandel engages the reader (and his students) with these dilemmas pointing to a thought process in four steps.[83] It very much resembles Frank's idea of a conclusion tentatively formulated (the hunch) and Scholten's leap of consciousness. Indeed, it is a didactic of moral reasoning:

a) The dilemma

b) Initial conviction

c) Reflection and confusion

d) Reconsideration

The first step is being confronted with a dilemma, such as in the Terror case, and trying to understand the dilemma. This involves, as the second step, an initial conviction or a conclusion tentatively formulated: of course, the pilot should *not* be convicted, he saved many lives albeit at the cost of other lives. This may be a valid conviction to have. But Sandel points out the importance to discover the underlying principle of this conviction. This requires the study of philosophy, for example utilitarian theory (Mill, Bentham). Students

[81] Frank 2009, n 18, 148.
[82] Michael J. Sandel, Justice. What's the Right Thing to Do? (Penguin 2019).
[83] Ibid, 27-28.

discover that the principle underneath the conviction lies in the notion that the moral worth of an act exists in its utility – promoting the general welfare of society for example; saving 30,000 at the cost of 300 passengers is surely a better outcome. Or is it? If we change the scenario, we could get uncomfortable with our initial conviction and start questioning the principle. We discover that human life perhaps has some absolute value, worth protecting; that we can't use people as a means to an end. We discover another principle (Kantian ethics). It is this all-important third step: a critical analysis of our initial conviction through philosophical investigation. It allows students to contrast and compare different ethical positions with an aim to formulate an ever-developing philosophical world view. And as an academic exercise, we can, as a fourth step, ask them to finalise their excursions and take position by reaffirming or rejecting the original position, while being aware of the consequences. Nothing is at stake – true judgment is still suspended. But students should also realise and do realise, that once in a position of responsibility – when they *have* to decide, as a judge or in some other capacity, something *is* at stake. For this process of investigation and discovery, Sandel says we need an interlocutor – to create dialogue.[84]

It is this (philosophical dialogue) which we should integrate in our courses and programmes with an aim to contribute to "honest, well-trained [law students] with the completest possible knowledge of the character of [their] powers, prejudices and weaknesses".[85] To be sure, Sandel's four-step approach is actually a particular didactic tool for moral reasoning. It is somewhat similar to tools developed by the psychologist James Rest – the Four Components Model,[86] or educational theorist David Kolb's Experiential Learning Cycle,[87] albeit that Sandel does not put experience (of students) centrally.[88]

[84] See for an educational experiment: Ubaldus de Vries, 'Law & Lounge: An Experiment on Student Self-Organization and Critique as Skeptical Reflexivity', in: Van Klink & De Vries 2016, 267-287.
[85] Frank 2009, n 18, 148.
[86] J.R. Rest, D. Narvaez, M. Bebeau & S. Thoma, *Postconventional Moral Thinking: A Neo-Kohlbergian Approach* (Lawrence Erlbaum Ass. 1999).
[87] David Kolb, Experiential Learning Experience as the Source of Learning and Development (Prentice Hall 1984).
[88] How to give shape to the dialogue in the classroom is the object of a further essay.

Conclusion

The Urgenda case shows that law and the administration of justice is more than the application of rules to facts. The case can be situated in the enclosed space of non-rationality – there where reason or reasoning stops and a decision is or must be made. The realm of consciousness resides in this enclosed space and where law is found. It remains guessing to what extent the idiosyncratic biases played a role as well as the (philosophical) world view of the judges involved. What the case shows, though, is an independence of mind and consciousness cloaked in legal argumentation. The court – its judges – spoke with a sovereign voice. It is this aspect this essay sought to address: the question how we can teach students to find the law on the basis of a developing independent voice in the legal debate, where they are conscious that in law there is something at stake. That, when their study is over, when the interval has passed, and they come into the world, they are aware of their societal responsibility based on a normative position as to what it is to act – to make decisions that have an impact on the lives of others. Legal theory and philosophy are instrumental to this endeavour. It is our task, in the words of Gert Biesta, to facilitate students to come into the world. It is *Erziehung* which is at stake: to encourage our students to take up the challenge of their 'person-to-be' and facilitate them in this discovery.[89]

[89] Biesta 2018, n 69, 21.

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Customer Value Theory and Dispute Resolution Strategy

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Abstract

Legal education within common law jurisdictions traditionally prioritises doctrinal and adversarial approaches. There is a strong emphasis on case law and statutory materials, which students are required (often from memory) to critically apply in order to identify and articulate solutions to complex legal problems. However, following significant changes to the legal and higher education sectors in recent years, there are now growing calls for such approaches to be supplemented by fresh perspectives which can prepare law graduates more fully for modern professional life, whether they ultimately go on to practise law or not. This paper presents the findings of an interdisciplinary, theoretical study which explored the application of customer value theory to modern dispute resolution strategy in a private law context. It is argued that customer value theory: (1) offers explanatory insight into the nature of dispute resolution strategy itself; and (2) has significant potential to enhance the effectiveness of such strategies in a given context. Accordingly, it is further argued that the inclusion of this and similar perspectives within the modern law degree would complement its longstanding and important doctrinal content and enhance the employability value of such programmes.

Keywords: customer value, strategy, dispute resolution, litigation, commercial awareness

Introduction

Legal education often prioritises doctrinal and adversarial approaches at the expense of more expansive, socio-critical perspectives.[1] There can be a strong emphasis on case law and statutory materials, which students are required (typically from memory) to critically apply in order to identify and articulate

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[1] Ben Waters, 'The importance of teaching dispute resolution in a twenty-first-century law school' (2017) 51 *The Law Teacher* 227.

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solutions to complex legal problems. This has previously been justified by the strong vocational link between the undergraduate law degree and the regulated legal professions (in England and Wales the roles of solicitor and barrister specifically), together with a suggestion that such approaches mimic those of the practising lawyer.[2] Whilst this argument may historically have carried sufficient weight to justify adherence to the status quo, more recent changes within the legal and higher education (HE) sectors have weakened it significantly.

Firstly, many law students do not go on to practise law in the traditional sense. Indeed, law graduates have reported 'anger' at not being able to secure employment opportunities within the profession.[3] As such, although lawyer qualification remains a highly significant (if not the most significant) area of focus in the marketing materials that university law schools produce for prospective law students, there is a strong case for arguing that the modern law degree must do more for those students who will inevitably find themselves working in very different roles than they might have envisaged when they first embarked upon their legal studies.[4]

Clearly the perceived purposes of university legal education - specifically as regards its relationship to the legal professions - vary from jurisdiction to jurisdiction. However, in England and Wales, the case for reforming course content is particularly strong, since the regulator of the solicitors' branch of the legal profession (which is much larger than its counterpart) recently received final approval of its plans to completely overhaul its qualification process.[5] A key feature of the new regime is that aspiring solicitors will no longer be required to have studied a so-called "qualifying law degree" (QLD). Whilst the QLD remains of significance for students hoping to qualify as barristers, this

[2] Alex Nicholson, 'Research-informed teaching: a clinical approach' (2017) 1 *The Law Teacher* 40.
[3] Julian Webb and others, *Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales* (LETR 2013) <www.letr.org.uk/wp-content/uploads/LETR-Report.pdf> accessed 11 November 2020, 281.
[4] Graeme Broadbent and Pamela Sellman, 'Great expectations? Law schools, websites and "the student experience"' (2013) 47 *The Law Teacher* 44; Alex Nicholson, 'The value of a law degree - part 2: a perspective from UK providers' (2020) *The Law Teacher* https://doi.org/10.1080/03069400.2020.1781483 (published online 30 June 2020).
[5] Legal Services Board, 'Legal Services Board approves significant changes to how solicitors qualify' (*LSB,* 28 October 2020) < https://www.legalservicesboard.org.uk/news/legal-services-board-approves-significant-changes-to-how-solicitors-qualify> accessed 11 November 2020.

change undoubtedly weakens the link between the law degree and the legal profession, and some have argued that this deregulation provides a much needed opportunity for law schools to refocus their curricula and deliver a more specialised, more rounded, or even a more intellectual legal education, thus providing much-needed diversity within an otherwise largely homogenous market.[6]

Additionally, there are arguments for saying that even future lawyers would benefit from the inclusion of a wider range of perspectives within their undergraduate legal education, which has traditionally had a very narrow focus. One such argument is that within the legal sector there has been a noticeable shift away from litigation and towards alternative dispute resolution methods (ADR), many of which have a more collaborative and commercial ethos than a purely doctrinal perspective might suggest – after all, legal rules on their own are arguably a blunt instrument for resolving disputes, since the "best" resolution will take account of a much broader range of factors.[7]

If ever it was, it is now simply not true to say that contentious lawyers primarily litigate. Whether or not the shift away from court proceedings has also resulted in a corresponding decline in the use of adjudicated methods generally (and therefore overtly doctrinal and adversarial approaches), is contested.[8] However, what is clear is that the starting point for lawyers at the outset of a dispute has changed. It is incumbent upon litigants to explore at an early stage whether there is an opportunity to resolve the matter without reference to the courts, and they may face significant cost consequences if they fail to do so.[9] Accordingly, ADR has become mainstream, and in England and Wales this

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[6] See for example Luke Mason, 'SQEezing the jurisprudence out of the SRA's super exam: the SQE's Bleak Legal Realism and the rejection of law's multimodal truth' (2018) 52 *The Law Teacher* 409; Ben Waters, 'The Solicitors Qualification Examination: something for all? Some challenges facing law schools in England and Wales' (2018) 52 *The Law Teacher* 519; Alex Nicholson, 'The value of a law degree – part 3: a student perspective' (2020) *The Law Teacher*, https://doi.org/10.1080/03069400.2020.1843900 (published online 3 December 2020).

[7] R H Coase, 'The Problem of Social Cost' (1960) 3 *The Journal of Law and Economics* 1.

[8] Gillian K Hadfield, 'Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Cases' (2004) 1 *Journal of Empirical Legal Studies* 705 and Judith Resnik, 'Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts' (2004) 1 *Journal of Empirical Legal Studies* 783; Robert Dingwall and Emilie Cloatre, 'Vanishing Trials: An English Perspective' (2006) *Journal of Dispute Resolution* <https://scholarship.law.missouri.edu/jdr/vol2006/iss1/7> accessed 10 November 2020.

[9] For England and Wales see CPR 44.4(3)(ii).

was the result of a deliberate policy decision.[10] The suggestion that legal education programmes should incorporate ADR methods should therefore not be controversial, and indeed there have been calls for such change.[11] At the very least, advising on and negotiating settlements is now a central feature of legal practice, in respect of which aspiring practitioners require appropriate instruction.[12]

Relatedly, law firms – and consequently also universities – have for some time emphasised the importance of "commercial awareness" as a key employability skill.[13] From the author's own experience teaching undergraduates, it seems that when tackling legal problems students tend to gravitate in their analysis towards substantive legal issues and often struggle to identify or engage with practical or procedural considerations - yet lawyers must be able to evaluate the wider commercial factors which might influence the strategic approach that is needed in order to deliver value for the client through the dispute resolution process. Accordingly, it is important that practical lawyer skills which take account of this bigger picture are also incorporated within legal education programmes.[14]

Such refinements are clearly important. However, calls for reforming the legal education curricula go much further than these relatively uncontroversial changes. There is now a growing consensus that there is a need for fresh

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[10] See Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (TSO 2009) <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf> accessed 11 November 2020. For an academic discussion of the impact on legal education see also Nigel Duncan, 'Preparation for Practice: Developing effective advocates in a changing world of adversarial civil justice', in Chris Ashford, Nigel Duncan and Jessica Guth (eds), *Perspectives on Legal Education: Contemporary Responses to the Lord Upjohn Lectures* (Routledge 2018).

[11] Dr Julie Macfarlane, 'The challenge of ADR and alternative paradigms of dispute resolution: How should the law schools respond?' (1997) 31 *The Law Teacher* 13; Duffy and R. Field, 'Why ADR Must Be a Mandatory Subject in the Law Degree: A Cheat Sheet for the Willing and a Primer for the Non-believer' (2014) 25(1) *Australasian Dispute Resolution Journal* 2.

[12] Judy Gutman, Tom Fisher and Erika Martens, 'Why Teach Alternative Dispute Resolution to Law Students? Part One: Past and Current Practices and Some Unanswered Questions' (2006) 16 *Legal Education Review* 125.

[13] Caroline Strevens, Christine Welch and Roger Welch, 'On-line legal services and the changing legal market: preparing law undergraduates for the future' (2011) 45 *The Law Teacher* 328.

[14] See for example Juliet Turner, Alison Bone and Jeanette Ashton, 'Reasons why law students should have access to learning law through a skills-based approach' (2018) 52 *The Law Teacher* 1.

perspectives within legal education – perhaps drawn from different disciplines - which will better equip law graduates for modern professional life, whether they ultimately go on to practise law or not.[15]

Customer value theory offers one example of a fresh perspective. It is concerned with what customers value, why they value it, and how products or services can be developed to maximise the value that customers will perceive. Lawyers' clients are essentially their "customers", each with their own unique conceptions of value. Parties to a dispute will have a wide range of objectives in seeking legal representation and what they each value about the dispute resolution process is likely to be just as varied. By understanding customer value theory, students and practitioners alike can gain a better understanding of what dispute resolution strategy is, and what it means to a client, thus enabling them to formulate strategies that are value-driven, and therefore more "valuable" from the client's perspective.

This paper presents the findings of an interdisciplinary, theoretical study which explored the application of customer value theory to modern dispute resolution strategy in a private law context. It is argued that customer value theory: (1) offers explanatory insight into the nature of dispute resolution strategy itself; and (2) has significant potential to enhance the effectiveness of such strategies in a given context. Accordingly, it is further argued that the inclusion of this and similar perspectives within the modern law degree would complement its longstanding and important doctrinal content and enhance the employability value of such programmes.

What is customer value?

The concept of "value" has been the subject of study for centuries and was originally conceived in purely economic terms, influenced by the work of classical economist writers such as Adam Smith, David Ricardo and Karl Marx.[16] As Publilius Syrus put it: 'everything is worth what its purchaser will pay for it'.[17] The value of goods or services was purportedly construed entirely

[15] Greta S Bosch, 'Deconstructing Myths about Interdisciplinarity: is now the time to rethink interdisciplinarity in legal education?' (2020) 1 *European Journal of Legal Education* 27.
[16] Douglas McKnight, 'The Value Theory of the Austrian School' (1994) 62 *Appraisal Journal* 465.
[17] As quoted in W J Baumol and A S Blinder, Economics: Principles and Policy (13 edn, Cengage Learning 2016), 81.

objectively, with reference only to their intrinsic attributes and their potential to be exchanged for different quantities of commodities, such as silver, gold, or rice (so-called "exchange value").[18] However, later theorists also came to recognise extrinsic components, or - in other words - that the true value of goods and services depended not only on objectively ascertainable attributes (such as quality or scarcity), but also on the use that such goods or services might have for a purchaser (so-called "use value"), and there was also recognition that the nature and perceived importance of such uses would vary from person to person.[19] Modern economic theories of value generally adopt this wider conception, but there remains a strong emphasis on what (in financial terms) a purchaser might need to exchange in order to procure goods or services of the relevant kind within a particular market.

By contrast, "customer value" refers to something that is qualitatively different. This much more recent term comes from the marketing discipline, and refers to a highly subjective concept.[20] Woodruff defines it as 'a customer's perceived preference for, and evaluation of, those product attributes, attribute performances, and consequences arising from use that facilitate (or block) achieving the customer's goals and purposes in use situations'.[21] The essence of customer value therefore is the extent to which products, services or other intangibles provide net benefits to a customer of a kind that they recognise and appreciate. Generally, customers will be prepared to pay for such benefits - with money or otherwise – but their true "value" exists only in the eyes of the beholder.[22]

On its own, a definition like this one has limited practical utility.[23] Arguably, all organisations - and all of their activities - exist to create customer value in some form or other,[24] and where culture and processes are carefully designed

[18] T Woodall, 'Conceptualising 'Value for the Customer': An Attributional, Structural and Dispositional Analysis' (2003) *Academy of Marketing Science Review* 1.
[19] Ibid. 4.
[20] Simon Kelly, Paul Johnston and Stacey Danheiser, *Value-ology* (Palgrave Macmillan 2017), 4.
[21] R B Woodruff, 'Customer value: The next source for competitive advantage' (1997) 25(2) *Journal of the Academy of Marketing Science* 139, 142.
[22] V A Zeithaml, 'Customer Perceptions of Price, Quality, and Value: A Means-End Model and Synthesis of Evidence' (1988) 52(2) *Journal of Marketing* 2.
[23] A Parasuraman, 'Reflections on Gaining Competitive Advantage Through Customer Value' (1997) 25 *Journal of the Academy of Marketing Science* 154.
[24] S F Slater, 'Developing a customer value-based theory of the firm' (1997) 25(2) *Journal of the Academy of Marketing Science* 162.

to maximise customer value, then this can create a competitive advantage which can help an organisation to succeed in a relevant market.[25] However, in order for customer value to be a useful concept, it must be operationalised – that is: theories, models and frameworks are needed which help to explain (amongst other things) what customers value, why they value it, and how organisations or processes can be developed to create new customer value. It is in this respect that the concept of customer value becomes complex and contested. For example, types of customer value that can be identified from the literature include concepts as wide ranging as: co-creation value;[26] economic value;[27] epistemic value;[28] experiential value;[29] functional value;[30] happiness;[31] material value;[32] practical value;[33] symbolic value;[34] and utilitarian value.[35]

Various attempts have been made to operationalise these concepts through typologies and frameworks.[36] However, Smith and Colgate argue that each of these such attempts has significant limitations, either in terms of breadth, depth, measurability or operationalisability.[37] Instead, they present their own framework which provides a mechanism by which value can be analysed systematically and holistically, and it comprises just four dimensions:

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[25] ibid 164.
[26] Stephen Vargo and Robert Lush, 'Evolving to a New Dominant Logic for Marketing' (2004) 68(1) *Journal of Marketing* 1.
[27] Michael E Porter, *Competitive Advantage: Creating and Sustaining Superior Performance* (Free Press 1985).
[28] Jagdish N Sheth, Bruce I Newman and Barbara L Gross, 'Why We Buy What We Buy: A Theory of Consumption Values' (1991) 22 *Journal of Business Research* 159
[29] Morris B Holbrook, 'Customer value and autoethnography: subjective personal introspection and the meanings of a photograph collection' (2005) 58 *Journal of Business Research* 45.
[30] Whan C Park, Bernard J Jaworkski and Deborah MacInnis, 'Strategic Brand Concept-Image Management' (1986) 50(4) *Journal of Marketing* 135.
[31] Kevin Kaiser and S David Young, *The Blue Line Imperative: What Managing for Value Really Means* (Jossey-Bass 2013), 2.
[32] M L Richins, 'Special Possessions and the Expression of Material Values' (1994) 21(3) *Journal of Customer Research* 522.
[33] K de Ruyter and J Bloemer, 'Customer loyalty in extended service settings: The interaction between satisfaction, value attainment and positive mood' (1999) 10(3) *International Journal of Service Industry Management* 320.
[34] Kevin Lane Keller, 'Building strong brands in a modern marketing communications environment' (2009) 15 *Journal of Marketing Communications* 139.
[35] Woodall (n 18).
[36] See for example Park, Jaworkski and MacInnis (n 30); Sheth, Newman and Gross (n 28); Woodall (n 18); W Ulaga, 'Capturing value creation in business relationships: A customer perspective' (2003) 32 *Industrial Marketing Management* 677.
[37] J B Smith and M Colgate, 'Customer Value Creation: A Practical Framework' (2007) 15(1) *Journal of Marketing Theory and Practice* 7, 8.

'functional/instrumental value'; 'experiential/hedonic value'; 'symbolic/expressive value'; and 'cost/sacrifice value'.[38] Functional/instrumental value is primarily concerned with how well a product or service helps a customer achieve the objective they had in mind when procuring it;[39] experiential/hedonic value is about how a customer feels when they experience the product or service;[40] symbolic/expressive value relates to the psychological meaning that customers attach to the product or service;[41] and cost/sacrifice value is concerned with associated transaction costs and ultimately making an 'overall assessment of the utility of a product [or service] based on perceptions of what is received and what is given'.[42]

Whilst even Smith and Colgate's framework does also have areas of overlap (for example, a customer's specific objective to pay as little as possible for a product might be framed in terms of either functional/instrumental value or sacrifice/cost value), at the time of writing it does arguably represent the most useful framework within the literature for developing customer value creation strategies, models, or frameworks.

What is dispute resolution strategy?

Chandler defined strategy as '…the determination of…long-run goals and objectives of an enterprise and the adoption of courses of action and the allocation of resources necessary for carrying out these goals',[43] whereas Mintzberg defined it as merely as 'a pattern in a stream of decisions'.[44] These apparently opposing definitions illustrate a current debate within the management discipline as to whether strategy is best seen as deliberate long-term planning or navigation which is responsive to changing circumstances. From the author's own experiences as both an organisational leader and as a practising dispute resolution lawyer, it seems that there is in fact a continuum, and strategy variously finds a place on that continuum at different times and in different contexts. Even when planned, strategy typically evolves with a degree

[38] J B Smith and M Colgate, 'Customer Value Creation: A Practical Framework' (2007) 15(1) *Journal of Marketing Theory and Practice* 7.
[39] Woodruff (n 21) 142.
[40] Holbrook (n 29).
[41] Smith (n 38) 10.
[42] Zeithaml (n 22) 14.
[43] Alfred D Chandler Jr, *Strategy and Structure: Chapters in the History of the American Industrial Enterprise* (Beard Books 1962), 13.
[44] Henry Mintzberg, *Tracking Strategies: Towards a General Theory* (OUP 2007), 2.

of undiscernible complexity and a certain randomness,[45] and there may be some merit in recognising this absence of linear rationality.[46] Additionally, the development and implementation of any strategy often involves the application of a significant quantity of tacit knowledge, which cannot necessarily always be accounted for within a formal strategic process.[47]

Where time and circumstances allow, strategy formulation should begin with an internal evaluation of strengths and competencies and a thorough consideration of external factors.[48] In that context, strategic options can be evaluated in terms of suitability (for meeting aims), acceptability (to stakeholders), and feasibility (in terms of capabilities and resources).[49] However, strategy is rarely developed in such a deliberate, systematic and positivistic way, since strategists often have to work with limited information and will themselves be influenced by their own biases and experiences.[50] As such, strategy is like a roadmap with a clearly marked destination and one or more tentatively sketched out routes, any of which may be varied during the journey in response to roadblocks, traffic, new information, or even a change in destination.

In a dispute resolution context, the modern lawyer might usefully be described as a legal strategist. Subject to the boundaries of her ethical responsibilities, it is the lawyer's role to evaluate: (1) the strength of the client's position (e.g. the legal merits of a claim or defence); (2) the external context (e.g. the client's broader aims and the implications of pursuing a particular course of action in that context); and (3) the suitability, acceptability, and feasibility of different strategic options that exist for the client. Accordingly, dispute resolution strategy must be about more than simply selecting a method (e.g. litigation or

[45] Stéphane J G Girod and Richard Whittington, 'Change Escalation Processes and Complex Adaptive Systems: From Incremental Reconfigurations to Discontinuous Restructuring' (2015) 26 *Organization Science* 1520.
[46] Marshall Scott Poole and Andrew H van de Ven, 'Using Paradox to Build Management and Organization Theories' (1989) 14(4) *Academy of Management Review* 562.
[47] Richard Whittington, 'Strategy as Practice' (1996) 29 *Long Range Planning* 731.
[48] CK Prahalad and Gary Hamel, 'The Core Competence of the Corporation' (1990) 68(3) Harvard Business Review 79; David Bach and David Allen, 'What Every CEO Needs to Know about Nonmarket Strategy' (2010) 51(3) *MIT Sloan Management Review* 41.
[49] Gerry Johnson and others, *Exploring Strategy: Text and Cases* (11th edn, Pearson 2017), 380.
[50] Richard M Cyert and James G March, *A Behavioral Theory of the Firm* (2nd edn, first published 1992, Prentice-Hall 2001).

ADR) by which to resolve the dispute. Rather, dispute resolution strategy is the process by which such mechanisms are selected, and this is a process which must be continually reviewed throughout the lifecycle of the dispute. In this respect, developing the perfect dispute resolution strategy in any given case may therefore constitute what Rittel and Webber have termed a 'wicked problem', in that as solutions are more proactively explored with clients this serves only to expand awareness of the complexity of the "problem".[51]

Much has been written about how to approach dispute resolution methods (e.g. litigation, negotiation, and other forms of ADR) "strategically", though this literature tends to focus on the specific strategic choices that might be available when using a particular method.[52] Similarly, there are lots of pre-existing examples of theory from other disciplines (particularly organisational management and psychology) being applied to dispute resolution in order to support and enhance strategic thinking in that context.[53] However, to the author's knowledge no attempt has yet been made to explicitly consider the application of customer value theory to dispute resolution, in order to elucidate what constitutes a valuable dispute resolution strategy from the client's perspective.

The literature on strategy in general emphasises value creation activities and their central function in organisational processes.[54] Entrepreneurs and organisations routinely identify and exploit opportunities to create new or enhanced value for their customers.[55] Similarly, it is argued that – by looking at disputes through the lens of customer value theory – it may be possible to

[51] Horst W J Rittel and Melvin M Webber, 'Dilemmas in a General Theory of Planning' (1973) 4 *Policy Sciences* 155, 160.
[52] For example, see Ray Fells, *Effective Negotiation: From research to results* (3rd edn, Cambridge University Press 2016), ch 5.
[53] For example, see Marc B Victor, 'The Proper Use of Decision Analysis to Assist Litigation Strategy' 40 *The Business Lawyer* 617; Catherine H Tinsley, 'Culture and Conflict: Enlarging our Dispute Resolution Framework' in Michelle J Gelfand and Jeanne M Brett (eds), *The Handbook of Negotiation and Culture* (Stanford Business Books 2004), ch 9; Anurag Agarwal, Sridhar Ramamoorti and Vaidyanathan Jayaraman, 'Decision Support Systems For Strategic Dispute Resolution' (2011) 15(4) *International Journal of Management and Information Systems* 13; Ho-Won Jeong, *International Negotiation: Process and Strategies* (Cambridge University Press 2016), ch 3.
[54] See for example Michael E Porter, *Competitive Advantage: Creating and Sustaining Superior Performance* (first published 1985, Free Press 2004).
[55] Scott Shane and S Venkataraman, 'The Promise of Entrepreneurship as a Field of Research' (2000) 25 *Academy of Management Review* 217; Robert G Cooper, *Winning at New Products: Creating Value Through Innovation* (4th edn, Basic Books 2011).

identify and exploit opportunities to develop new (or at least more nuanced) dispute resolution strategies which deliver greater value.

Methodology

Since this study was inspired by changes to and consequent calls for legal education reform, it was principally underpinned by a pragmatist philosophy which emphasises the importance of identifying practical solutions.[56] The aim of the study was to explore the ways in which customer value theory might be applied to dispute resolution strategy in order to identify opportunities to better equip students (and ultimately practitioners) to develop such strategies which deliver greater customer value for their clients.

The application of theory from beyond the discipline to deliver new explanatory insight in this way is not a novel methodological approach. Previous studies have considered other areas of theory that might be relevant to dispute resolution. Conflict theory provides one example.[57] To see "conflict" as a contest which depends solely upon ascertaining the correct application of legal principle is to fundamentally underestimate the complexity of this concept when studied from a psychological perspective.[58] Theory from the discipline of psychology is therefore helpful in developing understanding of dispute resolution strategy.

A theoretical study of this kind has the potential to facilitate the development of theory, models and/or frameworks which students/practitioners can then use to enhance their employability and/or to deliver value for their clients. Whilst empirical studies could conceivably provide data on the relative weight of certain value components amongst client populations in general, the inherently subjective nature of "value" would be a significant limitation on the generalisability of any such study. A purely theoretical approach however is capable of illuminating the full range of value components that have been identified within the marketing discipline in order to provide a generally

[56] Mihaela L Kelemen and Nick Rumens, *An Introduction to Critical Management Research* (Sage 2008); Bente Elkjaer and Barbara Simpson, 'Pragmatism: A lived and living philosophy. What can it offer to contemporary organization theory?' in Haridimos Tsoukas and Robert C H Chia (eds), *Philosophy and Organization Theory* (Emerald 2011).
[57] See B. Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide* (John Wiley & Sons, 2010), pp. 98–102.
[58] MacFarlane, 'The New Advocacy: Implications for Legal Education and Teaching Practice', in Roger Burridge and others (eds), *Effective Learning and Teaching in Law* (Routledge, 2003).

applicable framework through which students/practitioners can holistically evaluate the value of particular strategies to particular clients.

Whilst disputes can and do arise in a variety of different settings, this study focused on disputes within the private law context and in so doing adopted a single case, case study research strategy.[59] The purpose of such a strategy is to facilitate the generation of rich data and analysis and - although the findings presented here cannot be generalised in a positivistic sense - it is hoped they can be treated as applicable beyond the case study context.[60] The private law context has particular relevance in England and Wales, since it is in this context that aspiring lawyers will be examined on dispute resolution in the forthcoming solicitors qualifying examination (SQE).[61]

This study utilises pre-existing customer value theories and frameworks to explore conceptually the dimensions of value which might have relevance to the development of dispute resolution strategy, thereby providing both explanatory insight into the nature of dispute resolution strategy itself, and practical recommendations in relation to the development of effective strategies. Where appropriate, the author also draws upon his own experience teaching undergraduate law students at a UK university, as well as his experience practising as a commercial dispute resolution lawyer.

The intention was to develop a comprehensive model that could be utilised in respect of all types of private law dispute and which would facilitate a more systematic and value-driven approach to the development of dispute resolution strategy. Similarly, the use of such a model within legal education could provide students with a more holistic and accurate perspective on the modern dispute resolution process, enhancing their ability to deliver value for clients, and thus their employability.

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[59] Robert K Yin, *Case Study Research and Applications: Design and Methods* (6th ed, Sage 2018).

[60] Bent Flyvberg, 'Case Study' in Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Handbook of Qualitative Research* (SAGE 2011); Anna Dubois and Lars-Erik Gadde, 'Systematic combining: an abductive approach to case research' (2002) 55 *Journal of Business Research* 553; Hans-Gerd Ridder, Christina Hoon and Alina McCandless Baluch, 'Entering a Dialogue: Positioning Case Study Findings towards Theory' (2014) 25 *British Journal of Management* 373.

[61] Solicitors Regulation Authority, 'SQE 1 Assessment Specification' (*SRA* 14 October 2020) <https://www.sra.org.uk/sra/policy/solicitors-qualifying-examination/sqe1-functioning-legal-knowledge-assessment-specification/> accessed 12 November 2020.

Customer value theory as an explanation of dispute resolution strategy

In this section of the article, theoretical concepts from the customer value literature are identified and their significance for the dispute resolution context is explored.

Instrumental value

Instrumental value is primarily concerned with the utility of a product, service, or process, in respect of its potential to help the customer achieve specific objectives.[62] In the context of dispute resolution, a client's objectives are likely to be diverse and varied.

For example, insofar as a client's sole objective for the dispute resolution process was to secure compensation, then it might be reasonable to rely only on an economic conception of value, such as exchange value. From this perspective, dispute resolution would be perceived purely as a commercial transaction whereby the client will (ideally) receive payment of damages in exchange for the satisfaction of its cause of action. On this view, dispute resolution is somewhat analogous to the purchase of commodities which have an objective worth quite apart from that which is subjectively perceived by the customer, and which can be traded for other goods or services.[63] Indeed, disputes often do have an economic value, and in some limited circumstances it may even be possible for a claim (or more easily its proceeds) to be sold (or rather contractually "assigned") in order to realise this value more promptly.[64]

However, only in exceptional circumstances will this so-called "exchange value" provide a full explanation of a client's dispute resolution objectives. In most cases it seems likely that a client will also perceive certain extrinsic aspects. For example, drawing an analogy with the "use value" concept (see above), each unique client is likely to have specific objectives (or uses) for the dispute, such that the dispute resolution process has perceived utility of some kind beyond any assignable or realisable financial value.

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[62] Woodruff (n 21) 142.
[63] McKnight (n 16).
[64] See for example *Re Oasis Merchandising Services Ltd* [1995] 2 BCLC 493.

Dispute resolution aims will differ between clients and cannot be presumed. Consider for example the conjoined appeals of *Cavendish Square Holding BV v Talal El Makdessi* and *ParkingEye Limited v Beavis*.[65] Both cases concerned the application of the rule against contractual penalties to specific clauses within contracts between the various parties. Mr Makdessi hoped that the court's ruling would pave the way for him to recover an eight figure sum by way of a legal remedy from Cavendish, whereas ParkingEye's claim against Beavis was for the principal sum of just £85, thus suggesting that the claimants in these two appeals may have had differing objectives in pursuing their actions. Whilst we cannot say definitively what was in the minds of the parties, it is reasonably safe to assume that whilst obtaining compensation might well have been the primary concern for Mr Makdessi, for ParkingEye it almost certainly was not. Client objectives are likely to be as diverse and varied as client populations themselves, and may not in all cases even be entirely rational, since even sophisticated contracting parties do not always act entirely rationally.[66] However, from the writer's experience as a practising dispute resolution lawyer, examples might include: the preservation of reputation; the restoration of commercial, professional, or personal relationships; or simply an apology.

Recognition of a wide range of litigant objectives can also be found within the law itself. For example, the objectives of the law of tort are acknowledged to go beyond mere compensation and are commonly cited as including: deterrence; vindication; and corrective justice.[67] These aims might well also be framed as client objectives when engaging with the dispute resolution process. For example, when Annie Woodland received a £2m out of court settlement some 16 years after she suffered life changing injuries as a result of a negligently conducted school swimming lesson, her mother was reported as saying that the lengthy battle had never been about the money, but rather, to ensure that this kind of incident would not be repeated.[68] For the Woodland family, deterrence was apparently therefore a key objective that any dispute

[65] [2015] UKSC 67.
[66] Melvin Aron Eisenberg, 'The Limits of Cognition and the Limits of Contract' (1995) 47 *Stanford Law Review* 211.
[67] Steve Hedley, 'Making Sense of Negligence' (2016) 36 *Legal Studies* 491.
[68] Haroon Siddique, 'Woman gets £2m over near-drowning in school swimming lesson' *The Guardian* (London, 21 August 2016) <https://www.theguardian.com/uk-news/2016/aug/21/woman-awarded-2m-compensation-over-near-drowning-16-years-ago> accessed 10 November 2020. See also *Woodland v Essex County Council* [2013] UKSC 66.

resolution strategy needed to satisfy. Similarly, in *Ashley v Chief Constable of Sussex*, the family of a man shot dead in his own home by a police officer brought a tortious claim in spite of the fact that the Chief Constable had already admitted negligence and agreed to pay aggravated damages.[69] Despite having already secured the Chief Constable's agreement to pay as much in compensation as any court was likely to award, the House of Lords nevertheless allowed the claim to proceed on the basis that vindication was a legitimate basis in its own right for bringing a claim.[70]

Additionally, some disputes are supported by charitable or special interest groups which may have their own objectives, for example to change the law and/or practice for the benefit of society. This multi-stakeholder dimension brings even greater complexity to the development of dispute resolution strategy and introduces the possibility that client objectives may be philanthropical or moral in nature. For example, it is settled law that a claimant's illegality can provide a full defence to any tortious claims arising out of that illegality.[71] However, in *Hounga v Allen and another*, the claimant was an illegal immigrant working as a 'sort of au pair' for the defendants and was subjected to physical abuse.[72] Supported by several anti-trafficking and related groups, Miss Hounga was able to persuade the court that her claim should not be denied on the grounds of illegality, and the court held that there was not 'a sufficiently close connection between the illegality and the tort to bar the claim'.[73] Not only does this case highlight a client objective of a social justice flavour, but it also illustrates that a court's decision might be heavily influenced by such an objective. In *Hounga*, the court explicitly alluded to the strength of public feeling against human trafficking at that time, and indicated that this had influenced the outcome of the case.[74] As such, by understanding clients' objectives, legal advisers equip themselves not only to develop value-driven dispute resolution strategy, but arguably also to better understand and predict judicial reasoning which will often have regard to those objectives.

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[69] [2008] UKHL 25.
[70] For completeness it is worth noting that judicial review may sometimes provide an alternative route for 'victims' to achieve objectives such as vindication or social policy reform, for example when the decision of a public body has infringed their rights under the Human Rights Act 1998, but this is beyond the scope of the present case study context.
[71] *Gray v Thames Trains* [2009] UKHL 33.
[72] [2014] UKSC 47.
[73] *Ibid.* [59] (Lord Hughes).
[74] *Ibid.* [52] (Lord Wilson).

Similarly, although the strong policy trend in recent years has been to direct cases away from the courts, Mulcahy argues that in some cases it is completely appropriate that a case is heard within a public forum, not least to facilitate the development of common law precedent for the benefit of the legal system and for society more broadly.[75] Clients or other supporting charitable organisations might well share this view that certain disputes are appropriately resolved only through the formal court process. Furthermore, it is easy to envisage procedural or practical objectives that a client might have which would necessitate particular dispute resolution methods. For example, litigation may be necessary where a limitation period is close to expiry in order to preserve the validity of the claim. It may also be necessary where court powers are specifically needed, for example to freeze a defendant's assets or to obtain disclosure of an important document where a party refuses to provide this.

In addition to the immediate, short-term objectives that a client might have, dispute resolution lawyers should also seek to discern any longer-term objectives associated with the dispute at hand. One assumes for example that in the iconic case of *Carlill v Carbolic Smoke Ball Co*, the defendant had in mind not only Mrs Carlill's claim for £100, but also the many other claims that it might also subsequently have to settle if the court were to find in Mrs Carlill's favour.[76] In ParkingEye's case, its likely objective was even longer-term in nature. As an operator of private car parks, its entire business model was predicated on an assumption that the contractual mechanism by which it would "fine" its customers for breaching its parking conditions, was legally enforceable. Prior to its case against Beavis, the legal position on this issue was unknown, and it is likely that private car park operators simply took the strategic decision *not* to test the enforceability of its contractual provisions in the courts (presumably based on legal advice from dispute resolution lawyers) because the stakes were too high. Although during that time any decisions not to enforce in an individual case might mean that the contractual charges were not paid by an individual customer, a court judgment against a private car park operator on this issue would undermine its entire business model and threaten its very survival. During those times, any dispute resolution strategies which generally resulted in payments from defaulting customers without the need for litigation would have delivered significant customer value to private parking operators, even if the success rate or amounts recovered were lower than they

[75] Linda Mulcahy, 'The Collective Interest in Private Dispute Resolution' (2013) 33 *Oxford Journal of Legal Studies* 59.
[76] [1893] 1 QB 256.

might have been through a court process. However, *ParkingEye v Beavis* marks a turning point and a presumably fundamental change in ParkingEye's instrumental objectives. It seems that ParkingEye decided that it now needed a ruling on the law that would validate its business model, and the Supreme Court's decision did just that.

To take this one step further, Vargo and Lush write about "co-creation value" – the idea that significant value is created and only realised at the point of use.[77] As a result, to fully appraise the opportunities that dispute resolution strategies employed now might produce for value creation in the future – particularly for corporate clients - it is necessary to understand a client's overarching legal strategy and/or business model, of which the present dispute is just a single mechanical piece. Indeed, Bagley has argued that 'legally astute' managers can use law to proactively create value for their organisations over the long-term.[78] One good example of this is Coca Cola, which has notoriously adopted an aggressive dispute resolution strategy for decades, routinely litigating in order to protect its brand.[79] This is a corporate legal strategy which has undoubtedly contributed to its sustained position as one of the world's most valuable brands, at $64.4bn.[80] Similarly, the Walt Disney Company is known to take a proactive approach to its legal strategy in general, and famously successfully lobbied the US congress to extend the copyright period for all creative works by 20 years, pre-empting the otherwise imminent expiry of its copyright over Mickey Mouse.[81] Therefore, in the context of commercial disputes at least, dispute resolution strategy is almost never exclusively about the present dispute and lawyers should view all disputes within this wider strategic/corporate context.

Instrumental value also incorporates notions of quality – a product, service, or process that is of high quality is more likely to help the customer achieve their specific objectives. Therefore, when developing dispute resolution strategy, it is important to consider the attributes and efficacy of particular dispute resolution methods, and their consequent utility in facilitating the achievement

[77] S Vargo and R Lush, 'Evolving to a New Dominant Logic for Marketing' (2004) 68(1) *Journal of Marketing* 1.
[78] Constance E Bagley, 'Winning Legally: The Value of Legal Astuteness' (2008) 33 *Academy of Management Review* 378.
[79] Constance E Bagley, *Winning Legally: How to use the Law to Create Value, Marshall Resources, and Manage Risk* (Harvard Business School Press 2005), 142-143.
[80] Marty Swant, 'The world's most valuable brands' (*Forbes* 2020) < https://www.forbes.com/the-worlds-most-valuable-brands/> accessed 13 November 2020.
[81] Robert C Bird and David Orozco, 'Finding the Right Corporate Legal Strategy' (2014) 56(1) *MIT Sloan Management Review* 81.

of particular client goals. For example, different methods of ADR have their own advantages and disadvantages.[82] Before selecting certain methods therefore, there should be an assessment of their compatibility with the client's objectives.

Finally, it is important to note that perceptions of instrumental value are impacted by perceptions of quality which can change during the receipt of a service,[83] and that a customer's objectives themselves can also change over time.[84] Dispute resolution strategy is therefore a continuous process which must be routinely revisited and updated to ensure that the lawyer continues to act in the client's best interests and in a way that delivers value that the client will perceive.

Experiential value

Holbrook defines experiential value as: '(1) interactive, (2) relativistic…(3) preference, and (4) experience',[85] and in so doing he emphasises that customer value often has something to do with how the customer experiences either the product or service itself, or the associated transaction. As with instrumental value, the extent of experiential value which is perceived by a customer is likely to change during an experience, and so must be regularly reviewed.[86]

On the face of it, experiential value appears to be of greater significance in the purchase of consumer goods or services than it is in the context of a distressed purchase such as dispute resolution. It might seem that whilst going on holiday might be rich in experiential value, dispute resolution strategy would be unlikely to deliver significantly on this dimension. However, other concepts related to this broader category of value reveal that there are senses in which value of this kind might be relevant in this context.

On such related concept is "sensory value", i.e. that which is created through the environment within which consumption takes place.[87] In the dispute

[82] See Susan Blake, Julie Browne and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (4th edn, OUP 2016), ch 3.
[83] Ruyter (n 33).
[84] J Lapierre, 'Customer Perceived Value in Industrial Contexts' (2000) 15(2-3) *Journal of Business and Industrial Marketing* 122.
[85] Holbrook (n 29) 46.
[86] S Kalafatis and L Ledden, 'Carry-over effects in perceptions of educational value' (2013) 38(10) *Studies in Higher Education* 1540.
[87] Smith and Colgate (n 38) 16.

resolution context then, this has to do with precisely where the dispute is resolved, and the feelings that this might invoke for a client. One might assume that a dispassionate commercial client would pay little regard to such matters. However, it is conceivable that an individual (whether they are a commercial client's employee or a client in their own right) might relish the opportunity to spend time in the formal and prestigious context of a law firm's offices, or even a courtroom.

Similarly, whilst "enjoyment" is also rarely likely to be the primary driving force behind dispute resolution strategy, it is conceivable that some approaches/methods will be more enjoyable (and therefore deliver greater "emotional value") than others. A client may for example take pleasure in participating in more formal dispute resolution mechanisms (such as litigation or arbitration) and, contrastingly, less formal mechanisms (such as mediation) may promote feelings of trust and solidarity. Equally, a client may value the relationship that they build with their legal team.[88]

A third related concept is "epistemic value" or, in other words, 'the perceived utility resulting from [the] ability to arouse curiosity, provide novelty, or satisfy desire for knowledge'.[89] Once again, whilst it is clear how such value might be realised through (say) the purchase of a book or attending a museum, its role within dispute resolution strategy is more subtle. However, clients may for example perceive some value in strategies which enable them to develop their own knowledge about the relevant substantive legal issues or dispute resolution processes involved. Alternatively, it is conceivable that a client may wish to pursue litigation primarily out of a dominant desire to ascertain the true legal position in the context of uncertain or underdeveloped legal rules. Therefore, whilst it seems likely that epistemic value will in most cases represent a very small proportion of the holistic customer value provided by certain dispute resolution strategies, it has a role to play in understanding the complete picture.

When acting for a commercial client, it is important to distinguish between the client's interests and the interests of the client's representative(s) liaising with the lawyer in relation to the dispute. When dispute resolution strategy is

[88] See for example C Grönroos, 'Value-driven relational marketing: From products to resources and competencies' (1997) 13(5) *Journal of Marketing Management* 407-419, and K E K Möller and P Törrönen, 'Business suppliers' value creation potential: A capability-based analysis' (2003) 32(2) *Industrial Marketing Management* 109.
[89] Sheth (n 28) 162.

considered from a customer value perspective, it is easy to see how these interests might conflict. The representative may (for example) have a personal vendetta, or may themselves have made relevant mistakes that they wish to conceal by obtaining a prompt settlement. In the context of experiential value, the risk of conflict is even more acute. For example, where an individual is driven (even in part) by a desire to seek out the experiential value associated with spending time in plush law firm offices, or experiencing the drama of the courtroom, this will need to be carefully considered to identify whether a conflict of interest exists.

Symbolic value

Symbolic value is arguably the most subjective of all value types. It is primarily concerned with a customer's need for meaning or identity, and usually depends upon the perceptions of third parties of particular relevance to the customer. Park, Jaworski and MacInnis define symbolic needs as 'desires for products that fulfill [sic] internally generated needs for self-enhancement, role position, group membership, or ego-identification.'[90] In the context of dispute resolution strategy, a thorough assessment of stakeholder perceptions, and their relative significance for the client, will be necessary.

One aspect of this is "personal meaning", i.e. that which is unique to each individual, influenced by their own values and past life experiences.[91] Consider for example the broadly similar contract law cases of *Storer v Manchester City Council* and *Gibson v Manchester City Council*.[92] In both cases, the claimant had applied to purchase their council house at a heavily discounted price, but a subsequent political change meant that Manchester City Council refused to proceed with the sale. Given the discounted prices, it is of course entirely conceivable that Mr Storer and/or Mr Gibson primarily wished to recover damages in respect of the financial loss that they had each suffered as a result of the council's refusal to proceed with the transaction. Alternatively, it is also conceivable that their primary concern might have been to *actually* exercise their right to purchase their home. A property may well have personal meaning for a resident which means that money alone would not represent a sufficient remedy for the claimant in such circumstances. Indeed, the equitable remedy

[90] Park, Jaworski and MacInnis (n 30) 136.
[91] Smith and Colgate (n 38) 11.
[92] *Storer v Manchester City Council* [1974] 3 All ER 824; *Gibson v Manchester City Council* [1979] 1 WLR 294.

of specific performance exists precisely in recognition of this fact.[93] Few assumptions should be made about this aspect of symbolic value but dispute resolution lawyers should take time and care to discern the particular significance of a dispute for a client, and to allow that meaning to inform strategy development.

Another aspect of symbolic value is "self-expression", which is concerned with how a customer lives out their own personalities and values.[94] Just as with personal meaning, dispute resolution lawyers should take care to understand their clients in this way, whether those clients are individuals or organisations. A dispute resolution strategy which conflicts with the client's core values (for example by utilising a public forum for resolving a dispute with a client who values privacy, or attempting early settlement for a client who values vindication) is likely not only to lack instrumental value, but also symbolic value.

By contrast, "social meaning" relates to how the customer is perceived by other relevant individuals.[95] This is likely to be relevant to all clients, but consider for example the commercial client who values its reputation for fairness, or alternatively for taking a zero tolerance approach to the late payment of debts. These factors may not be articulated as key objectives (and thus may not be identified through examination of instrumental value) but yet they are important components of the holistic customer value that the client will receive through the dispute resolution process.

Sacrifice value

Sacrifice value also tends to have a strong economic flavour. It is concerned with the customer's overall assessment of the net benefits that they receive and particular attention is paid to what the customer has had to give up in order to gain those benefits, the so-called 'transaction costs'.[96] Often, these costs will include financial aspects, but not necessarily exclusively so.

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[93] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1997] UKHL 17.
[94] Smith and Colgate (n 38) 12.
[95] Smith and Colgate (n 38) 12.
[96] Smith and Colgate (n 38) 13.

From a purely economic perspective, sacrifice value is concerned with the process of calculating the net financial value of that which the client seeks to achieve (e.g. its instrumental value) after the irrecoverable costs associated with its recovery (or with defending the claim) have been deducted.[97] These figures can of course be estimated in anticipation of embarking upon any particular dispute resolution methods, and practitioners have professional conduct obligations to ensure that appropriate costs information is provided to their client.[98] Costs will also vary between methods and require careful evaluation. For example, litigation might appear to be the most expensive option, but the loser will typically be required to pay most of the winner's legal costs.[99] By contrast, a settlement (for example a *Calderbank* offer) may sometimes mean that parties bear their own costs.[100] The economic costs of each strategic option should be carefully calculated and regularly reviewed to ensure that the sacrifice value of the strategy remains high. In this respect, lawyers should also explore the funding options available to the client, as these are likely to have a significant impact on the economic costs of different strategies.

Additionally, a wide range of other costs which could be framed in economic terms might be associated with particular dispute resolution strategies and should be taken into account. For example, by adopting a highly adversarial strategy against an existing or potential commercial partner, supplier, or customer, a commercial organisation may irrevocably damage any relationship, and this may have significant economic implications. As such, a calculation of the true economic cost of each dispute resolution strategy would not be complete without consideration of such longer-term, consequential costs.

However, beyond economic costs, the "psychological costs" of different strategies should not be underestimated.[101] More adversarial dispute resolution strategies are likely to carry a much more significant emotional burden, particularly for individual litigants but also potentially for commercial litigants where the claim will be managed or heavily involve a small number of

[97] See Coase (n 7).
[98] Solicitors Regulation Authority, *Code of Conduct for Solicitors, RELs and RFLs* (SRA 2019) para 8.7 <https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/> accessed 10 November 2020.
[99] CPR 44.2(2).
[100] *Calderbank v Calderbank* [1976] Fam 93.
[101] Sheth (n 28) 161.

individuals.[102] A client's case may well be strong on the legal merits, but if the psychological toll (e.g. stress) on relevant individuals of bringing the litigation will be significant, then this will influence the client's perceptions of the value of such a strategy. Similarly, certain dispute resolution strategies may lead to the irrevocable breakdown of personal relationships of particular importance to the client, especially where the client and or the opposing party are private individuals.

Even where a client is able to handle the psychological effects of a protracted dispute resolution strategy, there is generally a significant time and energy commitment required. In developing the strategy, lawyers should discuss this "cost" with their clients, considering also how such time and energy might otherwise be spent and therefore what the opportunity cost of proceeding with the dispute resolution process might be.

Finally, one "cost" often overlooked by students is the risk of pursuing a particular strategy. No strategy is entirely risk free, but some methods will carry much greater risk than others. For example, Shell argues that the success of litigation depends not only on the legal merits of a claim, but also on: the legitimacy of the claim in the court of public opinion; the relative strength of the parties' strategic positions; the relative resources of the parties; and the extent to which each party has access to relevant decision makers (e.g. through lobbying government).[103] Any risks identified need to be weighed against the benefits of the particular strategy. Evidence is also key to assessing this risk, for example such as the strength of a party's witnesses. A client may have a very strong claim on the merits, but if the evidence is not there to support it then the position is significantly weakened, and this should influence strategy. A pre-action settlement in such cases may represent a more valuable resolution as the matter can be settled prior to the point at which documents may need to be disclosed or witness evidence exchanged.

A value slices framework for dispute resolution strategy

The Value Slices Model of Higher Education (VSM) – developed within a legal education context - provides a framework for the evaluation, creation, and

[102] Michaela Keet, Heather Heavin and Shawna Sparrow, 'Anticipating and Managing the Psychological Cost of Civil Litigation' (2017) 34(2) *Windsor Yearbook of Access to Justice* <https://wyaj.uwindsor.ca/index.php/wyaj/article/view/5023> accessed 10 November 2020.
[103] G Richard Shell, *Make the Rules of Your Rivals Will* (2004 Crown Business), ch 4.

articulation of value in respect of particular educational programmes or activities.[104] The "SLICES" mnemonic breaks down their typically obscured, holistic value, into five segments (or "slices) which are informed by customer value theory: "symbolic"; "lifetime"; "instrumental"; "community"; "experiential"; and "sacrifice".[105] By using this theoretical model, legal education providers are able to conduct a more comprehensive assessment of the value of their programmes/activities and identify opportunities to develop distinctive value of a kind that might not otherwise have been considered.

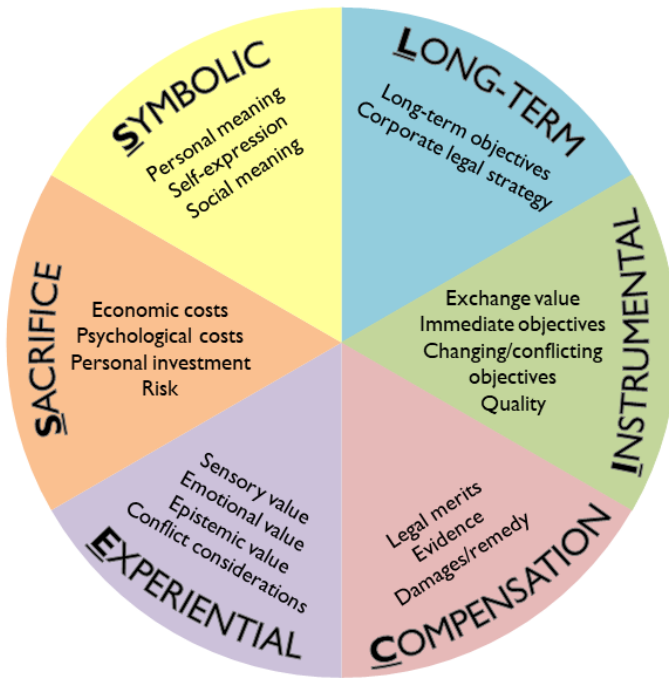

Figure 1: Value Slices Model of Dispute Resolution

A similar model might also assist law students (and ultimately also practitioners) to evaluate, create, and articulate value within their dispute resolution strategies. As such, figure 1 presents an adapted version of the VSM which provides a possible framework for the evaluation, development, and articulation of dispute resolution strategy. Whilst the core segments in general remain consistent with the HE model, the "lifetime" and "community"

[104] Alex Nicholson, 'The value of a law degree' (2020) 54 *The Law Teacher* 194.
[105] Ibid, 205.

segments are replaced with "long-term" and "compensation" respectively, to reflect: (1) the differing nature of the concepts under discussion; (2) the importance of evaluating both immediate and longer-term objectives; (3) the central importance in private law claims of establishing the legal merits of any such claim and the financial value of any likely compensatory awards; and (4) the fact that private law disputes are only very occasionally instigated for community benefit. Derived from the foregoing analysis, key issues that might usefully be explored within each segment might include:

- Symbolic
    - Personal meaning
      What significance does the client attach to the dispute?
    - Self-expression
      What are the client's core values?
    - Social meaning
      How will this dispute and its resolution be perceived by stakeholders?
- Long-term
    - Long-term objectives
      What longer-term implications might the resolution of this dispute have (e.g. in relation to reputation, relationships, or core business activity)?
    - Corporate legal strategy
      Does this dispute threaten the very survival of the client's organisation or core activities?
      Might particular dispute resolution strategies deliver a long-term competitive advantage for the client's business?
- Instrumental
    - Exchange value
      Could the client's rights in relation to this dispute be contractually assigned?
      Does pursuing this dispute represent a sound financial investment for the client?
    - Immediate objectives
      Beyond compensation, what specific objectives does the client have in relation to this dispute (e.g. apology, corrective justice, deterrence, vindication)?
    - Changing objectives
      How might the client's immediate objectives change during the dispute resolution process?
    - Quality

How effective/reliable are particular dispute resolution methods likely to be at achieving the client's objectives?

- Compensation
  - Legal merits
    What are the relative legal merits of the client's position as compared with their opponent?
  - Evidence
    What are the strengths and weaknesses of the client's evidential position?
  - Damages/remedy
    How much compensation is the claimant in this dispute likely to recover?
- Experiential
  - Sensory value
    Could the environment within which the client experiences the dispute (e.g. law firm offices, or a courtroom) have value for the client?
  - Emotional value
    Would any possible strategic choices be likely to result in positive emotions (e.g. enjoyment, pride, or trust) for the client?
  - Epistemic value
    Does the client have a particular interest in acquiring knowledge which might be served by particular strategic choices?
  - Conflict considerations
    For corporate clients only, is there sufficient alignment in perceived customer value as between the corporate client and its instructing representative(s)?
- Sacrifice
  - Economic costs
    What are the likely financial costs of pursuing these strategic choices and how do these compare to the anticipated financial rewards?
    Are particular strategies more or less likely to damage relationships of economic value to the client?
  - Psychological costs
    What psychological costs (e.g. stress) might also be incurred by the client through each strategic choice?
  - Personal investment
    What other non-pecuniary costs (e.g. time or energy) might be incurred by the client through each strategic choice?
  - Risk

How certain are the anticipated outcomes and how does this impact their value?

The model appears to suggest six dominant strategies for dispute resolution. However, in reality - whilst one or more of the "slices" may be dominant in a given case - all clients are likely to perceive aspects of value from within each segment to a greater or lesser extent. As such, in addition to identifying the answers to these questions, it would also be important to understand the extent to which the particular client perceives the value of each segment, since this may vary dramatically from client to client. Furthermore, students, educators, and practitioners must take care to ensure that any such assessment of customer value does not take place in a vacuum, but rather within the context of and subject to the ethical and regulatory frameworks within which legal advisors must operate.[106]

Similarly, just as with Smith and Colgate's framework, it is clear from the forgoing analysis that the dimensions of value (and consequently the "SLICES" in this model) are not mutually exclusive – there is a certain overlap. For example, if a client's primary objective in pursuing a resolution to their dispute is to receive compensation, then the achievement of this objective might be considered within the compensation value slice, framed as an aspect of instrumental value, or viewed in terms of the sacrifice value when weighed against the costs of pursuing the claim. However, this does not in itself diminish the utility of the model, the purpose of which is not to allocate aspects of value to particular slices, but rather to ensure that the fullest possible range of value components has been considered, specifically encouraging evaluation of dispute resolution strategies holistically and in a way that goes beyond mere analysis of the legal merits of the claim.

Finally, neither the model nor the theory on which it depends offers any definitive guidance as to how to reconcile potentially competing value components (e.g. a desire to receive the most compensation and a desire not to appear in court), but this is due to the inherently subjective nature of the value concept. Rather, the model provides a visual illustration and practical mechanism through which the value of a strategy can be evaluated holistically and adapted to reflect the client's perceptions. It can be utilised by practitioners

[106] See for example Solicitors Regulation Authority (n 98).

in their discussions with clients in order to develop a shared understanding of the client's value perceptions.

Conclusions and recommendations

Bosch has argued that interdisciplinary perspectives offer law students opportunities for: deeper understanding; the development of new solutions to pre-existing problems; and ultimately the acquisition of valuable analytical skills with obvious practical utility beyond the classroom, for example in professional life.[107] In this paper, it is argued that an appreciation of the customer value literature can enable law students to develop a deeper understanding of the nature of the dispute resolution process, and that the Value Slices Model of Dispute Resolution provides a mechanism by which they are able to develop more effective dispute resolution strategy.

Additionally, the resultant model also provides some direction for future empirical research which might usefully explore: additional value components which might be perceived in the dispute resolution context but which are not evident from the existing customer value literature; the prevalence and relative weightings of each value component amongst litigant populations; and the conditions which render some dispute resolution strategies more effective than others at delivering customer value. However, whilst such insight might help shape legal education programmes to some extent, given the subjective nature of value it will always be important for students and practitioners to understand the need to explore such weightings on an individual client basis.

This study has explored the explanatory insight that customer value theory from within the marketing discipline is able to offer to the development of effective dispute resolution strategy. It is easy to see how economic, philosophical, political, psychological, sociological, and even theological perspectives (to name but a few) might also be capable of adding additional insight which could strengthen even further students' understanding of the concept and which might therefore enhance their employability skills beyond those currently developed on programmes which exclusively adopt traditionally doctrinal and adversarial perspectives.

Given the apparently declining proportion of law students entering traditional legal practice, and the shift towards ADR, it is arguably more important that

[107] Bosch (n 15).

the modern lawyer can devise a value-driven dispute resolution strategy than it is that they have the technical skills to litigate. Furthermore, it is argued that the most important tool within that armoury is a framework which helps lawyers and litigants holistically evaluate the various options available to them.

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Mapping Motivations: self-determination theory and clinical tax education

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Abstract

The North West Tax Clinic is the first, student-led tax clinic in the UK. During its pilot between January and March 2020 the clinic experienced highs and lows in terms of the number of clients accessing the service. This paper, in co-authorship with one of the student volunteers, serves to present a co-reflection that maps out motivation onto the timeline of the clinic pilot. To do so, this paper draws on Self Determination Theory and student surveys to explore how the North West Tax Clinic encouraged autonomy, relatedness and competence. It is argued that where the events of the pilot failed to encourage these three, key psychological needs, both students and teachers were less motivated and engaged with the project.

Keywords: Clinical education, motivation, self-determination theory

Introduction

Student motivation drives student behaviour. That has been our experience in the North West Tax Clinic (NWTC), the first student-led Tax Clinic in the UK. The NWTC model is not unlike the better-known law clinic model, where students work directly with clients under the supervision of a tax professional. The students work to identify the tax issue, conduct independent research in the area, and draft advice to the client. For the NWTC, common tax issues included completing tax returns, drafting appeals to the tax authority (Her Majesty's Revenue & Customs, hereafter 'HMRC') and educational letters to explain tax obligations. The NWTC is now established on a permanent basis but ran for a ten-week pilot between January and March 2020. It is that pilot that forms the basis of this paper.

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The NWTC pilot did not quite go to plan. In particular, the numbers of clients were extremely low, especially for the first half of the pilot. This lack of clients required a pivot in the roles of both the staff and students involved in the clinic until client numbers improved in the second half of the pilot. During the ups and downs of the NWTC pilot, the supervisors noted that there were changes in the students' attitudes and motivations. Upon reflection, these changes in motivations also applied to the supervisors too. It is the purpose of this paper to map out the motivations of both students and supervisors over the event-timeline of the pilot. Specifically, this paper will draw on self-determination theory (SDT) to explore how events in the clinic affected motivation. To do so, this paper will draw on an original student-staff co-reflection and student surveys issued at the start and end of the pilot.

SDT is a theory that seeks to explain human motivation.[1] Previous research has highlighted that "only a minority of students are primarily interested in intellectual development for its own sake".[2] This makes reference to intrinsic motivation and can be contrasted with extrinsic motivation, where completion of an activity is "to attain some separable outcome" (an example being an addition to the CV).[3] SDT looks to how we can help students internalise extrinsic motivation.[4] This renders extrinsic motivation more like intrinsic motivation;[5] allowing the students to complete an action for the enjoyment and fulfilment it provides.[6] There are three basic needs that must be fostered to aid the internalisation of extrinsic motivation: autonomy, relatedness, and competence.[7] It is through this lens that this paper will reflect on and analyse the ups and downs of the NWTC.

Overall, the authors argue that the low points of the clinic corresponded to the lower levels of motivation for both staff and students. During these low points,

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[1] Paula J Manning, 'Understanding the Impact of Inadequate Feedback: A Means to Reduce Law Student Psychological Distress, Increase Motivation, and Improve Learning Outcomes' (2012) 43 Cumb L Rev 225, 229.
[2] Sandra Winn, 'Student Motivation: A socio-economic perspective' (2002) 27(4) *Studies in Higher Education* 445, 447.
[3] 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, 71.
[4] ibid, 70.
[5] Ibid, 72.
[6] Nigel Duncan et al., 'Resilience and student wellbeing in Higher Education: A Theoretical Basis for Establishing Law School Responsibilities for Helping our Students to Thrive'' (2020) 1(1) *European Journal of Legal Education* 83, 93.
[7] Ryan and Deci (n 3), 68.

the NWTC struggled to nurture autonomy, relatedness and competence. With the arrival of meaningful tasks and clients came a more positive outlook and students left the NWTC pilot with more confidence. This paper serves to expose how the ups and downs in clinical education can impact on motivation and so build on the existing SDT and clinical education literature.

Methodology

The North West Tax Clinic

The NWTC is a student-led clinic that initially ran as a ten-week pilot between January and March 2020. Over this period, students were trained as TaxAid volunteers,[8] welcomed clients, researched tax issues, and drafted advice under the supervision of a tax professional. The project followed the similar, better-known, Law Clinic model, which has provided an experiential learning environment for higher education students across the world for decades.[9] Tax Clinics in themselves are not novel, with clinics in the US,[10] Australia,[11] and Ireland.[12] However, the NWTC was the first such clinic in the UK, and the first known clinic to directly partner with a tax charity. Initially, the clinic recruited 14 student volunteers, of whom 11 completed the training and went on to participate in the full pilot.[13] The students were an equal blend of law and accounting students from Lancaster University and the University of Central Lancashire (UCLan) respectively.

This paper will draw upon two different data-type sources and so take a mixed-methods approach to analysing the NWTC pilot.[14] First, the paper will draw

[8] TaxAid is a UK national Tax Charity that helps low-income individuals with their tax affairs. For more information, see www.taxaid.org.uk accessed 10 July 2020.
[9] See Richard Grimes, Joel Klaff and Colleen Smith, 'Legal Skills and Clinical Legal Education - A Survey of Undergraduate Law School Practice' (1996) 30 *The Law Teacher* 44; Sara Browne, 'A survey of pro bono activity by students in law schools in England and Wales' (2001) 35 *The Law Teacher* 33.
[10] Federal Tax Clinic at Harvard University: <https://hls.harvard.edu/dept/clinical/clinics/federal-tax-clinic-lsc/> accessed 10 July 2020.
[11] Australian National Tax Clinic programme: < https://www.ato.gov.au/General/Gen/National-Tax-Clinic-program/> accessed 10 July 2020.
[12] NUI Galway Student Tax Clinic: <http://whitakerinstitute.ie/nui-galway-student-tax-clinic/> accessed 10 July 2020
[13] Two dropped out before training. One student obtained relevant employment mid-way through the pilot and left the project.
[14] Sharlene Nagy Hesse-Biber, *Mixed Methods Research: Merging Theory with Practice* (The Guildford Press 2010), 3.

upon a qualitative reflective co-authorship between student and teacher to map out the highs and lows of the NWTC. Second, quantitative student surveys, which measured the confidence of the students in their soft skills at the start and end of the pilot will be used to triangulate the reflections and draw initial learning from our experience of running the first tax clinic in the UK.[15]

Reflective co-authorship

There are avenues for undergraduate students to publish their work.[16] Indeed, undergraduate students co-authoring with academics is not unique.[17] It is, however, unusual:

> Though the literature is replete with articles about graduate student publishing, only a limited number of articles focus on writing at the undergraduate level. [18]

Whilst there is a focus on graduate student co-authorship and also in encouraging students to publish their own research from dissertations;[19]

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[15] A common approach for mixed-method research. See John Creswell and Vicki Plano Clark, *Designing and Conducting Mixed Methods Research* (3rd edition) (Sage 2017), Chapter 3.

[16] See, for examples: < https://www.bcur.org/undergraduate-journals/> accessed 14 July 2020. Michal was an undergraduate student when this paper was initially drafted. He is now an LLM candidate at Lancaster University.

[17] The following papers (not an exhaustive list) were co-authored with undergraduate students: Steven Vaughan et al., 'Of density and decline: reflections on environmental law teaching in the UK and on the co-production of environmental law scholarship' in Anel du Plessis et al. (eds) *Teaching and Learning in Environmental Law: Pedagogy, Methodology and Best Practice* (Edward Elgar 2020); Ben Bowling and Sophie Westenra, ''A really hostile environment': adiaphorization, global policing and the crimmigration control system' (2020) 24(2) *Theoretical Criminology* 163; Tanya Aplin and Ahmed Shaffan Mohamed, 'The concept of "reputation" in the moral right of integrity' (2019) 14(4) *Journal of Intellectual Property Law and Practice* 268-277; and James Bonehill et al., 'The shops were only made for people who could walk': impairment, barriers and autonomy in the moibility of adults with Cerebral Palsy in urban England' (2020) 15(3) *Mobilities* 341; Henk Huijser et al., 'Putting student partnership and collaboration centre-stage in a research-led context: A case study of the summer undergraduate research fellowship programme and Xi'an Jiaotong-Liverpool University' (2019) 3(1) *International Journal for Students as Partners* 160.

[18] Donna Wing and Dana Smith, 'Undergraduate student-faculty publication outside the baccalaureate curriculum' (2001) 26 *Nurse Educator* 256, 256.

[19] See, for instance, David Feldon et al., 'Faculty-student coauthorship as a means to enhance STEM graduate students' research skills' (2016) 7(2) *International Journal for Researcher Development* 178;

academics collaborating with undergraduate students to conduct research together is lacking. This paper contributes to this limited pool of student co-authored scholarship.

The benefits of academics collaborating with students in publications flow both ways. For students, experience of collaborating with academics and publishing enhances their research skills,[20] promotes the idea of 'writing to learn' to "foster deep, conceptual learning";[21] and feeds into the philosophy of 'Students as Partners' (SaP), which is an emerging pool of pedagogical scholarship. SaP is a relationship

> in which all involved – students, academics, professional services staff, senior managers, students' unions, and so on – are actively engaged in and stand to gain from the process of learning and working together.[22]

It is a process, not an outcome.[23] In this case, co-authorship was a dialogue between student and teacher to reflect on the NWTC pilot. As a theory based on relationships and partnership, SaP can result in an enhanced relationship or trust between students and staff,[24] although this could depend on the cultural context of the collaboration.[25] A 2017 review of SaP literature highlighted that only five percent of the papers had undergraduate student first authors.[26] It is hoped that this paper contributes to normalising teacher-student co-authorship at the undergraduate level.

Benefits also flow to the teachers. In co-authoring this paper, we have had an opportunity for rich collaboration with a student, providing insights that would

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and the Copenhagen FIRE journal, which actively trains and encourages students to publish: <https://jura.ku.dk/firejournal/english/about-fire-journal/> accessed 14 July 2020.

[20] ibid, 180, 186; Larry Yore et al., 'Scientists' views of science, models of writing, and science writing practices' (2004) 41 *Journal of Research in Science Teaching* 338.

[21] Alena Moon et al., 'Investigation of the role of writing-to-learn in promoting student understanding of light-matter interactions' (2018) 19 *Chemistry Education Research and* Practice 807, 807; Paul Connally and Teresa Vilardi, *Writing to Learn Mathematics and Science* (Teachers College Press 1989).

[22] Mick Healey et al., Engagement through partnership: students as partners in learning and teaching in higher education (Higher Education Academy 2014), 12.

[23] ibid, 7, 12.

[24] Lucy Mercer-Mapstone et al., "A systematic literature review of students as partners in higher education' (2017) 1 *International Journal for Students as Partners* 1, 11.

[25] Huijser et al. (n 17), 166.

[26] Mercer-Mapstone et al. (n 24), 1.

be otherwise unavailable to us. In other words, we were inspired, had a greater understanding of the student perspective and generated new beliefs.[27] For this paper, the involvement of a student drove the very direction of reflection and analysis. Through the use of co-reflection alongside co-authorship, this paper aims to develop methodological thinking in clinical education, as well as to tell the narrative of the NWTC.

The paper will present a double, student-teacher reflective narrative to map out perceived student motivations during four, key points in the NWTC pilot:

i) at the start of the clinic,
ii) one month into the clinic,
iii) two months into the clinic, and
iv) at the end of the clinic.

As co-authorship is a process, not an outcome,[28] a reciprocal exchange of ideas is critical between student and teacher.[29] The process of writing this article was therefore a dialogue, or conversation, between Amy, David, and Michal. The theoretical framework from which this paper hangs, self-determination theory, was entirely student driven. The importance of this is that the theory resonated with the student, rather than the teacher – inspiring the teachers and opening up new perspectives.

These narratives were drafted separately to avoid biases in reflection and were brought together for the purposes of the discussion in section 3. This process of deep reflection allowed us to combine two rich perspectives on the running of a student-led clinic.

Student surveys

Data were collected from a total of nine student volunteers.[30] Seven of the respondents were female, and four were first-generation students. Participation in the survey was fully voluntary and no incentives were used to induce participation. The reliability and generalizability of data is important in

[27] Ibid, 12.
[28] Healey et al. (n 22), 7, 12.
[29] Healey et al. (n 22), 14, 29; Mercer-Mapstone et al. (n 24), 14.
[30] The surveys were voluntary, and we had nine complete returns. There were two non-responses.

empirical research.[31] Due to the sample size and self-selecting nature of the responses, this data will not seek to set out concrete conclusions on the confidence-boosting nature of Tax Clinics in the UK. Rather, it will be used to add a statistical foundation to help validate the rich co-reflection that precedes it.[32]

The survey sought to measure confidence growth in the students by asking them to evaluate their own levels of confidence in a range of soft and technical skills. This approach, otherwise known as self-efficacy,[33] helps to provide an insight into the academic achievement and learning within the workplace of an individual.[34] It is an approach that has been adopted in existing Australian tax clinic literature.[35] The levels of perceived self-efficacy can drive student behaviour (and predicts the levels of effort a student will expend) and are a good indicator of individual performance.[36] Indeed, self-efficacy and confidence both drive student motivation.[37] The benefits of a project that is able to boost motivation and confidence (and so self-efficacy) are argued by Subramaniam and Freudenberg to be numerous.[38] Examples include more confident students who are more likely to be hired and have their overall performance 'bolstered'.[39] It is interesting to note that one of the widely reported student benefits of co-authorship is also improved confidence and self-efficacy.[40]

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[31] Nahid Golafshani, 'Understanding reliability and validity in qualitative research' (2003) 8(4) *The Qualitative Report* 597.
[32] Jennifer Greene, Valerie Caracelli, and Wendy Graham, 'Toward a Conceptual Framework for Mixed Method Evaluation Designs' (1989) 11(3) *Educational Evaluation and Policy Analysis* 255.
[33] Defined as "beliefs in one's capabilities to organize and execute the courses of action required to produce given attainments": Albert Bandura, *Self-efficacy: The exercise of control* (New York: WH Freeman 1997), 3.
[34] Mary Tucker and Anne McCarthy, 'Presentation self-efficacy: Increasing communication skills through service-learning' (2001) 13(2) *Journal of Managerial Issues* 227.
[35] Mercer-Mapstone et al. (n 24), 14.
[36] Nava Subramaniam and Brett Freudenberg, 'Preparing accounting students for success in the professional environment: enhancing self-efficacy through a work integrated learning program' (2007) 8(1) Asia-Pacific Journal of Cooperative Education 87.
[37] Brett Freudenberg et al., 'The penny drops: can work integrated learning improve students' learning?' (2010) 4(1) *E-journal of Business Education and Scholarship of Teaching* 42, 45.
[38] Subramaniam and Freudenberg (n 36), 88.
[39] Ibid.
[40] Mercer-Mapstone et al. (n 24), 11.

The survey was therefore a 15-item measure of self-efficacy given to students in the first and last week of the pilot. The data therefore explores any confidence growth that took place over the interim ten weeks by conducting t-tests (via SPSS)[41] with the initial and end confidence levels. The results will be analysed and triangulated with the co-reflection to explore the nexus of motivation, self-efficacy and confidence in clinical tax education.

Reflections: the journey of the NWTC

The start of the clinic

When we started the NWTC project, neither Amy nor David were brimming with confidence. We were sticking our heads above the parapet and embarking on an untrodden path in UK higher education. There are risks attached to that. However, David had recently spent some time in Australia discussing Tax Clinics with colleagues and felt connected, while Amy has volunteered in various projects since the age of 18. It took about nine months to meaningfully plan the project between March 2019 and the opening of the NWTC in January 2020. We had undertaken publicity with local radio, newspapers and on Facebook.

We were unsure what to expect on January 13th, 2020. We were particularly uncertain on the number of calls that might be received by the clinic. David noted the timing of our opening: it coincided with the annual tax return deadline on the 31st January. We could be busy: but had any of the publicity worked. We had not long completed the TaxAid training with our students. It allowed us to get to know them a little more and feel confident in their capabilities. Nonetheless, we were nervous to see how they would get on. As teachers in HE, this would also be one of the most regimented projects for us in terms of time: we would be in the clinic every Monday morning and Friday all day.

> Michal: These reflections are mostly in alignment with what I have felt before the Clinic and during its first weeks. The primary emotion for me was without a doubt uncertainty. Uncertainty whether I would get accepted into the Clinic in the first place. Uncertainty whether it would be successful if I do. Uncertainty whether I was up to the task. All of these have

[41] Keith McCormick et al., *SPSS statistics for data analysis and visualisation* (John Wiley 2017), Chapter 1; Robert Carver and Jane Nash, *Doing Data Analysis with SPSS: Version 18.0* (Brooks/Cole Cengage 2012), Chapter 11.

> been prevalent fixtures when I was getting started. The training helped to alleviate them a little, but I knew that more actual experience was necessary for me to become confident in my abilities and to really settle into the clinic. I was really looking forward towards the coming weeks.

Help, no clients!

The anticipated rush at the end of January (the tax deadline) did not materialise. The clinic received seven calls over the first four weeks of the pilot. Of those, the clinic took on three clients. There is clearly not enough to provide the students with the experiences we had hoped to provide, and Amy began to sense a disengagement from the students: taking themselves off the rota without communication and working on other work in the clinic in silence. David was concerned with the time keeping of his students from UCLan.[42]

As teachers, we were not doing any more than the students at this point in time. So, the sense of wasting time was also echoed in our involvement in the clinic. Emotions of guilt, failure, and concern were felt. We had taken risks to get this project off the ground and it clearly wasn't working. In particular, institutional, student, and external actor scrutiny were all at play. The pressure was on to do something about the pilot.

> Michal: This was the point at which my morale was the lowest. Without clients, I was unable to test my abilities in any meaningful way. This meant that the uncertainty was not going away any time soon. I was beginning to question my commitment to the clinic and whether it was worth my time; after all it was a voluntary activity, and I was not getting anything from it. I began to cut the hours I spent in the call centre every week. Just like Amy and David I had an unshakeable feeling of failure and wasted opportunity.

The pop-up and looking up

To overcome our lack of clients, we took a two-pronged approach. First, we created a new marketing strategy where we got in touch with every Member of

[42] The clinic was physically located on the campus at Lancaster and some distance from its city centre. UCLan is based in Preston, a city over 35km (20 miles) to the south.

Parliament (MP) and Citizens Advice Bureau (CAB)[43] in Lancashire and Cumbria.[44] In general, the response from the MPs was disappointing although a small number of MPs were incredibly helpful. Second, we involved the students in the client drive. The students liaised with external charities and organised a pop-up clinic day in the local library. They were in positions of responsibility once again and they had a clearer role to play. It was one they took seriously. We once again noticed an increase in their drive and engagement with the clinic. There was a buzz of excitement and tax conversation as they organised their meetings. This also allowed us to reprise our role as supervisor, albeit in a different capacity.

The pop-up clinic at the library was an excellent day out and it was fulfilling to spend some time with the volunteers and the public. The pop-up resulted in 29 public interactions, of which six were significant. Three substantive cases resulted, and we were impressed with the professionalism of the student volunteers.

> Michal: Here, for the first time since its beginning, I felt that I was finally achieving something with the clinic. Through the library pop up and other engagements with local charities we were able to get some clients and really see the impact that we were starting to have on the local community. My confidence begun growing in line with the responsibilities we were finally being assigned.

Overall, between the marketing and student input, the cases were beginning to arrive, and we could begin to see the excellent technical work that was being completed by the students, as well as soft skill development linked to client work. We were more confident as our roles began to transition to what we had expected at the start of the pilot.

The end of the clinic

If anything, the additional work undertaken by the students and teachers had been a little too successful – we were operating at full capacity and the clinic

[43] ”Citizens Advice” is a network of local advice centres staffed by volunteers. Some provide tax advice but most do not, see: < https://www.citizensadvice.org.uk/> accessed 5 February 2021.
[44] These are the two counties which cover the North West of England. The cities of Liverpool and Manchester lie to the south and Scotland to the north.

was slammed with an influx of new cases to deal with. The last opening of the clinic coincided with the start of the shutdowns in response to COVID-19. The miserable weather and the start of self-isolating stopped us exploring another pop up in the Preston area but by then we were getting more clients than we could comfortably cope with in the time to left to us. We were also ready for a rest.

In total, the NWTC took on 25 clients, 22 of those in the second half of the ten-week pilot. We were now consistently receiving calls each week. The students led on these clients and began to research and resolve their tax issues. This active engagement by students on the cases meant that they had once again become pivotal to the running of the clinic: they were actively responsible for the people they were helping. The students appeared to be proactive, committed and enthusiastic to help. Their actions resulted in positive outcomes.

> Michal: Overall, I would say that the Clinic was a resounding success, both as a pilot and for me personally. We have successfully assisted multiple people with their problematic tax affairs and indirectly improved their lives when they often did not have anyone else to turn to for help. This in itself should be considered a great achievement, but the growth I have experienced as a person and as a lawyer were equally important to me. It was a very positive experience and one which I would recommend to any other student.

Mapping motivation: self-determination theory

Self-determination theory

> The fullest representations of humanity show people to be curious, vital, and self-motivated. At their best, they are agentic and inspired, striving to learn; extend themselves; master new skills; and apply their talents responsibly […] yet, it is also clear that the human spirit can be diminished or crushed and that individuals sometimes reject growth and responsibility.[45]

The student-teacher reflections above speak to the highs and lows experienced during the NWTC pilot. This is natural as there were clear peaks and troughs

[45] Ryan and Deci (n 3), 68.

in the numbers of clients, and so experience that the clinic had to offer. More specifically, themes of purpose, trust and competence emerged from our discussions on the clinic. As teachers, Amy and David were concerned about whether the students would be able to deal with the client issues the Clinic was likely to see. As a student, Michal also worried about whether he was "up to the task". Later in the pilot, both the teachers and student felt lost, with emotions of guilt and uselessness. It was not until the clients starting walking through the door that the authors began to feel like they had a purpose again.

This purpose was linked to the responsibility held by both student and teacher. For Michal, once responsibilities had been given to him, he felt like he was "achieving something with the clinic". Amy and David also felt a transition to the roles they had anticipated at the start of the pilot: that of facilitators and supervisors. This purpose linked to a positive shift in outlook and motivation. These themes correlate with Self-Determination Theory (SDT), one of the most widely cited motivational theories,[46] that is based on empirical methods to demonstrate "importance of humans' evolved inner resources for personality development and behavioural self-regulation".[47] It is a "humanistic theory" that seeks to explain motivation and behaviour in humans.[48] In Law Schools in particular, Sheldon and Krieger identified the "corrosive effect" and "emotional distress" felt by Law students and applied SDT to explore the motivation of Law students.[49] Beyond Law Schools, SDT has been applied in sports;[50] school teaching;[51] playing video games,[52] and beyond.

[46] Christopher P Cerasoli, Jessica M Nicklin and Alexander S Nassrelgrgawi, 'Performance, Incentives, and Needs for Autonomy, Competence, and Relatedness: A Meta-Analysis' (2016) 40(6) *Motivation and Emotion* 781, 781.
[47] Ryan and Deci (n 3), 68.
[48] Manning (n 1), 229.
[49] Kennon Sheldon and Lawrence Krieger, 'Does Legal Education have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being' (2004) 22 *Behavioural Sciences and the Law* 261, 262.
[50] Geneviève Mageau and Robert Vallerand, 'The coach-athlete relationship: a motivational model' (2003) 21(11) *Journal of Sports Science* 883.
[51] Richard Ryan and Cynthia Powelson, 'Autonomy and relatedness as fundamental to motivation and education (1991) 60(1) *The Journal of Experimental Education* 49.
[52] Richard Ryan, C Scott Rigby and Andrew Przybylski, 'The motivational pull of video games: a self-determination theory approach' (2006) 30 *Motivation and Emotion* 344.

Intrinsic motivation is important for feelings of competence and self-determination.[53] It is described as our "natural inclination toward assimilation, mastery, spontaneous interest, and exploration".[54] However, its existence has been questioned and it has been argued to have been largely "wiped out".[55] Despite this, SDT also looks at how the three needs can help individuals internalise extrinsic motivation; as well as how to elicit and sustain any intrinsic motivation.[56] A core feature of SDT is to treat motivation in a differentiated way: "by asking what kind of motivation is being exhibited at any given time".[57]

More specifically, SDT has identified three key needs for individual growth and the enhancement of intrinsic motivation: autonomy, relatedness and competence.[58] These three needs then lead to autonomous motivation,[59] which is important in the education context:

> Under conditions conducive to autonomy, competence, and relatedness, people will be likely to express their inherent tendency to learn, to do, and to grow. People are engaged and motivated in domains where their basic psychological needs can be and periodically are fulfilled.[60]

Therefore, in order for a student to thrive and be positively motivated,[61] all three elements of SDT should be facilitated,[62] and experienced by

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[53] Edward Deci, Richard Koestner and Richard Ryan, 'Extrinsic rewards and intrinsic motivation in education: Reconsidered once again.' (2001) 71 *Review of Educational Research* 1, 3.
[54] Ryan and Deci (n 3), 70.
[55] Edwin Locke and Gary Latham, 'Core findings' in E. A. Locke & G. P. Latham (Eds.), *A theory of goal setting and task performance* (Englewood Cliffs, NJ: Prentice Hall 1990), 56; Edward Deci and Richard Ryan, 'The general causality orientations scale: self-determination in personality' (1985) 19 *Journal of Research in Personality* 109.
[56] Ryan and Deci (n 3), 70.
[57] Ibid, 69.
[58] Ibid, 68.
[59] Marjit Wijnen et al., 'Is problem-based learning associated with students' motivation? A quantitative and qualitative study' (2018) 21 *Learning Environment Research* 173, 173.
[60] Ryan and Powelson (n 51), 49, 53.
[61] Kennon Sheldon and Lawrence Krieger, 'Understanding the negative effects of legal education on law students: a longitudinal test of self-determination theory (2007) 33(6) *Personality and Social Psychology Bulletin* 883, 885.
[62] Louis Schulze Jr, 'Alternative justifications for law school academic support programs: self-determination theory, autonomy support, and humanizing the law school' (2011) 5 *Charleston Law Review* 269, 300.

individuals.[63] High levels of motivation not only help students to learn better, but also has links with positive wellbeing.[64] It is not a question of looking at how much an individual possesses the three psychological needs, but looking at how the educational environment of the NWTC helps to facilitate their fulfilment.[65] Together, Michal, Amy and David will reflect on the three elements of SDT in relation to the environment of the NWTC pilot.

Autonomy

Within the framework of SDT, the innate psychological need for autonomy can be understood, and consequently fulfilled, in a variety of ways. According to Bartholomew et al, it amounts to the degree to which individuals feel responsible for their own behaviour and education[66] while Wijnen et al argue that it can be stimulated when they are provided with choice and allowed to take control of their own learning.[67] This also feeds into Orsini et al's characterisation of autonomy in an educational context as 'making decisions by one's own will, based on one's own needs and values'[68] with students being at their most autonomous 'when they freely choose to devote time and energy to their studies or to a particular academic activity'.[69] Nevertheless, motivation is a complex and intricate web of factors, sprinkled with a healthy dose of expectations and external pressures. Consequently, it does not and cannot exist without a greater frame of reference. This, as argued by Katz et al, is usually provided by the environment students find themselves in.[70] For the purposes of this paper, we suggest that it is not too much of a stretch to extend this understanding to the facilitators as well. At any chosen point throughout the pilot, the motivation of both Amy and David was shaped by the factual

[63] Manning (n 1), 229.
[64] Duncan et al. (n 6), 92-93.
[65] Cerasoli et al. (n 46), 782.
[66] Kimberley J Bartholomew, Nikos Ntoumanis, Richard M Ryan, Jos A Bosch and Cecilie Thøgersen-Ntoumani, 'Self-Determination Theory and Diminished Functioning: The Role of Interpersonal Control and Psychological Need Thwarting' (2011) 37(11) *Personality and Social Psychology Bulletin* 1459, 1459.
[67] Wijnen et al. (n 59).
[68] Caesar Orsini, Vivian Binnie, Sarah Wilson and Maria J Vegas, 'Learning climate and feedback as predictors of dental students' self-determined motivation: The mediating role of basic psychological needs satisfaction' (2018) 22 *European Journal of Dental Education* 228, 229.
[69] Ibid, 230.
[70] Idit Katz, Avi Kaplan and Gila Gueta, 'Students' Needs, Teachers' Support, and Motivation for Doing Homework: A Cross-Sectional Study' (2010) 78 *The Journal of Experimental Education* 246, 249.

circumstances in which they found themselves. Whereas their autonomy cannot be directly compared to that of the students they were working with, they were nevertheless constrained in the pursuit of their goals by the initial lack of clients and had to adapt accordingly.

This way of approaching autonomy in education as being important to both facilitators and students is particularly salient when it comes to the Law Clinic. This should come as no surprise since, according to Hall and Kerrigan, it is a model which enhances creativity and vitality in legal education.[71] When placed in such environment, Madhloom argues, students act as problem setters rather than problem solvers through the identification of issues encountered and achieve their expected skills as a consequence.[72] Arguably, the exact same thing could be said for the facilitators as well, as the format of a Clinic is by its nature less predictable and more adaptable than a traditional university course. This is supported by findings of Orsini et al that an autonomy-supportive learning climate maintains students' innate motivation to learn, provides gradual empowerment, and acknowledges teachers' skills, knowledge and responsibilities[73] while being a stronger predictor of students' motivation than the feedback they receive.[74] Therefore, this marks the Law Clinic, of which the NWTC is a derivation in terms of model, as an important case study to explore when trying to understand the motivations driving both students and their facilitators in an educational setting.

The inherent need for autonomy is also one of the reasons why so many law students, as recognized by Blaze, forget their own unique reasons for coming to the law school in the first place and lose the connection they had with their course.[75] Here it is important to recognise, as argued by Vansteenkiste et al, that 'higher levels of motivation do not necessarily yield more desirable

[71] Jonny Hall and Kevin Kerrigan, 'Clinic and the Wider Law Curriculum ' (2011) 16 *International Journal of Clinical Legal Education* 25, 26.
[72] Omar Madhloom, 'A normative approach to developing reflective legal practitioners: Kant and clinical legal education' (2019) 53(4) *The Law Teacher* 416, 418.
[73] Caesar Orsini, Philip Evans, Vivian Binnie, Priscilla Ledezma and Fernando Fuentes, 'Encouraging intrinsic motivation in the clinical setting: teachers' perspectives from the self-determination theory' (2016) 20 (2) *European Journal of Dental Education* 102, 110.
[74] Orsini et al (n 68), 234.
[75] Douglas A Blaze, 'Law Student Motivation, Satisfaction, and Well-Being: The Value of a Leadership and Professional Development Curriculum' (2019) 58 *Santa Clara Law Review* 547, 548.

outcomes if the motivation is of a poor quality'.[76] This is often linked with the need for autonomy due to the fact that it is intertwined with 'a sense of psychological freedom'[77] and is 'characterized by a sense of volition and choicefulness',[78] which are usually not present within a traditional law curriculum. In theory, a Clinic such as the NWTC should be able to bridge this gap as it allows the facilitators to work alongside the students and through the exercise in autonomy let both develop.

Further understanding of the importance of autonomy in education can also be achieved by looking at the matter through the lens of *autonomous motivation* and *controlled motivation*. We defer to Ratelle et al's description of these:

> *Autonomous motivation* is observed when behavior is initiated and governed by the self (i.e., when intrinsically motivated or regulated by identification), whereas *controlled motivation* is observed when behavior is not initiated or governed by the self (i.e., when regulated by introjection or external factors).[79]

In the context of the NWTC this distinction is readily apparent. During the pilot, the students freely chose to give up their time and volunteer for the program, thus displaying autonomous motivation. Their actions were not a result of the usual external pressure in the form of a bad grade which follows a failure to act. They made the choice to be there despite the fact that, as Bone found, law students are often extremely busy and possess strictly limited amounts of free time.[80] Of course, an argument could be made that they joined the Clinic because of other external benefits, e.g. networking, transferable skills, or practical experience of law. The fact that these can affect the choices made by law students has been confirmed, inter alia, in a

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[76] Maarten Vansteenkiste, Eline Sierens, Bart Soenens, Koen Luyckx and Willy Lens, 'Motivational Profiles From a Self-Determination Perspective: The Quality of Motivation Matters' (2009) 101(3) *Journal of Educational Psychology* 671, 671.
[77] Ibid, 672.
[78] Ibid, 672.
[79] Catherine F Ratelle and Frederic Guay, Robert J Vallerand, Simon Larose and Caroline Senecal, 'Autonomous, Controlled, and Amotivated Types of Academic Motivation: A Person-Oriented Analysis' (2007) 99(4) *Journal of Educational Psychology* 734, 735.
[80] Alison Bone, 'The Twenty-First Century Law Student' (2009) 43(3) *The Law Teacher* 222, 244.

study by Turner et al.[81] In spite of this, an exercise in choice (and therefore autonomy) by the students was still required for them to participate. Since there were no negative consequences awaiting them should they not join the Clinic,[82] it simply cannot be ascribed to an externally controlled motivation.

This is all reflected in Michal's experience. Although he knew that there would be no academic consequence if he did not volunteer, this was only a peripheral issue for him. Instead, he was looking forward to receiving training from qualified tax professionals, acquiring valuable real-life experience, and giving back to the local community through his work. There were no external pressures on him to act in any way and yet he still decided to join the program. The facilitators, Amy and David, had a similar experience. They were equally as busy as the students they supervised – and the project was not reflected within their workloads. For them, the reward was in helping both the students and clients; which is why motivation dipped when the NWTC did not have any clients. As such, their behaviour should be regarded as autonomously and internally motivated precisely because of the autonomy and the freedom of choice they exercised. This can be either understood as the freedom to engage (or not) with the Clinic in the first place and the autonomy they were afforded throughout to pursue their assigned tasks. According to Pelletier et al, any social context which is autonomy supportive facilitates intrinsic motivation.[83]

Furthermore, autonomy is often understood as being a prerequisite to the fulfilment of the need for competence. Levesque et al argue that this is because 'perceived competence will not lead to greater well-being unless the behaviour performed is autonomous'[84] while its only 'under autonomy-supportive conditions that people's strivings for competence are most fully

[81] Juliet Turner, Alison Bone and Jeanette Ashton, 'Reasons why law students should have access to learning law through a skills-based approach' (2018) 52(1) *The Law Teacher* 1, 11.
[82] Or at least not to the same extent that a bad grade or a failed year would. A lack of practical experience might make it difficult to find a job after graduation, but not to the same extent that a failed degree would.
[83] Luc G Pelletier, Michelle S Fortier, Robert J Vallerand and Nathalie M Briere, 'Associations Among Perceived Autonomy Support, Forms of Self-Regulation, and Persistence: A Prospective Study' (2001) 25(4) *Motivation and Emotion* 279, 283.
[84] Chantal Levesque, A Nicola Zuehlke, Layla R Stanek and Richard M Ryan, 'Autonomy and Competence in German and American University Students: A Comparative Study Based on Self-Determination Theory' (2004) 96(1) *Journal of Educational Psychology* 68, 68.

expressed'.[85] This is reflected in the findings of Sheldon and Krieger who write that:

> to maximize the learning and emotional adjustment of its graduates, law schools need to focus on enhancing their students' feelings of autonomy. Why? Because such feelings can have trickledown effects, predicting changes in students' basic need satisfaction and consequent psychological well-being.[86]

As such, exploring autonomy is a crucial part in the exploration of motivation, doubly so in the context of the Law Clinic, both for facilitators and the students. In Michal's experiences, it has been the primary reason why he continued to engage with the Clinic, even throughout the 'dry' period. He was empowered by the trust placed in him by the facilitators and the clients. Without the autonomy afforded to him, the experience would have lost its appeal and become yet another mediocre university experience. This was likewise for facilitators, Amy and David, who were also able to resume their responsibilities as teachers; and also experience autonomy in creating meaningful tasks for the students to engage in.

Relatedness

If autonomy speaks to the independence and choice that an individual has in any given environment, then relatedness looks at how people are brought together and connected to their environment.[87] Indeed, the social environment of the NWTC could either encourage or impede the positive motivation of its students.[88] Historically, Law Schools have been criticised for promoting a disconnect between its students and the law profession:

> Furthermore, law schools' devotion to the case method and to doctrine at the expense of skills divorces students from their natural inclination to engage in lawyering; students spend the better part of a year of law school utterly separated from fundamental lawyering skills-counselling, interviewing, and

[85] Ibid, 68.
[86] Sheldon and Krieger (n 61), 884.
[87] Although relatedness is not "antithetical" to the other three needs: Ryan and Powelson (n 51), 53.
[88] Sheldon and Krieger (n 61), 884.

> negotiating-that might connect them to practice and thus people.[89]

Whilst significant steps have been made to integrate alternative learning and teaching approaches in Law Schools,[90] it could be said that there is still some way to go. In accounting and finance departments, practical education involving client work is much more in its infancy.

The concept of relatedness is defined as "the degree to which the pedagogical method promotes the feeling of interconnectedness with others and that the learning will lead to a greater ability to use the skills to interact with other people".[91] In other words, that students have the opportunity to connect "with the selves of other people",[92] experience "trusting and trusted relationships with others", [93] and connect "in ways that conduce toward well-being and self-cohesion in all individuals involved".[94] Relatedness is critical. As a human need, it has been compared "to a plant's need for sunlight, soil, and water".[95] It helps intrinsic motivation to "flourish";[96] and without it, individuals can be less motivated,[97] responsible, and take less initiative.[98] It even "has the power to expand the impact of autonomy-supportive behaviors beyond a specific task" to the whole Law School – i.e. a positive teacher-student relationship is itself "an ongoing autonomy-supporting factor".[99]

Even without intrinsic motivation, it is possible to provide a supporting environment that internalises the weaker, extrinsic motivation. This is because extrinsically motivated people quite often engage in action because of their relationship with other people. [100] To improve motivation (either by fostering

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[89] Schulze Jr (n 62), 327.
[90] See, for instance, Grimes et al. (n 9).
[91] Schulze Jr (n 62), 321.
[92] Sheldon and Krieger (n 61), 885.
[93] Duncan et al. (n 6), 94.
[94] Ryan and Powelson (n 51), 53.
[95] Sheldon and Krieger (n 61), 885; Richard Ryan, 'Psychological Needs and the Facilitation of Integrative Processes' (1995) 63(3) *Journal of Personality* 397.
[96] Ryan and Deci (n 3), 71.
[97] For a study that explores the impacts of cold and uncaring teachers, see: Richard Ryan and Wendy Grolnick, 'Origins and Pawns in the Classroom: Self-Report and Projective Assessments of Individual Differences in Children's Perceptions' (1986) 50(3) *Journal of Personality and Social Psychology* 550.
[98] Manning (n 1), 238.
[99] Manning (n 1), 237.
[100] Ryan and Deci (n 3), 73.

intrinsic motivation or internalising extrinsic motivation),[101] it is therefore important to provide a supportive environment to students. This aligns with broader teaching and learning scholarship in providing "growth-producing experience" to students:

> at one end learners feel that they are members of a learning community who are known and respected by faculty and colleagues and whose experience is taken seriously, a space "where everyone knows your name". At the other extreme are "mis-educative" learning environments where learners feel alienated, alone, unrecognized, and devalued.[102]

This space where students feel important to the teacher fosters relatedness.[103] It depends very much on the psychological resources of the teacher: how much time they can devote to students and whether they enjoy spending time with the students.[104]

Students therefore benefit from the "warmth" of their teachers;[105] particularly if the teacher also supports the autonomy of the student.[106] Smaller, more personal, teaching environments have been shown to have higher levels of relatedness. For instance, Wijnen et al. explore how PBL teaching increases a student's feeling of relatedness:

> Because the groups are small, the tutor is able to give more individual support when needed and show interest in all students, which can stimulate feelings of relatedness…[107]

This is the similar in clinical education setting, where students "typically work in pairs or small groups. They will encounter clients, mostly from low-income

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[101] Deci, Koestner and Ryan (n 53), 15.
[102] Alice Kolb and David Kolb, 'Learning Styles and Learning Spaces: Enhancing Experiential Learning in Higher Education' (2005) 4(2) *Academy of Management Learning and Education* 193, 207.
[103] Manning (n 1), 237.
[104] Ibid.
[105] Wijnen et al. (n 59), 176; Maarten Vansteenkiste, Christopher P Niemiec and Bart Soenens, 'The Development of the Five Mini-Theories of Self Determination Theory: An Historical Overview, Emerging Trends and Future Directions' in Timothy C Urdan and Stuart A Karabenick (eds), The Decade Ahead: Theoretical Perspectives on Motivation and Achievement (Emerald Group Publishing 2010), 131–2.
[106] Ryan and Powelson (n 51), 53.
[107] Wijnen et al. (n 59), 176.

backgrounds, whose life experience may be very different from their own".[108] A small group setting also allows students to get to know one another and support each other as peers.[109] This is opposed to more traditional, lecture-based curriculums, which "create a sense of anonymity among students".[110] As teachers in the NWTC, Amy and David tried to foster a friendly, safe space in the Clinic room. The small number of students meant that both Lancaster and UCLan students got to know each other and their teachers. The teachers knew the name of everyone involved and the room was often a hub of activity and conversation. This element of relatedness did not really bear as much correlation with the number of clients as others; but Amy and David noticed a marked increase in communication once the cases arrived.

In vocational subjects, such as law and accounting, relatedness also means a connection with the professional processes.[111] Introducing students to an experiential learning element can be one way of aligning SDT with our curricula.[112]

> These exercises connect students to an ultimate sense of purpose in their learning that allows them to see how they will relate in the future to clients, jurors, and other professionals by exposing students to practice skills usually ignored in law school: Professional communication.[113]

The NWTC provided a direct link to the tax profession. The students worked alongside David, a tax professional, on real client cases. Therefore, once the cases arrived, students were exposed to the skills they would not use in a traditionally taught module.

In a traditionally taught module, we have layers of verification to ensure the materials used for learning and assessment are clear and complete. This contrasts starkly with the real world where problems do not come in a succinct summary on one side of A4. In the clinical setting the first task is having to work out the question; the second, to determine the information you need; and the third, how to make do when you can't get everything you would have

[108] Duncan et al. (n 6), 109.
[109] Wijnen et al. (n 59), 182, 189.
[110] Ibid, 189.
[111] Schulze Jr (n 62), 327.
[112] Duncan et al. (n 6), 106.
[113] Schulze Jr (n 62), 327.

wanted. We have discussed the issues from one of our cases, in stylised form, in the professional press.[114] This involved the taxation of payments relating to the mis-selling of financial products and where HMRC had already made a number of mistakes and financial institutions provided incomplete information. This was also an area that was new to David. Michal and his colleague took the lead in researching the issues and they became the experts. It was from this position that they had to explain their findings to three different audiences. In turn, a senior colleague (David); the client; and HMRC. This mirrored well the way an issue would be resolved in the professional context.

Competence

Competence has been described as "being able to experience increasing mastery".[115] For students, it is "the feeling of being capable of successfully performing study-related activities".[116] They need to feel like they are good at what they do.[117] As Duncan et al. write, it is something we want to encourage in our teaching and indeed, is one of the critical components of SDT:[118]

> Competence is what we all seek to develop in our students. Students need to feel capable of mastering tasks and challenges that face them. We can support the development of student competence by providing well-structured affirming learning environments and avoiding environments that are 'chaotic and demeaning'.[119]

Engaging in activities that result in feelings of competence facilitates intrinsic motivation.[120] Competence itself is not sufficient, however, and an enhancement of intrinsic motivation will only occur when it is accompanied by a "perceived locus of causality" (or, autonomy).[121] In the NWTC, the students took the lead on the cases that they were looking after. It was the students, not Amy or David, who communicated with the clients. When there was a success story, it was down the student actions. Whilst this relied on the clients accessing the clinic, once they did, there was a clear, causal link to the student work and

[114] David Massey and Amy Lawton, 'Simple Interest' (2020) 188 *Taxation* 12.
[115] Duncan et al. (n 6), 94.
[116] Wijnen et al. (n 59), 174.
[117] Sheldon and Krieger (n 61), 885.
[118] Ryan and Deci (n 3), 68.
[119] Duncan et al. (n 6), 95.
[120] Ryan and Deci, (n 3) 70.
[121] Ryan and Deci (n 3) 70.

any outcomes. This was emphasised in the student making the calls to the clients to let them know these outcomes.

It is also important that the activities the students engage in are intellectually stimulating. Cerasoli et al. argue that feelings of increasing competence are not achieved where the student is "unchallenged".[122] That being said, an impossible or overchallenging task will likewise result in a loss in competence.[123] There is therefore a fine line in terms of pitching the level of the activity to students. During a learning activity, competence can be fostered by verbal, positive performance feedback, which generates feelings of perceived competence.[124]

There is also a professional element to both law and taxation. One of the fundamental principles of the tax profession is that of professional competence and due care. A tax adviser:

> … must carry out their professional work with proper regard for the technical and professional standards expected. In particular, a member must not undertake professional work which a member is not competent to perform, whether because of lack of experience or the necessary technical or other skills, unless appropriate advice, training or assistance is obtained to ensure that the work is properly completed.[125]

In law, meeting the competences set out in the competence statement forms an integral part of the requirements of service and competence of a solicitor.[126] These professional statements create a tension between supporting "competence" in the SDT sense and ensuring that students appreciate the limits of their knowledge and abilities. Within the classroom setting it can be very hard to develop an appropriate level of discernment in students. Showing students all the small print that it is essential to appreciate in practice can lead to a loss of confidence which can undermine their well-being. On the other

[122] Cerasoli et al. (n 46), 784.
[123] ibid.
[124] Deci, Koestner and Ryan (n 53) 3-4.
[125] Chartered Institute of Taxation, 'Professional Rules and Practice Guidelines' (2018), para. 2.4.
[126] Solicitors Regulation Authority, 'SRA Code of Conduct for Solicitors, RELs and RFLs', available at: <https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/> para. 3.1 accessed 12 June 2021.

hand, not advising them of their lack of competence at a professional level would be unethical.

The NWTC should nurture a mastery of new skills but not in an unlimited way. In the field of tax, this consistent and improving mastery has another dimension; the constantly changing nature of taxation. Not to mention its technically dense reputation. In the UK, we have at least one Finance Act a year, as well as statutory instruments, case law, and changing guidance that can quickly render obsolete large parts of a Tax textbook overnight. This fast-paced nature of taxation strikes to both students and teacher.

Indeed, the NWTC raised questions of how, as teachers, we can ensure that tax stays relevant for our students. Working alongside students in the NWTC has highlighted gaps in our syllabuses, as well as elements of ineffective teaching. At first sight these may be signs of incompetence, but they have, in fact, increased "competence" in the way meant by SDT.

Overall, the clinical environment allows a balance to be struck. Working together on real cases demonstrates that to master taxation is not to know everything but rather to appreciate the limits of that knowledge.

Data and discussion

The above reflection explores how the NWTC facilitated autonomy, relatedness and competence during its ten-week pilot. Where these three, key needs are fostered, students demonstrate their "inherent tendency to learn, to do, and to grow. People are engaged and motivated".[127] It is useful to capture this element of 'growth' from the students themselves. To measure how the pilot impacted on students perceived self-efficacy, they were surveyed at the start and end of the NWTC. Students were asked a total of 15 questions that explored how confident they were in a range of skills. For the purposes of discussion, these skills have been grouped into elements that resonate with autonomy, relatedness, and competence.

We received nine full responses out of the 12 students who volunteered for the NWTC. Each question was measured using a 7-point Likert scale ranging from not confident (1) to very confident (7). The data will be presented in tables that show the averages at the start and end of the clinic. These values will be used

[127] Ryan and Powelson (n 51), 49, 53.

to inform the discussion on the overall value of the NWTC on student growth, confidence and motivation. It is important to note that the surveys won't explicitly illustrate the bumps in the road that were experienced during the NWTC pilot. As there are only two survey points (at the start and end), it is a much blunter tool to supplement the above reflection.

Autonomy

The authors were able to map the levels of autonomy experienced in the NWTC to ebbs and flows of the clients. In particular, they were constrained by the lack of clients as this limited the levels of decision-making present in the Clinic and the ability for students and teachers to feel responsible for their own actions.[128] The students were not able to engage in their problem setting activities that would have been facilitated by the NWTC. Once clients began to approach the clinic, there was a shift in the authors' motivation and levels of autonomy. This was also seen by the wider students in the clinic, who also demonstrated a growth in confidence in autonomy-related activities over the ten weeks of the NWTC pilot:

Table 1: student data in relation to skills associated with autonomy. Source: NWTC.

		Mean	N	Std. Deviation	Difference in mean
Perform quite well under pressure	Start of the clinic	5.00	9	1.118	1.333
	End of the clinic	6.33	9	0.707	
Manage time	Start of the clinic	5.89	9	0.782	0.333
	End of the clinic	6.22	9	0.667	
Analyse topics to identify what information I need	Start of the clinic	5.44	9	0.527	0.667
	End of the clinic	6.11	9	0.333	
Coordinate tasks within my work group	Start of the clinic	5.33	9	1.323	0.778
	End of the clinic	6.11	9	0.782	
Critically evaluate the relevance,	Start of the clinic	5.00	9	0.707	1.444

[128] Bartholomew et al. (n 66); Wijnen et al., (n 56).

reliability and authority of information I find so that I know what to use and what to discard	End of the clinic	6.44	9	0.527	

On average, students were 0.911 points more confident on the 7-point Likert scale for autonomy-related skills such as the identification of information (to set their problems) or time management. The smaller increases in confidence, such as for the "manage time" skill can be contextualised also by its already high average at the start of the clinic. There were some skills, therefore, that already attracted high levels of self-efficacy from the students. This left little room for improvement following on the from the NWTC pilot. Nonetheless, some growth can be seen in our NWTC students.

Relatedness

Throughout the pilot, regardless of the numbers, the NWTC provided a friendly space for discussion where student and teacher were on first-name terms. The training provided by TaxAid was professionally orientated, allowing for an initial link between learning and the profession; the students were trained in client communication. The initial confidence scores by the students were therefore high and all above five out of seven on the Likert scale. Overall, students gained 0.833 in confidence from the start to the end of the NWTC.

Table 2: student data in relation to skills associated with relatedness. Source: NWTC.

		Mean	N	Std. Deviation	Difference in mean
Understand what is expected of me as a professional advisor	Start of the clinic	5.89	9	1.054	0.667
	End of the Clinic	6.56	9	0.527	
Communicate with clients in an effective manner	Start of the clinic	5.44	9	1.014	0.667
	End of the Clinic	6.11	9	0.928	
	Start of the clinic	5.44	9	1.130	1.222

Communicate with colleagues in an effective manner	End of the Clinic	6.67	9	0.500	
Contribute ideas for a team result	Start of the clinic	5.22	9	1.093	0.778
	End of the Clinic	6.00	9	0.866	

An environment that encourages relatedness also fosters autonomy-supportive behaviours.[129] It is encouraging to see, therefore, that there has been growth in both autonomy and relatedness in the NWTC students. This aligns with our reflections above that the NWTC provided a learning environment that encouraged relatedness: where relationships and communication skills were developed.

Competence

It is in the field of competence that there is the highest improvement in student self-efficacy. Indeed, here, a growth in confidence of 1.222 was seen. This is marked by a general trend of lower starting values, that then level off with the other confidence questions by the end of the NWTC clinic. The writing of advice for the NWTC clients would only be something that is possible with clients – this growth in confidence therefore begins to show the positive impacts of real-life clients on student self-efficacy.

Of particular interest is also the initial, low confidence levels seen in the career-related questions. The larger growth in confidence here is telling of a feeling of greater self-efficacy on the part of the student, or of having mastered some of the relevant skills and knowledge necessary to begin their career. This "mastery" was facilitated by the activities and tasks that were present in the NWTC.[130]

Table 3: student data in relation to skills associated with competence. Source: NWTC.

		Mean	N	Std. Deviation	Difference in mean

[129] Manning (n 1), 237.
[130] Duncan et al. (n 6), 94.

Accomplish difficult tasks when faced with them	Start of the clinic	5.00	9	0.707	1.222
	End of the clinic	6.22	9	0.833	
Structure and write advice	Start of the clinic	5.33	9	0.866	0.667
	End of the clinic	6.00	9	0.707	
Be clear when presenting my ideas	Start of the clinic	5.00	9	1.225	1.556
	End of the clinic	6.56	9	0.726	
Use a range of software applications	Start of the clinic	5.22	9	1.302	1.000
	End of the clinic	6.22	9	0.833	
Begin a career in the degree I am studying	Start of the clinic	4.67	9	2.062	1.556
	End of the clinic	6.22	9	0.833	
Achieve my career goals	Start of the clinic	4.67	9	2.000	1.333
	End of the clinic	6.00	9	1.000	

Discussion

Overall, the nine NWTC students began their journey with already quite high levels of confidence – with very few skills scoring an average of less than five. This confidence, otherwise known as self-efficacy,[131] helps to shed light on the motivation and learning experienced by a student in the higher education context. The groupings used above for autonomy, relatedness, and competence are, arguably, artificial. That being said, by measuring the confidence of students in a broad range of skills, this paper explores how students perceive their own strengths. These strengths resonate with the broader concepts of autonomy, relatedness, and competence as discussed in section 4. A higher self-efficacy also drives student motivation.[132] Over the course of the NWTC,

[131] Bandura (n 33), 3.
[132] Freudenberg (n 37), 45.

the ebbs and flows in student motivation correlate, in our reflection, to the ebbs and flows in terms of autonomy, relatedness and competence.

These highs and lows were primarily driven by the number of clients and whether productive tasks were being engaged with. This applied equally to both student and teacher. Therefore, once engagement and recruitment activities were introduced halfway through the clinic, both students and teachers were more motivated.[133] By exploring SDT, those ebbs and flows in motivation (where there were few clients) were also environments where autonomy, relatedness, and competence were at their low points during the NWTC pilot. Whilst the clinic did not actively discourage the three elements of SDT, it was not a nurturing place for them. By drawing on our reflection, data and experience, there is a relationship between student motivation and SDT. An environment that positively fosters autonomy, relatedness and competence will result in higher motivation. To help measure whether the NWTC positively fostered these three elements, we have drawn on the data from our co-reflection and our student surveys.

In terms of autonomy, the lack of clients made it difficult for students (and teachers) to feel autonomous. However, with tasks (followed by clients!), the NWTC reignited the ability for autonomy – students had tasks that required them to manage their time (0.333 improvement) and had to coordinate themselves and tasks as a group (0.778 improvement). Throughout the whole pilot, the NWTC was a small learning environment, which perhaps explains the larger increase in students' confidence in communicating with colleagues (1.222 improvement). The influx of clients allowed students to work on their communication skills in that regard (0.667 improvement) and get exposure to what it is like to be a professional tax adviser (0.667 improvement). The clients also allowed students to become more competent, with clear improvements in accomplishing difficult tasks (1.222) and writing professional advice (0.667). Perhaps one of the biggest signals of competence is the increase in confidence that the students would begin and achieve their career goals (1.556 and 1.333 respectively).

[133] There is a link between engagement and motivation, see: Lisa Claydon, 'Engaging and motivating students: assessment to aid student learning on a first-year core law module' (2009) 43(3) *The Law Teacher* 269, 270.

Despite the initially very low number of clients, the students grew in confidence for all aspects of the student survey. This higher confidence speaks to a higher, perceived self-efficacy. As we have explored, these higher levels of self-confidence can be framed through element of SDT, which the NWTC was able to foster once it proactively engaged with students and overcame the lack of clients.

Concluding remarks

By reflecting on the timeline of the NWTC, the authors have noted that the motivation of both student and teacher also had highs and lows that correlated with what was happening in the clinic. This conclusion isn't revolutionary; and indeed, is something that would be expected in line with SDT. Nonetheless, this paper exposes the intricacies of what happens in the clinical context and how they can potentially impact the way in which an environment encourages the three elements of SDT: autonomy, relatedness, and competence. That is particularly the case for a clinic that is not going well, as was the case for the NWTC. It also provides a glimmer of hope. It demonstrates that despite the lack of clients and things to during the first half of the clinic, the NWTC was still a positive experience for our students. It resulted in a growth in confidence for our student and we are confident that the NWTC fostered autonomy, relatedness, and competence. This is further supported by the consistent growth in confidence shown by our data. There is a lack of empirical work that couples reflection in this way. Moving forwards, work that considered reflection alongside more survey data points would be able to explore that highs and lows of a clinical education project in more depth.

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Legal Education in the US, Case Study method of training and public interest litigation

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Abstract

In the US the medium of instruction at law schools is the case law method that was inaugurated by Harvard University and which teaches both the substantive law and procedural rules. There has been criticism of this form of legal education because it is considered as overly academic, despite its clinical training and emphasis on preparing students for the private sector, There is scope for induction in public interest litigation in the ABA approved law schools that teach the Juris Doctor that is followed by the State Bar examination. The question posed by this paper is whether the legal training is exclusively intended for the market or if the clinical legal education programmes in law schools offer the opportunity for those students who want the experience of practice in the public sector. This enables the newly qualified attorneys to become part of non-profit ventures when they become practitioners and they can provide their expertise in public interest litigation. The argument here is that there is an increasing access to justice modules available by means of involvement in clinical legal education that are an extension of the case law method of study, but that they lead to debt problems for students post qualification, and a means has to be found for the concession for students who study law from less privileged backgrounds.

Keywords: Harvard case law method, Public Interest Litigation, Community Development Clinic.

Introduction

In the US there is a fused profession in which the legal practitioner is certified to practise in the jurisdiction of the licensing state. There is a necessary process of attaining a legal qualification to practise as attorneys after completing legal education and satisfying the requirement of good character before being admitted to the state bar. The issue is if legal education in public interest

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litigation, during graduation, is sufficiently utilised. Because of the need for students to service their debt after they complete their academic studies, students have to attain employment that generates a sufficient income for its repayment.

The significance of practising law is that each state has its own judiciary and appellate courts; and the Supreme Court approves the state bar examination, codes of practice and licensing of attorneys. The ethics of the profession are formulated by the rules that have been developed by the American Bar Association (ABA) Standing Committee on Legal Education, which has the power to recommend courses of study that state and local bar associations should require for admission to the practice of law. The bar examination syllabus is governed by the National Conference of Bar Examiners (NCBE) under the Uniform Bar Examination that provides a common standard to be attained for those intending to practise law.[1] The ABA formulates the guidelines for law schools in the US which are comprehensive, and take account of practical training. The ABA has published the Standards and Rules of Procedure for Approval of Law Schools 2020–2021 for legal education and admission to the bar. Chapter 3 sets out the Objectives of the Program for Legal Education as follows:

> Standard 301. (a) A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession. (b) A law school shall establish and publish learning outcomes designed to achieve these objectives.
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> Standard 302. A law school shall establish learning outcomes that shall, at a minimum, include competency in the following: (a) Knowledge and understanding of substantive and procedural law; (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context; (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and (d) Other professional skills needed for

[1] Overview of Bar examination 26/6/18.
https://www.americanbar.org/groups/legal_education/resources/bar_admissions/bartests/

> competent and ethical participation as a member of the legal profession. The other professional skills are determined by the law school and may include skills such as, interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation. [2]

The framework exists for public interest litigation to be taught within clinical legal education modules that will provide the student with contact of real-life circumstances and problems confronted by litigants who are on welfare. Law students in the US are from diverse backgrounds. This increases their horizons and scope for knowledge. The ABA does not recommend any undergraduate majors or group of courses to prepare for a legal education and students are admitted to law school from almost every academic discipline.[3]

Students who want to practise law undertake study in a non-law subject for their bachelor's degree prior to taking the Law School Admission Test (LSAT) preparation exam for law school.[4] The next stage is the academic training in earning the Juris Doctor (JD) which takes 3 years and that is followed by the Bar examination which if successfully completed leads to a certificate to practise law as an attorney. The Bar examinations are conducted on a state-by-state basis, and a lawyer qualified in one state is not necessarily qualified to practise in another. However, many states have reciprocal agreements accepting admission to the bar from other states as qualification for admission to their own bar ("admission on motion").[5]

There are "six primary practice settings where lawyers can work in the public service that capitalize on their legal training, analytical skills, and writing

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[2] American Bar Association. Standards and Rules of Procedure for Approval of Law Students. https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf

[3] American Bar Association. Pre law, Preparing for Law School https://www.americanbar.org/groups/legal_education/resources/pre_law/#:~:text=Undergraduate%20Education,from%20almost%20every%20academic%20discipline.

[4] The Law School Admissions Council (LSAC) prepares and administers the Law School Admissions Test (LSAT) for prospective law students. https://www.lsac.org/

[5] Comprehensive Guide to Bar Admission Requirements 2019. American Conference of Bar Examiners. p 39. https://www.ncbex.org/assets/BarAdmissionGuide/NCBE-CompGuide-2019.pdf

ability". These include "serving as the chief executive officer for a non-profit organization or philanthropic foundation; working to implement programs at a non-profit organization that does not provide legal services to clients; proposing policy changes as a staff member of a legislative representative's office or other governmental entity; serving as a public official (whether elected or appointed) or reporting on legal issues for a media outlet" such as Public Radio Service.[6]

A Yale Law School study has found that it is more onerous to find a permanent public interest job than getting a large firm job because the "public interest organizations (and small firms) tend to have occasional openings (versus 50 new associates each year in a large private sector law firm) and have limited funds. …. They don't hire recruitment people, they don't join the National Association for Law Placement (NALP), they don't visit law school hiring fairs, and they may not send law schools notices of their openings."[7] Moreover, "U.S. Attorneys' Offices and impact litigation organizations such as the American Civil Liberties Union (ACLU) … require at least two years of experience, with some offices requiring more"[8] post law school. This militates against the newly admitted lawyers from opting to work in public interest litigation and they chose private firms.

This paper considers the framework of legal education from its origins and its structuring by the case method of instruction developed by the Harvard Law School. It will include discussion about the evolution of the case law method that is the norm in the law schools as a medium of instruction. Community based Clinical Legal Education is an essential platform for students who want to practise in public interest law and its broadening framework is examined, including the contribution of not-for-profit law firms in the public interest litigation. This issue is examined in the framework of the discussion of whether this prepares the students to enter the field of law or if the social differentiation caused by student debts makes it more onerous for the benefits of this form of legal training to be availed.

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[6] Careers in Public Interest and Government. Stanford Law School. https://law.stanford.edu/levin-center/careers/

[7] Fact or Fiction: Public Interest Careers. Yale Law School. https://law.yale.edu/student-life/career-development/students/career-pathways/public-interest/fact-vs-fiction-public-interest-careers

[8] Ibid

Inception of the case law method and practical training

The source of the US legal system is the English common law and its principles spring from Anglo Saxon jurisprudence. This was by the assimilation of legal writings of Blackstone that were received in the form of Commentaries in 1771, and along with Coke's Second Institutes became the essential reading in the libraries of colonial America.[9] The legal induction has been described in the State of Virginia law libraries as follows:

> "The primary sources of the law represented in the identifiable tides are the reports of judicial decisions and editions of the statutes of Parliament and of the Virginia General Assembly. The secondary sources of the law are abridgments, digests, and treatises prepared by practicing lawyers, law publishers, and, beginning late in the eighteenth century, legal academics, the first and foremost of whom was Sir William Blackstone (1723-1780). Those were works of legal theory, legal history, legal philosophy, and jurisprudence."[10]

This was the original concept of textual reference in the training of lawyers in the US. There was no university degree that was required for admission to the bar and "[i]nstead of passing a standardized, written test, prospective lawyers relied on apprenticeships, self-studying and oral examinations. The first state to employ a written version of the bar exam was Massachusetts, in 1855".[11] The late 19th century saw railway connections from coast to coast, and the incorporation of industry and finance serving the business regulatory sector. This led to the legal market and a supply and demand for the litigation in the private sector and the development "created pressures for more thorough and rigorous intellectual training in the law" and the occupational requirements of

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[9] William Twining, Blackstone's Tower: The English Law School (Stevens and Sons/Sweet and Maxwell 1994), at p 1; Martha Rice Martini, Marx not Madison: The Crises of American Legal Education 41 (University Press of America 1997), Robert Stevens, Legal Education in in America : from the 1850's to the 1980's 1 (University of North Carolina Press 1983) p t 44.

[10] W. Hamilton Bryson, Law Books in the Libraries of Colonial Virginians, in "Esteemed Bookes of Lawe" and the Legal Culture of Early Virginia (Warren M. Billings & Brent Tarter eds., 2017) p 31.

[11] The Evolution of the Bar exam. 3 February 2015. blog.adapt.bar.com/the-evolution-of-the-bar-exam.

registered lawyers working in partnership as a law firm.[12] The emergence of "[b]usiness leaders needed skilled and effective lawyers to maximize their opportunities and manage their interests".[13]

Law schools began to recruit students in this period and the curriculum was formulated in order to train professionals in a structural academic method to meet this objective. Enrollment in law schools increased exponentially and the method used was to train students as apprentices.[14] The regulators at the state bar suggested a more profound requirement "part of which might be 'served' in law school, and an effective bar examination." [15]

It was also at this time that there was a law teaching method pioneered by the Harvard Law School that was by assimilation and debate which became the law school instruction manual. It has also been defined as premised on the "Socratic method" of reasoning and education in teaching theoretical subjects.[16] The benefits of the case method study of law are that "[c]ase learning is particularly useful for dramatizing abstract theoretical concepts, making seemingly distant events or issues seem more 'authentic' or 'real,' demonstrating the connection between theory and practice, and building critical-thinking and problem-solving skills."[17]

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[12] Susan K. Boyd, The ABA'S first section : Assuring a Qualified Bar (ABA 1993), quoting Samuel Thurman, "To What Extent Should Pre-law Education be Prescribed?," a speech before a joint session of the ABA Section of Legal Education and Admissions to the Bar and the National Conference of Bar Examiners (NCBE), August 25, 1959. pp. 60–61.

[13] Philip Gaines, The "True Lawyer" in America: Discursive Construction of the Legal Profession in the Nineteenth Century, 45 Am. J. Legal Hist. 132,132 (2001)

[14] Robert Stevens, supra note 10, pp. 24–25.

[15] Ibid at 25.

[16] The Socratic method is premised on "First, an instructor poses an open-ended question or has the student ask a question of him/her. Alternatively, the student or teacher can put forth a claim or argument as the topic to be examined. The purpose of this step is two-fold: (1) to provide a central topic into which one can inquire and (2) to produce a sense of wonder in the student. When asked broad, open-ended questions about virtues such as justice, good, evil, and truth, people have the tendency to try to answer for themselves and their own knowledge". Amanda J. Grondin, Effectiveness of the Socratic Method: A Comparative Analysis of the Historical and Modern Invocations of an Educational Method" (2018). Senior Theses. 253. pp. 6-7 https://scholarcommons.sc.edu/senior_theses/253

[17] Matthew Krain, "Putting the learning in case learning? The effects of case-based approaches on student knowledge, attitudes, and engagement," *Journal on Excellence in College Teaching* 27(2) (2016) pp. 131-153.

Professor Christopher C Langdell who introduced this "set of academic meritocratic reforms" reasoned that "[t]he principles of law are 'embodied' in cases" and the best way of discovering these principles is by studying them to analyse the opinions of judges. They comprise the matter of the science of law."[18] This was an analogy of law with an organic science with several guiding principles rather than as a series of facts and rules to be memorized and it was law professor's job to decipher the text of appellate cases to formulate the "general principles of law".[19]

This medium of instruction altered the content and nature of legal study in American law schools with the result that by the "beginning of World War 1, 40% of American law schools had adopted this method". There were "24 % who had partially accommodated this method" with potential full implementation and "36 % of law schools who did not" were down the teaching scale and "marginalised", but "they would convert" to this method of teaching "in the next decade". These concomitant meritocratic reforms would transform legal education and augment professional education for the bar.[20]

The case law technique was refined by another academic lawyer, William Keener, who viewed the law as more complex and underpinned by a varied methodology.[21] This placed less emphasis on the utility of the case method as a means of teaching the substantive principles of law, but to convey the power of analysis in the mind of the student. The intention was to provide the power of reasoning of a legal practitioner by fostering "the skill of thinking like a lawyer and methodology rather than substance that became the nub of the system".[22]

This approach which enhanced reasoning emphasised that the case method can be an effective medium for achieving educational benefits, but it required more endeavour than reliance on academic learning. The comprehensive manner of understanding law and its application compelled the student to be conscious of the "politics, the strands of class, religious, racial and national attitudes woven

[18] Martha Rice Martini, supra 10 , at p 58 at p 58
[19] Mark Bartholomew, Legal Separation: The Relationship Between the Law School and the Central University in the Late Nineteenth Century, 53 Journal of Legal Education 368, 377 (AALS 2003).
[20] Bruce A. Kimball, The Proliferation of Case Method Teaching in American Law Schools: Mr. Langdell's Emblematic "Abomination," 1890-1915, History of Education Quarterly Vol. 46, No. 2 (Summer, 2006), pp. 192-247
[21] Ibid. at p 55
[22] Ibid.

into the values and patterns of behavior with which law dealt; he needed some appreciation of the balance of power within the community, the clash of interests, and the contriving of economic institutions, as all these influenced and were influenced by the effort to order the society under law."[23]

The assimilation of the case law method in process in practical training in law schools received encouragement from the US Department for Education, which took over funding and invested $87 million on clinics that proliferated in law schools between 1978 and 1997.[24] This was augmented by the American Bar Association's influential MacCrate Report in 1992[25] which established "10 fundamental lawyering skills and 4 fundamental values of the legal profession".[26] It advised students and practitioners in their "self-assessment and self-development decisions" to create consultation "leading to a refined knowledge and understanding of shared fundamental skills and professional values"; and to promote "law schools and other educational providers" with improved "programs for educating students and practitioners in fundamental skills and values".[27] Law schools were invited to ingratiate professional skills for law students which led to the formation of the Clinical Legal Education Association (CLEA) in the same year, which had 1,000 teacher members and also published an academic journal as the Clinical Law Review.[28]

Law school pedagogy on case law analysis was further motivated by the Carnegie Report,[29] authored by Sullivan, et al, that mapped the future course of legal education. This prioritised the clinical aspect of law and concentrated more on its environment and less on doctrinal principles. The report argued that students should evaluate the problems by being involved in the "systemic

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[23] Martini, supra note 10,20, at p 59
[24] Peter A. Joy, The Cost of Clinical Legal Education, 32 B.C.J.L. & Soc. Just. 309 (2012), http://lawdigitalcommons.bc.edu/jlsj/vol32/iss2/5
[25] 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. , July 1992 Report".https://www.corteidh.or.cr/tablas/28961.pdf
[26] Ibid 135.
[27] Ibid 123.
[28]CLEA organized a workshop on the MacCrate report during the 1993 Association of American Law Schools -ALLS Annual Meeting. Clinical Legal Education Handbook and New Clinical Teacher. (2015) p 7
https://www.cleaweb.org/Resources/Documents/2015CLEANewCliniciansHdbk.pdf
[29] William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, and Lee S. Shulman, Educating Lawyers: Preparation for the Profession of Law (The Carnegie Report) The Carnegie Foundation for the Advancement of Teaching (Stanford: Jossey-Brass) (2007).

processes" which included "cognitive, ethical, and practice" which, therefore, should be organised around foundational professional skills and the contexts for applying those techniques.[30] The logical progression for law students proposes a time span of three years degree for graduates that develops the three lawyering apprenticeships of knowledge/understanding, practice expertise, and professional identity/judgment in which formal knowledge and practical skills are integrated to focus on developing ethical, competent legal professionals.[31]

The Carnegie report concluded that there would be "unintended consequences" of almost exclusive reliance on the case law method of instruction.[32] It proposed "a framework for a bolder, more integrated approach to legal education" where "each aspect of the legal apprenticeship — the cognitive, the practical, and the ethical-social — takes on part of its character from the kind of relationship it has with the others."[33] The three approaches that it identified in terms of learning by apprenticeships were the framework for establishing a legal curriculum which would be based on "wise judgment" by the law school.[34]

The study corroborated previous findings that study of law of law required problem-solving in real life situations of clients. The Carnegie report concentrated on the skills needed for practice, as the MacCrate report did before it. David Thomson considers the Carnegie sponsored report "as perhaps the most influential document in current debates about the future of legal education".[35] He argues that it affirmed the first year curriculum, "in inculcating students in the principles of the first apprenticeship through the case method of study, which it called the 'signature pedagogy" in law schools". In terms of "practical apprenticeship, the report expressed concern that there was not enough teaching of legal doctrine in the context of practice" which was required as "MacCrate report did before it". [36]

However, the main issue it identified was "the lack of intentional development of its students in the third apprenticeship, the ethical-social, which it also

[30] Ibid 191.
[31] Ibid 208.
[32] Ibid 188.
[33] At 194.
[34] At 191.
[35] D. Thomson, 'Defining Experiential Legal Education' in Journal of Experiential Learning. Vol 1, Issue 1, Article 3 (2015): https://digitalcommons.tourolaw.edu/jel/vol1/iss1/3
[36] Ibid 9.

referred to as the students' formation of professional identity as a lawyer". The apprenticeship of professional identity would include the "conceptions of the personal meaning that legal work has for practicing attorneys and their sense of responsibility toward the profession that would make a significant and lasting impact".[37]

This has also drawn criticism from law librarians in the context of the Carnegie report and they contend that law schools have not placed enough importance on increasing research skills in training lawyers which would also be a form their apprenticeship. They argue that "the ABA Section on Legal Education has consistently failed to enforce its accreditation standards with respect to legal research instruction". There is an obligation that "legal research should be given much more attention than it has received in accreditation decisions, including during site visits and in written materials submitted as part of the law school's accreditation process. The lack of enforcement of Standard 302(a)(1) perpetuates the inattention paid to this fundamental skill by law schools across the country and undermines the entire accreditation system's purpose to serve the public interest."[38]

There is an imperative "as law schools come under more pressure to reform legal education by providing more opportunities for skills instruction, the need to tap the underutilized resource represented by law librarians to help meet these needs becomes more obvious".[39]

The case law method in training lawyers had negated the use for apprenticeships which was considered to be an inferior method in giving law students the grounding necessary in professional practice.[40] Harvard Law School's method was based on the economies of scale which meant that in this forum law teaching consisted of the faculty-student ratio of one professor for every seventy-five students. This combined with the encouragement of a critical approach in which the argumentation and case analysis was integral to the lectures increasing the quantum of students in the lecture theatre. The object

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[37] Ibid 10.

[38] Barbara Bintliff and Duncan Alford, Teaching Legal Research, published as 28 Legal Reference Services Quarterly (combined issues 1 and 2, and 3 and 4, 2009); also published as a monograph, Teaching Legal Research (Routledge)(2010).

[39] Ibid.

[40] Stephen Ellmann, The Clinical Year, 53 N.Y.L. SCH. L. REV. 877 (2008/2009); Jessica Dopierala, Bridging The Gap Between Theory And Practice: Why Are Students Falling Off The Bridge and What Are Law Schools Doing to Catch Them? 85 U. DET. MERCY L. REV. 429 (2008).

was to ensure that "law schools could be self-supporting" and this was in the interest of the faculty administrators.[41] The impact of these studies was immense and case law method become pervasive and by 2010 almost all law schools in the US have multiple clinics for Clinical Legal Education.

The critical approach considers that the current system of legal education "invites a deeper examination of law school curricula and pedagogy, with a focus on sequencing of doctrine, skills and values across the curriculum designed to prepare students for practice...." This is because legal education is at a "crossroads, uniquely ripe for innovative curricular and pedagogical change".[42] This discussion is based on the economic, social and legal variables in the form of legal education, its utility in terms for preparing students for public interest litigation and the accumulation of debts which will determine the choice of working for private firms at the expense of not-for-profit sector. However, there needs to be a more detailed insight into the case law method and how it has been integrated with the clinical legal education that is for problem solving in the community.

Clinical awareness of community legal problems

The legal education based on the Harvard case law method for potential attorneys inaugurated at the end of the 19th century is still the foundation of the training of lawyers in the US. Clinical Legal Education in the US is a "catchall term for a wide variety of practices and methodologies not easily summarised".[43] This has integrated the case law method formula that has been accepted by the ABA which formulates the conduct rules and disciplinary codes which operate on the national scale. The ABA is granted the power to accredit and approve law schools and regulate them by the US Department of Education under Title 34, Chapter VI, Part 602 of the Code of Federal Regulations. The Council of the ABA Section of Legal Education and Admissions to the Bar (the "Council") is recognized by the federal Department

[41] Stevens, supra note 10, 16 , at p 63.
[42] Karen Tokarz, Antoinette Sedillo Lopez, Peggy Maisel, and Robert F. Seibel, Legal Education at a Crossroads: Innovation, Integration, and Pluralism Required!, 43 Wash. U. J. L. & Pol'y 11 (2014), https://openscholarship.wustl.edu/law_journal_law_policy/vol43/iss1/7
[43] R. Sandefur and J. Selbin, The Clinic Effect, Clinical Law Review, 16 (2009), at p 58 http: //ssrn.com/abstract= 1498844

of Education (ED) as the accrediting agency for programs that lead to the J.D. degree.[44]

The Best Practices for Legal Education report by Roy Stuckey, et al has made recommendations on how to improve legal education. These have been set out as designed for "improving law school professionalism training in Teaching and Learning Professionalism". By their implementation, the "faculty must become more acutely aware of their significance as role models for law students' perception of lawyering; greater emphasis needs to be given to the concept of law professors as role models of lawyering in hiring and evaluating faculty; adoption of the pervasive method of teaching legal ethics and professionalism should be seriously considered by every law school; every law school should develop an effective system for encouraging and monitoring its ethics and professionalism programs; the use of diverse teaching methods such as role playing, problems and case studies, small groups and seminars, story-telling, and interactive videos to teach ethics and professionalism, should be encouraged; law book publishers should consider adopting a policy requiring that all new casebooks and instructional materials incorporate ethical and professionalism issues."[45]

The report also suggests that the law publishers should also "publish more course-specific materials on legal ethics and professionalism issues as part of new casebooks, new editions of old casebooks, supplements to casebooks, compilations of supplemental readings, and compendiums, law schools need to develop more fully co-curricular activities, policies, and infrastructures that reflect a genuine concern with professionalism."[46]

The JD is an onsite 3-year program for graduate students the format of which is mirrored across universities in all the states. The first-year's curriculum provides a "solid intellectual foundation on which to build their legal education, covering core principles and concepts, theory, and skills of legal practice and providing a thorough grounding in fundamental legal reasoning and

[44] American Bar Association. The Accreditation Process. https://www.americanbar.org/groups/legal_education/accreditation/schools-seeking-aba-approval/

[45] Roy Starkey and others, Best Practices for Legal Education. A Vision and a Road Map. Clinical Legal Education (20070 .p 75. cleaweb.org/Resources/Documents/best_practices-full.pdf.

[46] Ibid

analysis".[47] The subjects taught include "courses in civil procedure, constitutional law, contracts, criminal law, legislation and regulation, property, and torts, which collectively provide a foundation for understanding the common law tradition and governing structures of the U.S. legal system and the role of statutes and regulations within that system."[48]

In the second year, there is focus on other activities such as mock trials, moot court, and other extra-curricular activities that offers a simulated environment. There are seven optional studies in public interest litigation which are: Law and Government; Law and Social Change; Law and Business; Law and History; Criminal Justice; International and Comparative Law; and Law, Science and Technology – developed by the Law School faculty to provide pathways through the upper-level curriculum". These offer students guidance on structuring an academic program that will give them extensive exposure to the law, policy, theory, and practice in their chosen areas of focus".[49] In the third year the students are encouraged to partake "in a capstone learning experience: advanced seminars, clinical practice, and writing projects that call on students to use the full extent of their knowledge, skills, and methodological tools in a field to address the most interesting and complicated legal problems of today".[50]

The final two years of the degree course comprises the Clinical Legal Education which becomes an important part of training for potential attorneys. The students are taught a wide range of professional skills that have a public interest litigation dimension. "Public interest" law has been broadly defined to include law-related work for governmental agencies, legal services, prosecutors, public defenders, and non-profit organizations which provide legal assistance, conduct research, or engage in other activities aimed at advancing the common good. The law schools have established the Public Interest Centers that either oversee a law school's clinical legal education or focus on a particular public law issue, such as poverty or environmental law where advice is offered pro bono. These projects may be financed by the school or dependent upon outside funding.[51] The majority of law faculties offer this

[47] Harvard Law School, J.D Program, 2019-20 his harvard.edu/depts/academics/degree-programmed/-d-programs/
[48] Ibid
[49] Ibid
[50] Ibid
[51] American Bar Association, Public Interest Clinics, https://www.americanbar.org/groups/center-pro-

form of training for law students with a combination of public interest and clinical legal education.

There are pertinent examples of the community law basis for the potential development of students under the supervision of the legal academic. Albany Law School's (ALS) Clinical Legal Studies program "consists of in-house projects, field placement programs, and one-hour practicum courses and there are a maximum of 12 credit hours six specialty law projects: Domestic Violence, Litigation, Health Law, Civil Rights & Disabilities, Low Income Taxpayer and Securities Arbitration that combine classroom education with hands-on legal experience while providing a free public service to the abused, discriminated against and disadvantaged in the community. Legal presentation by law students under supervision by faculty attorneys is provided to the victims of domestic violence, disabled children denied access to appropriate health care or education, HIV/AIDS infected parents planning for their children's future, the unemployed and low income taxpayers."[52]

ALS's Justice Centre has a proactive program, and its students are actively involved in pro bono assistance. In 2017-18 there were 172 second and third year law students from Albany Law School who in the academic year provided direct legal representation to about 175 clients. They provided legal assistance of thousands of hours to under- served and low- income residents. The time used up was 42,000 pro bono hours of the graduating class who offered direct law services to clients who otherwise could not afford to be represented. [53] There is a wider public dimension which is based around the Community Development Clinic (CDC) that has facilitated "dozens of nonprofits and small businesses with key business law and transactional legal representation". In the spring semester alone, CDC students created one for-profit and three non-profit organizations, and assisted three non-profit organisations in applying for tax-exemption status.[54] The legal input went further in terms of the partnership with

bono/resources/directory_of_law_school_public_interest_pro_bono_programs/definitions/pi_pi_clinics/

[52] Albany Law School, The Justice Centre, https://www.albanylaw.edu/centers/the-justice-center

[53] 'A welfare for many. Albany Law School continues tradition of problem work'. Times Union, Jenifer Patterson 13/11/18. . https://www.timesunion.com/local/article/Law-Clinic-Justice-Center-a-lifeline-for-many-13388950.php

[54] There are two broad categories of non-profit organizations: charitable non-profits, as described under Section 501(c)(3) of the Internal Revenue Code or a service and membership organizations formed under other subparagraphs of Section 501(c). In order to create a nonprofit corporation, state laws and federal rules will require a very specific

the "business improvement districts and community organizations throughout the Capital Region to provide free legal workshops educating residents on the legal issues that could come up during the lifecycle of a business including standalone events on commercial leasing and doing business online".[55]

The CDC also partnered with other public charities such as "The Legal Project, Innovate 518, and the Community Loan Fund of the Capital Region to provide brief legal consultations to small businesses."[56] These were integrated with public law and administration with "drafting a white paper for a trade association on capital access models for under-resourced manufacturers; creating organizational documents for a tech-focused startup; and creating terms of use and a privacy policy for an online-based company".[57] The CDC has moved outside its parameter of "the Capital Region by partnering with a dozen other law school transactional clinics to study barriers to entrepreneurship through a grant from the Kauffman Foundation".[58]

There was direct correlation between the pro bono assistance and the scholarship to the bar examinations. The students practised conducting hearings and trials in local courts under the supervision of experienced defense attorneys/prosecutors; advised inventors and reviewed patent applications under practising attorneys at the SUNY Research Foundation; assisted in the Governor's Counsel's Office by researching and advancing legislative and policy proposals; drafted legal memoranda and other documents for the U.S. Attorney's Office; performed legal research and drafted proposed decisions for judges in state and federal courts. The Pro Bono Scholars Program fast tracked 10 students to take the state bar exam before graduation and then they spent their final semester of law school assisting public interest organizations on behalf of low-income clients who were helped in this scheme.[59]

Boston College Law School offers structured clinical courses in the Civil Litigation Clinic, Juvenile Rights Clinic, Entrepreneurship Clinic, Immigration

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purpose clause and they require more than one initial director. https/www.usa.corporate.com/new-business-resources/nonprofits/

[55] Years of Impact: Capital Justice Centre provides lifeline to the Undeserved and spurs development in Capital Region. 29/6/19. Albany Law School. https://www.albanylaw.edu/about/news/2018/Pages/Year-of-Impact-Justice-Center-Provides-Lifeline-to-the-Underserved-in-Capital-Region.aspx

[56] Ibid.

[57] Ibid.

[58] Ibid.

[59] Ibid.

Clinic, Community Enterprise Clinic and Appellate Program Clinic.[60] This offers an opportunity to work with practising lawyers representing actual clients. The Civil Litigation Clinic offers induction in cases with a public law and justice element including (i) landlord and tenant disputes; evictions; issues with subsidized housing (ii) state welfare benefits (EAEDC, TANF; SNAP; food stamps; Men's health) (iii) Divorce and Paternity Cases with a history of domestic violence).[61]

There was also provision of Clinical Legal Education in the public sector by Boston College in the form of the BC Ninth Circuit Appellate Program that provides pro bono services. This is based on the "criticism of immigration law is that it treats hundreds of crimes the same, failing to take into account that state and federal judges consider specific offenses not serious or deserving of probation instead of incarceration. The clinic's mission is to use federal court advocacy to restore proportionality and common sense into the immigration consequences of criminal convictions." [62]

This clinic avails the very "unique opportunity provided by the US Ninth Circuit Court of Appeals that screens pro se petitions filed by non-citizens to identify meritorious (and often novel) issues, accelerates the briefing schedule to coordinate with the academic school year, and permits law students to present oral argument to a sitting panel of judges in the spring of each year."[63]

The success is not measured on the scale of victories in the Court but will be based "on the amount of material learned, the types of appellate skills mastered, and the contact with the client to help them navigate a case" upon which their outcome to remain in the US is in jeopardy.[64]

The significance of this form of vocational training has been cited by appellate judges and Supreme Court Justices in their opinions. Justice Thomas relied upon the amicus brief of the Clinical Legal Education of the ChapmanUniversity's Claremont Institute that has a Constitutional Jurisprudential Clinic (CJC) in his dissenting opinion in *Arizona v. The Inter*

[60] Boston College, Law Community Enterprises. https://www.bc.edu/bc-web/schools/law/academics-faculty/experiential-learning/clinics/community-enterprise.html.
[61] Ibid.
[62] Kari Hong, NCAP Supervising Attorney and Clinic Founder, bclawlab.org/ncap
[63] Ibid
[64] Ibid.

Tribal Council of Arizona, 133 S.Ct. 2247, 2266 (2013) (Thomas, J. dissenting). The clinic's brief in another case was cited by Ninth Circuit Judge N. R. Smith in his dissent in *American Trucking Associations v. City of Los Angeles*, 660 F.3d 384, 412 (9th Cir. 2011) (N.R. Smith, dissenting). The CJC is ranked 6th nationally among organisations that regularly acts as amicus curiae and files briefs in reviews before the Supreme Court.[65]

The Law School has benefited from the expertise of the Pacific Legal Foundation, a not-for-profit law firm that specialises in property rights and economic liberty cases that has provided the platform for serving the amicus curiae for the courts in cases dealing with property and individual rights.[66] The Pacific Legal Foundation (PLF) has also invested heavily in the educational programs offered by Berkeley Law School. The Seminar & Field Placement was launched at Berkeley Law School in August 2018 by PLF offering a unique opportunity to reach students at one of the country's most prestigious law schools—where students are not typically exposed to discussions about the importance of individual liberty. These seminars conducted by the PLF Executive Vice President and General Counsel John M. Groen concentrate on strategic constitutional litigation and the evolution of key legal principles, such as the regulatory takings doctrine, that impact property rights and economic liberty.[67]

The Berkeley Policy Advocacy Clinic itself is a proactive centre with interdisciplinary teams of law and public policy students who pursue non-litigation strategies to address systemic racial, economic, and social injustice. The clinic's approach is ground based drawing from "lives of real people, problem-based addressing pressing social issues, and client-driven accountable to advocacy organizations. The students support local and state change

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[65] Adam Chandler, *Cert.-stage amicus "all stars": Where are they now?*, Scotus Blog (Apr. 4, 2013, 3:00 PM), https://www.scotusblog.com/2013/04/cert-stage-amicus-all-stars-where-are-they-now

[66] In *Shelby County v. Holder*, 570 U.S. 529 (2006) a constitutionally important law case dealing with the discriminatory law inherent in section 5 of the Voting Act 1965, the Supreme Court heard the challenge after the Pacific Legal Foundation filed an amicus curiae. This resulted in the Court awarding a certiorari and declaring the provision as a nullity because it was 40 years and against the basic principle of equality enshrined in the First amendment.

[67] Berkeley Seminar & Field Placement at Berkeley Law School*, Pacific Legal Foundation, pacificlegal.org/law-school-programs*

campaigns while exploring the capacities and limits of law and public policy to solve problems."[68]

The contemporary programs have a remit that covers the "state and national" level and are intended to "reduce the harmful and racially discriminatory impact of fines and fees on low-income people in the criminal justice system, with a special emphasis on the interests of youth and people experiencing homelessness". In this range of induction the "students learn substantive law and policy skills. They interview clients and experts, conduct legal and social science research and analysis, and consult stakeholders (community members, policy and advocacy organizations, public officials, academics)."[69]

Harvard Law School has a comprehensive program for law students to become trained through clinical legal education. The school offers both internal and external clinical programs, and there were 416 students on clinical placements in more than 21 cities across the US from this university. The law faculty offered Externship Clinics in the 2018-19 academic year which included the Capital Punishment Clinic; Child Advocacy Program; Criminal Justice Appellate Clinic; Criminal Prosecution Clinic; Democracy and the Rule of Law Clinic; Employment Law Clinic; Government Lawyer: Attorney General Clinic; Government Lawyer: United States Attorney Clinic; Government Lawyer: Semester in Washington; Judicial Process in Trial Courts Clinic; Sports Law Clinic; and Supreme Court Litigation Clinic.[70]

The training program for this particular clinical legal education syllabus is rigorous, and for those who elect to take the Democracy and the Rule of Law option there are 12 studentships per year. Final year students work in conjunction with the 'Protect Democracy Project' a not- for-profit organisation founded by White House and Department of Justice attorneys for potential scholars who want to practice in this area of law. This is dedicated to" holding the President and the Executive Branch accountable" to the legal system through both the "Democratic and Republican" political party led administrations. The emphasis is on "litigation" and on "ensuring the impartial application of the rule of law; safeguarding healthy civic institutions that allow

[68] Experiential Education, law.berkeley.edu/experimental/clinics/policy-advocacy-clinic
[69] Ibid.
[70] Externship Clinics, hls.harvard.edu/dept/clinical/clinics/externships-clinics/

for public participation in political debate; prohibiting official corruption and challenging governments if it targets" groups in society. [71]

The experience gained is similar to apprentices in their training in law firms except that it is in a clinical legal environment.[72] The dual form of training equips the law student with hands-on training in public law such as procedures of "[d]eveloping and submitting Freedom of Information Applications (FOIA) requests, including identifying recipients", processing the "administrative FOIA appeals" and correspondence with agency Inspectors General, the Office of Special Counsel, or state Attorneys General" to inform them of future inquiries". The litigation techniques are also enhanced by formulating " legal theories and possible causes of action, and assessing approaches to overcome justiciability barriers drafting complaints and preliminary injunction motions and briefs", and assisting with "discovery" and "depositions" in the entire pleadings all way up to the Supreme Court.[73]

The necessity of public sector training has been recognised by the formalisation of public interest law and community justice in Clinical Legal Education in this field. This has been achieved by public sector not-for-profit organisations integrating themselves with educational institutions and establishing a think tank for research and data collection. The National Centre for Access to Justice (NCAJ) is headquartered in New York, at Fordham Law School, provides the academic community by the integration of public interest litigation with law schools in the universities. The NCAJ is a hybrid organisation that has an extensive pro bono program which "partners with faculty members and students on courses, guides students on research projects, and hosts public gatherings that advance access to justice movement". Its preamble states "it

[71] Democracy and the Rule of Law Clinic, hls.harvard.edu/dept/clinical/democracy-and-the-rule-of-law-of-the-clinic/

[72] The Public Law Project has defined Clinical Legal Environment as premised on "University law clinics that are a developing tool for both legal skills-based education and academic education. As well as providing students with experience of law in action and a practical base for academic enquiry, law clinics are, and should be supported as, an important means of providing practical legal work experience; especially where they can provide experience of working with clients who face social problems that many students may never face themselves". Public Law and Clinical Legal Environment, Public Law Project. 5 April 2018 https://publiclawproject.org.uk/resources/public-law-and-clinical-legal-environments/

[73] Ibid.

relies on data to expand access to justice in the civil and criminal justice systems".[74]

The flagship program of the NCAJ is the Justice Index – a web-based resource supporting justice system reform and facilitates a high powered convergence of private sector and public sector organisations. It includes the Pfizer Inc. and the Pfizer Legal Alliance (PLA) of 15 law firms, Deloitte, MSDS, attorneys and staff at Skadden Arps and at Kirkland and Ellis, students at Cardozo School of Law and University of Pennsylvania School of Law, along with attorneys and staff at UBS Corp. The utility for the law students who are inclined to public interest litigation is that the accumulated data shows the extent to which "each of our 50 state-based justice systems has "adopted best policies for assuring access to justice for all". This evaluation includes the empowerment of judges, legislators, executive branch officials, court administrators, legal aid reformers, Access to Justice Commissions, reporters, academics and activists in their respective and diverse efforts to improve our justice system.[75]

The findings of the Justice Index have been published and been collated on "four aspects of state based justice systems: the number of civil legal aid lawyers per 10,000 low income individuals in each state; systems in place to support self represented parties in state courts; systems in place to support people with limited proficiency in English in state courts; and systems in place to support people with disabilities in state courts".[76] The NCAJ raised enquiries with "state justice system officials to respond to an extensive set of questions about laws, rules, and policies for assuring access to justice in every state, the District of Columbia and Puerto Rico". [77] There were "five law firms (contributing more than 50 lawyers) who worked pro bono with NCAJ staff to conduct a rigorous Quality Assurance Review of the proposed findings recommended by the states.[78]

The evidence points to the US law schools preparing their students to serve the public through the final stages of their academic qualification. They have established curriculums that provide the education and training for the students

[74] https://ncforaj.org/wp-content/uploads/2019/07/National-Center-for-Access-to-Justice-one-pager-7-23-19-pdf.pdf
[75] Ibid.
[76] Justice Index, National Centre for Access to Justice. https://ncaj.org/state-rankings/2021/justice-index
[77] Ibid.
[78] Ibid.

to become practitioners in the field of public interest litigation. This form of teaching is heavily emblematic of the case study method introduced in the Harvard Law School, that has by its reasoned approach, increased the discourse of assisting the community that is in need of legal assistance. The educational goals and methods of the law schools are designed to initiate students for practice with not-for-profit organisations in preference to the large corporate firms that are in private practice.

Practitioner goals and reality of public interest employment

The training of students by means of Clinical Legal Education does not make them successful as practitioners in the field of public interest litigation. There has been strong criticism of US law schools for the rapidly rising costs of legal education that prevent the students from lower income families to attain the level of practicing Attorneys. This is because they will accumulate large debts and have limited employment prospects after pursuing a law school education.[79]

The Ivy league list who have compiled the top 5 schools in the US have a monopoly in finding employment over those who have graduated from a public law based education and training. At Columbia Law School employment ratio amounted to 78 % of the 2013 graduates, according to the Schools report to the ABA. Nationally the figure for graduates of ABA -accredited schoolsis about 16 %, but at low ranked law schools that figure is sometimes radically lower. [80] The selection process sustains the upper strata of society which contribute "tax-exempt donations, connecting their disproportionately wealthy students to lucrative job opportunities, and fostering exclusive social networks of the rich and powerful".[81] There is a cost critique of legal education, and how it may be affecting social mobility of students from lower strata of the income generating population.

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[79] "In recent years, legal jobs for new law-school graduates have fallen into a markedly bimodal salary distribution. Most such jobs pay between $40,000 and $65,000, with the exception of associate positions at the largest law firms, which generally pay about $160,000. (The high-five-figure-salary jobs that many prospective law students imagine they will settle for if they aren't hired by a big firm basically do not exist.)" . Paul Compos, The Law School Scam, The Atlantic, September 2014. https://www.theatlantic.com/magazine/archive/2014/09/the-law-school-scam/375069/

[80] -. Ibid.

[81] Breaking the Ivy League Monopoly. The American Interest. 11-2-15. the-american-interest.com/2015/11/02/breaking-the-ivy-league-monoploy.

The Legal Education "Best Practices" Report findings showed that "in 1990, private law school tuition averaged $11,000, about three times more than the approximately $3,500 average tuition at a public (state supported) law schools. The 1990s and until early 2000s the law school tuition at both private and public law schools increased at rates that sometime exceeded 10 per cent per year". The upshot is that educational debt has had "a significant impact on practice options graduates pursue" and those “students who may otherwise wish to practise as public interest lawyers by working for non-profit organizations or the government often seek higher paying jobs in private firms and companies in order to repay student loans. To assist students who want to dedicate their legal careers to public service, many law schools developed loan repayment assistance programs, known as LRAPs, given the absence of significant federal loan assistance.”[82]

The Report states further that "since the economic downturn in 2008, most law schools have continued to increase tuition fees between 3 to 5 % annually even though the cost of living in the U.S. has remained at an even level" and the data shows that "average law school education debt amount is approximately $90,000 and students who have taken out loans for their undergraduate educations often have combined debt loads in excess of $120,000".[83] This increase in law school fees and willingness of “law students to incur such high debt was fueled by near 100% employment rates at or within six months of graduation and relatively high salaries in the 1990s and early 2000s, with some entry level salaries above $160,000 per year by 2008 and since then the "number of such high paying positions has dropped significantly and employment rates have been reduced".[84]

The salary that the law graduate earned reflected the law school that they attended and correlated with the reputation of the university. The salary that the private sector graduate earned was $180,000 and the median salary for the private law school graduate earned was $77,500. The income from this sector varied greatly and in 2019 graduate salaries from the 182 ABA ranked law

[82] Margaret Martin Barry, Jon C. Dubin, and Peter A. Joy Legal Education "Best Practices" Report, US, 2011 in the Europeanization of Clinical Legal Education: How Clinical Legal Education is Being Adopted for European Law and European Issues (2018) in A Alemanno & L. Khadar (Eds), Reinventing Legal Education: How Clinical Legal Education is Reforming the Teaching and Practice of Law in Europe (2011) pp 126-207. Cambridge University Press.
[83] Ibid.
[84] Ibid.

schools varied from $50,000 to as high as $190,000. The median starting salaries of J.D. graduates who entered the public sector in 2019 were considerably lower than those of their peers in the private sector. Among the 182 ranked law schools that reported these data, the median public sector salary was $57,908, with median salaries ranging from a low of $40,000 to a high of $70,250.[85] The "majority of lawyers work in private and corporate legal offices and some work for federal, local, and state governments but most work full time and many work more than 40 hours a week" and the "median wage of lawyers in May 2020 was $122,960".[86] The implication of the report is that U.S. law schools can and should do more to prepare students to become effective and ethical lawyers.

It has been argued that a legal education brings a "wealth of non monetary benefits " which includes "knowledge, personal enrichment that cannot be measured in crude cost benefit analysis."[87] However, that does not alter the fact that there is a sizeable debt that public law school graduates accumulate when they acquire their degree. In 2007, the federal government enacted the College Cost Reduction and Access Act (CCRAA), to provide purposeful loan forgiveness assistance scheme for the lower income bracket.

The CCRA has "two separate and distinct components: Income Based Repayment Plan (Section 203) - If your debt is high and your income is low, regardless of whether you work in public service, you are entitled to pay back your federal loans through the Income Based Repayment plan (IBR), beginning July 1, 2009 and the remainder of your debt will be forgiven after 25 years. Loan Forgiveness (Section 401) - If you work full-time in public service for a cumulative 10 years, at the end of the 10 years (or after you have made 120 qualifying payments while working in public service) the remainder of the Federal Direct Consolidation loans will be forgiven".[88]

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[85] Ilana Kowarshi, Price, Payoff of Law School before enrolling, US news 12/3/19 https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/law-school-cost-starting-salary

[86] US Bureau of Labor Statistics, Occupational Outlook Handbook. May 2019, bls.gov/ooh/legal/lawyers/htm

[87] Brian Z. Tamanaha, Is Law School Worth the Cost? *Journal of Legal Education,* Vol. 63, No. 2 (November 2013), pp. 173-188.

[88]Information about the Cost Reduction and Access Act. College of Arts and Sciences. Loyola University, New Orleans. http://cas.loyno.edu/information-about-college-cost-reduction-and-access-act.

This has not offered a solution for students who qualify through public sector education. They have financial burdens despite 34 % of community college students receiving grants or loans whose debts may increase if they pursue a JD degree or enrol at the graduate school. Furthermore, the increase in the Pell Grants of only $500 is not adequate to cover the costs facing low-income college students. The college loan providers small- to medium-sized lenders will be forced out of business without the subsidies and the decreased competition will harm students in the long run.[89]

The debt problems that arise from student loans have increased for public law schools over the private law teaching institutions. The average low debt tuition statistics show an increase for those who have studied at public law schools rather than private law schools. The average total debt/tuition in 2004 across $85,000 in which 87% borrowed, the average private school graduate debt being $32,484, and the average public school graduate debt being $13,742; in 2008 it was $84,230 in which 89% borrowed, the average private tuition being $36,424 and average public tuition being $17,880. In 2012 average total debt was $121,890 of which 86% borrowed, and average private tuition was $41,985 and average public tuition was $23,879. The transformation in this calculus is that total debt accumulated from 2004–2012 was 43% of which average private law school student debt increased 29% and average public school student debt went up 74%.[90]

Public legal education relies heavily on grants and scholarships which, as statistics show, is on the increase.[91] This impacts on the law schools because the "growth in scholarships gives rise to a few problems because these scholarships tend to go to applicants with high LSAT scores" which assists the students who are " wealthier and less diverse as a group than applicants with lower numbers".[92] There are first year law students for whom the scholarships "are eliminated or reduced" which are termed as 'exploding scholarships' leaving them with debt after they finish education. There is a "problem of 'exploding' scholarships' which are not renewed unless the student maintains a

[89] Grace Chen, Community college review, 3/4/19, communitycollegereview.com/blog/thecollege-cost-reduction-and-access-act-of 2007 .
[90] David Lat, Everything That's Wrong With Legal Education — According To Law School Deans, 17/5/16 , abovethelaw.com/2016/05/everything-thats-wrong-with-legal-education-according-to-law-school-deans
[91] Digest of Education Statistics, National Center of Education Statistics. 2015. https://nces.ed.gov/programs/digest/d15/tables/dt15_401.30.asp
[92] Ibid.

certain GPA(Grade Point Average), which the schools are aware will not happen" because of the grading curve", giving law school the opportunity to offer degrees on a "bait-and-switch" basis which leads a higher cost in terms of incurring debts in the long run.[93]

The increasing debt problems particular for those who are in public law schools means that after completing education they have limited career paths because only certain jobs can generate enough income to service such debts. This dissuades the qualified attorneys from taking up public sector jobs or working for not-for-profit organisations. They have to prioritise servicing their debts and this requires working for larger firms where the clinical public education that they have gained experience for in Community supported legal aid will not be utilised.

Glenn Reynolds offers proposals to terminate the influence of Ivy League by suggesting that the government should:

> (i) eliminate the tax deductibility of contributions to schools having endowments in excess of $1 billion. That won't end all major donations to the Ivy League, but it will doubtless encourage donors to look at less wealthy and more deserving schools, such as Northern Kentucky University, recently deemed 'more inspirational than Harvard' in the London Times Higher Education magazine,
>
> (ii) require that all schools with endowments over $1 billion spend at least 10% of their endowment annually on student financial aid. That will make it easier for less wealthy students to attend elite institutions, and
>
> (iii) should require that university admissions be based strictly on objective criteria such as grades and SAT/ACT scores, with random drawings used to cull the herd further if necessary. That will eliminate the Ivy League's documented discrimination against Asians.[94]

The responsibility is of the ABA to set up a mechanism to redistribute the income that the universities generate to lessen the burden on public law school graduates who have a greater difficulty in locating employment, repaying debt

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[93] Ibid.

[94] Glen Reynolds, To reduce inequality abolish the ivy league. https://eu.usatoday.com/story/opinion/2015/11/01/glenn-reynolds-reduce-inequality-abolish-ivy-league-elitist-discrimination-column/74998648/ (internal references deleted).

and fulfilling their potential in litigation. The ABA Task Force has, in the past, been instrumental in devising clinical legal education for law schools through its 1992 report.[95] The Task Force conducted further research on the economic impact of public legal education and its disparities and issued its findings on the steps necessary to ease debt problems of law students.[96] The survey issued the findings in 2015 in which it acknowledged that the training of lawyers provides "public value" and that was the reason for "more concern today with problems in law schools and legal education than with problems in education in other disciplines" such as business administration. [97] It also accepts that legal training has "private value" and that it provides "skills, knowledge, and credentials that will enable" those equipped to earn a livelihood. It presupposes that legal education is part of the "market economy and law schools are subject to market conditions and market forces in serving students and shaping programs".[98]

It is with this concept of private value that the ABA approaches this problem to respond to "consumer preferences", irrespective of those within the law school, at least in order to ensure the continued financial sustainability of their programs. The Report identifies nine areas where there could be a revision for better delivery of legal education and service by professionals. The first point deals with the "financing of law-related education" and recognises that "financing legal education has many deficiencies" which encourages "constant tuition increases, high student debt, and subsidization" of less deserving students by better qualified students.[99]

The recommendation that the ABA has made in order to override high cost of legal education is the coordination between the "access to careers in law, availability of lawyers and legal services, financial commitments of the federal government, the national economy" all in order to achieve an 'integrated

[95] ABA Section of Legal Education & Admissions to the Bar, Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap 138-141 (1992), available at https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professio nal_development_maccrate_report).authcheckdam.pdf
[96] Ibid 734-740.
[97] American Bar Association Task force on The future of Legal education, Report and Recommendations (January 2014), available at http://www.americanbar .org/content/dam/aba/administrative/professional_ responsibility/report_and_recommendations_of_aba_task_ force.authcheckdam.pdf.
[98] Ibid at 14.
[99] Ibid.

system". The improvement will flow from the "efficiency increases, and cost containment" brought about by professionals and the “law schools are slowly moving to use them; regulators, who are more intimately connected with the business world, are likely in an even better position to use these tools to improve their part of the system for producing new lawyers".[100]

The value system that the ABA is invoking is the market and it is based on encouragement of the universities to be "self-supporting" and self-generating in their incomes.[101] This is to continue the revenue cycle of the Ivy League and other top tier colleges and promotes the interest of the professors or the academic lawyers in the equation of market feasibility. The emphasis is on better debt financing for students, better procedures and applications to the Department of Education, and improving the law school curriculum.

However, it is not primed for the beneficial impact of Clinical Legal Education which the students undertake by providing them job opportunities and long term prospects in careers in public interest litigation. The legal training in pro bono work should ensure that the students are able to gain employment with law firms and not-for-profit organisations which serves practitioner interests. A possible manner in which it might be achieved is by redistributing income and transfers of wealth from private universities to public universities for higher fees tariffs and reversing the financial burden problems that restrict student choice in the public sector employment.

Conclusion

The legal training of lawyers in the US is premised on the original Langdellian case method which has a humanities focus, initially through the introduction of case law, and subsequently through the development of clinical methods. The case law method developed and promoted by Harvard Law School is more intensive in problem solving and adopts the rational approach to teaching that is based on reasoning and emphasises debate over dictation. This was accepted by the ABA, which was delegated the task of implementation of a national system of education and the JD degree which encouraged the study of a range of subjects to provide knowledge for the practice of law.

[100] Ibid at 17.
[101] Stevens supra 10, 16 and 43 at 268.

The scheme of clinical legal education adopted in law schools across the US focuses on empirical training of ingrained knowledge through the process of understanding case scenarios of individuals with real life problems. Law schools adopted their curriculum for final year students, and they may have accreditation on their degree outcomes by their involvement in the community based programmes. These have been supported by the not-for-profit organisations and law firms that have gained universal acceptance in the field of public interest litigation.

This has to consider the problem of student indebtedness and its impact on the diversity of the profession and the reluctance of JD graduates to go into public interest practice because of remuneration which is considerably lower in the public sector than in the private sector. The sources of wealth in the system are various and include the commercial law firms, the high-status university law schools, the families of the already privileged, and those who have gained entry through veterans' programmes. There needs a proportionate payment of fees for those graduates who have not come through the elite programmes, and they should gain discounted fees. The lack of any effective mechanisms for achieving such a redistribution is hindering those who want to specialise in public interest litigation and working for non-profit organisations. This replicates the existing power relationships in the unequal society where public sector work will never be a priority for law graduates.

This method of legal training in the US includes the academic, vocational, and professional stages of qualification. While attaining a legal qualification is still a Herculean task the system sanctioned by the ABA does provide a fusion of applied legal principles that that can be utilised with experience of clinical legal education. The variety and the increasing volume of access to justice programs establish the basic grounding for those who want to specialise in public interest litigation and to achieve their goals. The need for increasing job opportunities in the not-for-profit sector should enable lawyers to avail the benefits of legal training gained in the clinical education provided they are relieved of overburdening debts.